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1952

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CASE OVERRULED IN A. I. R. (39) 1952 RAJASTHAN

('51) A. I. R. 1951 Raj. 16=1950 R. L. W. 281, Sita Ram v. State — Overruled in A. I. R. 1952 Raj. 160.

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1952

Rajasthan High Court

A. I. R. (39) 1952 RAJASTHAN 1 (C. N. 1)

(Jaipur Bench)

RANAWAT, J.

Jamna Das, Appellant v. Gulraj, Respondent.

Second Appeal No. 85 of 1949, D/- 2-8-1951.

(a) Easements Act (1882), Ss. 33, 35 — Closing of ancient window — Obstruction to light and air— Burden to prove substantial damage lies on plaintiff.

In a suit for a perpetual injunction restraining the defendant from obstructing light and air of a window of the plaintiff's house the question to be considered is whether the act of the defendant in obstructing the light and air of the plaintiff's ancient window can be considerded to be a nuisance. It is for the plaintiff to show, what specific injury is caused to him and when he has failed to prove this, he cannot succeed on the mere presumption that by closing down of the disputed window, specific injury should be deemed to have been caused to the plaintiff. Such a presumption cannot be raised in view of the language of Ss. 33 and 35. It is for plaintiff to prove his case and a plaintiff is entitled to claim damages or an injunction under Ss. 33 and 35 only when he establishes that the obstruction of the ancient window has caused substantial injury to him as defined in the sections. Mere closing down of the ancient window cannot by itself be deemed to have caused substantial injury to the plaintiff. Nor does spreading of the smoke by closing the window (which in this case happened to be in the kitchen of the plaintiff) can be taken into account in judging whether substantial injury is caused to the plaintiff by the closing of the window. AIR (1) 1914 PC 45, Foll. (Paras 1, 4, 5, 6)

Anno: Ease. Act, S. 35, N. 2, Pt. 5.

(b) Civil P. C., (1908), O. 18, R. 18 — Spot inspection — Observation made at, how not to be used.

It is not proper to use the observations made by the Court by spot inspection in place of the evidence itself. Spot inspection can be used only to appreciate the evidence of the parties that has come on the record, but it cannot itself be taken to form part of the evidence. (Para 6)

Anno: C. P. C., O. 18, R. 18, N. 1, Pt. 6.

B. D. Quanogo, for Appellant. C. L. Agrawal and G. N. Sharma, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('15) 42 Cal 46: (AIR (1) 1914 PC 45) (Pr 5)
('07) 4 All L Jour 477: (29 All 571) (Pr 5)
('14) 36 All 516: (AIR (1) 1914 All 343) (Pr 5)
('84) 8 Bom 95 (Pr 5)
(1904) AC 179: (73 L J Ch 484) (Pr 5)
(1907) AC 1: (76 L J Ch 1) (Pr 5)

JUDGMENT.: This is plaintiff's second appeal arising out of a suit filed by Jamna Das against Gulraj in the Court of the Munsif, East Jaipur on 15-7-1947, for a perpetual injunction restraining the defendant from obstructing light and air of a window of the plaintiff's house. The houses of both the parties are adjoining to each other, in the city of Jaipur and there is a kitchen on the top floor of the plaintiff's house, in which there is a window over-looking the house of the defendant, which, it is said, has been closed by the defendant by erecting a wall by the side of the wall of the plaintiff's house. The plaintiff claimed that he had acquired a right of easement by prescription as he has been receiving light and air through that window for more than 20 years. The smoke of the plaintiff's kitchen was also let out through the same window. The defendant admitted that the window had been in existence since the year 1872, but he pleaded that it was constructed with the consent of the defendant's predecessor on the condition that it would be closed whenever the defendant required the other party to do so. The defendant, in pursuance of this condition had closed the window by erecting a wall. It was further alleged that the closing of the window did not materially diminish the quantity of air and light in the kitchen of the plaintiff and there was, therefore, no cause of action for the plaintiff to sue the defendant. The trial Court decreed the suit of the plaintiff. The findings of the First Court were that the document produced by the defendant purporting to be an agreement between the plaintiff's predecessor in interest regarding construction of the disputed window on the specific condition that it would be closed, whenever the defendant desired to close it, was not proved and the obstruction created by the defendant was such as materially interfered with the right of the plaintiff, in diminishing the quantity of light and air of the plaintiff's kitchen. On an appeal, the District Judge, reversed the finding of the lower Court as regards the execution of the agreement produced by the defendant relating to the window and it was held that the document was duly executed by the predecessor in interest of the plaintiff, but it was not relied upon on account of the suspicion that it may have been antedated by the executant Vijai Narain, who was said to be not on good terms with the plaintiff. The District Judge inspected the site and on the basis of his inspection of the spot, held that there was sufficient light and air in the kitchen of the plaintiff, even after the closing down of the disputed window. He, therefore, dismissed the suit on the ground that the closing of the window by the defendant did not interfere with the

access of light and air to the kitchen of the plaintiff, materially. The plaintiff has come in second appeal against the judgment of the District Judge and it has been contended that the lower appellate Court was wrong in making use of the observations made by the Court by spot inspection in place of the evidence. According to the appellant, the closing of the disputed window, materially diminished the access of light and air to the kitchen of the plaintiff.

(2) It may be observed that the existence of the disputed window for more than 20 years is admitted by both the sides, but it is disputed that the closing of the window does not materially reduce the quantity of light and air so as to give a right to the plaintiff to claim an injunction or damages against the defendant. It is further contended that the disputed window was constructed with the consent of the defendant on the condition that it it would be closed whenever it was so desired by the defendant.

(3) An agreement executed by Vijai Narain in favour of the defendant, Gulraj, has been produced by the defendant and Vijai Narain has come in the witness-box and he has admitted the execution of the document. Narain, one of the attesting witnesses has also been examined and he has testified the fact of the agreement. Vijai Narain who was the executant of the agreement, sold his house to Jamna Das in the St. year 1980 and the agreement of Vijai Narain is, therefore, produced against the plaintiff. The relations of Vijai Narain and Jamna Das are admittedly not very good and the stamp on which the agreement has been written was not purchased by Vijai Narain himelf, but it was purchased by one Isar and this fact has also been considered by the lower Court in holding the document to be suspicious. The counsel of the defendant has argued that during the days when this agreement was executed, it was not necessary for the executants themselves to go and purchase the stamps from the treasury, but the shopkeepers used to purchase stamp-paper from the treasury who in turn, sold them to the persons who required them for executing documents and it was because of this practice that Vijai Narain himself did not purchase the stamp from the treasury, but purchased it from Isar. This practice has not been refuted by the other side, but it is said that Vijai Narain should have obtained the signatures of Isar when he purchased the stamp from him. This defect is not grave and by itself it should not be considered sufficient to render the document of doubtful character. Even supposing that Vijai Narain had a motive to antedate the document, there is no explanation why Narain should have participated in the fabrication of this agreement. There is, therefore, no good reason to discard the agreement executed by Vijai Narain. Moreover, the plaintiff may be considered entitled to claim an injunction against the defendant, not to obstruct the access of light and air into his window, only when he can show that the disturbance of his right to get a light and air has actually caused substantial damage to him.

Section 33, Easements Act is as follows:

"The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of an easement or of any right accessory thereto provided that the disturbance has actually caused substantial damage to the plaintiff."

Substantial damage has been defined in Explanations 1, 2 and 3 of S. 33, Easements Act, which are as follows:

"Explanation I.' The doing of any Act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damage within the meaning of this section and S. 34.

'Explanation II. Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section unless it falls within the first Explanation or interferes materially with the physical comfort of the plaintiff or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to the institution of the suit.

'Explanation III.' Where the easement disturbed is a right to the free passage of air to the opening in a house, damage is substantial within the meaning of this section, if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health."

(4) An injunction can be. granted to restrain the disturbance of an easement, if the easement is actually disturbed when compensation for such disturbance might be recovered under Chapter IV of the Easements Act, vide S. 35, Easements Act. The case of the plaintiff would, therefore, be governed by S. 33, Easements Act, and the plaintiff could only be held to be entitled to an injunction in his favour if he could show that the disturbance of his right to air and light had actually caused substantial damage to him. In the present case, there was a specific issue on this point and the counsel of the plaintiff has referred to the evidence of Durgalal and Jamnadas on this point. Durga Lal simply has stated that smoke also escapes through the disputed window. He has not, however, said anything which may go to show that the closing of the window would interfere with the exercise of the right to receive light and air, in such a way as to cause substantial injury to the plaintiff. The next witness, Jamna Das, is the plaintiff himself. He has stated that there is loss of light and air to the kitchen on account of the closing of the window, smoke spread out in the kitchen. As regards the right to create smoke and to let it on the premises of the defendant through the disputed window, the plaintiff has failed to produce evidence to the effect that he had acquired any such right by way of prescription. The spreading of the smoke in the kitchen of the plaintiff would, therefore, not be taken into account in judging whether substantial injury is caused to the plaintiff by the closing of the window. There is, therefore, no evidence whatsoever on the record of the case, which may go to show that the reduction in the quantity of light and air on account of the closing of the disputed window is such as would cause substantial injury to the right of the plaintiff. There is diminution of light and air in the kitchen of the plaintiff on account of the closing of the disputed window, but it is not clear whether the diminution is such as would interfere materially with the physical comfort of the plaintiff or prevent him from carrying on his accustomed business in his house as beneficially as he had done previous to the closing of the window.

(5) The learned counsel for the plaintiff has cited 'Nand Kishore v. Bhagubai', 8 Bom 95 and 'Kunni Lal v. Kundan Bibi', 4 All L Jour 477, in order to show that the closing down of a window and thus reducing the quantity of light and air to the dominant tenement should by itself be presumed to cause substantial injury to the owner of the dominant inheritage. These rulings, it may be pointed out, are very old. 4 All L Jour 477 has been overruled by 'Sardar Singh v. Ratan Lal', 36 All 516 and 8 Bom 95 should also be deemed to have been overruled by the decision of the Privy Council in 'P.C.E. Paul v. W. Robson', 42 Cal 46.

The law on this point has been thoroughly discussed by their Lordships of the Privy Council in 42 Cal 46 and the principles settled by the decision in 'Colls v. Home and Colonial Stores, Ltd.', (1904) AC 179 were held to be good law. The decision of the House of Lords in 'Jolly v. Kine' (1907) AC 1, was also relied upon. The observations of Lord Davey in 'Cole's case' are as follows:

"The owner of the dominant tenement is entitled to uninterfered access through his ancient windows of the quantity of light and air the measure of which is what is required for the ordinary purposes and inadequacy or absence of the tenement according to the ordinary notion of mankind."

The question, therefore, is whether the act of the defendant in obstructing the light and air of the plaintiff's ancient window can be considered to be a nuisance. There is absolutely no evidence to show that any substantial injury is caused to the rights of the plaintiff on account of the obstruction complained of. It was for the plaintiff to show, what specific injury was caused to him and when he has failed to prove this, he cannot succeed on the mere presumption that by closing down of the disputed window, specific injury should be deemed to have caused to the plaintiff. Such a presumption which was held to arise in 8 Bom 35 cannot be raised in the present case in view of the language of Ss. 33 and 35, Easements Act. It is for the plaintiff to prove his case and a plaintiff is entitled to claim damages or an injunction under S. 33 or 35 only when he establishes that the obstruction of the ancient windows has caused substantial injury to him as defined in the sections. Mere closing down of the ancient window cannot by itself be deemed to have caused substantial injury to the plaintiff This has been held to be so in 42 Cal 46 (PC). The plaintiff's case, therefore, has been rightly dismissed by the Court below. The lower appellate Court has made use of the fact of the spot inspection in place of evidence for deciding that there was no substantial injury caused to the plaintiff by the closing down of the disputed window. But it is not proper to use the observations made by the Court by spot inspection in place of the evidence itself. Spot inspection can be used only to appreciate the evidence of the parties that has come on the record, but it cannot itself be taken to form part of the evidence. Both the trial Court and the first appellate Court nave not discussed any evidence as regards the point whether the closing down of the disputed window interfered with the right to light and air of the ancient window of the plaintiff, in such a way as to cause substantial injury to him. The counsel on either side, therefore, conceded that this may be decided in this second appeal and the case not be remanded for this purpose. This Court, therefore, went into the evidence and has decided this issue which related to a question of fact. This appeal fails and is dismissed with costs.

V.S.B. *Appeal dismissed.*

A. I. R. (39) 1952 RAJASTHAN 3 (C. N. 2)

(Jaipur Bench)

RANAWAT AND SHARMA, JJ.

Madhusudhan, Applicant v. Shyam Dass, Opposite Party.

Civil Revn. Appln. No. 145 of 1950, D/- 16-7-1951.

Constitution of India, Art. 227 — Applicability — Order of Collector fixing standard rent under S. 6 (2), Rent Control Order — Interference by High Court —(Rajasthan) Rent Control Order, S. 6 (2).

The powers of revision under Art. 227 can be invoked in cases of grave dereliction of duty for which no other remedy is available and which will have serious consequences if not remedied. In cases where grave injustice results by ignoring the provisions of law it becomes the duty of the High Court to interfere and to issue a proper direction to the Court or the tribunal to exercise its jurisdiction in accordance with the provisions of law. (Paras 5 and 6)

Where both the parties pleaded the existence of data on which basic rent could be fixed by the Controller and the Collector but instead of arriving at the basic rent they chose to fix standard rent under S. 6 (2) of the (Rajasthan) Rent Control Order instead of in accordance with the second schedule of the Order:

'Held', that both of them had ignored the provisions of Section 6 (2) and of the second schedule and thus committed an illegality in the exercise of their jurisdiction. (Para 6)

(The order of Collector was set aside and he was directed to fix standard rent after considering the provisions of the second schedule.)

Madhusudhan Sharma in Person. Sadhu Narain Saxena, for Opposite Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('31) AIR (18) 1931 Bom 582: (55 Bom 544) (Pr 4)

('37) AIR (24) 1937 Bom 153: (38 Cri L Jour 606) (Pr 4)

RANAWAT, J.: This is an application under Article 227 of the Constitution of India.

(2) Certain premises were let by Pandit Madhusudan to Shyamdas on a rent of Rs. 35/- per month and the tenant thinking that the rent was too high filed an application in the Court of the Rent Controller on the 3rd of May 1949 for fixation of standard rent, and after taking proceedings in this case the Rent Controller on the 24th of January 1950 fixed the rent of the premises at Rs. 10/- per month exclusive of light and water. Both parties went in appeal to the Court of the Collector, Jaipur, who, on the 27th of April 1950, increased the rent to Rs. 12/- but included therein the charges for light. Pt. Madhusudhan who is the landlord has now come before this Court in revision and he has raised three objections: (1) That the Rent Controller did not frame any issues before deciding the case. (2) That the Rent Controller and the Collector both acted illegally in the exercise of their jurisdicion in determining the standard rent of the premises not in accordance with Schedule II of the Rent Control Order and in fixing the standard rent to Rs. 2/- under Section 6 (2) of the Rent Control Order. (3) That the Controller was wrong in including the electric charges in the standard rent when the question of the electric and water charges had been separately decided by him and the matter had become 'res judicata.'

(3) The petitioner at the time of the hearing of this case waived the first point and we need not deal with it here.

(4) Article 227 of the Constitution of India lays down that every High Court shall have superintendence over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction. Under the corresponding Section 107 of the Government of India Act, 1915, "Superintendence" was interpreted to include judicial as well as administrative superintendence vide 'Sholapur Municipality v. Tulji Ram', AIR (18) 1931 Bom 582, 'Emperor v. Jamnadas', AIR (24) 1937 Bom 153.

(5) Under Section 224 of the Government of India Act, 1935, the power of superintendence was expressly barred in judicial matters by adding sub-s. (2) to section 224, which ran as follows:

"Nothing in this section shall be construed as giving to a High Court any jurisdiction to ques-

tion any Judgment of any inferior Court which is not otherwise subject to appeal or revision."

But under Article 227 of the Constitution of India the same position which obtained under the Government of India Act, 1915, has been revived. The powers of revision under Article 227 can be invoked in case of grave dereliction of duty for whic no other remedy is available and which will have serious consequences if not remedied. The counsel on the opposite side has conceded that this Court has got powers of Superintendence over the Court of the Collector in the matter of fixing the standard rent of the premises under the Rent Control Act in cases where Jurisdiction is exceeded. Section 6 (2) of the Rent Control Order runs as follows:

"(2) Where for any reason it is not possible to determine the standard rent of any premises on the principles set forth in the second schedule, the Controller may, on the application of any person interested or on his own motion, determine the standard rent, and in so doing shall have regard to the standard rents of similar premises in the same locality and other relevant considerations."

(6) It may be pointed out that the Rent Controller can fix standard rent of the premises under Section 6 (2) only when for any reason it is not possible for him to fix the standard rent of the premises in accordance with the second schedule of the Act. In the present case, both the Rent Controller and the Collector considered the application of second schedule unfair to the tenant because the basic rent perhaps worked out to be higher than the rent of similar premises in the same locality. Both the parties pleaded the existence of data on which basic rent could be fixed by the authorities, but instead of arriving at a finding as to the basic rent, the authorities chose to fix the standard rent under Section 6 (2) instead of in accordance with the second schedule of the Rent Control Order. The Rent Controller and the Collector were both bound by Section 6 (2) to fix the standard rent on the basis of the basic rent of the premises, in the light of the provisions of the second schedule. Both of them have ignored the provisions of S. 6 (2) and of the second schedule in so doing. They have thus committed an illegality in the exercise of their jurisdiction and they have thus altogether ignored the provisions of law. In cases where grave injustice results by ignoring the provisions of law it becomes the duty of this Court to interfere and to issue a proper direction to the Court or the tribunal to, exercise its jurisdiction in accordance with the provisions of law.

(7) In view of the opinion expressed above, on the second point, it is not necessary now to discuss the third point raised by the petitioner.

(8) This application is allowed and the order of the Collector dated the 27th April 1950 is set aside and he is directed to fix the standard rent of the premises after considering the provisions of the second schedule to the Rent Control Act.

G.M.J. *Application allowed.*

A. I. R. (39) 1952 RAJASTHAN 4 (C. N. 3)

(Jaipur Bench)

RANAWAT AND SHARMA, JJ.

Bhanwarlal, Applicant v. Gyarsi, Opposite Party.

Restoration Appn. No. 12 of 1951, D/- 23-7-1951.

Civil P. C. (1908), S. 151, O. 41, R. 19 — Appeal dismissed for default — Application for restoration by legal representative — Limitation — Limitation Act (1908), Art. 168.

Where an appellant dies within thirty days of the date of dismissal of the appeal for default his legal representative cannot make an application for restoration beyond the prescribed period of 30 days from the date of dismissal. The original applicant could not have made an application for restoration beyond 30 days from the date of dismissal. The legal representative is also in the same position. The applicant has a remedy under Order 41, Rule 19. Simply because the applicant had allowed his remedy under O. 41, R. 19, to become time-barred he cannot be given the benefit of Section 151; AIR (22) 1935 Nag 189 dist. (Para 2)

Anno: C. P. C., S. 151, N. 2, O. 41, R. 19. N. 9; Lim. Act Art. 168, N. 3, 4, 5.

Jaideo Singh Verma for Applicant. Sadhunarain Saxena; for Opposite Party.

Case referred to:

('35) AIR (22) 1935 Nag 189: (31 Nag L R 374) (Pr 2)

SHARMA, J.: The applicant Bhanwarlal, who is the son of the original appellant Gogaram, has filed this application for restoration of the appeal dismissed for default of the appellant on the 14th November 1950. The grounds for restoration are that while the appeal was dismissed for default Gogeram was lying ill and died a few days after. The applicant had no knowledge of the dismissal for default.

(2) This application was made on the 5th February 1951 when 30 days prescribed for an application for restoration of an appeal or a suit had expired. The application was apparently time-barred. The learned counsel for the applicant has however argued that the applicant had 90 days to apply for substitution of his name in place of the deceased appellant after his death. The death occurred on 3rd December 1951 and the application for substitution having been made on 9th January 1951 and the application for restoration on 5th February 1951 both were in time. The learned counsel for the applicant has not been able to place any authority in favour of the view that where all appellant dies within thirty days of the date of dismissal for default his legal representative can make an application for restoration beyond the prescribed period of 30 days from the date of dismissal. Article 168 of the Limitation Act prescribes a period of 30 days from the date of dismissal for readmission of an appeal dismissed for want of prosecution. The original applicant could not have made an application for restoration beyond 30 days from the date of dismissal. The legal representative is also in the same position, and he could not make an application for restoration beyond 30 days. The learned counsel argues that the case is a very hard one and even if Order 41, Rule, 19 C.P.C., does not apply the appeal should be restored under Section 151, C.P.C. Section 151 can be applied only when there is no other remedy open to the applicant. In the present case the appeal having been dismissed for want of prosecution the applicant had a remedy under Order 41, Rule 19. Simply because the applicant had allowed his remedy under Order 41, Rule 19 to become time-barred he cannot be given the benefit of Section 151. The learned counsel has cited a ruling reported in Laxminarayan v. Laxmibai', AIR (22) 1935 Nag 189. The facts of that case were distinguishable from the facts of the present case. In that case the appellant had died before the date of hearing of the suit and the order of dismissal for default was made in ignorance of the death of the plaintiff. Order 9 Rule 9 did not apply to such a case and it being held that the order of dismissal in the circumstances of the case was a nullity, it was set aside under Section 151, C.P.C.

(3) The case is certainly an unfortunate one but the applicant cannot have the restoration of the

appeal either under Order 41, Rule 19 or Section 151, C.P.C.

(4) The application is dismissed but under the circumstances of the case we make no order as to costs.

Application dismissed.

D.H.

A. I. R. (39) 1952 RAJASTHAN 5 (C. N. 4)

(JAIPUR BENCH)

RANAWAT AND SHARMA, JJ.

Gopichand and Prabhu Dayal, Plaintiffs v. Meena lal, Defendant.

Second Appeal Nos. 24, 44 & 45 of 1949, D/- 24-7-1951.

(a) *Pre-emption — Nature of transaction — Possession as mortgagee.*

It is the ownership in a property that gives rise to the right of pre-emption and not the possession only as a mortgagee. (Para 7)

(b) *Pre-emption —. Loss of right — Vendee becoming co-sharer by purchase after suit is filed — Effect.*

Right of pre-emption is a very weak right and can be defeated by any legitimate means. The policy underlying this law is that no stranger should be allowed to thrust himself upon the co-sharers in a property against their will. If, therefore, before the First Court's decree the vendee becomes just as much a co-sharer as the pre-emptor, the latter can have no complaint that a stranger has thrust himself upon the property and hence can have no preferential right over the vendee.

No doubt it looks very unsavoury that a defendant by his unilateral and voluntary act should defeat the plaintiff's suit which was perfectly justified when it was brought and it appears to prevent such an undesirable result that recently statutory provisions have been made in the Agra and Punjab Pre-emption Acts. But in the absence of any such statutory safeguards the general principle shall prevail that the pre-emptor in order to succeed in a suit should prove his subsisting right against the vendee not only on the date of sale but also on the date of suit and the date of the First Court's decree. AIR (7) 1920 All 159; AIR (20) 1933 Lah 481 (2) and AIR (19) 1932 PC 57 Relied on. 7 All 535; 10 All 472; AIR (23) 1936 Oudh 250 and AIR (3) 1916 Oudh 301 Disting. (Paras 9, 10)

J. N. Mathur and P. N. Datta, for Plaintiff (Gopichand); D. M. Bhandari and G. C. Kasliwal, for defendant (Meenalal); C. L. Agrawal, for Plaintiff (Prabhudayal.)

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('15) 42 Ind App 10: (AIR (1) 1914 PC 11) (Pr 9)

('32) AIR (19) 1932 PC 57: (54 All 189) (Pr 9)

('85) 7 All 535: (1885 All W N 142 FB) (Pr 8)

('88) 10 All 472: (1888 All W N 177) (Pr 8)

('20) AIR (7) 1920 All 159: (42 All 268) (Pr 9)

('17) 44 Cal 47: (AIR (4) 1917 Cal 716) (Prs 9, 10)

('33) AIR (20) 1933 Lah 481 (2): (14 Lah 421) (Pr 9)

('16) 36 Ind Cas 799: (AIR (3) 1916 Oudh 301) (Pr 8)

('36) AIR (23) 1936 Oudh 250: (12 Luck 101) (Pr 8)

SHARMA J.: These are three appeals which arise out of two suits for pre-emption of a property situated in Chowkri Bisheshwarji Rasta Gopalji Jaipur City sold by Hanuman Prashad defendant in favour of Mina Lal (hereinafter to be called the vendee) as per sale-deed, dated 7th December 1942 and registered on 16th June, 1943. One of the suits namely 149 of St. 2,000 was filed by Prabhoo Dayal who hereinafter will be referred to as the first pre-emptor and the other that is 150 of St. 2000 was filed by Gopichand who will hereinafter be referred to as the second pre-emptor. Both the suits were filed in the Court of City Sub-Judge, Jaipur on the 1st July, 1944. The sale consideration was Rs. 2,599/- and the property sold is represented by letters A & B on the ground floor and letters Y and X on the second and third floor respectively in the sketch map Ex. A 3 filed in the suit No. 150 and is coloured red. It is the part of a big Haveli.

(2) The claim of each of the pre-emptors is that he has preferential right as compared to the vendee on account of being co-sharer in the property, participator in immunities and appendages and owners of adjoining immoveable property.

(3) The vendee denied both the pre-emptors' right to pre-empt and asserted that he himself had the preferential right as compared to the pre-emptors.

(4) The learned Sub-Judge dismissed the suits of both the pre-emptors so far as properties X and Y are concerned holding that the vendee had is houses adjoining these two properties on the north and the walls between these two disputed properties on one side and the property of the vendee on the other were joint. This property of the vendee is shown in Ex. A 3 in yellow colour and is marked M & N. He also gave an additional ground for dismissal of the suit with respect to property Y that property K adjoining towards south belonged to the vendee and had a joint wall and stair case with property Y. He however, decreed first pre-emptor's suit with respect to property A and the second pre-emptor's suit with respect to property B to the extent of one-half each on the ground that they had their properties adjacent to these properties and the walls between them were joint. He dismissed the suits with respect to these two properties to the extent of other half holding that property C shown in Ex. A 3 had been purchased by the vendee after the sale-deed in dispute and the said property had joint walls with properties A & B.

(5) Against this decree of the learned Sub-Judge the vendee filed 2 appeals contending that the two pre-emptors ought not to have been given a decree to the extent of half in the properties A & B. Each of the pre-emptors also filed an appeal contending that his suit should have been decreed in full. The learned District Judge, after hearing all these appeals disposed them of by one judgment, dated 23rd March, 1948. He dismissed both the appeals of the vendee and partly allowed the appeals of the pre-emptors inasmuch as the 1st pre-emptor was given a decree for the whole of the property A on payment of an additional sum of Rs. 137/9/- and the second pre-emptor was given a decree for the whole of property B on payment of an additional sum of Rs. 281/4/. The reason for this modification of the decree as given by the learned District Judge is that the purchase of property C by the vendee after the disputed sale conferred upon him no right of pre-emption.

(6) The second pre-emptor and the vendee have come in second appeal to this Court. Two appeals Nos. 44 and 45 of 1949 have been filed by the vendee in suits Nos. 149 and 150 respectively while the second pre-emptor has filed appeal No. 24 of 1949 in suit No. 150 of St. 2000. We have heard all the 3 appeals and they can be disposed of by one single judgment.

(7) Taking up the appeal of the second pre-emptor first, his learned counsel did not challenge the lower Court's finding so far as property X was con-

cerned. His only argument was that this pre-emptor should have been given decree with respect to property Y to the extent of one-half. It was argued that if the vendee had his property M adjacent to property Y, this pre-emptor has his property L beneath this very property. Both had, therefore, equal rights and the pre-emptor was entitled to a decree to the extent of one-half. It was argued that property K was not in the ownership of the vendee but was in his possession only as a mortgagee which could give him no right of pre-emption. If the decision were to turn on the ownership of property it would have been necessary to give effect to this contention because it is the ownership in a property which gives rise to right of pre-emption and not only possession as a mortgagee. At the most the vendee has been able to prove that he has been in possession of property K as a mortgagee but this cannot give him a right of pre-emption. The judgment of the lower appellate court however, shows that it is not based on any right of the vendee in property K. It is based upon the fact that the wall between property M and property Y is a joint wall and therefore the vendee can be said to be a "Sharik" in property Y. The finding that the wall between M & Y is joint has been concurrently arrived at by both the Courts below. It cannot therefore be interfered with in second appeal. Second pre-emptor's appeal therefore fails.

(8) Coming to the 2 appeals of the vendee there can be no doubt that he purchased property C after he purchased the disputed property. This sale was effected on 31st March, 1944. By virtue of this the vendee became owner of property C and this sale was never pre-empted. He had therefore become an owner of this property not only before the date of the decree of the first Court which was passed on 24th of April, 1946 but also before the date of 2 suits which were filed on 1st July, 1944. The wall between the disputed property B and the property C is joint and there is a common staircase leading to both. The vendee was therefore a co-sharer in the property in dispute before the suit was brought and the decree of the 1st Court was passed. He was therefore equally entitled to pre-emption with the second pre-emptor so far as property B is concerned as the second pre-emptor also had a joint wall between his property and the property B. Similarly both the first pre-emptor and the vendee had joint walls between their properties C & D, and the disputed property A. They were therefore equally entitled. It was argued on behalf of the pre-emptors that the acquisition of property C by the vendee after the sale of the property in dispute would not help the vendee as he should be entitled to pre-emption on the date of sale. The lower appellate Judge has favoured this view on the strength of the rulings reported in 'Sheo Narain v. Hira', 7 All 535 (F B), 'Sakhina Bibi v. Amiran', 10 All 472, 'Mahomed Zafar v. Mt. Taj Bibi', A I R (23) 1936 Oudh 250 and 'Ratan v. Ram Niwaz', 36 Ind Cas 799 (Oudh). These authorities have no bearing on the facts of the present case which are easily distinguishable. In 7 All. 535 (F B) the plaintiff purchased after the date of sale in dispute the property on the basis of which he claimed pre-emption. It was therefore, held that he had no right of pre-emption. In 10 All 472 it was contended by the vendee that the property on the basis of which pre-emption was claimed had gone out of the pre-emptors' ownership and possession after the date of the 1st Court's decree. The right of pre-emption was therefore defeated. It was held that it could not be defeated as events after the 1st Court's decree had no relevancy. In A I R (23) 1936 Oudh 250 the plaintiff acquired right to pre-empt the disputed property after the date of sale. It was held that he could not take advantage of it. In '36 Ind Cas 799 (Oudh) the plaintiff acquired property by virtue of which he claimed pre-emption after the date of sale which was the subject of pre-emption suit. It was held that the plaintiff was not entitled to a decree.

(9) In the present case the vendee has not brought a suit for pre-emption. On the contrary he is resisting suit for pre-emption brought by others. Right of pre-emption is a very weak right and can be defeated by any legitimate means. The policy underlying this law is that no stranger should be allowed to thrust himself upon the co-sharers in a property against their will. If, therefore, before the 1st Court's decree the vendee becomes just as much a co-sharer as the pre-emptor, the latter can have no complaint that a stranger has thrust himself upon the property. Even if the vendee be deprived of the property under pre-emption he would remain a co-sharer all the same by virtue of the other property acquired by him after the sale under pre-emption. There would therefore be no sense in depriving him of the property under pre-emption. It is on account of this that it has been held in a number of cases of different High Courts that if a vendee becomes a co-sharer of an equal degree with the pre-emptor in the property under pre-emption by virtue of another transfer effected before the 1st Court's decree the pre-emptor can have no preference over the vendee. It was so decided in 'Beharilal v. Mohan Singh', AIR (7) 1920 All 159. Tudball and Rafique JJ. held that a plaintiff pre-emptor in order to succeed must be entitled to pre-empt not only on the date of the suit, but also upto the date of the decree. Where therefore a vendee was a stranger at the date of the transfer, but after the institution of a suit for pre-emption and before the date of the decree, he became a co-sharer in the village the plaintiff would have no right to pre-empt and a suit must fail. In 'Hetram v. Dalchand', A I R (20) 1933 Lah 481(2) it was held that the plaintiff should show that he has the right on three important dates that is (1) the date of sale (2) the date of institution of the suit and (3) the date of the first Court's decree. In 'Noori Miyan v. Ambika Singh', 44 Cal 47 the same thing was held. In 'Hans Nath v. Ragho Prashad' A I R (19) 1932 P C 57 it was held that when a sale has taken place to a stranger the vendees' acquisition by gift of a share in the village pending a co-sharer's suit for pre-emption instituted before the passing of the Agra Pre-emption Act 1922, defeats that co-sharer's claim for pre-emption. The decisive date as regards the rights of the co-sharer to pre-empt is the date of the decree. Their Lordships quoted with approval the following passage from the judgment of the Privy Council in 'Digambarsingh v. Ahmad Saeed Khan', 42 Ind App 10 at p 18:

"In all cases the object of a custom of pre-emption is as far as possible to prevent strangers to a village from becoming sharers in the village."

Their Lordships further observed that if this object would not be attained by a decree in favour of the plaintiff pre-emptor, it may not unreasonably be held that such a decree should not be passed.

(10) There is no doubt that in all these rulings excepting that reported in '44 Cal 47 the pre-emption was claimed on the basis of a custom. But from the reports it would be found that the decisions did not turn on the ground that the custom laid down that the suit for pre-emption would be defeated if the vendee acquired equal status with the pre-emptor between the date of sale and the date of the 1st Court's decree. The decisions were based on general principles that the plaintiff having either lost his status as a co-sharer before the date of the 1st Court's decree or the vendee having become a pre-emptor of

equal status with the pre-emptor before the date of the decree, the plaintiff colud not be given any preference over the vendee. So far as the case reported in 'Noori Miyan v. Ambika Singh', 44 Cal 47 is concerned, it was a case under Muhammadan Law and is therefore a clear authority for the proposition that the plaintiff to succeed in a pre-emption suit should establish not only that his right existed at the date of the sale, but also at the date of the institution of the suit and the date of the decree of the primary Court. No doubt it looks very unsavoury that a defendant by his unilateral and voluntary act should defeat the plaintiffs' suit which was perfectly justified when it was brought and it appears to prevent such an undesirable result that recently statutory provisions have been made in the Agra and Punjab Pre-emption Acts disentitling the vendee to defeat a suit for pre-emption by virtue of a voluntary transfer in his favour during the suit, but that is another matter. In the absence of any such safeguards the general principle shall prevail that the pre-emptor in order to succeed in a suit should prove his subsisting right against the vendee not only on the date of sale but also on the dates of suit and on the date of the 1st Courts' decree. This principle finds support also from Wilson's Anglo Mohammedan Law 6th Edition para 356 A on page 394. The learned author says that the co-sharership, "Participation in appendages" or ownership of contiguous property, as the case may be, must not only exist at the time of the sale which gives rise to the claim of pre-emption but must continue to exist down to the time when the suit is instituted, and (it seems) even down to the decree of the primary Court.

(11) The result is that the appeal of Gopichand first pre-emptor is dismissed but the two appeals of Mina Lal vendee are allowed the decree of the lower appellate Court is modified and the decree of the original Court is restored. The vendee Mina Lal shall get the costs of all the 3 appeals from the contesting pre-emptors.

D.R.R. *Order accordingly.*

A. I. R. (39) 1952 RAJASTHAN 7 (C. N. 5)

(JODHPUR BENCH)

(FULL BENCH)

WANCHOO, C. J., NAWAL KISHORE AND BAPNA, JJ.

Hasti Mal and another, Appellants v. Shanker Dan and others, Respondents.

Second Appeal No. 67 of 1949, D/- 26-7-1951.

†✣ (a) *Precedents — Decisions of late Chief Court of Jodhpur if binding on Rajasthan High Court — Civil P. C. (1908), Pre.*

The late Chief Court of Jodhpur as constituted in 1912 not being a Court of Record is not a Court of co-ordinate jurisdiction with the High Court of Rajasthan which is declared to be a Court of Record by the Rajasthan High Court Ordinance (XV (15) of 1949) and as such the judgments of the former Court are not binding on the latter. (Para 5)

Anno : C. P. C., Pre N. 15, Pts. 25a and 25b.

(b) *Rajasthan High Court Ordinance (XV (15) of 1949), S. 34 — 'Law', meaning of — Rajasthan Administration Ordinance (I (1) of 1949), S. 3.*

The term 'law' in S. 34 Rajasthan High Court Ordinance would obviously mean the law as described in S. 3 (2) Rajasthan Administration Ordinance which does not include within its purview judge-made law or law deducible from decisions. (Para 6)

✣ (c) *Limitation Act (1908), S. 19 — Acknowledgment if operates as a fresh contract.*

A mere acknowledgment of debt does not operate as a new contract and cannot be made the basis of the suit. It only keeps alive the original cause of action, and the suit must be founded on such original cause of action. 1950 R. L. W. 284, approved. (Para 7)

Anno : Lim. Act, S. 19, N. 8.

(d) *Civil P. C. (1908), O. 6, R. 17 — Suit on basis of acknowledgment — Plaintiff misled into drafting such plaint owing to law laid down by late Chief Court of Jodhpur — Plaintiff allowed to amend plaint by incorporating original cause of action.* (Para 9)

Anno : C. P. C., O. 6, R. 17, N. 11.

Harak Lal Manihar, for Appellants; Govind Mal, for Respondents.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('50) AIR (37) 1950 MB 31 (FB) (Prs 3, 4, 6)

('29-30) 1929-30 MLR 44 (FB) (Pr 3)

('50) 1950 RLW 284 (Prs 2, 7)

('27) AIR (14) 1927 Rang 4: (4 Rang 313 FB) (Prs 4, 6)

BAPNA J. : This is a reference by a Division Bench of this Court and raises certain important questions.

(2) The appellant sued the respondent for recovery of a sum of Rs. 700/- on the basis of a 'khata' dated 'Chait Sudi' 12, 'Samwat' 1925. The defendant pleaded, 'inter alia', that the document was a mere acknowledgment and could not form the basis of the suit. The trial Court accepted the defence and dismissed the suit, and the same judgment was upheld on appeal. The second appeal came up for hearing before a Single Judge of this Court, who referred the question

"Whether acknowledgment of a previous debt not barred by limitation could be the basis of a suit?"

to a Division Bench. In the meanwhile, the same question came up for decision in 'Kanraj v. Vijey Singh', 1950 RLW 284 before another Division Bench, and it was held that :

"An acknowledgment of liability only allowed extension of limitation if made before expiration of the period of limitation but did not create a new right. It did not operate as a new contract but only kept alive the original cause of action and consequently it could not form an independent cause of action or a basis for a suit."

(3) When the reference came up for hearing before the Division Bench, it was argued that there was a Full Bench decision of the former Chief Court of Jodhpur reported in 'Mohanlal v. Badu', 1929-30 MLR 44, in which it had been held that an acknowledgment of liability signed by a debtor formed a good basis of a suit and that the said Full Bench decision was binding on a Division Bench of this Court. Reliance was placed on 'Dagdu v. Tulsi Ram', AIR (37) 1950 MB 31. As the question raised was of considerable importance, the case was referred to a Full Bench.

(4) In the Madhya Bharat case (AIR (37) 1950 MB 31), a civil second appeal was pending in the High Court of Judicature at Indore, but owing to integration of the various States

of Madhya Bharat, the High Court of Indore was abolished and the High Court of the United State of Madhya Bharat was constituted, and the case was transferred to that Court, and came up for hearing before a Single Judge. The point in dispute in the appeal was concluded by a Full Bench decision of the Indore High Court but the learned Single Judge referred the question of law arising in the case to a Full Bench of the High Court of the United State, and the point arose as to how far the decisions of the High Courts of the Covenanting States should be held to be binding on Judges of the High Court of the United State. It was held that the Indore High Court was a Court of co-ordinate jurisdiction, and as such the Full Bench decisions of the Indore High Court stood on the same footing as the Full Bench decisions of the High Court of the United State, and were binding on Division Benches and Single Judges until reconsidered by a larger Bench of the High Court of the United State. It was also pointed out that under the constitution of the High Court of the United State, it was laid down that

> "the High Court shall apply the laws and usages prevailing in any State forming part of the United State to civil, criminal and other proceedings in that State till such time as the duly constituted authority modifies them",

and the term 'law' was sufficiently wide to include Judge-made law found in the various decisions of the High Courts of the Covenanting States. The learned Judges of the Madhya Bharat referred to the Full Bench decision of the Rangoon High Court in 'Ma Mya v. Ma Thein', AIR (14) 1927 Rang 4, in which a decision of the Chief Court of Lower Burma was held to be not binding on the Rangoon High Court as the Chief Court of Lower Burma was not a Court of co-ordinate jurisdiction.

(5) The first question, which arises in the present case is whether the Chief Court of Jodhpur was a Court of co-ordinate jurisdiction with the High Court of Rajasthan. It is sufficient to point out one distinguishing feature in order to hold that the Chief Court of Jodhpur was not a Court of co-ordinate jurisdiction. The High Court of Rajasthan has been constituted under the Rajasthan High Court Ordinance (Ordinance No. XV of 1949), promulgated by the Rajpramukh of Rajasthan after the integration of the various Covenanting States, and in the preamble of the Ordinance, the High Court of Rajasthan has been declared to be a "Court of Record". The Chief Court of Jodhpur was constituted in 1912 by the Maharaja Regent of Jodhpur by Notification, dated 12th October, 1912, published in the Marwar Gazette of November 23, 1912, and while the said Court was made the highest Court of Appeal and of original jurisdiction in the State under His Highness the Maharaja Regent in Council, it was not declared to be a Court of Record. It was only in 1947 that the Chief Court of Jodhpur was converted into a High Court and made a Court of Record by the Government of Jodhpur Act, 1947. As to whether the High Court of the Covenanting State of Jodhpur established in 1947 was or was not a Court of co-ordinate jurisdiction does not arise in this case. So far as the judgments of the former Chief Court of Jodhpur are concerned, they were not by a Court of co-ordinate jurisdiction, and the Full Bench decision of the Chief Court of Jodhpur is of no binding authority on this High Court.

(6) The second ground of decision in the Madhya Bharat case (AIR (37) 1950 MB 31) rested on the particular language used in the Ordinance constituting the High Court, and certain other Ordinances. In Rajasthan, the saving clause as regards the laws in force in the previous Covenanting States is to be found in sub-section (1) of section 3 of Ordinance No. I of 1949 (Rajasthan Administration Ordinance, 1949). It lays down that

> "All the laws in force in any Covenanting State immediately before the commencement of this Ordinance in that State shall, until altered or repealed or amended by a competent Legislature or other competent authority, continue in force in that State subject to the modification that any reference therein to the Ruler or Government of that State shall be construed as a reference to the Raj Pramukh or, as the case may be, to the Government of Rajasthan."

Sub-section (2) of this section makes it clear that the word "law" referred to in sub-section (1) means

> "any Act, Ordinance, regulation, rule, order or bye-law which, having been made by a competent Legislature or other competent authority in a Covenanting State, has the force of law in that State."

The Judge-made law or the law deducible from decisions has been left out in this section. It may be pointed out that a discussion is also found in the 'Full Bench case of Rangoon', (AIR (14) 1927 Rang 4) referred to above, on the interpretation of the word "law" as an argument was advanced on section 17 of the Letters Patent, which was as follows :

> "And we do further ordain that with respect to the law to be applied to each case coming before the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction such law shall be the law which would have been applied by the Chief Court of Lower Burma to such cases if these Letters Patent had not issued."

The majority of the Judges held that the word "law" did not include the published decisions of the Chief Court of Lower Burma unless they had been merged in any enactment or used to modify or repeal any enactment. The provision with respect to the law to be administered by the High Court is to be found in section 34 of the Rajasthan High Court Ordinance, and it is to the effect that the law or equity and the rule of good conscience to be applied by the High Court to each case coming before it in the exercise of its jurisdiction as a Court of Appeal, Revision or Reference, will be the law or equity and the rule of good conscience, which the Court in which the proceedings in such case were originally instituted ought to apply to such case. The term "law" in this case would obviously mean the law as described in sub-section (2) of Section 3 of Ordinance No. I of 1949.

(7) On the merits we fully agree with the view of law taken in 'Kanraj v. Vijai Singh', (1950 RLW 284) in which the entire case law has been fully discussed. For the reasons given in that judgment we hold that a mere acknowledgment of debt does not operate as a new contract and cannot be made a basis of the suit. It only keeps alive the original cause of action, and the suit must be founded on such original cause of action. The acknowledgment

of debt would no doubt enure to the benefit of the creditor for the purpose of saving limitation if it is made before the original debt became barred by time.

(8) It was argued that the plaintiff should be given an opportunity in this case to amend his plaint so as to bring forth the original cause of action.

(9) It is possible that in the view of law taken by the Jodhpur Chief Court the plaintiff and his lawyer may have been misled into drafting the plaint in the way they have done. The plaintiff is, therefore, allowed to amend his plaint by incorporating the original cause of action. He will, however, pay the costs incurred by the respondent in this Court and the lower appellate Court.

(10) The appeal is, therefore, accepted, the judgment and de ree of the lower Court are set aside, and the case is sent back to the trial Court. The plaintiff will be allowed to amend his plaint within one month of the record reaching the trial Court, and the trial Court will proceed further according to law. The appellant will pay cos's of the first appellate Court and of this Court. The costs of the trial Court will abide the final result of the suit.

K.S. *Case remanded.*

A. I. R. (39) 1952 RAJASTHAN 9 (C. No 6)

(JODHPUR BENCH)

WANCHOO, C. J. AND BAPNA, J.

Taru Lal and others, Defendants, Appellants v. Mangi Lal and another, Plaintiffs-Respondents.

Appeals Nos. 46 and 47 of 1950, D/- 1-8-1951.

(a) Civil P. C. (1908), O. 34, R. 14 — Money decree passed in respect of claim arising under mortgage — Suit for bringing mortgaged property to sale — Deposit in Court after suit of part of decretal amount — Effect.

Where a mortgagee after obtaining a money decree in satisfaction of a claim arising under the mortgage, brings a suit for bringing the mortgaged property to sale in enforcement of the mortgage, the plaintiff is entitled to a decree for sale. The fact that the defendant deposited a sum after the suit had been filed would not deprive the plaintiffs of the right to get a decree for sale. (Para 4)

Anno: C. P. C., O. 34, R. 14, N. 2.

(b) Civil P. C., (1908), O. 34, R. 14, S. 34 — Suit under O. 34, R. 14 — Power of Court, to grant interest not allowed in money decree.

Order 34, R. 14 only provides for a decree declaring that the mortgaged property can be brought to sale for the decree for money which had already been obtained in satisfaction of the claim arising under the mortgage. It does not permit the Court hearing the suit to reopen matters relating to interest and so on which must already have been decided when the decree for payment of money was passed in the previous suit. AIR (1) 1914 All 98, Not Foll. (Para 5)

This position is also supported by Section 34 (2). (Para 5)

Anno: C. P. C., S. 34, N. 17, O. 34, R 14 N 13

Ganpat Singh, for Appellants; Chand Mal for Respondents.

Case referred to:

('14) AIR (1) 1914 All 98: (36 All 264) (Pr 4)

WANCHOO, C. J.: These are two connected appeals from the same judgment and decree of the District Judge of Rajsamand, dated the 28th of August, 1948. Appeal No. 46 is by Taru Lal and others who are defendants, and appeal No. 47 is by Mangi Lal and Meera Lal who are plaintiffs.

(2) The plaintiffs brought their suit under Order XXXIV, Rule 14. Their case was that they were sub-mortgagees of the defendants. They had on an earlier occasion filed a suit for the money due to them and had obtained a decree for Rs. 1,753/6/9. In that suit, however, there was no prayer for sale on the basis of the sub-mortgage and, therefore, no decree for sale under Order XXXIV had been passed. When the earlier decree was put into execution, the plaintiffs wanted to put the property to sale. They were then met with the objection that the property could not be put to sale as there was no decree under Order XXXIV for sale in their favour. This dispute was taken up to the High Court of Udaipur. The High Court decided that the decree could not be executed by sale of the property and directed that if the plaintiffs wanted to sell the property, they should file a suit under Order XXXIV, Rule 14. Thereupon, the present suit was filed. While filing the suit, the plaintiffs also claimed Rs. 485/9/3 as interest. It may be mentioned that the previous decree for Rs. 1,753/6/9 did not allow any interest after the date of that decree. The trial Court gave a declaration to the effect that the property was saleable under Order XXXIV, Rule 14 in order to pay up the amount of Rs. 1,753/6/9. It dismissed the claim with respect to further interest which was claimed. Both parties appealed from this decree. The defendants' case was that as they had deposited a sum of Rs. 1,627/- after the decree in the previous suit, no decree for sale should have been passed against them. The case of the plaintiffs was that they were entitled to interest. The appellate Court dismissed the appeal of the defendants and affirmed the decree for sale. Further, it allowed the appeal of the plaintiffs in part and gave them a further sum of Rs. 175/- as interest from the date of the decree till the date of the deposit as damages.

(3) Both parties have again appealed to this Court. The defendants have claimed that no decree for sale should have been passed against them and that the sum of Rs. 175/- should not have been allowed to the plaintiffs as interest by way of damages. The plaintiffs, on the other hand have claimed that they should be allowed the full interest which they had claimed viz., Rs. 485/9/3.

(4) We shall deal with the defendants' appeal first. This may be divided into two parts: one relating to the decree for sale and the other relating to the amount of Rs. 175/- allowed as interest. So far as the decree for sale is concerned, we do not see how the defendants can resist that decree. Order XXXIV, Rule 14 specifically provides for cases where there was an earlier decree for payment of money only though the document on which the money was advanced might have been a mortgage-deed. Further, in this case, this point was in dispute before the High Court of Udaipur and that Court specifically held against the defendants and ordered the plaintiffs to file a suit under Order XXXIVV, Rule 14. Under these circumstances, it is too late for the defendants to contest that the decree for sale cannot be passed against them for the amount which was decreed in the previous suit viz., Rs. 1,753/6/9. The fact that they deposited a sum of Rs. 1,627/- about 2½ years later, after the present suit had been filed would not deprive the plaintiffs of the right to get a decree for sale. If that money is still lying in Court, it can always be used by the defendants to pay up the amount due from them when execution is taken out.

(5) Next we come to the question of interest. Order 34, Rule 14 contemplates a suit in a case where a decree for the payment of money in satisfaction of the claim arising under the mortgage has already been obtained. Normally, in such a suit the plaintiff also prays for sale; but it may some-

times happen that the prayer for sale may be left out by inadvertence or otherwise. In such cases but for Order 34, Rule 14, the plaintiff would be barred from asking for sale of the property in view of the provisions of Order 2, Rule 2. As we read Order 34, Rule 14, it seems to us that it only provides for a decree declaring that the mortgaged property can be brought to sale for the decree for money which has already been obtained in satisfaction of the claim arising under the mortgage. It does not seem to us possible to reopen matters relating to interest and so on which must already have been decided when the decree for payment of money was passed in the previous suit. Learned counsel for the appellants relied on 'Indar Pal v. Mewah Lal', AIR (1) 1914 All 98, where the plaintiffs who had already obtained a decree for money and had been allowed interest at a certain rate, claimed higher interest when they filed the suit under Order XXXIV Rule 14. They were given interest at the higher rate. It seems that no objection was raised to this in the trial Court or in the memorandum of appeal to the High Court. The point seems to have been raised in argument and the learned Judges brushed it aside by observing that as the plaintiffs were entitled to sue upon their mortgage, they had a right to claim interest at the stipulated rate up to the date fixed for payment. Learned counsel for the plaintiffs, therefore, urges that this case is an authority for the proposition that further interest can be allowed in a suit under Order 34 Rule 14 although no interest might have been allowed in the previous money decree. With all due respect to the learned Judges who decided this case, we feel ourselves unable to follow it. We may point out that there is no discussion of the point in the judgment except a bare observation that the plaintiffs are entitled to interest at the rate mentioned in the mortgage-deed. Further, the Allahabad case fails to notice the provision of S. 34(2) of the Code of Civil Procedure. That sub-section provides that where a decree is silent with respect to the payment of further interest on such aggregate sum as has been decreed from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit, therefore shall not lie. This provision was for the first time inserted in the Code of Civil Procedure of 1882 by Act VII of 1888. The reasons why this was inserted was that in some cases before 1888, it had been held that interest though not awarded by the decree could be granted later on in execution or in a separate suit. This Act was passed negativing the law laid down by those cases. Learned counsel for the plaintiffs has cited these cases but we need not refer to them in detail in view of this provision. We are of opinion that the decree of the trial Court was correct and the lower appellate Court was wrong in allowing a further sum of Rs. 175/- as interest by way of damages to the plaintiffs. It follows from this that the plaintiffs' appeal for a further sum as interest by way of damages must fail.

(6) We, therefore, dismiss appeal No. 47 of 1950. We partly allow appeal No. 46 of 1950 and set aside that part of the decree of the lower appellate Court by which a further sum Rs. 175/- has been allowed to the plaintiffs as interest by way of damages, thus restoring the decree which was passed by the trial Court. Parties will pay and receive costs throughout in all the Courts according to success and failure.

V.B.B. *Order accordingly.*

A. I. R. (39) 1952 RAJASTHAN 10 (C. N. 7)

(JODHPUR BENCH.)

WANCHOO, C. J. AND BAPNA, J.

Jeet Mal and another, Appellants v. Nand Lal and others, Respondents.

Civil Reference No. 232/1950 D/- 30-7-1951.

(a) Civil P. C. (1908), S. 113 and O. 46 R. 1 — Decree not subject to appeal.

References under S. 113 C. P. C. can only be made in suits where there is no appeal provided from the decree or in such appeals where there is no further appeal provided.

Hence a reference under S. 113 in a suit for pre-emption is incompetent when there is obviously an appeal provided from the decree which will be passed in the suit. (Para 3)

Anno: C. P. C. O. 46 R. 1 N. 4 Pt. 1.

(b) Civil P. C. (1908), O. 46 R. 1 — Statement of facts and Court's opinion.

Under O. 46, R. 1 Civil P. C. it is the duty of the Court making a reference to record its own opinion on the point before making such reference. This does not mean that the Court should merely say that the case is one about the interpretation of the Constitution and of great public importance. It should record its own opinion on the point raised. (Para 6)

(c) Civil P. C. (1908), S. 113, Proviso — Reference under, is only possible when validity of Act, Ordinance or Regulation or any provision thereof is involved — Question relating to law of pre-emption as based on custom and not on any Act — Reference cannot be made. (Para 6)

WANCHOO C. J.: This is a reference by the Civil Judge of Udaipur in a civil suit No. 147 of 2005 Samvat. The suit was for pre-emption. An objection was raised by the defendant that in view of Art. 19(1)(f) of the Constitution of India, read with Art. 13(1), the right or custom of pre-emption was inconsistent with these provisions and the suit should be dismissed on this ground. The Civil Judge thereupon said in his order that he had read Art. 13(1) and Art. 19(1)(f) of the Constitution and was of the opinion that the question related to the interpretation of the Constitution and was of great public importance. Consequently, he sent the file to this Court under S 113 of the Civil P. C. This order was passed on the 28th of August, 1950.

(2) We are of the opinion that this reference was completely incompetent on the date on which it was made. The learned Civil Judge who looked up S. 113 of the Civil P. C. never cared to look up O. XLVI Rule 1 which provided the procedure for making references to this Court. O. XLVI, R. 1 reads as follows:

"Where, before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court."

(3) A mere glance at this rule shows that references under S. 113 C. P. C. can only be made in suits where there is no appeal provided from the decree or in such appeals where there is no further appeal provided. In the present case, there is obviously an appeal provided from the decree which will be passed by the Civil Judge and under the circumstances no reference could be made to this

Court under S. 113 read with Order XLVI R. 1 of the Civil P. C. We may also point out that it is the duty of the Court making a reference to record its own opinion on the point before making such reference. This does not mean that the Court should merely say that the case is one about the interpretation of the Constitution and of great public importance. It should record its own opinion on the point raised which in this case was whether the custom of pre-emption was invalid and could not be enforced in view of the provision of the Constitution. Even if the reference had been competent, we would have sent it back to the Court below for recording its opinion and giving reasons therefore before we considered it ourselves.

(4) This reference must, therefore, be dismissed and the record will be returned for disposal of the suit according to law.

(5) We may, however, draw the attention of the trial Court to Central Act No. XXIV of 1951 which has added a proviso to S. 113 of the Civil P. C. That proviso read as follows:

"Provided that where the Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor, and refer the same for the opinion of the High Court."

(6) The trial Court will consider this proviso and if it is of the opinion that the case is covered by this proviso, it should make a reference in accordance with the terms of this proviso. We may, however point out that such a reference is only possible where there is an Act, Ordinance or Regulation and it will not be right to make a reference under this proviso if the law of pre-emption in Mewar is merely based on custom and not on any Act of the former Mewar State or of Rajasthan.

K.S. *Reference rejected.*

A. I. R. (39) 1952 RAJASTHAN 11 (C. N. 8)

(JODHPUR BENCH)

WANCHOO, C. J. AND BAPNA, J.

Arjun Lal, Applicant v. Hiralal and others, Respondents.

Civil Misc. Appln. No. 9 of 1951, D/- 2-8-1951.

Constitution of India, Art. 134(1)(a) and (b) — Suit for partition of plaintiff's share in joint family property —Valuation — Substantial question of law — Civil P. C. (1908), S. 110.

The plaintiff sued for partition of his one third share in a joint-family house which was admittedly more than Rs. 20,000/ in value but the plaintiff's share was less than Rs. 2,000/-. The suit was dismissed in all the lower Courts. The plaintiff applied under Art. 134(1)(a) and (b) of the Constitution for leave to appeal to the Supreme Court.

'Held' that the applicant was not entitled to a certificate either under Cl. (a) or Cl. (b) of Art. 134(1) as the value of the subject-matter of dispute in appeal will be the value of the plaintiff's share and not the value of the entire joint-family house. A. I. R. (31) 1944 P. C. 65 Rel. on. (Para 3)

'Held further' that the decree being one of affirmance and the only question sought to be raised in the appeal being one of wrong appraisement of evidence by the High Court, which was no substantial question of law at all, leave under Art. 134 (1) (b) could not be granted. (Para 4)

Anno: C. P. C. S. 110 N. 11, 17.

Umashanker Trivedi, for Applicant.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('44) A I R (31) 1944 P C 65: (I L R (1944) Bom 745) (Pr 3)

('32) 54 All 858: (A I R (20) 1933 All 177) (Pr 3)

('06) 10 Cal W N 564: (3 Cal L Jour 257) (Pr 3)

WANCHOO C. J.: This is an application by Arjun Lal under Article 133 (1) of the Constitution of India for a certificate under clauses (a) and (b) of that Article. Learned counsel urges that the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than Rs. 20,000/-, or that, in any case, the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value.

(2) The suit, in this case, was filed by the petitioner for partition of his one-third share in a certain house in the Civil Court at Udaipur. This suit was dismissed by the trial Court. There was an appeal, which was also dismissed, and then there was a second appeal to the Mahadraj Sabha, which was equivalent to a High Court in the former State of Mewar, which was also dismissed. Thereafter, on account of some peculiar circumstances, which were prevalent in the State of Mewar in those days, the case came up again for hearing before the High Court of Udaipur which was established on the 1st October, 1940. When the United State of Rajasthan was formed in 1949, and this Court was created, the appeal, which was pending in the High Court of Udaipur, was transferred to this Court. It was heard by a Division Bench, and was dismissed, thus confirming the decision of the three Courts below.

(3) It is stated that when the suit was filed in the trial Court it was not necessary to value the suit. So the exact valuation of the suit is not known. In the present application the applicant says that the house in dispute is worth over a lakh of rupees, and that his share is worth over Rs. 20,000/-. Besides this bare statement of the applicant, which is also not supported so far by any affidavit, there is nothing on the record to show that the applicant's share was valued at over Rs. 20,000/- at the time the suit was filed. It has been stated that the defendant in his written statement claimed that he had spent about Rs. 30,000/- over the constructions, and that therefore, the entire house was certainly worth more than Rs. 20,000/-. Learned counsel then relies on Article 133 (1) (b), and says that as this is a suit for partition, and the entire house on the defendant's own showing was worth more than Rs. 20,000/-, he is entitled to a certificate. He relies on two cases, viz., 'Bhugwat Sahay v. Pashupati Nath', 10 Cal W N 564; and 'Muhammad Asghar v. Abida Begum', 54 All 858 These two cases, however, were considered by their Lordships of the Privy Council in 'Shevantibai v. Janardhan Raghunath', A I R (31) 1944 P. C. 65, and were impliedly overruled by the following observations, which occur at page 66:

"It is enough for the purposes of the present case to say that their Lordships feel no doubt that, a question as to the title of the plaintiff to the share which he claims in the joint property does not become a question respecting the whole of the joint familyy estate merely because if his title is established it will result in the joint family estate being partitioned."

Even, therefore, if the house was valued at about Rs. 30,000/-, the share of the applicant would only be Rs. 10,000/-, and the applicant is not entitled to a certificate either under clause (a) or clause (b) of Article 133 (1). We may mention that he is not claiming a certificate under clause (c) of that Article.

(4) Further, even if it were to be conceded, for the sake of argument, that the value of the applicant's share in the house was and is not less than Rs. 20,000/-, the applicant would not be entitled to a certificate, unless he can further show that the appeal involves some substantial question of law, as this Court has confirmed the decree of the Court immediately below it. Learned counsel urges that the substantial question of law involved in this case is that this Court has gone wrong in appraising the evidence, which was produced, and coming to certain conclusions of facts on that evidence. We are of opinion that this is no substantial question of law at all, and the applicant is, therefore, not entitled to any certificate under Article 133 (1) of the Constitution.

(5) The application is hereby rejected.

K.S. *Certificate refused.*

A. I. R. (39) 1952 RAJASTHAN 12 (C. N. 9)

(JODHPUR BENCH)

WANCHOO, C. J. AND BAPNA J.

Sewa Ram, Applicant v. Misrimal and others, Opposite Party.

Civil Revn. No. 229 of 1950, D/- 30-7-1951.

(a) Civil P. C. (1908), O. 9 Rr. 6 ,7 — Order under R. 7 — Effect.

Once an 'ex parte' order has been passed against a defendant, it lasts till the termination of the suit, and the defendant cannot be permitted to appear in defence at a subsequent hearing unless he gets the 'ex parte' order set aside in the manner provided in Order IX, R. 7, that is, by assigning good cause for his non-appearance. A I R (12) 1925 Mad. 1274 diss from. A I R (32) 1945 Sind 98 Rel. on. Case law discussed. *(Para 18)*

Anno: C. P. C. O. 9 R. 7 N. 2.

(b) Civil P. C. (1908) O. 9 R. 6 — Order striking off defence.

The Court while ordering that the suit should proceed 'ex parte' cannot also strike off the defence. *(Para 19)*

Anno: C. P. C. O. 9 R. 6 N. 1.

(c) Civil P. C. (1908) S. 115, O. 9, R. 7 — Order "as to costs" — Revision.

The amount that is ordered by the Court as costs cannot be challenged in revision. *(Para 18)*

Anno: C. P. C. S. 115 N. 20, O. 9 R. 7 N. 3.

Sawai Mal, for Applicant — Roshan Lal, for Opposite Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('22) A I R (9) 1922 All 33: (64 Ind Cas 958) (Prs 4, 8)

('22) A I R (9) 1922 All 110: (66 Ind Cas 892) (Prs 4, 8)

('24) A I R (11) 1924 Cal 806: (81 Ind Cas 867) (Prs 4, 9)

('47) 1947 Jaipur L R 303 (Pr 5)

('31) A I R (18) 1931 Lal 616 (1): (134 Ind Cas 1107) (Prs 5, 11)

('25) A I R (12) 1925 Mad 1274: (91 Ind Cas 545) (Prs 4, 5, 7, 10, 11, 12, 13, 14, 17)

('39) A I R (26) 1939 Mad 385: (185 Ind Cas 247) (Prs 5, 12).

147 Mar L R 88 (Pr 5)

('31) A I R (18) 1931 Nag 122: (27 Nag L R 50) (Prs 5, 10)

('44) A I R (31) 1944 Nag 77: (I L R (1944) Nag 442) (Prs 5, 13, 16)

('49) A I R (36) 1949 Oudh 59: (I L R (1950) All 6 F B) (Prs 6, 16, 18)

('45) A I R (32) 1945 Sind 98: (I L R (1945) Kar 1) (Prs 6, 15, 16, 17, 18)

WANCHOO C. J.- This is a revision by Sewa Ram against an order of the District Judge of Pali.

(2) The facts, which have led to this revision, are these. A suit had been filed by Misrimal and others against the applicant. It was fixed for hearing on the 29th of July, 1950. On that date, the applicant was absent, and an order was passed that the suit should proceed 'ex parte', and the written statement of the applicant should be struck off. When the matter came up again for hearing on the 23rd of August, 1950, the applicant appeared, and it was contended on his behalf that the 'ex parte' order was only for that day, viz., the 29th of July, 1950, and that the applicant could appear in the suit thereafter without having the 'ex parte' order set aside. The learned District Judge, however, held that the applicant should not appear in the suit so long as the 'ex parte' order stood, and that he had to apply for setting aside the 'ex parte' order of the 29th of July, 1950. Eventually, the District Judge set aside the 'ex parte' order, and permitted the applicant to appear in the suit on payment of Rs. 100/- as costs. The order striking off the written statement was also set aside.

(3) The applicant has come up to this Court, and contends that it was not necessary for him to apply for setting aside the 'ex parte' order, and that he should have been permitted to appear in the suit on the 23rd of August, 1950, and take part in the proceedings from that date, and that the order of the District Judge, by which he was asked to pay Rs. 100/- as damages was in excess of his jurisdiction.

(4) This argument is based on the interpretation which learned counsel puts, on O. IX, Rule 7, of the Code of Civil Procedure, which reads as follows:

> "Where the Court has adjourned the hearing of the suit 'ex parte', and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance."

The argument is that, as the applicant did not want to be put in the position as if he had appeared on the day fixed for his appearance, and merely wanted to take part in the proceedings from the 23rd of August, 1950, Order IX, R. 7, had no application to his case, and he should have been allowed to appear from that date without being made to pay damages for setting aside the 'ex parte' order passed on the 29th July. The leading case on the subject, on which learned, counsel places reliance, is 'Venkatasubbiah v. Lakshminarasimhan', A I R (12) 1925 Mad 1274. In that case Wallace J. relied on the words "be heard in answer to the suit as if he had appeared on the day fixed for his appearance." and said that the Order IX, R. 7, applied to a party who wished to be relegated back to the position which he would have been in if he had appeared at a previous hearing at which he was absent, and who wished the proceedings taken in his absence to be taken over again in his presence. He also went on to say that "ex parte" only meant that the party had not been heard because he was absent and the adjournment of the hearing "ex parte" in the words of R. 7 applied only to the hearing on the particular day when that hearing

and adjournment "ex parte" had been made. He further observed that there was one cardinal principle applicable to trials by Courts, namely that a party had a right to appear and plead his cause on all occasions when that cause came on for hearing. He relied on three earlier cases, namely, 'Mannu v. Tulsi', A I R (9) 1922 All 33 'Bhagwat Prasad Tewari v. Muhammad Shibli', A I R (9) 1922 All 110, and 'Satyaendra Nath v. Narendra Nath', A I R (11) 1924 Cal 806.

(5) This Madras case was followed in 'Harba v. Mt. Chandrabhaga', A I R (18) 1931 Nag 122, 'Meh Raj Din v. Hans Raj', A I R (18) 1931 Lah 616 (1), 'Peru Mal Naicken v. Kondama Naiken', A I R (26) 1939 Mad 385, and 'Devi Das Ganpatrao v. Sunderlal', A I R (31) 1944 Nag 77. Further, there are certain observations in 'Chandrabhana v. Pukh Raj', 147 Mar L R 88, and 'Tulsis v. Gyarsilal and Gyarsilal v. Kana', (1947) Jaipur L R 303, where though the point was not the same, the principle behind 'Venkatasubbiah's case', A I R (12) 1925 Mad 1274 was by implication approved.

(6) On the other side are two cases, namely, 'Hariram Rewachand v. Pribhdas Mulchand', A I R (32) 1945 Sind 98, and Mt. Tulsi Devi v. Srikrishna', A I R (36) 1949 Oudh 59.

(7) Before we consider the reasoning behind 'Venkatasubbiah's case', AIR (12) 1925 Mad 1274, we should like to refer briefly to the cases on which it was based, and the cases which have followed it.

(8) The judgment in the first Allahabad case of 'Mannu v. Tulsi', A I R (9) 1922 All 33 does not deal with the words of O. IX, Rule 6, or O. IX R. 7 at all. That was a case where one party had been absent himself on a certain date of hearing. Later, there was an application for referring the case to arbitration, and that party also joined it. It was urged that this was not possible as the party had been absent at an earlier date. But this objection was overruled without any reference, however, to the words of these two Rules. In the case of 'Bhagwat Prasad Tiwari', A I R (9) 1922 All 110 also, no reference was made to the words of these two Rules. Further, it is not clear from the judgment whether there was any application by Bhagwat Prasad Tewari for setting aside the Ex parte' order. We do not, therefore, think that these two cases are any authority for the view that a party against whom an 'ex parte' order has been made can appear at a subsequent hearing without that order having been set aside.

(9) In the case of 'Satyendra Nath', A I R (11) 1924 Cal 806 the facts were different When the case came up for hearing on the 12th of April, 1923, the defendants were absent. The plaintiff was present, but wanted one month's time to produce his evidence. The Court ordered that the case should be put up on 14th of April, 1923, for disposal 'ex parte,. On the 14th of April, the defendants appeared and prayed for permission to defend the suit. This prayer was rejected and a preliminary decree was passed 'ex parte'. The High Court held that the plaintiff was also absent on the 12th of April, and consequently Order IX, R. 6, had no application, and therefore O. IX, R. 7, also did not apply. This case, therefore, cannot be an authority on the interpretation of O. IX, R. 7.

(10) In the case of 'Harba', A I R (18) 1931 Nag 122 the Nagpur Court relied on the case of 'Venkatasubbiah', A I R (12) 1925 Mad 1274 and there is no fresh reasoning in support of the view taken there.

(11) The judgment in 'Mehraj Din's case' A I R (18) 1931 Lah 616 (1) is a very short one without any reasoning, and is based entirely on the case of 'Venkatasubbiah', A I R (12) 1925 Mad 1274.

(12) 'Perumal Naicken's case', A I R (26) 1939 Mad 385 follows the case of 'Venkatasubbiah', AIR (12) 1925 Mad 1274 and goes even further. In that case, the defendant did not appear on the date of first hearing, and the case was ordered to proceed 'ex parte'. He appeared six months later applied to have the 'ex parte order set aside, alleging that summons had not been served upon him. This application was dismissed. Thereupon he applied for permission to file a written statement, and to take further part in the conduct of the case. The Munsiff refused to allow him to file a written statement on the ground that the case was proceeding 'ex parte' against him, and his application for setting aside that order had been dismissed but permitted him to cross-examine the witness for the plaintiff. Further, the Munsiff refused to permit him to lead evidence on his side. Varadachariar J., who referred to the judgment of Wallace J. in 'Venkatasubbiah's case', A I R (12) 1925 Mad 1274 eventually permitted the defendant to file a written statement as well as to adduce evidence on his behalf. Obviously, this case goes much further than the case of 'Venkatasubbiah', A I R (12) 1925 Mad 1274 and the learned Judge also realised that he was going too far, for he observes as follows at page 386:

> "I quite realize that the object of Rr. 6 and 7 of O. 9 will be frustrated if defendants could be allowed to absent themselves with impunity at the earlier stage of a litigation."

But in the special circumstances of that case, as very little progress had been made, he saw no reason why these Rules should be applied as penal provisions depriving parties of the opportunity of putting forward their defence. We feel, with due respect, that in view of the learned Judge's own observations, this case can hardly be treated as an authority for the view which has been contended for on behalf of the applicant.

(13) The last case in this series is the case of 'Devidas Ganpatrao', AIR (31) 1944 Nag 77. In that case also, 'Venkatasubbiah's case' AIR (12) 1925 Mad 1274 was followed but Pollock J. was apparently driven to the conclusion that O. IX, R. 6, only meant that "the Court proceeds 'ex parte' not for the rest of the suit but only until the defendant reappears". He, therefore, introduced certain words in O. 9 R. 6, which are not there in order to support the view taken in 'Venkatasubbiah's case' A I R (12) 1925 Mad 1274 and the view which he was taking in Devidas Ganpatrao's case.

(14) We now turn to examine the leading Madras case. If we may with great respect, say so, there does not appear to be any justification for the cardinal principle which had been made the basis of his decision by Wallace J., namely, that a party has a right to appear and plead his cause on all occassions when that cause comes on for hearing. We feel that the party can only come and appear according to the provisions of the Code of Civil Procedure. If the party could appear otherwise, it would mean that any party could walk out of Court at any stage and walk in again to take part at a later stage. This, in our opinion, is bound to cause inconvenience and delay, and may sometimes result in injustice to the other side. For example, a case is ordered to proceed 'ex parte', and fixed for 'ex parte' evidence on the next hearing. As is usual, when cases are to be heard 'ex parte', the plaintiff brings one or two witnesses to prove his case. He is then suddenly confronted by the fact that the defendant has put in appearance, and wants to take part from that date. The plaintiff is thus driven to the necessity of asking for an adjournment, for it is a different matter altogether to prove a case when the other side is there to defend it. If he is lucky enough to secure the adjournment without costs, there would at any rate, be delay, for which he cannot be compensated. But if it so happens that the adjournment is

refused, and he is forced to rely on one or two witnesses, whom he has brought, while the defendant comes prepared with all his evidence, the plaintiff may lose his case for no fault of his. There could not, therefore, in our opinion, be such a cardinal principle which has been assumed by Wallace J. in 'Venkatasubbiah's case', A I R (12) 1925 Mad 1274.

(15) We may in this connection refer to the observations of O'Sullivan J. in 'Hariram Rewachand's case' A I R (32) 1945 Sind 98 at page 102. While dealing with the cardinal principle enunciated by Wallace J., O'Sullivan J. observed as follows:

"'Cardinal principles', 'principles of natural justice', 'fundamental principle of justice' and the like are indeterminate terms liable to cause misconception and arguments based upon them must necessarily be considered with circumspection. With the greatest respect, I demur to the proposition that

> a party has a right to appear and plead his cause on all occasions when the cause comes on for hearing.

I am aware of no such 'cardinal principle'. Assuming that Wallace J. meant by the 'right to appear and plead his cause' something more than the right merely to argue that he meant the right 'to be heard in answer to the suit.' and all that that expression implies, I again with the greatest respect am unable to accept the view that the Civil P. C. does not deprive a defendant who has deliberately failed to obey a summons, or a direction to be present at an adjourned hearing, of that right."

We must, therefore, construe O. IX, R. 7, and the connected R. 6, without reference to any such cardinal principle as Wallace J. enunciated, and must hold that the right of a party to appear and defend a suit is circumscribed by the provisions of the Code of Civil Procedure.

(16) In order to put a correct interpretation on Order IX, R. 7, we may briefly refer to the scheme of O. IX. This Order deals with the first appearance of parties and consequence of non-appearance. R. 1 provides that on the day fixed for the defendant to appear and answer, the parties shall be present in Court in person or by pleader, and the suit shall then be heard unless adjourned for a future day. R. 2 provides for dismissal of suit where summons is not served in consequence of plaintiff's failure to pay costs. R. 3 provides for what happens where neither party appears on the day so fixed. R. 4 provides for remedies for the plaintiff in case the suit is dismissed under Rr. 2 and 3. R. 5 provides for dismissal of the suit, if the plaintiff fails to apply for fresh summons within a certain time. Then we come to Rule 6, which provides for what the Court has to do, if the plaintiff appears and the defendant does not appear on the first day of hearing. Clause (a) of this Rule says that if the plaintiff appears, and the defendant does not appear, and it is proved that the summons was duly served, the Court may proceed 'ex parte'. It also provides for what the Court should do in case the summons was not duly served; but we are not concerned with that. What is the meaning to be attached to the provisions of clause (a) of R. 6(1)? Is it only that this clause means what Pollock J. said in 'Devidas Ganpatrao's case' A I R (31) 1944 Nag 77, namely, that the suit would proceed 'ex parte' only until the defendant appears? We do not think that this is the meaning of this clause. Obviously, the clause says that if the summons is duly served, the Court may proceed 'ex parte'. This refers to the future, and there is, in our opinion, no reason to cut down this future period to the time till the defendant chooses to appear. If the intention of the legislature was that the Court should proceed 'ex parte' only till such times as the defendant chooses to appear, it should have been made clear by express words as no such words are to be found in this clause, the only interpretation, in our view, is that the proceedings will be 'ex parte' in future, and the limit of this future period must coincide with the time for which the suit lasts. We are supported in this view by the observations of O'Sullivan J. in 'Hariram Rewachand's case' A I R (32) 1945 Sind 98 to the following effect:

"It follows that reading O. 9, Rr. 1 and 6, Civil P. C. together, the defendant, in order to save ex parte proceedings against him must appear on the day fixed in the summons and answer the suit. It is to be observed that it is not sufficient for the defendant to take any course short of the appearance contemplated by O. 9, R. 1, Civil P. C."

The same view was taken by a Full Bench of the Oudh Chief Court in 'Mt. Tulsha Devi's case' A I R (36) 1949 Oudh 59. There can, therefore, be no doubt that once an order that the suit may proceed 'ex parte' against a party is made, that order lasts till the suit comes to an end, unless it is set aside.

(17) Let us then turn to Rule 7 to see if any other interpretation is possible on the language of this Rule. We may point out that this Rule is to be read along with Rule 6, because sometimes it may happen that the suit may not be decided on the day on which the order to proceed 'ex parte' has been passed. So Rule 7 provides for adjourning of the hearing of the suit 'ex parte', and also provides what the Court can do in case the defendant appears at the adjourned hearing, namely, that the Court may hear the defendant as if he had appeared on the day fixed for his appearance, if he shows good cause for his previous non-appearance. There is no scope, if one reads Rr. 6 and 7 together, for the view that a defendant who has absented himself, and against whom it has been ordered that proceedings will be taken 'ex parte', can appear at any later stage, without showing good cause for his previous non-appearance. It may be argued that O. IX, R. 6, applies only to the first hearing of the case, and whatever may be the penalties for failure to appear on the first hearing, the same penalties do apply if the party present on the first hearing and absented himself on later hearing But this argument is met by the provisions of O. XVII, R. 2, which provides that where the parties, or any of them, fail to appear on an adjourned date of hearing, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX. It follows, therefore, that if a party has absented himself on some date after the first date of hearing, the Court can order proceedings against him 'ex parte'. In such case, the duration of 'ex parte' proceedings, in our opinion, must be the same as the duration of an 'ex parte' order passed under O. IX, R. 6, namely, till the suit terminates. In 'Venkatasubbiah's case', (A I R (12) 1925 Mad 1274), the effect of O. XVII, R. 2 was not considered at all by Wallace J. As pointed out by O'Sullivan J. in 'Hariram Rewachand's case', A I R (32) 1945 Sind 98, a party is no more entitled to absent himself at an adjourned hearing without risk of 'ex parte' proceedings than he would be at the first hearing.

(18) We may, further refer to the provisions of O. IX, R. 12, which are as follows:

"Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear."

Now suppose that a defendant has been ordered to appear personally on some later hearing in the suit, and he fails to appear, and there is no sufficient cause for this failure. In such a case the Court is authorized to pass an order that proceedings be 'ex parte' in terms of O. IX, R. 6. Can it be said that on the cardinal principle enunciated by Wallace J., such a defendant can walk in on a later hearing and take part in the proceedings from that stage without getting this 'ex parte' order set aside? We feel that if this is possible, it would be making the various provisions of O. IX absolutely nugatory. We, therefore, agree, with all respect, with the view taken by O Sullivan J. in 'Hariram Rewachand's case' A I R (32) 1945 Sind 98. The reasons given in that case for holding that an 'ex parte' order lasts till the suit is decided, and the party must get it set aside before he can be heard thereafter, were amplified in the Full Bench case of 'Mt. Tulsha Devi', A I R (36) 1949 Oudh 59. It was pointed out in that case that it was one thing to prove one's own case in the face of active opposition of a defendant, and quite another to prove it one-sided with the defendant precluded from appearing. We are, therefore, of opinion that once an 'ex parte' order has been passed against a defendant, it lasts till the termination of the suit, and the defendant cannot be permitted to appear in defence unless he gets the 'ex parte' order set aside in the manner provided in O. IX, R. 7, that is by assigning good cause for his non-appearance. In this view of the matter, we are of opinion that the District Judge was right in insisting upon an application for setting aside of the 'ex parte' order before allowing the applicant in this case to appear to defend the suit. As for the amount that was ordered by him as costs, we are of opinion that that cannot be challenged in revision. In any case, the amount does not appear to me excessive in the circumstances of the present case.

(19) We may finally refer to another point. The District Judge, while ordering that the suit should proceed 'ex parte', also struck off the defence. This he could not do. We point this out for the benefit of the subordinate Courts in this State, though in this case the matter has no practical importance as the District Judge has also set aside the order striking off the decree.

(20) We, therefore, dismiss this revision with costs of this Court to the opposite party.

D.H. *Revision dismissed.*

A. I. R. (39) 1952 RAJASTHAN 15 (C. N. 10)
(JAIPUR BENCH)
SHARMA, J.

Shree Narain, Applicant v. Kishanlal and others; Opposite Party.

Civil Revn. No. 15 of St. 2005. D/- 27-7-1950.

(a) Civil P. C. (1908), S. 115 — "Case", meaning of — Interlocutory order whether is "Case decided."

There is no warrant for the proposition that 'case' when used with reference to a suit means the whole suit and that no interlocutory order passed during the pendency of a suit is open to revision until the whole suit is decided. The word 'case' is wide enough to include a decision on any substantial question in controversy between the parties affecting their rights, even though such order is passed in the course of the trial of the suit. An interlocutory order deciding a question of this kind (as distinguished from purely formal and incidental) is a 'case decided' but it will be open to revision only if the other conditions expressly laid down by S. 115 are satisfied. A I R (30) 1943 Lah 65 (FB) Foll. A I R (23) 1936 All. 686 (FB) not foll. (Para 6a)

Anno: C. P. C., S. 115, N. 5.

(b) Civil P. C. (1908), S. 115, O. 6, R. 17 — Amendment of plaint refused — Revision.

A revision lies against an order refusing to amend a plaint if it is found that the lower Court has committed illegality in the exercise of its jurisdiction in refusing to amend it; A I R (30) 1943 Lah 65 (FB) Foll. (Paras 7, 8)

Anno: C. P. C., S. 115, N. 5.

C. L. Agarwal, for Applicant; D. P. Mathur, for Opposite Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('33) A I R (20) 1933 All 374: (55 All 256) (Pr 5)
('35) A I R (22) 1935 All 353: (57 All 459) (Pr 5)
('36) A I R (23) 1936 All 686: (I L R (1937) All 17 FB) (Prs 4, 6)
('34) A I R (21) 1934 Cal 102: (149 Ind Cas 923) (Pr 5)
('35) A I R (22) 1935 Cal 102: (155 Ind Cas 1109) (Pr 5)
('43) A I R (30) 1943 Lah 65: (I L R (1943) Lah 257 FB) (Pr 6)
('25) A I R (12) 1925 Mad 585 (2): (87 Ind Cas 90) (Pr 5)

JUDGMENT: This is a plff's. application to revise the order of the learned Judicial Officer, Shamlat Area, Sambhar, refusing to amend the plaint. The plff. brought a suit with the allegation that the plots Nos. 1607, 1608, 1609, & 1610, along with a few other plots, in the town of Sambhar, belonged to him & had been in his possession as owner for a very long time. In August 1943, the defts. encroached upon a piece of land, 185 ft. x 24 ft. which formed part of Khasra No. 1607. The land in dispute was shown in the sketch attached to the plaint. The plff. prayed that the possession be delivered to him of the said land which was denoted by letters A, B, C, D on the sketch.

(2) The defts. denied the plff's. title to the land in suit, and pleaded that they had been in possession thereof for about 17 years. The learned Judicial Officer framed issues, the material being issue No. 1 which runs as follows:

"Whether the land in dispute, A, B, C, D. is owned & possessed by the plff?"

The plff. produced his evidence & when one of his witnesses, Devi Narain, Revenue Inspector, who had prepared a plan, was being examined, it appeared from his statement that the land in dispute did not form part of the plot No. 1607, but of 1610. Thereupon the plff. made an application for amendment of the plaint to the effect that instead of plot No. 1607, plot No. 1610 might be substituted in the plaint. The learned Judicial Officer, holding that the amendment substituted a new subject-matter, dismissed the application. The plff. has now come in revision to this Court.

(3) It has been argued by the learned counsel for the applicant that the amendment did not seek to change the subject-matter. The only amendment, that was sought, was with respect to the description of the property in dispute. According to the plff's. case, the plots Nos. 1607 & 1610 belonged to the plff. & therefore the amendment did not cause any prejudice to the defts.

(4) On behalf of the opposite party, it has been argued that no revision lies, because the order under revision is an interlocutory order & a revision is not permissible against such an order. For this reliance has been placed upon a Full Bench ruling of Allahabad High Court reported in 'Mt. Surajpali v. Arya Pratnidhi Sabha', A I R (23) 1936 All 686. In that case, the amendment of the plaint has been refused by the lower Court & the High Court held that no revision lies from an order refusing to allow the amendment of a pleading. Cases where an amendment comes under some other order of

the Court, as for example, addition or substitution of the parties of the striking off of pleadings, may amount to 'cases decided', but the order passed purely under O. 6, R. 17 does not.

(5) On behalf of the applicant I have been referred to the rulings reported in 'Kishanlal Babulal v. Ramchand', AIR (20) 1933 All 374, Rurmal Ramnath v. Kapilman Misar', AIR (22) 1935 All 353; 'Kariya Goundan v. Tirukkaivalu Chetty', AIR (12) 1925 Mad 585; 'Loknath Mukerji v. Abani Nath', A I R (21) 1934 Cal 102; and 'Indubala Dessi v. Lakshmi Narayan', A I R (22) 1935 Cal 102. In these rulings it has been held that a revision lies against an order refusing to amend the pleading.

(6) I have considered the rulings reported by both the learned counsel. No doubt, so far as the Allahabad High Court is concerned, it is now an established law that an order refusing to amend the pleadings is not a case decided within the meaning of S. 115, C.P.C. The two rulings of the Allahabad High Court cited by the learned counsel for the applicant have, therefore, no longer any force.

(6a) The fact, however, remains that so far as the other High Courts are concerned, it has been held that a revision lies against an order refusing to amend pleadings. The ground, on which a revision was disallowed in the Full Bench case of Allahabad cited above, was that, though the word 'case' is more comprehensive than the word 'suit', no instance can be quoted of its use in the Code, where it would not at least include 'suit' & that where the 'case in which revisional jurisdiction of the High Court is invoked, happens to be also a suit, then the suit itself is the case which requires to be decided before the record is called for. An interlocutory order in suit, which did not decide the suit itself, is not a 'case decided', & cannot be interfered with under S. 115, C.P.C. In a Full Bench ruling of Lahore High Court 'Bibi Gurdevi v. Mohammad Baksh', AIR (30) 1943 Lah 65, it was held that the word 'case' under S. 115, C.P.C., is wide enough to include interlocutory orders passed in a suit. An order by the Court staying a suit before it on receipt of a Robkar from a Debt Conciliation Board under S. 25, Punjab Relief of Indebtedness Act, is a 'case decided' within the meaning of S. 115, C.P.C., & therefore is revisable by the High Court. The Full Bench case of Allahabad High Court reported in A I R (23) 1936 All 686, was cited before their Lordships. Their Lordships, however, held that the view that a branch of a suit is not a case within the meaning of S. 115, C.P.C., is too narrow. Bhide, J., who gave the leading judgment, said:

"I would accordingly hold that from standpoint of language alone, the word 'case' is wide enough to include decision on any matter in controversy affecting the rights of the parties to a suit. This interpretation is supported by the dictionary meaning of the word, by the sense in which it is used in some other sections of the Code itself & by the rule of interpretation which requires that a beneficial construction should be placed upon the provisions of a statute, when this appears to be consonant with its object. The main objection to this wide interpretation seems to be the feeling that it may cause great inconvenience to the parties by delay in the disposal of suits by petitions for revision. But this objection loses its force when it is remembered that the exercise of the revisional powers under S. 115, Civil P.C., is subject to two-fold restrictions. Firstly there are various restrictions expressly mentioned in the section itself. Secondly, there are the other implied restrictions which are to be deduced from the very nature of the extraordinary jurisdiction under S. 115, Civil P. C....." The very fact that the majority of the High Courts have generally acted upon the above wide interpretation of the word 'case', as pointed out already would show that the danger of possible inconvenience in this respect has been exaggerated."

Another member of the Bench, Tek Chand, J., said that the interpretation placed on the word 'case', that a branch of a suit is not a 'case' within the meaning of S. 115, C.P.C., is too narrow. I can see no warrant for the proposition laid down therein that 'case when used with reference to a suit means the whole suit and that no interlocutory order passed during the pendency of a suit is open to revision until the whole suit is decided. The word 'case' is wide enough to include a decision on any substantial question in controversy between the parties affecting their rights, even though such order is passed in the course of the trial of the suit. An interlocutory order deciding a question of this kind (as distinguished from purely formal & incidental) is a 'case decided', but it will be open to revision only if the other conditions expressly laid down by S. 115 are satisfied.

(7) The weight of the authorities is in favour of the view that a revision lies against an order refusing to amend a pleading. The reasons given by their Lordships of the Lahore High Court in the Full Bench ruling quoted above, appeal to me & I hold that the order now before me is open to revision.

(8) The only question remains whether, under the circumstances of the case, the order should be interfered with a revision. A revision lies either when a jurisdiction has been usurped or there has been a failure to exercise jurisdiction vested in a subordinate Court. It also lies when the lower Court commits any illegality or material irregularity in the exercise of its jurisdiction. In the present case, the plff. alleged that he was the owner of the plot No. 1607 as well as of the plot No. 1610. He attached a sketch of the land in dispute along with the plaint. The subject-matter of the suit was the land A, B, C, D., shown in the sketch. The number of the plot has been mentioned only in connection with the description of the land in suit. The plot itself is not the subject-matter of dispute. The learned lower Court was, therefore, wrong in its view that by the amendment sought for, the subject-matter of the suit would be changed. Under O. 6, R. 17, C.P.C., all amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. The real question in controversy between the parties is whether the land in suit belongs to the plff. Looking to the contention of the plff. that he is the owner of the plot No. 1607 as well as of the plot No. 1610, it would not be reasonable to shut him out from proving his case simply because he has mentioned a wrong plot in connection with the land in suit. By doing so, the Court will be prevented from determining the real question in controversy. In my view, the lower Court committed illegality in the exercise of its jurisdiction in refusing to amend the plaint as it acted in breach of the mandatory provisions of O. 6, R. 17, C.P.C., which lays down that all such amendment shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. The order of the lower Court is, therefore, liable to be set aside.

(9) The application for revision is allowed, & the order of the lower Court refusing to amend the plaint, as prayed, is set aside. The case is sent back to the lower Court with a direction that the plaint be amended, as prayed, provided the plff. pays Rs. 25/- as costs to the contesting defts. So far as the costs of this revision are concerned, the parties shall bear their own costs.

V.S.B. *Revision allowed.*

A. I. R. (39) 1952 RAJASTHAN 17 (C. N. 11)

(*JODHPUR BENCH*)

WANCHOO C. J. AND BAPNA J.

Kewal Mal Singhi, Applicant v. Heta Ram and others, Respondents.

Civil Misc. Appln. No. 4 of 1950, D/- 28-8-1951.

(a) *Rajasthan Administration (Amendment) Ordinance (5 of 1949), S. 8 — Order authenticated by secretary — Absence of words "By order of His Highness the Raj Pramukh" — Effect.*

Where an order published in the Government Gazette itself shows that it has been passed by the Government of Rajasthan and is authenticated by a secretary to Government, it cannot be challenged because of a technical defect, viz., the absence of the words "By order of His Highness the Raj Pramukh". (Para 7)

(b) *Constitution of India, Art. 311 (2) — Applicability — Removal of civil servant on account of certain rules framed by Government.*

The word "removal" in Art. 311 applies to those cases of removal which are due to some fault or misconduct of the civil servant, and not to removal pure and simple on account of certain policy. Hence, there would be no point in giving reasonable opportunity of showing cause to a public servant, if the removal is unconnected altogether with his conduct. (Paras 8, 9)

(c) *Constitution of India, Art. 310 — Change by Government of conditions of service of past employees to their disadvantage — Legality.*

Civil servants hold office not during good behaviour but only during the pleasure of the Governor or Rajpramukh, and if it pleases the Governor or Rajpramukh to frame a rule like, for instance, retiring the civil servants before the age of superannuation, there would be nothing illegal in such a rule, whatever may be the moral obligation of the State in this connection. Generally the Government, as a moral obligation, do not change the conditions of service of past employees to their disadvantage whenever new conditions of service for future employees are framed; but that is a moral obligation only except in the cases of those persons who are expressly protected under the Constitution. (Para 9)

(d) *Constitution of India, Art. 14 — "Equality before the law or the equal protection of the laws."*

Equality before the law or the equal protection of the laws does not preclude the State from making classification so long as the persons within a particular classification are treated equally or given equal protection of the laws. Reasonable classification is permissible, and what is prohibited is arbitrary selection or discrimination within the class. (Para 10)

Where by a rule, the Government fixed upon a certain date, and said that anybody who completed 55 years of age or 30 years' qualifying service on that date would be retired, and there was no discrimination within this class, the Rule is not hit by Art. 14 of the Constitution. (Para 10)

Noratan Mal, for Applicant — Mansha Ram, for Union of India — L. N. Chhangani, for the State of Rajasthan.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('50) 1950 R L W 192 (Pr 8)

(1886) 118 U S 356: (30 Law Ed 220) (Pr 12)

WANCHOO, C. J.: This is an application by Kewal Mal Singhi under Article 226 of the Constitution of India praying for a writ of 'mandamus' and 'certiorari' and 'prohibition' or any of these or any other order that may be appropriate to be issued to the State of Rajasthan.

(2) The facts, on which the present petition is based, are these. The applicant was serving as Section Superintendent in the Audit Department of the former State of Jodhpur under an order of appointment of the Finance Minister of Jodhpur, and under the Rules of service operative in Jodhpur on the 1st November, 1948. Under these Rules, he was entitled to continue in service till the completion of the age of 55 years, and was a permanent member of the public services of the former Jodhpur State. On the formation of the present State of Rajasthan on the 7th of April, 1949, the applicant continued to be employed in the service of the State of Rajasthan from that date in the Audit Department on a salary of Rs. 168/- per month in the grade of Rs. 120-6-180, and thus held a civil post under the State of Rajastnan. In May, 1949, however, the Government of Rajasthan laid down certain procedure and principles to be followed in carrying out the programme of integration of services in the various Covenanting States. Under that procedure, all Government servants who had completed 55 years of age or 30 years' qualifying service on the 1st May, 1949, were to be retired. In pursuance of this, the Accountant General, Jodhpur, directed, by an order dated 27th July, 1949, that the applicant be retired from service from the 15th of August, 1949. Later, however, this order was cancelled, and the Accountant General, Jodhpur, informed the applicant on the 16th of August, 1949, that his retirement had been deferred. The applicant thus continued in service up to the 26th of January, 1950, when the Constitution of India came into force. Thereafter, on the 25th of February, 1950, the applicant was informed that he would be retired with effect from the 28th of February, 1950, and he was actually retired from that date. The present application is directed against this order of retirement.

(3) In the application a large number of grounds have been taken, which it would be cumbersome to put down here in detail. It is enough to say that the main points urged on behalf of the applicant are these: (1) In view of the Rules of Service in force in the former Jodhpur State, and in view of the guarantee given in Article XVI of the Covenant creating the United State of Rajasthan, the applicant submits that the order of retirement passed against him was 'ultra vires', illegal, invalid, and inoperative in law. (2) As the applicant had been appointed by the Finance Minister of the former Jodhpur State, and was continued in service by the State of Rajasthan, he could not be removed from service by any authority which was subordinate to that by which he had been appointed, and as such the Accountant General, Jodhpur could not order his retirement. (3) The order of his retirement before he completed the age of superannuation amounted to removal from service, and this could not be done without complying with the provision of Article 311(2) of the Constitution of India. As the provisions of that Article were not complied with, the applicant's removal was illegal. (4) The principle laid down by Government that those who had completed the age of 55 years or 30 years' qualifying service on the 1st of May, 1949, would be retired was 'ultra vires' their powers, as it was against Article 14 of the Constitution of India.

(4) We shall now take the points urged on behalf of the applicant one by one. With regard to the first point, it appears that the applicant was born on the 30th of November, 1897. Ordinarily, under the Jodhpur Government Service Regulations a Government servant was required to retire from service on attaining the age of 55 years, vide Chapter III, Rule 8 of the Jodhpur Government Service Regulations, as they existed up to the 6th of December, 1948. Normally, therefore, the applicant would have continued to serve the former Jodhpur State

till the 30th of November, 1952. The applicant's contention is that these Rules continued to apply to him, and, therefore, he would not be retired before he had completed the age of 55 years at any rate. It is further urged on his behalf that Article XVI of the Covenant protected him in this matter.

(5) Article XVI of the Covenant reads as follows:

"(1) The United State hereby guarantees either the continuance in service of the permanent members of the public services of the former Rajasthan State and of each of the new Covenanting State on conditions which will not be less advantageous than those on which they were serving on the 1st November 1948 or the payment of reasonable compensation or retirement on proportionate pension."

(6) It has been urged that as the applicant was continued in service on the 7th of April, 1949, on which date the United States of Rajasthan came into being, he should have been continued in service thereafter, and that the other alternatives could not be taken advantage of by the State after the 7th of April, 1949. We are of opinion, that there is no force in this argument. It was obviously impossible for the State of Rajasthan which came into being on the 7th of April, 1949, to decide on that very day which of the public servants of the Covenanting states would be retained in service, and which would be asked to go on the payment of reasonable compensation or retirement on proportionate pension. This decision was bound to take time, and, therefore, the fact that any public servant was retained in service on the 7th of April, 1949, would not take away from the State of Rajasthan the right to decide which of these three courses should be followed in connection with the permanent members of the public services, which it was inheriting from the Covenanting States. Further, Article XVI of the Covenant did not guarantee appointment only, but provided two other alternatives, namely, payment of reasonable compensation and retirement on proportionate pension. No permanent member of the public services of the Covenanting States could, therefore, be continued in service by the State of Rajasthan. In the present application, the applicant has confined himself only to the question of the continuance in service. We are, therefore, not prepared to consider whether the applicant has been given the advantage of either of the other two alternatives, which were to be used in case of a public servant, who was not continued in service. The fact, therefore, that under the Jodhpur Service Rules, the applicant could ordinarily continue till the age of 55 would not stand in the way of the Government of Rajasthan in dispensing with his services earlier, as Art. XVI of the Covenant did not guarantee continuance of service, and provided for retirement on proportionate pension or removal on payment of reasonable compensation. We may also point out that R. 9 Chap. III, of the Jodhpur Government Service Regulations also shows that even under those Regulations the applicant had no such indefeasible right to continue in service till the age of 55 years, as he claims. Under R. 9, every permanent Government servant, except those engaged from outside the Government on special agreements, were liable to give, and entitled to receive, one month's notice to terminate his service. Thus, even though a public servant of Jodhpur could not ordinarily be retired before 55 years of age, he could give one month's notice if he wanted to leave service, and the State could give him one month's notice, if the Government wanted to terminate his service. It was urged that this part of Rule 9 must be deemed to have come to an end, as it was against Article 311 of the Constitution of India. We shall, if necessary, deal with this aspect of the matter later, when we come to Article 311. It is enough for present purpose to say that the applicant has no case based on either Art. XVI of the Covenant, or the Jodhpur Government Service Regulations.

(7) As to the second point, we see no force in the contention raised on behalf of the applicant. It is true that the notice was given to him that he would be retired from the 15th of August, 1949, and later from the 28th of February, 1950, by the Accountant General; but that notice was in pursuance of the policy of the Government laid down in order No. 401 G. D./Sec./II dated 24th June, 1949. It was, therefore, not the Accountant General, Jodhpur who ordered the retirement of the applicant after 30 years' service; but it was the State of Rajasthan which really gave the order which the Accountant General carried out. Therefore, the removal of the applicant was not by any authority subordinate to that by which he had been appointed. It was urged that the Government order of the 24th of June, 1949, was not in accordance with S. 8 of the Rajasthan Administration (Amendment) Ordinance, 1949 (No. V of 1949). That section lays down that all executive action of the Government of Rajasthan shall be expressed to be taken in the name of His Highness the Raj Pramukh. It also lays down that orders made in the name of His Highness the Raj Pramukh shall be authenticated by any Secretary, Additional Secretary, Joint Secretary, Deputy Secretary, Additional Deputy Secretary, Under Secretary or Additional Under Secretary, or Assistant Secretary or Additional Assistant Secretary to the Government of Rajasthan or by such other person or authority as may be prescribed in this behalf. It is true that in the Gazette publishing this order, the words 'By order of His Highness the Raj Pramukh' do not appear, though the order is signed by Secretary to Government. This point, however, was not taken in the petition itself, and was raised only during arguments. It was, therefore, not possible for the State to show by affidavit, if necessary, that the order was of the Government of Rajasthan. The order itself shows that it has been passed by the Government of Rajasthan and is authenticated by a Secretary, and the only defect that appears in it is that the words "By order of His Highness the Raj Pramukh" do not appear at the end, as they should. That in our opinion, is a mere technicality, and we have no reason to suppose that the order in question, on the basis of which the applicant was retired, had not been passed by the Government of Rajasthan. As a matter of fact, the applicant himself in paragraph 5 of his application says that the Government of Rajasthan was pleased to lay down certain procedure and principles to be followed in carrying out the programme of integration of the services. In paragraph 6, he says that in pursuance of the Government's policy to retire those Government servants who had completed 55 years of age or 30 years' qualifying service on the 1st May, 1949, the Government of the United State of Rajasthan was pleased to pass the Order No. 401 G. D./Sec./II, dated 24th June, 1949. In view of this statement in his application, it is not open now to the applicant to challenge the order on the ground that the order was not passed by the Government of Rajasthan because of a technical defect, viz., the absence of the words "By order of His Highness the Raj Pramukh." We are, therefore, of opinion that the order of the applicant's retirement cannot be challenged on the ground that it was passed by an authority subordinate to that by which he had been appointed.

(8) The third point that has been urged on behalf of the applicant is that his removal from service was illegal because the provisions of Article

311(2) of the Constitution were not complied with. It is provided there that no person who is a member of a civil service of a State or holds a civil post under a State shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. It is undoubted that the applicant was not given any opportunity of showing cause against his retirement. It has been urged that retirement of a person before he completes the age of superannuation amounts to removal within the meaning of Article 311(2) of the Constitution. In support of this, reference is made to the Rajasthan Services (Classification, Control, and Appeal) Rules, 1950, where it is provided in R. 15(VI) that removal from the civil service includes compulsory retirement before the age of superannuation. This is provided in these Rules as one of the penalties which may be inflicted on a Government servant for good and sufficient reasons. In a loose sense, there is no doubt that a person, who is retired before the age of superannuation, is removed from service; but the question that falls for consideration is whether "removal" as used in Art. 311 (2) means any kind of removal from public service, or only a particular kind of removal. So far as the Civil Services (Classification, Control and Appeal) Rules are concerned, the removal by means of compulsory retirement before the age of superannuation is a penalty which can be inflicted for good and sufficient reasons. These Rules, however, do not apply to the applicant, as they were passed in November, 1950, after the applicant had been retired, and are only helpful in understanding the meaning of the word "removal" as used in Art. 311(2). We feel that the word "removal" as used in Article 311(2) applies to a removal which is due to some fault of the civil servant concerned. It seems to us that there would be no point in giving reasonable opportunity of showing cause to a public servant, if the removal is unconnected altogether with his conduct. We are in agreement with the view which was taken in an earlier case in this Court, 'Nihal Chand v. The State of Rajasthan' 1950 R L W 192, to which one of us was a party. It was pointed out there that

> "Dismissal, removal or reduction in rank of permanent employees except on complaint or misconduct is not contemplated in this Article."

Though, therefore, in a loose sense it may be said that the applicant was removed from public service when he was retired before the age of superannuation, this is not the kind of removal contemplated under Article 311 (2).

(9) It was next urged that if a removal of this kind was not included in Article 311 (2) there would be insecurity of tenure, inasmuch as Government servants could be removed from service on the basis of any Rules framed by the Government, as for example a rule that any public servant who has completed 5 years' service on a particular date shall be retired. Normally, no Government would pass such a Rule, but if it does, we are of opinion that there is nothing in the Constitution to prevent it from doing so. We may refer, in this connection to Article 310 of the Constitution which definitely lays this down that:

> "except as expressly provided by this Constitution, every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor or, as the case may be, the Raj Pramukh of the State."

Civil servants, therefore, hold office not during good behaviour, but only during the pleasure of the Governor or the Rajpramukh, and if it pleases the Governor or Rajpramukh to frame a rule of the kind mentioned above, there would be nothing illegal in such a rule, whatever may be the moral obligation of the State in this connection. It is only certain high officers who are specially protected, like Judges of the Supreme Court and High Courts, the Auditor-General, the Members of the Public Service Commissions, and such persons who come under Article 314. Article 311 cannot, therefore, be so interpreted as to turn the tenure of a civil servant, which is prescribed in Article 310 as during the pleasure of the Governor or the Rajpramukh, into tenure during good behaviour. If every kind of removal were to be included within the meaning of that word as used in Article 311 (2), the effect would be that that Article would provide something which would be contrary to Article 310. Therefore, we have no hesitation in coming to the conclusion that the word "removal" in Article 311 applies to those cases of removal which are due to some fault or misconduct of the civil servant, and not to removal pure and simple on account of certain Rules framed by Government in pursuance of a certain policy. We may also point in this connection that Article 309, which provides for framing of rules, also does not provide any protection to civil servants from a change in those rules, affecting them adversely. If that was the intention, we should have found something corresponding to the provisio to Art. 221, which protects the allowances of a judge, and his rights in respect of leave of absence and pension from being varied to his disadvantage after his appointment. Generally the Government, as a moral obligation, do not change the conditions of service of past employees to their disadvantage, whenever new conditions of service for future employees are framed; but that appears to us to be a moral obligation only except in the cases of those persons who are expressly protected under the Constitution. We are, therefore, of opinion that retirement in this case does not come within the ambit of the word "removal" as used in Article 311 (2), and it was, therefore not necessary, before the applicant was retired, to give him a reasonable opportunity of showing cause against such retirement.

(10) We now come to the last point. It is urged that the Rule retiring people who had completed 55 years of age or 30 years' qualifying service on the 1st May, 1949, is 'ultra vires' under Article 14 of the Constitution, because it discriminates, between various classes of Government servants, and does not afford equal protection of the laws to all. We have not, however, been able to appreciate this argument. The Rule as framed makes no distinction in favour of any particular person. It applies equally to all Government servants who completed 55 years of age or 30 years' qualifying service on the 1st of May, 1949. The contention is that if the Rule had been that as and when each Government servant completed 55 years of age or 30 years' qualifying service, he would be retired, that would have been all right; but as it fixes a certain date, viz., 1st of May, 1949, it discriminates in favour of those, who, for example, complete 55 years of age or 30 years' qualifying service on the 2nd of May, 1949. This argument is, in our opinion, fallacious. Equality before the law or the equal protection of the laws does not, in our opinion, preclude the State from making classification so long as the persons within a particular classification are treated equally or given equal protection of the laws. Any other interpretation would, in our opinion, make government impossible. As has been remarked in Dicey's Law of the Constitution, 1939 Edition, page 47, equality before the law does not mean an absolute equality of men, which is physical impossibility, but the denial of any special privilege by reason of birth, creed or like in favour of any individual and also the equal subjection of all individuals and classes to the ordinary law of the land administered by the ordinary law Courts.

Further Cooley in his Constitutional Law, pages 281 and 286, says that equal protection does not prohibit the granting of special privilege to particular enterprises or employments in the interests of the general welfare, provided there is no discrimination within that class, e.g., in favour of national banks, insurance companies, railways and the like. Thus, these remarks of two learned commentators show that reasonable classification is permissible, and what is prohibited is arbitrary selection or discrimination within the class. In the present case, the Government fixed upon a certain date, namely, the 1st of May, 1949, and said that anybody who completed 55 years of age or 30 years' qualifying service on that date would be retired. There was no discrimination within this class, and, therefore, the Rule cannot, in our opinion, be hit by Article 14 of the Constitution.

(11) It was next urged that the order provided that,

"for reasons of special merit and exceptional circumstances, if it is proposed to retain an official falling under the above categories, the question of his re-employment can be considered separately."

and, therefore, there was discrimination. We are unable to agree with this argument. This was no exception to the rule, namely, that everybody who came within the rule should be retired. It only provided that if exigencies of public service required, some persons out of those retired might be re-employed. That was, of course, an order about future re-employment, and would not make the order as to retirement discriminatory.

(12) Lastly, it was urged that the actual fact was that everybody who was hit by the Rule was not retired, and that some persons were retained, and therefore, the principle of the case 'Yick Wo v. Hopkins', (1886) 118 U S 356, applied. That was a case where a certain law about laundries had been passed in a town in the United States. Under that law people had to take licences for doing laundry work. When the law came to be administered, the Chinese who till then had the majority of the laundries, were all refused licences, while the Americans were all granted licences except in one case. It was then held that the law on the face of it might be satisfactory, but the manner of its application was such that it denied equal protection of the laws. The decision in that case in our opinion, depended upon the peculiar facts, which were found by the Court, viz., refusal to all Chinese and grant of permanent licences to all Americans except one. There was thus a wholesale abuse of the law in that case. In the present case, there is nothing to show that there has been any such wholesale abuse of the Rule. Under the circumstances, we are of opinion that the Rule is valid, and is not hit by Article 14 of the Constitution.

(13) There is, therefore, no force in this application, and it is hereby dismissed with costs to the State Government.

G.M.J. *Application dismissed.*

A. I. R. (39) 1952 RAJASTHAN 20 (C. N. 12)

(JAIPUR BENCH)

RANAWAT AND SHARMA, JJ.

Dasu Ram, Appellant v. State.

Criminal Appeal No. 79 of 1950, D/- 7-9-1950.

(a) Evidence Act (1872), S. 27 — Statement of accused to police officer — Recovery of articles alleged to be stolen — Portion of statement admissible.

Where the accused told the police officer that the ear-tops and the bangles, which the deceased was wearing and which had been taken off his body, were in the accused's house and that he would recover them:

'Held' that the portion of the statement regarding the taking of those ornaments was inadmissible in evidence as it amounted to a confession. The portion that he would recover the ornaments from his house was relevant under S. 27. *(Para 11)*

Anno: Evidence Act, S. 27, N. 7.

(b) Evidence Act (1872), S. 27 — Information first given to Sub-Inspector — Second time information given to him in presence of witnesses — Evidence of witnesses — Admissibility.

Where the evidence of the Sub-Inspector was that the accused had already told him that he would recover the ornaments from his house and that he (accused) told so in the presence of witnesses for a second time who were not present when this disclosure for the first time was made to the Sub-Inspector:

'Held' that it could not be said that the ornaments in question were discovered on the information given to the Sub-Inspector in the presence of the witnesses. The only information that could be said to have led to the discovery was the information given to the Sub-Inspector when he was alone. Hence the evidence of the witnesses about the accused having shown his readiness to recover the property was not admissible. *(Para 12)*

Anno: Evidence Act, S. 27, N. 3, 7.

(c) Penal Code (1860), S. 411 — Pointing out or production of articles — Conviction.

Where the only thing which was proved was that the accused recovered the ornaments in question from a thatch meant for tethering cattle of the family of the accused which consisted of several members, and which thatch could not therefore be said to be in exclusive possession of the accused:

'Held', that it was possible for the accused to have knowledge of the place without himself being guilty for any offence and so the recoveries alone were not sufficient to justify the conviction under S. 411. *(Para 14)*

Anno: Penal Code, S. 411, N. 8, 10.

Brij Bushan Lal, for Appellant; Ram Avtar, Govt. Advocate, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('47) A I R (34) 1947 P C 67: (48 Cri L Jour 533) (Pr 11)

(30) A I R (17) 1930 Lah 91: (31 Cri L Jour 774) (Pr 14)

('39) A I R (26) 1939 Mad 15: (40 Cri L Jour 433) (Pr 12)

('40) A I R (27) 1940 Mad 710: (42 Cri L Jour 582) (Pr 12)

SHARMA, J: This is an appeal by Dasu accused against his conviction and sentence by the learned Sessions Judge, Alwar. He has been convicted under Section 411, I.P.C., and sentenced to 3 years' rigorous imprisonment.

(2) The prosecution case is that one Azmat, a Meo boy about 11 years old, had gone on the 17th November 1949 for grazing his buffaloes in the jungle of village Chaprara in Alwar District. He was wearing a gold ear-top in each of the ears and a pair of silver bangles on the wrists. In the evening the buffaloes came back alone for Azmat did not return. A search was made for Azmat, as a result of which his dead body was found inside a well, called Alam-wala well. On the dead body, however, the ornaments, which Azmat was wearing when he started for grazing the buffaloes, were not found. A written report, Ex. P A under the signatures of Ummed and thumb impressions of a Lambardar and Chhotalli Hissedar, was lodged at the Police Station, Sadar, Alwar, the same day. On the 21st November 1949, Dasu accused was arrested and at his instance the ornaments given above were found from a corner of thatched portion in

his Nohara which was used for tethering the cattle of his family. These ornaments were dug out by the accused himself.

(3) The body of the deceased was subjected to post-mortem examination, as a result of which it was found that his death was due to asphyxia.

(4) The ornaments alleged to have been recovered from the house of the accused at his instance were got identified before Mr. Ramanand, Magistrate III Class, Alwar, on 5th December 1949.

(5) The accused was ultimately challaned under Sections 302 & 392 of the Indian Penal Code in the Court of Mr. Prem Nath, Magistrate I Class, Alwar, who committed the accused to take his trial for offences under Sections 302 & 392, I.P.C., or in the alternative under Section 411, I.P.C., before the Court of Session at Alwar.

(6) The accused denied the charge and pleaded that the witnesses, being Meos, had deposed falsely against him. The learned Sessions Judge was not satisfied that the charge of murder and robbery under Sections 302 and 392, I.P.C., respectively was brought home to the accused. He, however, found him guilty under Section 411, I.P.C., and sentenced him to 3 years' rigorous imprisonment, as noted above.

(7) The accused has come in appeal to this Court against his conviction and sentence.

(8) It was argued by the learned counsel for the appellant that there was no satisfactory evidence to prove that the ornaments in question were the property of Amzat or were stolen away from him. It was argued that their weight or any particular description was not given in the F.I.R., nor was the weight or other description of the ornaments mixed up with the ornaments in question at the time of identification given. It was also argued that the articles were identified by four witnesses, Ummed, Chhuttan, Kallu and Sumer Singh. Of these Kallu was not produced for reasons best known to the prosecution. Ummed had seen the articles at the time of the recovery and so his identification was useless. Sumer Singh and Chhuttan had an opportunity of being told the description of the ornaments in question by Ummed and so their identification was also not of much use.

(9) On a careful consideration of the evidence on record we are satisfied that it is proved that the ornaments in question were the very ornaments which the deceased wore on his person on the day of his death. Ummed's evidence may be ignored as he had seen the ornaments at the time of the recovery, but there is nothing to doubt the evidence of Chhuttan and Sumer Singh. Sumer Singh is the own brother of Azmat deceased and was, therefore, perfectly familiar with them. He identified them before the identifying Magistrate and also deposed on oath before the Court that they were Azmat's ornaments which he was wearing at the time of his disappearance on the 17th November 1949. The fact that their weight or any peculiarity was not given in the report does not matter under the circumstances of the case. The appellant himself did not deny that the ornaments belonged to Azmat. He simply stated that they were not recovered from his house at his instance, as alleged by the prosecution. Under these circumstances, we are not prepared to hold that the learned Sessions Judge was wrong in holding that the ornaments belonged to Azmat.

(10) It is also clear that the ornaments in question were stolen by somebody from the body of Azmat and therefore there is no force in the contention of the appellant that they were not the stolen property.

(11) The only question is whether the appellant can be held responsible for receiving them, knowing or having reason to believe them to be stolen property. For this the only evidence is that of recovery of the ornaments. The prosecution case is that on the 21st November 1949 the appellant himself showed his readiness to recover the ornaments. For this the evidence is that of Sohanlal Sub-Inspector and of Ummed and Moti. The Sub-Inspector says that the appellant told him, that the ear-tops and the bangles which the deceased was wearing and which had been taken off his body, were in the appellant's house and that he would recover them. The portion of the statement regarding the taking of those ornaments is inadmissible in evidence as it amounts to a confession. A confession made to a Police Officer or some other person while the accused is in police custody, is not admissible in evidence, 'vide' Sections 25 & 26 of the Evidence Act. It was also held in the case 'Pulukuri Kottayya v. Emperor,' A I R (34) 1947 P. C. 67, that where the accused made a statement "I will produce a knife concealed in the roof of my house, with which I stabbed the deceased',, the portion 'with which I stabbed the deceased' was inadmissible, since these words did not relate to the discovery of the knife in the house of the informant. We cannot, therefore, admit into evidence that portion of the statement which relates to the taking of the ornaments from the body of the deceased. It may, however, be said that the portion that he could recover the ornaments from his house is relevant under Section 27 of the Evidence Act.

(12) The only portion of the statement, which can be read in evidence, is that the appellant stated that the ornaments were in his house and that he would recover them. This statement has been attempted to be proved by the evidence of the Sub-Inspector Sohanlal and two witnesses Ummed and Moti. The evidence of the Sub-Inspector, however, is that the accused had already told him that he would recover the ornaments from his house and that he told so in the presence of Ummed and Moti for a second time who were not present when this disclosure for the first time was made to the Sub-Inspector. Under these circumstances, the evidence of Ummed and Moti about the accused having shown his readiness to recover the property is not admissible. It was held in 'Public Prosecutor v. Subbareddi', A I R (26) 1939 Mad 15, that where a Circle Inspector knew beforehand what the accused was going to say, but finding it necessary to have more trustworthy persons present as witnesses, when the information should be disclosed, he sent for two witnesses to go to the Police Station where the accused was kept in custody and on the arrival of those witnesses, the accused was brought out of the lock-up and examined by the Circle Inspector and the statement of the accused was embodied in a Panchayatnama and signed by the witnesses and the information said to have been then given by the accused led to the discovery of certain instruments by which the accused was alleged to have committed the murder, it was impossible to say that anything was discovered in consequence of the statement made by the accused to the Inspector in the presence of the witnesses. Hence the evidence regarding the statement of the accused embodied in the Panchayatnama and spoken to the witnesses was wholly inadmissible. It was again held in 'In re Kottameedi Chennareddi' A I R 1940 Mad 710, that it is the first statement of the accused to whomsoever made that leads to the discovery of the fact, after a fact is discovered. Thus it cannot be said that the ornaments in question were discovered on the information given to the Sub Inspector in the presence of Ummed and Moti. The only information that can be said to have led to the discovery was the information said to have been given to the Sub-Inspector when he was alone.

(13) Coming to the question of recovery, it was argued by the learned counsel for the appellant that the recovery was not made in the presence of two or more respectable inhabitants of the locality, as required by Section 103, of the Code of Criminal Procedure. The only witnesses, who are said to have been present at the time of the alleged recovery, are Kishanlal Tongawala who did not belong to the village, and Motiram who was more or less a permanent witness for the police and the Sub-Inspector himself. The recovery was, therefore, not in accordance with law. It was further argued that the recovery was made from a place which was not in the exclusive possession of the accused, but was possessed by the whole family of the accused consisting of his parents, his brothers and sisters. Even if it be held that the recovery was made, as alleged, it at the most shows that the accused knew where the property was hidden. This alone would not be sufficient for his conviction under Section 411 of the Indian Penal Code.

(14) We are certainly not satisfied with the manner in which the recovery was made. A lot of persons are living in village Chaprara and it was not difficult for the Sub-Inspector to call 2 or more independant witnesses of the locality at the time of the recovery. No such witnesses were called. It was considered sufficient that the recovery be witnessed by Kishanlal Tongawala who had been engaged by the Sub-Inspector from Alwar, and Moti Ram who had admittedly been utilized by the police on several similar occasions previous to the recovery in question. It cannot, therefore, be said without doubt that the recovery was made in the manner alleged by the prosecution. Moreover, even if the prosecution evidence is believed the only thing which is proved is that the appellant recovered the ornaments in question from a thatch meant for tethering cattle of the family of the accused which consisted of several members including his parents. It cannot, therefore, be said that the said thatch was in the exclusive possession of the accused. It was held in 'Sohansingh v. Emperor', A I R (17) 1930 Lah 91, that where an accused pointed out certain places, from which portions of stolen property were recovered and those places belonged to the family of the accused consisting of his father and other members, it was possible for the accused to have knowledge of the places, without himself being guilty for any offence and so the recoveries alone were not sufficient to justify the conviction under Section 411, I.P.C. The fact of the recovery alone, therefore, cannot be sufficient for the conviction of the appellant in the present case.

(15) The learned Government Advocate, however, argued that there was some other evidence besides the recovery of the ornaments in qustion and this evidence was that of Ummed and Chhuttan who had deposed that the deceased was seen in the company of the accused at about 1 in the afternoon on the day of occurrence. This evidence is, however, quite insufficient to connect the appellant with the crime. It has not been proved that the deceased did not fall into the company of any other person after 1 o'clock in the afternoon, and that the accused kept company with him right up to his disappearance. Moreover, the learned Sessions Judge himself has not relied on this evidence and has based his conviction only on the evidence about the recovery. We are, therefore, not satisfied that guilt has been brought home to the appellant without a reasonable shadow of doubt. His conviction under Section 411, I.P.C., cannot, therefore, be sustained.

(16) The appeal is allowed. The conviction and sentence are set aside, and the accused is acquitted. He shall be set at liberty forthwith unless required in connection with some other case. The two Murkis and the bangles recovered during the investigation shall be returned to the family of the deceased.

(17) RANAWAT, J: I agree.

G.M.J. *Appeal allowed.*

A. I. R. (39) 1952 RAJASTHAN 22 (C. N. 13)

(JODHPUR BENCH)

(Full Bench)

WANCHOO, C.J., NAWAL KISHORE AND BAPNA, JJ.

Lakshmi Lal and others, Appellants v. Bhagwat Singh Mehta and others, Respondents.

Misc. First Appeal No. 23 of 1950, D/- 17-9-1951.

(a) Constitution of India Art. 226 — Certiorari, writ of — Stating of relevant facts.

For a writ of certiorari all relevant facts should be mentioned in a petition and counsel should not pick and choose in a matter like this, since it may be that what counsel may think to be irrelevant may turn out to be very relevant in the case. AIR (38) 1951 Simla 1 Rel. on. *(Para 13)*

(b) Civil P. C. (1908), S. 115 — "Subordinate Court" — Mewar Proceedings of the Special Commissions Validating Act (XVII (17) of 1944), S. 6 — Certiorari — Writ of.

The Commissioner from whose orders an appeal was directed to lie to the Prime Minister whose decision was declared final under S. 6 of Act (XVII (17) of 1944) are not subordinate to the High Court within the meaning of S. 115. The dismissal of the revision petition by the High Court when it had no jurisdiction to interfere, cannot be a bar to a subsequent petition for a writ of certiorari. *(Para 14)*

Anno: C. P. C., S. 115, N. 6.

(c) Specific Relief Act (1877), S. 45 — Withdrawal of petition under — Effect.

Where a petition under S. 45 had been withdrawn without any decision on merits after the coming into force of the Constitution of Mewar a subsequent petition for a writ of certiorari is not barred. *(Para 15)*

Anno: S. R. Act. S. 45, N. 1.

(d) Mewar Proceedings of the Special Commissions Validating Act (XVII (17) of 1944), S. 4 — Jurisdiction of Civil Court — Prohibition — Writ of — Alternative remedy.

S. 4 clearly barred the jurisdiction of a civil Court to question the order of the Commissioners or the Government on the ground that they had no jurisdiction to make the order. Thus the alternative remedy of a suit is not open in such case. Even in cases where an alternative remedy exists, the jurisdiction of the High Court to issue a writ of prohibition in a proper case is not barred. *(Para 16)*

(e) Mewar Proceedings of the Special Commissions Validating Act (XVII (17) of 1944), S. 6 — Validity — Constitution of Mewar (1947) Art. XVIII.

S. 6 was contrary to Art. XVIII of the Constitution of Mewar by which the judicial power of the State was declared to be vested in the High Court of Udaipur or such subordinate Court as the Legislature from time to time established. S. 6 in effect purported to vest the Prime Minister with judicial power in the State. S. 6, therefore, would be invalid from the date of the Constitution. But it does not follow that the entire Act would be invalid as the provisions of S. 6 can be separated from the remainder of the Act. *(Para 20)*

(f) Constitution of Mewar (1947), Art. I — Whether retrospective.

Art. I is prospective and not retrospective. Therefore, what had been a valid appointment or order prior to the Constitution would not become invalid simply because such order could not be

passed after the enforcement of the Constitution. (*Para 21*)

(g) Constitution of Mewar (1947), Art. XIII — Scope.

The first portion of Art XIII says no more than that the action by which any person is to be deprived of his liberty or property has to be justified under some law. The second portion of Article deals with equality before the law. It is not absolute equality which is guaranteed under the Constitution, since by the very nature of things all men are not equal. What is provided is that a particular class of persons to which any enactment may apply are to be dealt with equally. (*Para 22*)

(h) Constitution of Mewar (1947) — Mewar Proceedings of the Special Commissions Validating Act (XVII (17) of 1944) — Validity.

The provisions of Act No. XVII of 1944, except S. 6, are not inconsistent with the Constitution of Mewar, and have not been rendered invalid with the enforcement of the said Constitution. (*Para 23*)

(i) Constitution of Mewar (1947) Art. XVIII (2) — Judicial and quasi judicial tribunals — Commissioners appointed under Mewar Proceedings of the Special Commissions Validating Act (XVII (17) of 1944) — Constitution of India Art. 226.

The Commissioners appointed or deemed to have been appointed under Act No. XVII of 1944, constitute a judicial tribunal. In any case, the tribunal was a 'quasi judicial' tribunal, and the High Court having powers to issue writs had authority to interfere. The restriction on the Civil Courts under S. 4 of Act XVII of 1944 to question the validity of the orders of the Commissioners does not prohibit the High Court from correcting the errors of the Commissioners by issue of proper writs or orders or directions. (*Para 25*)

(j) Constitution of Mewar (1947) — Retrospective operation — Order dated 19-6-1946 of the Commissioners deemed to have been appointed under Mewar Proceedings of the Special Commissions Validating Act (XVII (17) of 1944), in so far as it directed the petitioners to contribute towards the payment of creditors beyond the assets reserved for such purpose declared to be without jurisdiction and hence set aside. A I R (38) 1951 S C 128 and AIR (38) 1951 S C 217, disting. (*Para 28*)

Jeewan Singh, for Appellants; Mahavir Chand, for Respondent No. 3, Mansha Ram, Govt. Advocate, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('51) A I R (38) 1951 S C 128: (52 Cri L Jour 860) (Pr 26)

('51) A I R (38) 1951 S C 217: (52 Cri L Jour 736) (Pr 26)

('51) Writ Petn. No. 21 of 1951 D/- 10-8-1951: (AIR ('38) 1951 Raj 161 (Pr 25)

('51) AIR (38) 1951 Simla 1: (52 Pun L R 267) (Pr 13)

BAPNA, J: This case has come up before the Full Bench of this Court, as there was a difference of opinion between two learned Judges of the old Rajasthan High Court, and under Section 22 (2) (b) of the United State of Rajasthan High Court Ordinance, 1948, the case was referred by the learned Judges to a Full Bench. The case had been pending before the old Rajasthan High Court, and has come by transfer to this Court under Section 49 of the Rajasthan High Court Ordinance (No. XV of 1949).

(2) The relevant facts are that there was a firm Ummaid Mal Dharam Chand carrying on money lending and other business at Udaipur, in which there were four partners, viz., Roshan Lal, Lakshmi Lal, Fateh Lal, and Omkar Lal. The first two had one-third share each, and the last two had the remaining one-third share. Disputes having arisen among the partners, they approached His Highness the Maharana of Udaipur for dissolution of partnership and winding up of its affairs. By an order dated 'Sawan Sud' 9, 'Samvat' 1993, four officers, viz., Shri Jagannath Singh Mehta, Shri Balwant Singh Kothari, Shri Jawan Singh Ranawat, and Shri Dal Chand Agarwala, were appointed to settle the matter between the parties. Some of these officers were unable to act, and the matter was finally referred to Shri Jawan Singh Ranawat, Shri Gamer Singh, Shri Jagannath Singh Mehta, and Shri Moti Lal Bonara. These gentlemen, however, thought it proper to take an agreement from the parties that they would agree to whatever might be decided by these gentlemen as arbitrators. The arbitrators gave a preliminary award on 22-12-1938, in which various objections of the parties were decided, and they submitted their opinion to the Mehkama Khas with a recommendation that three lots be made of the assets in accordance with the award, and as regards the liabilities, each of the partners should undertake to pay to such of the creditors as were related to him. The arbitrators submitted their report to the Mehkama Khas of Mewar where the parties were directed to produce agreed lists of lots; but as the parties could not agree, the matter was referred again to His Highness, who ordered the Mehkama Khas to re-submit the papers with their opinion. Thereafter, four lists were prepared. Three of these lists related to the assets of the firm for distribution between the partners. The fourth list contained the detail of the liabilities, and certain assets were reserved in it, which after realization, were to be utilized towards satisfaction of the liabilities. This list is known as list A, and the relevant recommendation, when translated, is as follows:

> "Our opinion with respect to list A is that because various persons had deposited amounts with the partnership firm, and if any partner does not repay the amount, it would be contrary to the best traditions of 'Sahukars', therefore, it seems proper and convenient that the three partners should clear off the accounts of 'lenden' according to the list, and whatever may be left in balance may be distributed between the parties according to their shares."

The Mehkama Khas recommended on the 3rd of May, 1940, that if their report was acceptable to His Highness, Shri Jawan Singh Ranawat and Shri Moti Lal Bohara be directed to enforce the recommendations. The aforesaid two gentlemen were appointed Commissioners to carry out the recommendations of the Mehkama Khas. Sometime afterwards, Shri Bhagwat Singh Mehta and Shri Keshari Singh Ranawat were appointed Commissioners in place of the previous officers. These Commissioners proceeded to realize the assets reserved in list A, and to pay off the creditors mentioned in that list; but it was found that the assets reserved, though nominally kept at a figure higher than the debts to be paid actually fetched a less amount. The Commissioners accordingly passed an order on the 19th of June, 1946, that as the assets of list A were not sufficient to pay off the creditors in full, each of the partners should produce certain amounts, and if he did not do so, the amounts would be realized by attachment and sale of his property. The amounts fixed for each party were different, as certain adjustments were made by the Commissioners as became necessary in distributing the assets of the partnership among the parties according to the three lots, which had been approved by the parties and the Mehkama Khas.

(3) On the 28th of June, 1947, Lakshmi Lal and Fateh Lal made a petition to the High Court of

Udaipur for a writ of 'certiorari', (a) declaring that the realization of the assets mentioned in list A by the Commissioners was invalid, (b) prohibiting the Commissioners from making payments to creditors contrary to the preliminary award dated 22-12-1938, and the order of the Mehkama Khas, dated 3-5-1940, (c) prohibiting the Commissioners from realizing the assets, or paying off the creditors, mentioned in list A without the consent of the petitioners, and (d) prohibiting the Commissioners from realizing any amount from the petitioners in addition to the assets reserved in list A for payment to the creditors.

(4) It was mentioned in the petition that the petitioners had filed an appeal against the order of the Commissioners before the Prime Minister, as provided by Section 6 of the Mewar Proceedings of the Special Commissions Validating Act (No. XVII of 1944), but it had been dismissed.

(5) The Commissioners by their reply dated the 17th of July, 1947, raised a plea that under the Mewar Proceedings of the Special Commissions Validating Act, 1944, their proceedings could not be challenged in any Court. They also pleaded that whatever directions had been given by them were in accordance with the order of the Mehkama Khas, dated the 3rd of May 1940. The petition was also opposed by Roshan Lal who was later made a party.

(6) The petition came up for hearing before Dhanopiya, Actg. C. J. He dismissed the petition holding, 'inter alia', that the Proceedings of the Special Commissions Validating Act was not 'ultra vires', the legislature, as contended for the petitioners, and that as the Commissioners were functioning in an executive capacity and not as a judicial tribunal, a writ could not be issued.

(7) On appeal to a Division Bench, Gupta, J., agreed with the opinion of Dhanopiya, Actg. C. J., while Mehta, J., was of opinion that although the Mewar Proceedings of the Special Commissions Validating Act was valid, the Commissioners were acting in a judicial capacity, and they had acted in excess of their jurisdiction in so far as they had called upon the partners to contribute certain sums beyond the assets reserved in list A for payment to creditors. He was of opinion that a writ of prohibition should be issued calling upon the Commissioners not to ask the partners to pay any amount of money beyond what might be available in list A.

(8) Owing to the said difference of opinion, the case was to be laid before a Full Bench of the old Rajasthan High Court, and it came to this Court by transfer under Section 49 of Ordinance No. XV of 1949, as aforesaid.

(9) Learned counsel for Roshan Lal, and learned Government Advocate, who appeared for the Commissioners, raised certain preliminary objections, viz.,

(1) that certain important facts and intermediate proceedings had been concealed while making this petition, and on that ground alone this petition should be thrown out;
(2) that the petitioners had filed a revision against the order of the Commissioners, dated 19th June, 1946, which had been dismissed by the High Court of Udaipur;
(3) that the petitioners had filed a petition for a writ under Section 45 of the Specific Relief Act as adapted in Mewar, and the said petition had been dismissed;
(4) that the petitioners had filed a civil suit claiming the same reliefs, and that suit was pending in a civil Court;
(5) that the proceedings by the Commissioners could not be called in question before any civil Court under Section 4 of the Proceedings of the Special Commissions Validating Act.

(10) On the merits, it was contended that the Commissioners had acted entirely in accordance with the order of the Mehkama Khas dated 3rd May, 1940, and that under the said order a duty had been cast on the Commissioners to pay off the creditors, and the direction to divide any balance of the assets remaining after payment of creditors involved a corresponding direction that, if the assets were insufficient, the Commissioners could call upon the partners to produce equal amounts for payment to the creditors. It was explained that the difference in the amounts called for from the parties was due to adjustments of accounts arising out of the distribution of the lots among the partners.

(11) Learned Government Advocate also raised an objection as to the maintainability of the petition on the grounds (1) that a certified copy of the order of the Commissioners dated 19th June, 1946, which was being challenged had not been produced along with the petition, and (2) that the order of the Prime Minister rejecting the appeal on the 4th of July, 1946, was final when passed, and could not be reopened now.

(12) So far as the non-production of the copy of the order is concerned, it may be pointed out that the Commissioners, at any rate, could not claim any want of knowledge of that order, since it were they who had passed the order, and it must appear on the file of the proceedings before the Commissioners. Learned Government Advocate, when questioned, could produce the order from the file of the Commissioners, which had been handed over to him by them along with the instructions in the case.

(13) The first preliminary objection was not raised before the Single Judge, and it is too late now for the respondents to raise it. The important facts, which are alleged to have been concealed, are those which are the subject of preliminary objections Nos. 2 to 4, and since they have to be dealt with on the merits, it would be improper to throw out the petition on this preliminary point. Learned counsel for the petitioners, when questioned, stated that he did not mention those facts in his petition as he did not consider them relevant to the petition. It may be pointed out that all relevant facts should be mentioned in a petition of this nature, and counsel should not pick and choose in a matter like this, since it may be that what learned counsel may think to be irrelevant may turn out to be very relevant in the case. In the case of 'U. C. Rekhi v. The Income-tax Officer', A I R (38) 1951 Simla 1, it was observed that

> "Uberima fides' is essential where an application is made for a rule 'nisi' for a writ of prohibition, and therefore if there is a suppression of material facts in the applicant's affidavit the Court will refuse the writ without going into the merits."

As stated above, the two Courts having gone into the merits already, and this Full Bench having also heard the case at great length, it would be improper not to deal with the merits in this case.

(14) As to the second objection, the point was taken in the reply by Roshan Lal in para. 7 of the additional pleas, but no date of the decision of the revision was mentioned, nor was a copy of the judgment filed in this case. One would not be surprised if the High Court of Udaipur declined to interfere under Section 115 of the Code of Civil Procedure, as the opening words of that Section are that

> "the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court."

The Commissioners, even if they were acting as Presiding Officers of a Court, were not subordinate to the High Court, as under Section 6 of Act No. XVII of 1944, an appeal was directed to lie from the order of the Commissioners to the Prime Minister, whose decisions were declared to be final. The dismissal of the revision petition by the High Court of Udaipur, while it had no jurisdiction to interfere, cannot be a bar to the present petition.

(15) The third objection needs more consideration. It may be said that in this case also, while the objection has been taken in para. 6 of the additional pleas by Roshan Lal, and para 6 of the reply of the Commissioners, a copy of the judgment was not produced. The Specific Relief Act was promulgated in Mewar as Act No. XVIII of 1942, and Section 45 was so adapted as giving the High Court of Udaipur power to issue orders mentioned in Section 45 of the Indian Specific Relief Act. This section empowered the High Court of Udaipur to issue writs of prohibition or 'certiorari' or 'mandamus' within its territorial jurisdiction, and if such an application had been dismissed, the present petition would not lie. But it transpired during the course of arguments that that petition had been withdrawn after the coming into force of the Constitution of Mewar, and no decision was given on that petition on the merits. Learned counsel for the appellants stated that it was withdrawn on the 25th of June, 1947, and the present petition was filed three days later on the 28th of June, 1947, as it was considered that the powers of the High Court had been widened under the Constitution. It was not denied by the opposite party that the petition under Section 45 of the Specific Relief Act had been withdrawn without decision on the merits.

(16) The fourth objection that the petitioners had instituted a suit for identical reliefs in a civil Court was further augmented by an argument that if on the showing of the petitioners themselves they had an alternative remedy, the High Court should refuse to issue any kind of writ. The pleas taken in this connection by the two respondents are not identical. The Commissioners say in para 6 of their additional pleas that the suit, which had been filed by the petitioners in the District Judge's Court, had been dismissed, while para. 6 of the reply of Roshan Lal is to the effect that the suit was pending in the Court of the District Judge, and the 15th of April, 1948, was the date of hearing. A copy of the plaint was again not produced in this case; but learned counsel for the respondents was allowed to read the relief para from his brief, and it was stated that the prayer was that a declaration might be issued that the Commissioners or the Government had not been authorised to settle or adjust the dealings between the firm Ummaid Mal Dharam Chand and Rikhab Deo Factory at Fatehnagar, or to compel the plaintiffs to make payment for that purpose. This suit was said to have been filed some time in 1945. In the first place, Section 4 of Act No. XVII of 1944 appears to act as a bar to such a suit. The relevant portion of that section clearly says that

> "no proceedings conducted or order made by the Commissioners or the Government before or after the passing of this Act in cases specified in Schedule 1 (Ummaid Mal Dharam Chand's case being mentioned in the Schedule), shall be called in question in any proceedings before any civil Court on the ground that the said Commissioners or the Government had no jurisdiction to conduct such proceeding or to make such order."

That section, therefore, clearly barred the jurisdiction of a civil Court to question the order of the Commissioners or the Government on the ground that they had no jurisdiction to make the order. It was conceded by learned counsel for the respondents that in their written statement before the District Judge a plea had been taken that the Court had no jurisdiction to entertain that suit. We are of opinion that the alternative remedy of a suit was not open to the petitioners in this case. Even in cases where an alternative remedy exists, the jurisdiction of this Court to issue a writ of prohibition in a proper case is not barred. The statement of law on this subject appears in para 1397 of Halsbury's Laws of England, Hailsham Second Edition, Volume 9, as follows:

> "The Court, in deciding whether or not to grant a writ of prohibition, will not be fettered by the fact that an alternative remedy exists to correct the absence or excess of jurisdiction, or any appeal lies against such absence or excess. Similarly the fact that an appeal on the merits of the case has already failed, or that the party applying for prohibition has himself initiated the proceedings in the inferior Court, is not material to the decision of the Court to grant or to refuse the writ."

(17) On the merits, the jurisdiction of the Commissioners to issue the order of the 19th of June, 1946, was challenged on two grounds, viz., (1) that the very appointment of the Commissioners had been invalidated by the coming into force of the Mewar Constitution on the 23rd of May, 1947, and (2) that the order of the Commissioners in so far as it called upon the partners of the firm Ummaid Mal Dharam Chand to make contributions from their pockets in addition to what had been reserved in list A for the payment of creditors was in excess of the jurisdiction with which they had been vested by competent authority. It was contended that the dispute between the parties related to the dissolution of the partnership firm and winding up of its affairs, and the suit, if filed by any of the parties, was cognizable by a civil Court, and that action of His Highness the Maharana of Mewar in appointing a commission was an executive act unauthorized by any law, and with the dawn of democratic era, the appointment and proceedings of such commissions were sought to be validated by Act No. XVII of 1944; but that Act also became inconsistent with the Merwar Constitution, and lost its force. Reference was made to Articles I, XIII and XVIII of the Merwar Constitution.

(18) Article I, clause (1) of the Constitution of Mewar declared the Constitution to be the Supreme Law of Mewar, which would override all laws whether constitutional or otherwise as were inconsistent with it. Under Article XIII, clause (1), it was provided that

> "no person shall be deprived of his life or property without due process of law, nor shall any person be denied equality before the law within the territories of Mewar".

Article XVIII, clause (i), declared that

> "the judicial power of the State shall be vested in the High Court of Udaipur and in such subordinate Court as the Legislature from time to time establish".

(19) It was contended that the provisions of Act No. XVII of 1944 were inconsistent with the Constitution in so far as, while Art. XVIII of the Constitution of Mewar declared the judicial power of the State to be vested in the High Court of Udaipur, section 6 of Act No. XVII of 1944 made the orders of the Commissioners appealable to the Prime Minister whose decision was to be final, and this was clearly inconsistent with the Constitution more so as the Commissioners were declared to possess all the powers of a civil Court under clause

(3) of section 6 of Act No. XVII of 1944. It was also contended that in asking the petitioners to deposit certain amount of money amounted to depriving him of their property without due process of law, as Act No. XVII of 1944 went so far as to say in the later part of section 4 that the orders of the Government or Commissioners made before the passing of the Act could not be challenged in a civil Court on the ground that such proceedings or orders were opposed to the provisions of any law, custom or usage for the time being in force. It was urged that the proceedings up to the passing of the award on 22-12-1938 were by consent of the parties as being by arbitrators who had been appointed by the parties; but that the subsequent proceedings, including the order of the Mehkama Khas dated 3rd May, 1940, which were confirmed by His Highness, were invalid as the Mehkama Khas purported to pass orders in a judicial matter which should have gone to a court of law. It was also urged that provision as to equality before the law in Article XIII of the Constitution of Mewar was also infringed, as their case alone was to be dealt with under Art No. XVII of 1944 by the Commissioners.

(20) There is no doubt that section 6 of Act No. XVII of 1944 was contrary to Article XVIII of the Constitution of Mewar by which the judicial power of the State was declared to be vested in the High Court of Udaipur or such subordinate Court as the Legislature from time to time established. Section 6 of Act No. XVII of 1944 in effect purported to vest the Prime Minister with judicial power in the State. Section 6, therefore, would be invalid from the date of the Constitution. But it does not follow that the entire Act would be invalid as the provisions of section 6 can be separated from the remainder of the Act.

(21) As to Article I of the Constitution it is prospective and not retrospective. Therefore, what had been a valid appointment or order prior to the Constitution would not become invalid simply because such order could not be passed after the enforcement of the Constitution. The appointment of a commission by His Highness to deal with a civil matter is something unparalleled in any democratic State governed by law; but in Mewar it appears that executive interference in judicial matters must have been common, and that accounts for the passing of Act No. XVII of 1944. Whatever may have been the position prior to the Act, the commissions appointed before the Act were declared to have been appointed under the Act by clause (iii) of section 3, and clause (ii) of the same section empowered the Government to appoint a Commissioner or Commissioners to decide the cases mentioned in the Schedule, and section 4 prevented any civil Court from challenging any previous order of the Government or Commissioners in that behalf. If any law provided for the constitution of a Special Court for deciding any particular case, there is nothing inherently illegal in that procedure. Under Article XXIV, all the laws in force on the date of enforcement of the Constitution were to be deemed to have been made by or under the Constitution, and in so far as they were consistent with the provisions were declared to continue in force until amended or repealed by the appropriate legislative authority. The creation of a special Court has not been shown to be inconsistent with any provision in the Constitution. It may be pointed out that under clause (ii) of section 3 of Act No. XVII of 1944, the Commissioners' powers were declared to be the powers of a Civil Court, and under section 5 the procedure to be followed by the Commissioners was declared to be the Code of Civil Procedure.

(22) As to Article XIII, the first portion says no more than that the action by which any person is to be deprived of his liberty or property has to be justified under some law. The Commissioners apparently were acting under the powers conferred upon them by Act No. XVII of 1944. As to whether they have exceeded the jurisdiction or not will be considered later. The second portion of Article deals with equality before the law. It is not absolute equality which is guaranteed under the Constitution, since by the very nature of things all men are not equal. What is provided is that a particular class of persons to which any enactment may apply are to be dealt with equally. It is not contended that the several partners of the firm Ummaid Mal Dharam Chand are being treated unequally in this case.

(23) In our opinion, the provisions of Act No. XVII of 1944, except section 6, have thus not been shown to be inconsistent with the Constitution of Mewar, and have not been rendered invalid with the enforcement of the said Constitution.

(24) The other objection that the Commissioners have exceeded their jurisdiction is more substantial. Having read the order of Mehkama Khas dated 3rd May, 1940, which had been approved by His Highness and which has been stated in the earlier part of this judgment, it is quite clear to us that the proposal of the arbitrators that each partner should take upon himself the liability of such of his creditors as were his relations was modified by the Mehkama Khas on the ground that it would affect the 'Sahukari usage, if someone of the partners did not pay up the creditors, and it seems to have been not without hesitation that a recommendation was made for satisfaction of the creditors out of certain assets reserved for that purpose, and it also appears that the Mehkama Khas had no doubt that the reserved assets would be more than sufficient to pay up the creditors, since at the end it is stated that any amount which remains after paying off the creditors should be distributed between the partners. It is difficult to think, as contended by the opposite party, that the last portion of the recommendations involved the further consequence that if the assets were insufficient, the partners could be called upon to contribute out of the assets received by them for payment of the creditors. In a suit for dissolution and winding up of affairs, such a procedure would be unheard of, and it would be left to the creditors to enforce their claims in a Court of law, should the partners fail to meet such claims on demand. There would also be opportunity for the debtors to dispute any claim or raise certain pleas which may act as a bar for the enforcement of the claim. The entire procedure in this case appears to have been to circumvent the Courts, and for this the present petitioners are also not free from blame, since it was on their petition that the commission was appointed by His Highness. A certified copy of that petition and the order of His Highness dated 'Sawan Sud 9, Samwat' 1993, are on the record. Be that as it may, it would not be legitimate to presume any delegation of authority to the Commissioners in excess of what appears in the order itself. As stated above, the Mehkama Khas order does not contemplate the contingency where the assets would fall short of the debts to be paid to the creditors. In our opinion, in asking the partners to contribute from their pockets to pay up the creditors after the utilization of the assets reserved for that purpose was an act in excess of the jurisdiction of the Commissioners.

(25) The view taken by the Acting Chief Justice, Mr. Dhanopiya, and concurred by Justice Gupta that the Commissioners appointed or deemed to have been appointed under Act No. XVII of 1944, do not constitute a judicial tribunal is not correct.

In the first place, the Act itself by section 3(ii) confers on the Commissioners all the powers of a civil court, and the fact that an appeal against the orders of the Commissioners was directed to lie to the Prime Minister cannot change the nature of the functions which were entrusted to the Commissioners under the Act. In any case, the tribunal was a quasi judicial tribunal, and the High Court having powers to issue writs had authority to interfere. It may be observed that the restriction on the civil courts under Section 4 of Act XVII of 1944 to question the validity of the orders of the Commissioners does not prohibit the High Court from correcting the errors of the Commissioners by issue of proper writs or orders or directions as held in a recent judgment of this Court in 'Mewar Textile Mills Ltd. v. The Industrial Tribunal, Writ Petition No. 21 of 1951, D/- 10-8-51. In that case an Industrial Tribunal had been constituted by the Government under section 7 of the Industrial Disputes Act (XIV of 1947), and its validity was challenged by a petition for writ of prohibition. On behalf of the Government, reliance was placed on section 9 of the Act, which laid down that

"no order of the appropriate Government appointing any person as a member of a Board, Court or Tribunal shall be called in question in any manner."

It was observed in dealing with that plea that

"Section 9 of the Industrial Disputes Act cannot take away the jurisdiction of this Court conferred on it by Article 226 of the Constitution of India."

Article XVIII, clause (2), of the Mewar Constitution conferred powers similar to those described in Article 226 of the Constitution of India on the High Court of Udaipur.

(26) It now remains to consider the other objection raised on behalf of the Commissioners. Learned counsel for the Commissioners relied on two Supreme Court judgments, viz., 'Keshavan v. The State of Bombay', A. I. R. (38) 1951 S. C. 128 and 'Janardhan Reddy v. The State of Hyderabad', A. I. R. (38) 1951 S.C. 217, and argued that the order of the Commissioners dated 19th of June, 1946, and the order of the Prime Minister dated 4th July, 1946, were final when they were passed, and could not be reopened later on by the promulgation of the Constitution of Mewar in 1947. In the first case it was observed by their Lordships of the Supreme Court that

"Every Statute is 'prima facie' prospective unless it is expressly or by necessary implication made to have retrospective operation. Before the Constitution of India came into force, there was no such thing as fundamental right. As the fundamental rights became operative only & from the date of the Constitution the question of the inconsistency of the existing laws with those rights must necessarily arise on & from the date those rights come into being. Therefore Art. 13 (1) can have no retrospective operation but is wholly prospective. If an act was done before the commencement of the Constitution in contravention of the provisions of any law which, after the Constitution, becomes void, with respect to the exercise of any of the fundamental rights, the inconsistent law is not wiped out so far as the past act is concerned."

In the second case, their Lordships observed that

"The provisions of Article 32 (2) of the Constitution of India were not intended to operate restrospectively, & therefore something which was legally good on 25-1-1950 cannot be held to have become bad on 26-1-1950. Where, therefore, the judgment of the High Court of Hyderabad affirming the convictions & sentences of the petnrs. had acquired finality in the fullest sense of the term before 26-1-1950, no one could question the validity of the convictions at the date when the Constitution of India came into force."

(27) These are indeed very learned observations emanating from high authority; but the present case is distinguishable on facts. In the case of Janardhan Reddy, the sentences had been passed and confirmed by the High Court, and what remained was the execution of those sentences. Similarly, in the first case, the petitioner Keshavan Madhava Menon was alleged to have committed an offence under the Press (Emergency Powers) Act, 1931, and it was argued that the said enactment had become void on the enforcement of the Constitution of India, as it infringed upon certain fundamental rights of free speech mentioned in Articles 19 and 13 of the Constitution of India. Their Lordships of the Supreme Court, while stating the law to be as mentioned above, observed that there was no fundamental right that a person would not be prosecuted and punished for an offence committed before the Constitution came into force. So far as the past acts were concerned, the law existed, notwithstanding that it did not exist with respect to the future exercise of fundamental rights. In the present case, what the Commissioners have ordered is to ask for contribution from the various partners for the purpose of paying off the creditors. No order of payment to any creditor has yet been alleged to have been made, and if, as stated by the petitioners, some amount has been realized from them, it is lying with the Commissioners, and an appropriate order for its distribution will now be made. The order which cannot be questioned is the order of 3rd May, 1940, which was valid when it was made, and what is sought to be challenged in these proceedings is that the Commissioners who had a delegated authority to carry out the orders of 3rd May, 1940, have exceeded their jurisdiction. It has not been argued, and could not have been argued, that the Commissioners' powers were, in any way, in excess of the order of the Mewar Mehkama Khas, dated 3rd May, 1940. The fact that the Prime Minister of Mewar declined to interfere on appeal does not bar the jurisdiction of this Court to interfere, since, as stated above, notwithstanding the provisions barring the jurisdiction of a civil court or the declaration of the order of the Prime Minister to be final, the powers of the High Court of Udaipur even with reference to section 45 of the Mewar Specific Relief Act then in force were wide enough to interfere in a case where a judicial tribunal had acted in excess of the jurisdiction conferred upon it.

(28) The order of the Commissioners dated 19th of June, 1946, in so far as it directed the petitioners to contribute towards the payment of creditors beyond the assets reserved for such purpose is, therefore, declared to be without jurisdiction, and is hereby set aside. The Commissioners are hereby prohibited from recovering from the ex-partners of the firm Ummaid Mal Dharam Chand any amount beyond what was reserved in list A for payment to creditors and if any amount has been recovered, to return the same to the person from whom it had been recovered.

(29) This disposes of relief (d) in the petition. The prayer for other reliefs cannot be granted. The sale of the shares and other assets for payment of the creditors was authorized under order dated 3rd May, 1940, and prayers (a) and (c) cannot be accepted. As to relief (b) it was not shown in what manner the Commissioners have acted contrary to the orders of 22-12-1938 and 3-5-1940 beyond what has been discussed above in connection with relief (d). It was urged during the course of arguments that while under the award of the arbitrators, a certain mode of accounting

in respect of dealings between the partnership and Fatehnagar factory was indicated, the Commissioners had not made up accounts in that manner but had accepted the correctness of the debt due to the factory as given in list A. It has, however, not been stated what difference it would make in the result by making accounts in the manner suggested by the petitioners.

(30) The petition is allowed as aforesaid. As the petitioners have only partially succeeded, they will receive only half the costs from Roshan Lal.

D.H. *Petition partly allowed.*

A. I. R. (39) 1952 RAJASTHAN 28 (C. N. 14)

(*JODHPUR BENCH*)

WANCHOO, C. J., AND BAPNA, J.

Jetharam and others, Appellants v. Hazarimal, Respondent.

Appeal No. 9 of 1950, D/- 28-8-1951.

(a) *Hindu Law — Joint family — Presumption as to existence of joint family property — Self-acquired property when becomes joint family property.*

There is no presumption that a Hindu family, because it is joint, possesses joint property or any property. The burden of proving that any particular property is joint family property is in the first instance upon the person who claims it as coparcenary property. Further to render the property joint, the person claiming such interest in the property must prove that the family was possessed of some property with the income of which the property could have been acquired or from which the presumption could be drawn that all the property posseseed by the family is joint family property or that it was purchased with joint family funds or acquired by joint labour. None of these alternatives is a matter of legal presumption. It can only be brought to the cognisance of the Court in the same way as any other fact, namely, by evidence. AIR (20) 1933 P.C. 85; AIR (32) 1945 Mad 62; AIR (17) 1930 Oudh 39; AIR (22) 1935 Bom 343, Rel. on. (*Paras 3, 5*)

(b) *Benami — Property acquired by father — Name of minor son also shown in 'Putta' of property — Title in property whether conferred on son.*

The doctrine of advancement is not followed in India. The fact that minor's name is included in the document of title does not confer any title in him unless it is proved that the minor had any independent source of income and the minor's money was utilized in the acquisition of the property. 6 Bom 717; AIR (23) 1936 Nag 185; AIR (3) 1916 Upp Bur 7 (2) Ref. (*Para 6*)

(c) *Registration Act (1908), S. 35 (3) — Several persons executing document — One alone admitting execution — Registration of document — Validity of.*

Where a document is executed by two or more persons, and one of them admits execution and the document is registered then the document will be effective against the person at whose instance the document is registered. 1 All 465 (PC) Foll. (*Para 8*)

Anno: Registration Act, S. 35, N. 10.

(d) *Hindu Law — Joint family — Property acquired by father — Sons allowed to use it — Property whether becomes family property.*

The fact that his sons and gradsons lived with the father in the same house is not sufficient for any presumption or finding that the father had voluntarily thrown the self-acquired property in the common stock with the intention of abandoning all separate claims upon it. For, a clear intention to waive the separate rights of the person who acquired the property must be established. It will not be so inferred from the mere fact of his allowing the other members of his family to use it conjointly with himself. (*Para 9*)

(e) *Hindu Law — Debt — Father — Antecedent debt.*

While a debt contracted by the father alone which is not for illegal or immoral purpose becomes an antecedent debt, it is not the less antecedent because his sons are joint debtors with him. According to the doctrine of pious obligation, the male issues of a Hindu are under a pious obligation or duty to pay the debts — even the personal debts — of the ancestor provided the debt is untainted, i.e., not of an illegal or immoral nature. The emphasis is on the fact that in such cases, the debt may be one contracted for his own benefit by the debtor. It does not mean that if the debt contracted by the father is such that his sons are co-debtors with him, such debt will not become an antecedent debt, when it is antecedent in fact as well as in time. (*Para 12*)

(f) *Specific Relief Act (1877), S. 12 — Contract to sell immovable property — Inadequacy of consideration if ground to refuse specific performance.*

Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money. A contract to sell immovable property in this one where grant of pecuniary compensation is not an adequate relief. Further, the inadequacy of the consideration is no ground for refusing specific performance of the contract to sell unless that fact taken with other circumstances make out a case for holding that the bargain was an unconscionable one. (*Para 13*)

Anno: Sp. Rel. Act, S. 12, N. 4.

Indernath and Utsavlal, for Appellants; Sohan Nath and Sardar Nath, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('76-77) 4 Ind App 166: (1 All 465 PC) (Pr 8)
('33) AIR (20) 1933 P C 85: (142 Ind Cas 739) (Pr 3)
('23) AIR (10) 1923 All 535: (73 Ind Cas 1010) (Pr 12)
('33) AIR (20) 1933 All 273: (55 All 370 FB) (Pr 12)
('35) AIR (22) 1935 All 478: (155 Ind Cas 1106) (Pr 9)
('81-82) 6 Bom 717 (Pr 6)
('35) AIR (22) 1935 Bom 343: (59 Bom 573) (Pr 4)
('32) AIR (19) 1932 Lah 636: (13 Lah 491) (Pr 9)
('27) 50 Mad 582: (AIR (14) 1927 Mad 676) (Pr 9)
('45) ILR (1945) Mad 378 at p. 384: (AIR (32) 1945 Mad 62) (Pr 3)
('36) AIR (23) 1936 Nag 185: (ILR (1936) Nag 65) (Prs 6, 9)
('30) AIR (17) 1930 Oudh 39: (5 Luck 400) (Prs 4, 6)
('16) 35 Ind Cas 12: (AIR (3) 1916 Upp Bur 7 (2)) (Pr 6)

BAPNA, J.: This is an appeal against the judgment and decree of the High Court of the former covenanting State of Jodhpur, and was filed before the Ijlas-i-khas and transferred to this Court by virtue of the provisions of Ordinance No. XL of 1949 read with Ordinance No. XII of 1950.

(2) The respondent Hazarimal sued the appellant Jetharam for specific performance of a contract of sale of a house situated at Jodhpur and more particularly described in the plaint, on the basis of an agreement of sale Ex. P-1, dated the

29th January 1941. Rugnath Das and his three sons were impleaded as defendants Nos. 2 to 5 as mortgagees of the property. Laduram and Jaitulal, sons of Jetharam defendant, and their minor sons were impleaded as defendants Nos. 6 to 12 on their own application. Defendant No. 1 and defendants Nos. 6 to 12 filed separate written statements but have taken identical pleas. They contested the suit on the following grounds:

(1) that Jetharam was a person of weak intellect and his signatures had been secured on Ex. P-1 under a misrepresentation and he did not fully understand the nature of the transaction at the time; (2) that the completion of the sale had been made dependant upon the consent and willingness of the sons and grandsons of Jetharam & as the same had not been secured. the agreement was not enforceable; (3) that the house in dispute had been built by Dalla father of Jetharam, and was the joint family property of Jetharam, and his sons and grandsons, and Jetharam alone had no authority to enter into an agreement for sale which was thus unenforceable.

The mortgagees denied any knowledge of the agreement of sale and expressed that they had no interest except under the mortgage which, they said, had been executed by Jetharam and his sons. The trial Court accepted the defence on all the three points and dismissed the suit. On appeal, the learned Judges of the High Court of the former covenanting State of Jodhpur reversed those findings and held on a discussion of the evidence and circumstances of the case that it had not been established that the house had been built by Dalla and was ancestral property in the hands of Jetharam. It was held that the land had been acquired and built upon by Jetharam himself. The contention that Jetharam had since the acquisition of the property thrown it into the common stock and made it joint family property belonging to his sons and grandsons was negatived. It was also held that even on the assumption that the house was joint family property, the agreement to sell had been made for payment of his antecedent debts and was binding on his sons and grandsons. It was further held that it had not been proved that Jeharam was a person of weak intellect but on the other hand it had been fully proved that he had executed Ex. P-1 of his own free will after understanding its implications and no misrepresentation had been made to him, and further that there was no stipulation for obtaining the consent of the sons of Jeharam before the agreement of sale was to become complete. The suit was accordingly decreed for specific performance of the contract of sale against Jetharam, with directions that he should execute a sale-deed and have it duly registered and also deliver possession to the plaintiff, and for possession against the mortgagees on receipt of their mortgage amount, and for possession against defendants Nos. 6 to 12 as well, as they stated that they had got into possession by redeeming the mortgage. A further direction was made that if any amount was left over after payment of the mortgage debt, it was to be paid to Jetharam.

(3) The present appeal has been filed by Jetharam and defendants Nos. 6 to 12 who are his sons and grandsons, and it appears that the mortgagees having been paid off were not made parties to this appeal. The finding that Ex. P-1, the contract of sale, was not vitiated by any misrepresentation or lack of understanding by the executant or by absence of consent of the sons of Jetharam is one of fact and cannot be raised in this appeal and the learned counsel for the appellants very rightly did not address any arguments on these points. It was, however, contended for the appellants that it was the case of both parties that Jetharam and his sons were members of a joint Hindu family and, therefore, there was an initial presumption that the house property which was in possession of the members of the family was joint family property. The law is, however, well settled that there is no presumption that a family, because it is joint, possesses joint property or any property. The burden of proving that any particular property is joint family property is in the first instance upon the person who claims it as coparcenary property 'Shadilal v. Lal Bahadur', AIR (20) 1933 PC 85. The mortgagee in that case brought a suit to enforce the mortgage by sale of the property mortgaged by the father, and the sons pleaded that the mortgaged property was ancestral and that there was no necessity for the loan. It was held by their Lordships of the Privy Council that there was no presumption that a family, because it is joint, possesses joint property, and it was for the sons of the mortgagee to allege and prove that those properties were joint family properties. 'Shadilal's case', (AIR (20) 1933 PC 85), was referred to by the Madras High Court in 'Jankiamma v. Venkata Rajagopala Chinnarao', ILR (1945) Mad 378 at p. 384. It was there contended by the respondent that if any member of a Hindu joint family claimed any property in his possession to be his separate property, the onus was on him to prove that it was acquired by him out of his own funds and without the aid of the family estate. Their Lordships observed that before the appellant could be called upon to assume such burden, it was incumbent on the respondent to show that the family was possessed of some property with the aid of which the property in dispute could have been acquired.

(4) In an Oudh case: 'Mt. Brij Kunwar v. Sankata Prasad', AIR (17) 1930 Oudh 39, a suit was brought by the mortgagee after the death of the mortgagor against his sons and grandsons. It was pleaded that the property was ancestral and the mortgage was not binding as it was not for legal necessity or antecedent debt. It was held that there was no presumption in Hindu Law about any property being ancestral and it was for the persons alleging that it was so to prove their contention. In 'Kamlakant Gopalji v. Madhavji Vaghji', AIR (22) 1935 Bom 343, it was held that merely from the fact that the father and the sons are joint in food and worship, there is no presumption that they hold joint family property. It is for the plaintiff to show that the family possessed some joint or ancestral property from which the presumption could be drawn that all the property possessed by the family was joint family property.

(5) The principles which have now been well established are that to render the property joint, the person claiming such interest in the property must prove that the family was possessed of some property with the income of which the property could have been acquired or from which the presumption could be drawn that all the property possessed by the family is joint family property or that it was purchased with joint family funds or acquired by joint labour. None of these alternatives is a matter of legal presumption. It can only be brought to the cognisance of the Court in the same way as any other fact, namely, by evidence.

(6) It was contended that the 'patta' of the property was in the name of Jetharam and his sons. It may be pointed out that the defence in the trial Court was that the plot had been purchased and built upon by Dalla, father of Jetharam, but that fact was held not proved. The patta itself was not produced by the defendants. It was argued that the plaintiff in his statement admitted having seen the patta and did not deny Laduram's name being in it. What the plaintiff stated was

that he had seen the patta but did not remember in whose name it was. The statement of the plaintiff need not be considered incorrect since it is possible that he may not have remembered in whose name the patta was. The Patta was in possession of the defendants themselves and they could have very easily produced it if they wanted to rely upon it. It is, however, conceded that the patta of this property was obtained in Section 1969 when Laduram, the eldest son of Jetharam, was not more than 12 years old. The mere fact that Jetharam thought it proper to add his minor's son's name does not prove that the property was acquired jointly by Jetharam and his son. Some proof should have been adduced as to the source from which the money was forthcoming not only for the purchase of the land but for the construction of the property thereafter. There is no evidence on the record in this respect. The doctrine of advancement is not followed in India and the fact that a minor's name is included in the document of title does not confer any title in him unless of course it is proved that the minor had any independent source of income and the minor's money was utilized in the acquisition of the property. Reference may be made to 'Naginbhai v. Abdulla', 6 Bom 717, 'Gopal Trimbak Bhate v. Kesheosa Vishnoosa', AIR (23) 1936 Nag 185, and 'Nga Tin Cyi v. Nga Twe Aung', 35 Ind Cas 12 (UB).

(7) It was next contended that even if the property was the self-acquired property of Jetharam, it had been blended with the joint family property and was thrown in the common stock of the family and Jetharam and his two sons Laduram and Jaitulal dealt with the property as if it belonged to them jointly. For the last contention reliance was placed on Exs. P-10, P-11, P-12, and D-1. Ex. P-10 is a mortgage-deed purporting to have been executed by Jetharam and his two sons Ladu and Jaitulal for a sum of Rs. 22,000/- on 9th of October, 1929 in favour of Ragunath. P-11 is another mortgage deed, dated 7-5-1935 executed by the aforesaid three persons in favour of Ragunath for a sum of Rs. 1,999/-. This was a second mortgage and the amount of consideration was the interest which had fallen due on the first mortgage. Ex. P-12 is dated 17-5-1939 and is a third mortgage in lieu of Rs. 1,999/- due on account of interest Ex. P-10 and purports to have been executed by Jetharam and his two sons Ladu and Jaithu in favour of the same mortgagee Ragunath. Ex. D-1 is the last mortgage deed executed by Jetha, Ladu and Jaitulal for Rs. 25,998/- in supersession of Exs. P-10 & P-11 and Ex. P-12, the earlier mortgages. All these mortgages are in favour of the same mortgagee Ragunath.

(8) Learned counsel for the appellant argued that the Division Bench of the High Court had committed an error in so far as it observed that these were mortgages executed by Jetharam or by Jetharam and his two sons. As a matter of fact, all the four mortgages were executed by Jetharam and his two sons Ladu and Jaitulal but the observation of the learned Judges of the Division Bench was made while discussing whether the property had been acquired by Dalla. He was alive when two of the mortgages had been executed, and the fact that he was not a party to the transactions was held to be inconsistent with the case set up by the defendants. The present argument is that the owners were Jetharam, Laduram and Jaitulal. In the first place, it is rather curious that while the documents were purported to be executed by Jetharam and his two sons Laduram and Jaitulal, the sons never appeared in the course of the registration proceedings in respect of the three deeds Exs. P-10, P-11 and P-12. The person who appeared before the Registrar was only one and he was Jetha. Only in the last deed of mortgage Ex. D-1 did all the three executants appear in registration proceedings and admit the mortgage. This Ex. D-1 is dated 14-2-1941 and was executed not only after the agreement to sell had been executed by Jetharam on 29-1-1941 but after the plaintiff had given him notice on 10-2-1941 to execute the deed of sale and convey the property. By this time, obviously, the defendants had made up their mind to make out a case that Jetharam alone had no authority to alienate the property. It was at one stage argued by the learned counsel for the appellant that if only one of several executants appeared to admit the mortgage before the Registrar and the deed was registered, it was invalid even as against the person on whose admission the deed was registered. The argument, however, was not supported by any authority. On the other hand, the case of 'Md. Ewaz v. Brijlal', 4 Ind App 166, is an authority to the contrary. It was held in that case that where the document was executed by two or more persons, and some of them admitted execution while others denied it, the document should be registered as to the persons admitting the execution and it would be effective against the persons on whose instance the document was registered. This decision was given by their Lordships of the Privy Council in 1877 and sub-s. (3) of S. 35, Registration Act was amended to bring it in accordance with that decision. The law of registration in Marwar on the point was not different. The mortgages Exs. P-10, P-11 and P-12 were thus operative only against Jetharam. The inclusion of the name of his sons Laduram and Jaitulal has, therefore, no significance beyond giving some sort of satisfaction to the mortgagee that the sons of the mortgagor will not perhaps question the mortgage later on. Ex. D-1 which was executed by Jetha, Ladu and Jaitu, and got registered by all the three of them, does not carry the matter further as the consideration was entirely composed of the mortgage money of Ex. P-12 and interest thereon.

(9) There is no proof also as to any express act by Jetha Ram which may show that he had given up his sole ownership of this property. The fact that his sons and grandsons lived with him in the same house is not sufficient for any presumption or finding that Jetha had voluntarily thrown the property in the common stock with the intention of abandoning all separate claims upon it. It has been held that a clear intention to waive the separate rights of the person who acquired the property must be established and that it will not be so inferred from the mere fact of his allowing the other members of his family to use it conjointly with himself. Reference may be made to 'Rajkishore v. Madangopal', AIR (19) 1932 Lah 636; 'Govind Prasad v. Shanti Swarup', AIR (22) 1935 All 778; 'Gopal Trimbak Bhate v. Kesheosa Vishnoosa', AIR (23) 1936 Nag 185; and 'Periakaruppan Chetty v. Arunachelam Chetty', 50 Mad 582.

(10) It was contended that the consideration of the first mortgage was ultilized as mentioned in the deed to pay off a debt of Rs. 14,000/- incurred in connection with the motor business and Rs. 8,000/- were payable to the Jodhpur State in connection with certain contracts. No evidence has been produced to show as to who were carrying on this motor business or this contract business, and there can be no presumption that this was the business of the family. In any case, if Jetharam had become indebted along with his sons, he was jointly and severally liable and he might have thought it prudent to raise a loan on his property in order to wipe off his liability which would incidentally wipe off the liability of his sons as well.

(11) An important feature in this case is that Jetharam himself has not come in the witness-box

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and the defendants have, therefore, kept back the circumstances with respect to the acquisition or enjoyment of the property which could throw considerable light on the fact whether it was the property of Jetharam alone or was that of the joint family consisting of himself and his sons and grand-sons. It was argued that the creditor Ragunath had stated that the debts were of Jetha and his sons in lieu whereof he had mortgaged the property. He appears on the scene when taking the first mortgage on 9-10-1929. He has no knowledge of the debts for payment whereof the mortgage had been executed. His statement can only be of the fact in corroboration of the mortgage deed itself that the three persons Jetha, Ladu and Jaitu had executed the mortgage and they were his debtors. Beyond that fact, the statement of Ragunathdas is of no value.

(12) It was next contended that the lower Court was not right in holding that the sale was valid even on the assumption that the property was joint family property. It has been observed by the High Court that the sale had been made in order to pay off the mortgage-money and its interest which was an antecedent debt and was, therefore, binding on the sons and grandsons. It was contended that if the property was joint family property and the debts evidenced by Exs. P-10, P-11 and P-12 were the debts outstanding against the family as a whole, the debts were not the antecedent debts of Jetharam alone. The debts were of the family, the payment thereof was not due to legal necessity as it had not been shown that there was any pressure on the family for repayment. The distinction is sought to be made on the ground that when the alienation is for family necessity, it must be proved that there was pressure for repayment of the debt 'Bandhuram v. Ram Kishun Sonar', AIR (10) 1923 All 535, 'Chiranjilal v. Bankeylal', AIR (20) 1933 All 273. There is no doubt that if an alienation is made by manager other than the father, it is not enough to show merely that the debt is a pre-existing debt but it must be proved that there was pressure on the family and that there were no other means to repay the debt. In the present case, Jetharam was not only the manager but the father of the sons and the debt was such that he was one of the debtors assuming that the loan had been obtained jointly by the father and the sons. While a debt contracted by the father alone which is not for illegal or immoral purpose becomes an antecedent debt, it is not the less antecedent because his sons are joint debtors with him. According to the doctrine of pious obligation, the male issues of a Hindu are under a pious obligation or duty to pay the debts— even the personal debts— of the ancestor provided the debt is untainted, i.e., not of an illegal or immoral nature. The emphasis is on the fact that in such cases, the debt may be one contracted for his own benefit by the debtor. It does not mean that if the debt contracted by the father is such that his sons are co-debtors with him, such debt will not become an antecedent debt, of course, when it is antecedent in fact as well as in time. There is no force in this contention either.

(13) It was finally argued that specific performance of the contract may not be granted as it was a discretionary relief. It was contended that property was of a much higher value than the amount of consideration viz., Rs. 31,000/-, and Jetharam may have agreed to sell in an unguarded moment and there is something to show that he was a person of weak intellect. The contention that Jetharam was a person of weak intellect is not borne out on the record. He himself did not come into the witness-box and there is no medical evidence on the subject. The explanation to Section 12 of the Specific Relief Act is, however, clear that unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money. A contract to sell immovable property is, thus, one where grant of pecuniary compensation is not an adequate relief. It may be pointed out also that there is no evidence as to the value of property in 1941 when the contract was made. In any case, the inadequacy of the consideration is no ground for refusing enforcement of the contract unless that fact taken with other circumstances make out a case for holding that the bargain was an unconscionable one. There is no proof in this case for any such finding specially when the finding of the lower Court as to Jetharam being of weak intellect has been given against the defendants.

(14) The appeal has, therefore, no force, and is dismissed with costs.

V.S.B. *Appeal dismissed.*

A. I. R. (39) 1952 RAJASTHAN 31 (C. N. 15)

(JODHPUR BENCH.)

KSHEM CHANDRA GUPTA AND TRILOCHAN DUTT BHARDWAJ, JJ.

Suraj Karan and others, Appellants v. Sitaram and another, Respondents.

Regular F. A. No. 2 of 1950, D/- 11-12-50.

(a) Civil P. C. (1908), S. 20 (a) — Plaintiff to prove that Court has jurisdiction to try suit.

Where a suit is brought in a particular Court under the provisions of S. 20, it is for the plaintiff to prove that at the time the suit was filed, the defendant was a resident and carried on business in the place over which the Court has jurisdiction to try the suit. (Para 3)

Anno: C. P. C., S. 20, N. 2.

(b) Civil P. C. (1908), S. 20 (a) — "Resides" — Residence means ordinary residence and not casual. — Necessity of residence at time of filing of suit.

It is the actual residence of the defendants at the time of the commencement of the suit that is to be considered for determining whether the Court has jurisdiction or not. The word 'residence' means the ordinary and general residence of the defendants and not a casual or occasional return of the defendants to their family homes where they and their families had been brought up. Moreover, such residence must be at the commencement of the suit and not long before or long after the institution of the suit. AIR (12) 1925 P. C. 290; AIR (20) 1933 Lah 851; Dist. 1938 Mar L Rep 156 (Civil), Expl. (Para 4)

Anno: C. P. C., S. 20, N. 3, 4.

Sohan Lal, for Appellants; Murli Manohar, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('25) A I R (12) 1925 P C 290: (53 Ind App 58) (Pr 5)

('24) A I R (11) 1924 All 669: (22 All L Jour 457) (Pr 6)

('33) A I R (20) 1933 Lah 851 (1): (145 Ind Cas 755) (Pr 5)

('38) 1938 Mar L R 156 Civ (Pr 6)

GUPTA, J: The first appeal on behalf of the plaintiffs arises out of a suit filed by them against the respondents in the Court of the District Judge No. 2, Jodhpur, on the 29th of April, 1947, for the recovery of a sum of Rs. 20,531/-.

(2) The main question that has been raised in this appeal before us relates to the jurisdiction of the Civil Courts in Marwar and it is to be deter-

mined whether or not did the defendants actually and voluntarily reside in Mundwa, Marwar at the commencement of the suit so as to give the Courts in Marwar jurisdiction to entertain the suit. We have , therefore, to examine the pleadings of the parties and the evidence produced by them in this respect. The plaintiffs have stated it in their plaint that they themselves carried on the business of commission agents in Bombay in the name and style of Ramratan Sheo Bux and had a shop of the same name in Mundwa (Marwar) also, while the defendants who were real brothers, carried on their business in Nizamabad, Hyderabad State, in the name and style of Sitaram Satya Narain and in Mundwa, Marwar in the name and style of Shrikishen Sitaram and that they were the permanent residents of Mundwa Marwar. It was also stated in the plaint that defendant No. 2, Rajaram had been adopted to one Jainarain, the real brother of Shrikishen who was the natural father of the two defendants. It was further alleged by them that the defendants under the name and style of Sitaram Rajaram appointed the plaintiffs as their commission agents in Bombay on the Margshirsha Krishna 12, S. 2002 and did a lot of business of buying and selling gold, silver and cotton. The agency business, it was stated, lasted up to Jyeshth of Samvat 2003 and it was further stated that during this period of about seven months, the plaintiffs executed the business of the defendants as 'Pucca Arhatias' and that according to the 'pucci Arhat', it was the 'Arthatia's name that was disclosed to the other party to the contract and not that of principal and it was the agent who was entitled to or liable for, as the case may be, any profit or loss from or to that party while the 'Arhatia' was himself liable to pay profits to or entitled to recover losses from his principals and the losses, if any, on account of bad debts had to be suffered by the 'Arhatia.' Sitaram, defendant 1, was not personally served and substituted service of summons was effected on him by having a copy of the summons affixed on the notice board of the Court, a copy being pasted on the outer door of his house and by publication of a notice in the Jodhpur Government Gazette of February, 28, 1948. On the 7th of April, 1948, Mr. Sardarnath who appeared for defendant 2 undertook to file his vekalatnama for defendant No. 1 also. But, he never appears to have done that and it appears that without an order to the effect, ex parte proceedings were taken against him. Rajaram, defendant No. 2, who contested the suit denied in his written statement that the plaintiffs resided permanently in Mundwa or had any business concern there. He further denied that the defendants lived in Mundwa, Marwar, or carried on any business there. It was, on the contrary, categorically stated that the defendants neither lived in Mundwa nor carried on any business of any kind there. However, it was admitted that they had a shop under the name and style of Sitaram Satya Narain in Nizamabad, Hyderabad State, but it was asserted that on this shop they carried on the business of buying and selling food-grains and manufacturing and selling 'Biris.' Of the seven issues framed by the lower Court, issue No. 6 bears on the question before us. It is to the following effect:

"Is this suit not triable by this Court which has no jurisdiction in the matter?"

The trial Court after recording the evidence of four witnesses for the defendants and five witnesses for the plaintiffs came to the conclusion that it had no jurisdiction to try the case and returned the plaint to the plaintiffs for presentation to the Court having jurisdiction therein. Hence this appeal.

(3) We may at once point it out that by the issue, in the manner as it was framed, the burden of proof was wrongly placed on the defendants. From the pleadings of the plaintiffs, it was clear that the business of agency was carried on in Bombay and that it was at Nizamabad that the defendants had their main business. Further, it was evident that the plaintiffs had brought this suit in the Courts of Marwar on the allegation that the defendants were the permanent residents of Mundwa, Marwar, and also carried on business in Mundwa. This allegation was categorically denied by the defendants and under the circumstances issue should have been framed the other way and the burden of proof should have been placed on the plaintiffs to prove that at the time the suit was filed, the defendants were the residents and carried on business in Mundwa, Marwar, and, therefore, the Court had jurisdiction to try the suit. The issue, as it was framed, has made it possible for the learned counsel to argue that the defendants had not discharged the burden placed upon them. We see no force in this argument because both the parties have adduced evidence on the question and it can be decided on the material on the record.

(4) An argument was also made on the fact that the defendants who were the best witnesses as to whether or not they were the residents of Mundwa had not entered into the witness-box and a presumption should be drawn against them that their evidence would have gone against them if they had entered into the witness-box and submitted themselves for cross-examination. We have already stated that in this case it was for the plaintiffs to prove that the Mundwa Court had jurisdiction. We will, therefore, first scrutinise the evidence of the plaintiffs and if we find that they have been able to prove that at the commencement of the suit the defendants were either actually residing in Mundwa or carrying on some business in Mundwa, we will turn to the defendants' evidence to see how far they have succeeded in disproving their residence or carrying on business in Mundwa at the time of the commencement of the suit. In doing so, we will take into consideration even those parts of the defendants' evidence which prove the plaintiffs' case.

(After discussing the evidence the judgment proceeded.) From the entire evidence produced by the parties which is discussed above we are not able to come to a finding that the defendants actually resided in Mundwa at the time the suit was instituted. Now, before we consider the arguments addressed to us by the learned counsel for the appellants, we would do better to consider the provision of law on the question contained in S. 20, C.P.C. The relevant portion of the Section reads:

"Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

(a) the defendant, or each of the defendants where there are more than one at the time of the commencement of the suit, actually and voluntarily resides, or....., or....."

It is clear from the above that it is the actual residence of the defendants at the time of the commencement of the suit that is to be considered for determining whether the Court has jurisdiction or not. In our opinion, by using the word 'residence', the legislature has meant the ordinary and general residence of the defendants and not a casual or occasional return of the defendants to their family homes where they and their families had been brought up. Again, such residence must be at the commencement of the suit and not long before or long after the institution of the suit.

(5) The learned counsel for the appellants was at great pains to argue that the above evidence

showed that the defendants had two residences: one permanent that was at Mundwa and another temporary that was at Nizamabad and with the help of a decision of the Privy Council reported in 'Bansilal Abirchand v. Ghulam Mahbub Khan', AIR (12) 1925 P C 290, contended that the Court at Mundwa had jurisdiction to entertain the suit. In the aforesaid decision, loan had been borrowed at Sikanderabad while the defendants and their sureties were the residents of Hyderabad. The discussion centred on the arising of the cause of action. It was held by their Lordships of the Privy Council that the Court at Sikanderabad had no jurisdiction to entertain the suit for recovery of the loan. The learned counsel contends in this case that though the business of buying and selling gold and silver had been contracted by the plaintiffs at Bombay, it was at Mundwa where the plaintiffs resided, that the suit could be brought because Nizamabad was not their permanent residence. We are unable to see how this judgment of the Privy Council is helpful to the appellants. In our opinion, it has no application to the facts of the case before us and is of no avail to the appellants. The learned counsel then referred us to a decision of the Lahore High Court reported in 'Dhera Shah v. Sant Ram' AIR (20) 1933 Lah 851 (1), where the word 'Sakunat' has been defined. On appeal by the creditors whose application to have the debtors-respondents declared insolvent had been dismissed, a contention was raised that on the record it had been proved that the debtors resided at Nara. The debtors themselves had denied that they resided in Nara. They stated that they had left the place and had been, for the last 12 or 13 years, carrying on busines at another place called Phullarwan. Two witnesses were produced to prove their residence at Nara. A petition-writer stated that in a mortgage-deed, the debtors described themselves as having their 'Sakunat' at Nara. Dalip Singh, J., observed as follows:

> "I do not think the word 'Sakunat' necessarily means that they ordinarily resided at Nara. Nara is the family home and the respondents had a house there; but from that it did not follow that they ordinarily reside at Nara. I, therefore, repel this contention of the appellants also."

Evidently, this decision does not at all support the plaintiffs-appellants. If anything, it goes against their contention, inasmuch as, the mention of Mundwa as 'Sakunat' in the 'Vakalatnama' and the gift-deed executed by Rajaram did not necessarily mean, according to this ruling, that Rajaram ordinarily resided at Mundwa. Mundwa may have been the family home and the respondents may have had a house there; but from that it did not follow that they ordinarily resided at Mundwa. Much less could it mean that the defendants-respondents actually resided in Mundwa at the time the suit was instituted.

(6) The learned counsel next referred us to a judgment reported in '1938 Mar L R 156 (Civil) wherein relying on another judgment reported in 'Municipal Board, Barelily v. Hafiz Ala Baksh', AIR (11) 1924 All 669, it had been observed that in every case residence was a question of fact and depended upon the particular circumstances and that the general practice was to accept as the person's residence the place where throughout the year one would ordinarily expect him to be found. It was further observed that the term 'residence' was naturally a flexible one but in the case of traders carrying on business it was manifestly that place where they earned a living and did their daily work nor did that place cease to be their residence merely because for purposes of rest or recreation or family ties they occasionally returned to the family home where their families had been brought up. The above observation, we are constrained to observe, does not help the appellants at all; on the contrary, it helps the case of the defendants. From the evidence on the record of this case, defendants are proved to be carrying on business at Nizamabad at the commencement of the suit and one would ordinarily expect them to be found there. That place did not cease to be their residence merely because for purposes of rest or recreation or family ties they occasionally returned to their family home in Mundwa where they and their families have been brought up. Manifestly, it is at Nizamabad where they earn a living and do their daily work. Under the circumstances, we think, a case has not been made out on behalf of the appellants for our interference with the finding of the lower Court. It is unnecessary to refer to the arguments or the rulings cited by the learned counsel for the defendants-respondents. In our opinion, this appeal has no force and deserves to be dismissed. It is, accordingly, dismissed with costs.

(7) BHARADWAJ, J.: I agree.

V.S.B. *Appeal dismissed.*

A. I. R. (39) 1952 Rajasthan 33 *[C. N. 16.]*

(Jodhpur Bench)

WANCHOO, C. J., AND NAWAL KISHORE, J.

Abdul Rahim, Petitioner v. The State.

Criminal Misc. Petn. No. 4 of 1951, D/- 6-4-1951.

(a) Constitution of India, Art. 166 — Detention order by Rajasthan Govt. — Order signed by Home Secretary — Express mention that Order was issued by Rajpramukh — Order if not in accordance with law.

Where in an order for detention issued by the Rajasthan Govt., above the signature of the Home Secretary it is explicity mentioned that the order had been issued by His Highness the Rajpramukh, it may be taken to have been made in the name of His Highness the Rajpramukh, and this was authenticated by the signature of the Home Secretary to the Govt. of Rajasthan. The defect that the order had not been expressly passed in the name of His Highness the Rajpramukh, if any, is of a highly technical character. (Para 3)

(b) Preventive Detention Act (1950), S. 3 — Detention grounds — Dates of activities not mentioned — If sufficient to make grounds vague and insufficient.

Merely because the dates relating to the various activities mentioned in the grounds supplied to the petitioner are missing, the grounds cannot be held to be vague and indefinite. Whether reference to the dates of these activities is necessary in order that the grounds may cease to be vague and indefinite would always depend upon the facts of each case and the nature of the grounds supplied to the detenu: AIR (36) 1949 All 148 (FB), Rel. on; AIR (37) 1950 Raj 40, Disting. (Para 5)

Abdul Jalil, for Petitioner; Sumer Dan, for Govt. Advocate; for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('49) A I R (36) 1949 All 148: (I L R (1949) All 458 FB) (Pr 5)

('50) 1950 Raj L W 37 (45): (A I R (37) 1950 Raj 40: 51 Cri L Jour 1160) (Pr 5)

('50) 1950 Raj L W 204: (A I R (38) 1951 Raj 69) (Pr 5)

NAWAL KISHORE, J: This is a petition by Abdul Rahim, son of Himmat Khan, Sindhi Muslim of village Bandasar, under Art. 226 of the Constitution of India & S. 491, Criminal P. C., for the issue of a writ of 'habeas corpus', & is based on the following three principal grounds:

(1) That on 10/11-1-1951, an order was issued by the Govt. of Rajasthan for the arrest & detention of one Shri Adring, son of Himta, under S. 3, Preventive Detention Act, 1950, for a period of one year, & was served upon the petitioner on 16-1-1951. Inasmuch as the order related to one Adring & the petitioner's name was Abdul Rahim, it had no connection with him, & accordingly the petitioner's detention was illegal.

(2) That the order of detention was not in accordance with law, inasmuch as it had not been expressly passed in the name of His Highness the Rajpramukh as required by Art. 166 of the Constitution, & had been simply signed by the Home Secretary.

(3) That the grounds of detention supplied to the petitioner were very vague, incomplete, & insufficient, &, therefore, the petitioner had been deprived of his right of making an effective representation to the Govt.

(2) A copy of this petition was forwarded to the Govt. of Rajasthan for a reply, & it is stated that the petitioner also bore the name of Adring (Adrim), & being the son of Himta, Musalman of village Bandasar, Tahsil Sheo, was the same person for whose arrest & detention the order had been issued by the Govt. In support of this a reference has been made to the fact that the petitioner acknowledged the service of the order of detention on him under his signature as 'Adrim.' The grounds of detention had also been received by him under the same signature. Copies of the order & the grounds of detention have been filed along with the reply, & thereafter the learned Public Prosecutor has placed on the record the originals. It is further stated that the order of detention was in proper form & according to law, inasmuch as it has been expressed to have been made in the name of His Highness the Rajpramukh, & has been duly authenticated by the signature of the Home Secretary to the Govt. As regards the grounds of detention being vague, incomplete, & insufficient, it is stated that the petitioner had already submitted his representation, & that all the necessary particulars, which would enable him to do so, were contained in the grounds supplied to him, & accordingly he had not been deprived of an opportunity of making an effective representation.

(3) We have heard the learned counsel for the petitioner at length, & have no hesitation in rejecting this petition. So far as the first ground relating to a mistake in the identity of the petitioner is concerned, the learned counsel, after perusing the reply furnished by the Govt. of Rajasthan & the acknowledgments made by the petitioner under his signature as 'Adrim', deemed it fit not to press it. On the other question whether the order of detention was not in accordance with law, all that has been submitted is that it should have been expressly in the name of His Highness the Rajpramukh. There seems to be no doubt that according to Art. 166 of the Constitution, the order should have been issued in the name of His Highness the Rajpramukh, but we consider that the defect in this case, if any, is of a highly technical character, inasmuch as above the signature of the Home Secretary to the Govt. of Rajasthan it is explicitly mentioned that the order had been issued by His Highness the Rajpramukh. In other words it may be taken to have been made in the name of His Highness the Rajpramukh, & this has been authenticated by the signature of the Home Secretary to the Govt. of Rajasthan.

(4) So far as the last ground is concerned, the learned counsel has in substance urged that although the order of detention contained as many as eight grounds & referred to the manifold activities of the petitioner, it was vague & indefinite, inasmuch as the particular, dates & places where these activities had been carried on by him had not been specifically set out. As stated above, the order of detention describes in considerable detail the various forms of activities imputed to the petitioner. For instance, it was mentioned that he was an associate of one Syed Shah Murad of Pakistan, who was convening meetings on the Indo-Pakistan border for the purpose of instigating border Muslims against Hindus, & was accordingly in league with him, & helping him by conveying information about military & police dispositions for the purpose of committing dacoities. There is a reference particularly to a dacoity having been committed in the Indian territory on the border near Gadra Road when 35 head of cattles had been removed, & it was mentioned that the petitioner being in close contact with the raiders in Pakistan territory had offered to recover the cattle from Pakistan if the owners paid a ransom of Rs. 600/-. This amount was later raised to Rs. 1,000/-. After these grounds had been furnished to the petitioner he put forward a detailed representation in which he practically denied all the allegations referred to above. The learned counsel urges that inasmuch as it was not mentioned in the grounds to whom information about military & police dispositions on the Indian side of the border had been conveyed, & how & on what dates she had instigated Syed Shah Murad to commit dacoities in Indian territories, the petitioner had been labouring under a serious handicap, & therefore, had not been able to make a proper representation to the Govt.

(5) There is, however, no substance in this contention. It appears from the representation itself that the petitioner had no misgiving with regard to the nature of the allegations contained in the various grounds supplied to him, nor was he labouring under any kind of handicap only because the dates were missing from those grounds. Reference may, in particular, be made in this connection to para. No. 11 (e) of his representation where he stated that on the occasion when 35 heads of cattle were taken by Pakistani raiders about a year back, he had gone out of station & was not near Gadra Road. From this alone it appears that the ground put forward is merely an excuse, & altogether without substance. The learned counsel has cited a few authorities, but none of these is in point for the purpose of enabling this Court to hold that if the dates relating to the various activities mentioned in the grounds supplied to the petitioner are missing, the grounds must be held to be vague & indefinite. 'Durgadas v. Rex', A I R (36) 1949 All 148, a Full Bench judgment of that Court, does not support the contention of the learned counsel. All that was held there was that the question had to be decided upon the basis of the particulars supplied in each case, & that the grounds & particulars supplied must convey sufficient information to the detenue to enable him to make a representation that the detaining authority was wrong in its belief that his detention was necessary in the interest of public safety. This authority was referred to in 'Haqiqatullah Khan v. The State', 1950 Raj LW 204, a Division Bench Judgment of this Court, & discussed at length, but further reference to it is not necessary, as the point raised by the learned counsel was not gone into. The learned counsel next referred to 'Kasturchand v. Sarkar', 1950 Raj LW 37 (45), which held that the ground of detention was not communicated to the detenue within a week &

was vague & indefinite. The only ground mentioned was that the petitioner was an active communist & as an agitator had been fomenting & organising industrial strikes. This ground was held to be vague & indefinite, as neither the place or places where the detenue had fomented or organized industrial strikes, nor the names of the industries he wanted to be hit by his agitation , nor yet the dates on which this had been done, were indicated in the grounds supplied to him. That case, in our opinion, is distinguishable, inasmuch as a complete picture of the various activities carried on by the detenue was not presented in such great detail as has been done in this case. Whether reference to the dates of these activities is necessary in order that the grounds may cease to be vague & indefinite would, as held in A I R (36) 1949 All 148, always depend upon the facts of each case & the nature of the grounds supplied to the detenu. In the case before us, we are of the view that the grounds are sufficiently detailed & contain a narration of the various activities with which the petitioner was connected. Not only this; there is a definite reference to a particular raid in which 35 heads of cattle had been removed by a gang of Syed Shah Murad, & the petitioner appears to have known very well of the occasion on which this raid had taken place, inasmuch as he has furnished a reply to this allegation in the representation made by him to the Govt. In the circumstances, it is not possible to hold in this case that the grounds of detention supplied to the petitioner were vague, indefinite or insufficient for the purpose of enabling him to make an effective representation to the Govt.

(6) The petition fails & is hereby dismissed.

V.B.B. *Petition dismissed.*

A. I. R. (39) 1952 Rajasthan 35 *[C. N. 17.]*

(Jodhpur Bench)

BAPNA, J.

Mt. Nani Bai, Petitioner v. Mithulal and another, Respondents.

Civil Revn. No. 182 of 1950, D/- 19-2-1951.

Civil P. C. (1908), O. 41, R. 27 (1) (b) —Power to admit additional evidence — When to be exercised — Failure to record reasons — Revision.

Under O. 41, R. 27 (1) (b), the appellate Court has power to admit additional evidence only if it requires it and further the new evidence should have a direct and important bearing on the main issue in the case: A I R (18) 1931 P. C. 143, Rel. on.

Where the appellate Court purporting to act under O. 41, R. 27 (1) (b), directed the trial Court to examine certain witnesses as Court witnesses on a point which was remotely relevant to the main issue in the case and it did not indicate in its judgment that it was necessary to examine any additional witness to enable it to pronounce judgment or for any other substantial cause.

'Held' that the order being contrary to express provision of law must be set aside. (Para 2)

Anno: C. P. C., O. 41, R. 27, N. 4, 10, 20.

Chandmal, for Petitioner; Ratanlal, for Respondents.

Case referred to:

('31) A I R (18) 1931 P C 143: (10 Pat 654) (Pr 2)

ORDER: This a revision against an order of the Dist. J. of Udaipur, dated 24-4-1950.

(2) The petitioner, Mst. Nani Bai, sued Mithulal for ejectment from a shop & arrears of rent on the basis of a certain rent-note alleged to have been executed in favour of Gopalji Ratichand, & impleaded one Mohan Lal as deft. as the aforesaid tenant Mithulal alleged him to be the real owner & successor in title of Gopalji Ratichand. The tenant, Mithulal, set up the title of Mohan Lal as owner of the property on the basis of an alleged adoption by Nani Bai to her husband Onkarlal. Certain issues were struck by the trial Court, & it was found that the plff. was the successor in title of Gopalji Ratichand, & decreed the suit. On appeal by Mithulal & Mohan Lal, the learned Dist. J., was of opinion that certain documentary evidence filed by Mohan Lal had not been properly proved, & while holding that the appellant was not entitled to produce further evidence, directed the lower Court to examine certain witnesses as Court witnesses. The plff. has filed this revision, & it is contended that the lower Court had no jurisdiction to direct taking of additional evidence as the conditions requisite for the exercise of discretion under O. XLI, R. 27, C.P.C., did not exist.

(2) The learned counsel for the opposite party raised a preliminary objection that the revision was not maintainable. The question depends upon whether the Court had a discretion to direct taking of additional evidence or that the Court had no jurisdiction to pass the order which it did. It was contended by the learned counsel for the opposite party that on a certain date fixed for the evidence of the deft., a prayer for adjournment was made, which was refused & the evidence was closed, & therefore, the first appellate Court had jurisdiction under Cl. (a) of R. 27, to direct further evidence to be taken, which had been refused by the lower Court. The proposition of law is correct, but in the present case the learned Dist. J., did not act on this ground. In fact the Court has ordered that the opposite party having closed his evidence had no right to produce further evidence, & the witnesses were to be examined not as deft's. witnesses but as Court witnesses. In other words, the lower Court purported to act under Cl. (b) of R. 27. Under this clause, the point which the lower Court had to consider was as laid down by their Lordships of the Privy Council in A I R (18) 1931 P C 143 'Parsotim Thakur v. Lal Mohar Thakur', that it is the requirement of the Court, & the new evidence should have a direct & important bearing on the main issue in the case. The fresh evidence is to be taken according to the order of the lower Court on the point of adoption of Mohan Lal, & the evidence directed to be recorded was in support of the proof of certain sale deed executed by Mohan Lal as son of Onkarlal. The evidence may show the conduct of Mohanlal himself, but is only remotely relevant on the question of adoption. The learned Dist. J., has pointed out that the plff. did not produce certain documents in her possession. But that would only be an occasion for making certain presumption against the plff. if the circumstances of the case so indicate. The lower Court has not at all indicated in its judgment that it was necessary for the appellate Court to require any witness to be examined to enable it to pronounce judgment or that there was any substantial cause. The order of the Court below was, therefore, contrary to the express provision of law.

(3) The revision is, accordingly, accepted, the order of the lower Court is set aside, & the case is remanded to that Court for decision of the appeal on merits. Costs of this Court will abide the result of the appeal in the lower Court.

K.S. *Revision allowed.*

A I. R. (39) 1952 Rajasthan 36 *[C. N. 18.]*

(JAIPUR BENCH)

WANCHOO C. J. and DAVE J.

Nathulal — Applicant v. *Collector, Sawai Jaipur—Opposite Party.*

Misc. Appln. No. 6 of 1950, D/- 8-1-1951.

Houses and Rents — Jaipur Rent Control Order, 1947, Para 12— Appellate authority if can review its decision — Civil P C. (1908), S. 141.

The only statutory right given to a party aggrieved by the order of the Rent Controller is that of appeal. The order of the appellate authority, whatever it may be, is final and there is no provision laid down for presenting a review application. [Para 4]

Rent-Controller and the appellate authority under the Jaipur Rent Control Order are quasi-judicial authorities with "some trappings of a Court" but they are not Courts of civil jurisdiction in the strict sense of the term. Therefore the power of review exercised by a Court under S. 114 and O. 47, R. 1 read with S. 141, Civil P. C., cannot be exercised by an appellate authority under S. 12. [Para 6]

It is a well-settled principle of law that when a matter is finally disposed of by a judicial or quas-judicial authority, that authority in the absence of any statutory provision becomes *functus officio* and is left with no authority to rehear and give a fresh decision unless such authority is given to it by law. And further, apart from correcting clerical mistakes or errors arising from an accidental slip or omission, there is no inherent power vested in the appellate authority exercising its appellate jurisdiction under S. 12 to review a final decision given on merits *inter partes*. 40 Cal. 552 (PC.); A. I. R. (6) 1919 Mad. 244; A. I. R. (23) 1936 Mad. 531 & A. I. R. (28) 1941 Mad. 272, *Rel. on.* [Paras 11, 14]

Anno. Civil P. C., S. 141, N. 6.

H. P. Gupta—for Applicant; D. M. Bhandari—for Opposite Party.

Cases referred to.—

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('13) 35 All. 331: (40 Ind App. 151 P. C.) [Prs. 7, 8]
('13) 18 Ind. Cas 956: (40 Cal. 552 P. C.) [Pr. 13]
('82) 5 All. 163: (1882 All. W. N. 202 F. B.) [Prs. 7, 8]
('15) A. I. R. (2) 1915 All. 172 (2):(37 All. 380) [Prs. 7, 9]
('34) A. I. R. (21) 1934 All. 287: (148 Ind. Cas. 614.) [Prs. 7, 9]
('30) A. I. R. (17) 1930 Bom. 294: (55 Bom. 368) [Prs. 7, 9]
('19) A. I. R. (6) 1919 Mad. 244: (53 Ind Cas 56) [Pr. 13]
('36) A. I. R. (23) 1936 Mad. 531 : (59 Mad. 825 F. B.) [Pr. 13]
('41) A. I. R. (28) 1941 Mad. 272: (1940 2 Mad. L. Jour. 780). [Pr. 13]
('24) A. I. R. (11) 1924 Pat. 673: (3 Pat. 930). [Prs. 7, 9]
(1931) A. C. 275: (100 L. J. P. C. 55). [Pr 6]

Dave J. — This is a miscellaneous application filed by one Nathulal against an order of the Collector, Sawai Jaipur, Shri Sanwaldan Ujjwal, dated 27-2-1950. It was presented under S. 45, Specific Relief Act, and S. 28, Rajasthan High Court Ordinance of 1949, but what the petitioner really seeks is a writ of prohibition against the said Collector.

[2] The facts giving rise to this petition are that the applicant leased out his building situated outside Sanganer Gate in the city of Jaipur to one Gurudutt Singh partly in 1947 and partly in 1948 on a total rent of Rs. 250 per month. On 19-5-1948 the tenant Gurudutt Singh filed a petition before the Rent Controller, Jaipur, for determining a standard rent for the said premises on the ground that the contractual rent was very excessive. The Rent Controller thereupon fixed Rs. 100 as the standard rent. The applicant, landlord, preferred an appeal against that order to the then Deputy Commissioner of Jaipur, Shri Ram Kanwar Sharma, who was the appellate authority under the Rent Control Order. He reversed the decision of the Rent Controller on 16-7-1949 on the ground that the tenant was running a Hotel in the said building and that the Jaipur Rent Control Order of 1947 did not apply in the case of a hotel. Against this decision, the tenant filed an application for review before the same Officer, Shri Ram Kanwar Sharma, but he was transferred to another place before he could decide it. The matter, therefore came before the present Collector, Shri Sanwal Dan Ujjwal. An objection was raised before him by the landlord to the effect that the decision of his predecessor was final and there being no provision for review in the Jaipur Rent Control Order, the application was not maintainable. This application having been dismissed by the Collector, the petitioner has come to this Court praying for a writ that the said authority be prohibited from exercising a jurisdiction not vested in it by law.

[3] It is not disputed by any of the parties before us that the Rent Controller and the Collector appointed to hear appeals against the decisions of the Rent Controller under the Jaipur Rent Control Order 1947, are quasi-judicial authorities amenable to a writ of this Court and, therefore, the only point which calls forth for our determination is whether the Collector is exceeding his jurisdiction in proceeding to make a review of the final decision of his predecessor.

[4] The provisions of the Jaipur Rent Control Order 1947, which are relevant for our purpose, are as follows:

"2 (a) 'Controller' means the person appointed by the Government from time to time to be the Controller for the purposes of this Order."

"6 (1) If any dispute arises regarding the standard rent payable in respect of any premises, it shall be determined by the Controller."

"12 (1) Any person aggrieved by an order of the Controller may within fifteen days from the date of such order, appeal therefrom to such authority as the Government may from time to time appoint in this behalf.

(2) The appellate authority shall then send for the record of the case from the Controller, and after perusing such record and making such further enquiry as it thinks fit either itself or through the Controller, shall decide the appeal.

(3) The decision of the appellate authority and subject only to such decision, an order of the Controller shall be final."

It is clear from the language of S. 12 (3) that the decision of the appellate authority and subject to his decision an order of the Controller is final according to law. The only statutory right given to a party aggrieved by the order of the Rent Controller is that of appeal. The order of the

appellate authority, whatever it may be, is final and there is no provision laid down for presenting a review application.

[5] It is contended by Mr. Bhandari advocate for the opposite party that although the Jaipur Rent Control Order makes no provision for review applications, the Rent Controller and the appellate authority can exercise the powers under S. 114 and O. 47 R. 1, Civil P. C., by virtue of S. 141, thereof. Section 141, C. P. C. runs as follows:

"The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction."

The Civil Procedure Code was enacted to consolidate and amend the laws relating to the procedure of the Courts of civil judicature and the wordings of the above section also make it clear that the procedure provided in this Code in regard to suits is applicable to proceedings in a Court of civil jurisdiction. It is urged by the learned advocate for the opposite party that the Collector as an appellate authority under the Rent Control Order is a Court of civil jurisdiction. In his order, which is the subject of discussion in this application, the Collector has also remarked that there being no provision for review in the Rent Control Order, the provisions of the basic law i. e., Civil Procedure Code may be applied in such cases, as also expressed by the Law Secretary on a reference by this office. The learned advocate for the opposite party has not produced in this Court the letter of the Law Secretary referred to in the above order. This Court is, therefore, not aware as to what was the basis on which such an opinion was expressed by that Officer. This argument, however, does not seem to be tenable.

[6] It was observed by their Lordships in *Shell Co. of Australia* vs. *Federal Commissioner of Taxation* 1931 A. C. 275 that

"the authorities are clear to show that there are tribunals with many of the trappings of a Court which, nevertheless are not Courts in the strict sense of exercising judicial power."

The Rent Controller and the appellate authority under the Jaipur Rent Control Order are certainly quasi-judicial authorities with "some trappings of a Court" but they are certainly not Courts of civil jurisdiction in the strict sense of the term. This is apparent from the scheme of this very order. Section 11 of this Order lays down that:

"so long as this Order is in force, no Court shall have jurisdiction to entertain, try and decide any suit for ejectment or possession arising out of an agreement of existing or intended tenancy, unless the plaintiff produces a valid certificate under clause 8 from the Controller in that behalf."

This leaves no doubt that a clear distinction in this law was made between a Rent Controller and the appellate authority on the one hand and a Court on the other, and to say therefore that the appellate authority under the said order was a Court of civil jurisdiction, is not correct.

[7] It is further contended by the advocate for the opposite party that there being an apparent error on the face of the record in the order passed by Shri Ram Kanwar Sharma, the Collector had an inherent jurisdiction to correct it for the ends of justice and to prevent the abuse of the process. In support of his argument he has referred to *Narsingh Das* v. *Mangal Dubey*, 5 ALL. 163, *Debi Bakhsh* v. *Habibshah*, 35 ALL. 331, *Parma* v. *Nek Ram*, A. I. R. (2) 1915 ALL. 172 (2), *Lachhman Rai* v. *Jang Bahadur Rai*, A. I. R. (21) 1934 ALL. 287, *Manilal* v. *Durga Prasad*, A. I. R. (11) 1924 Pat. 673, *Yusuf I. A. Lalji* v. *Abdullabhoy Lalji (No. 1)*, A. I. R. (17) 1930 Bom. 294. We have examined these rulings and we think that they do not help him.

[8] In the first case viz., 5 ALL. 163 it was observed by Mahmood J. p. 172 that:

"the Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law."

In the first place this observation appears in a dissenting judgment of only one of the Judges of a Full Bench in which three other learned Judges had taken a contrary view on the main question involved in that case. It was a second appeal from a decree of a District Judge of Benares affirming a decree of the Munsif of Benares; who had rejected the plaint on the ground of multifariousness. It was held that the Munsif had rightly rejected the plaint. It would thus appear that even the said remarks of Justice Mahmood were made in connection with the procedural matters in a Court and not regarding a substantive right of the party to present an appeal or an application for review. It has, therefore, no bearing on the present case. In the second case 35 ALL. 331 it was held by their Lordships of the Privy Council that

"apart from S. 151, Civil P. C. any Court might rightly have considered itself to possess inherent power to rectify the mistake inadvertently made."

But these observations were made in a case where the plaintiff's suit was dismissed for default at a time when the plaintiff was in fact dead on the date of the order. On the mistake being subsequently brought to its notice, the first Court had set aside its order, but the appellate Court had reversed it on the ground that it had no such authority. This appellate order was reversed by their Lordships and that of the first Court was maintained. It is clear that the first Court had in this case not given any decision on the merits and a mere question of procedure was involved.

[9] In the third case, A. I. R. (2) 1915 ALL. 172 (2), the District Judge of Agra had granted Letters of administration on the mere request of an applicant named Parma. When another person Nekram appeared in the Court the same day and put forward his claim, the first ex parte

order was cancelled by him. On an appeal by Parma, it was held by their Lordships that Parma having obtained an order granting Letters of Administration that order ought not to have been cancelled without giving him notice. That order was set aside and the case was remanded for trial according to law. It was observed by one of the learned Judges that it would be open to the District Judge when the matter goes back to him to consider whether under the provisions of S. 114 or 151, Civil P. C., he could or ought to reconsider his ex parte order in favour of Parma apart altogether from the provisions of S. 50, Probate and Administration Act itself. It is clear that the learned Judges had only left the matter to be reconsidered by the District Judge and, therefore, it does not give a clear pronouncement of law. In the fourth case, A. I. R. (21) 1934 ALL. 287 it was held that

"where a Court passes an order under a misapprehension of facts, it is open to it under its inherent power to set aside such order when true facts are brought to light."

In that case, the Munsif had first referred the matter to arbitration but since the award was not filed on the date fixed and nobody appeared in the Court an order was passed superseding the arbitration and another date was fixed for the trial of the suit. When it was brought to the notice of that Court that the arbitrators had already given their award, the previous order superseding the arbitration was set aside and a decree was ordered to be framed in the terms of the award. It was on an objection being raised by the opposite party that the above observation was made by the learned Judges. Thus it was again a question of procedure involved in this case.

[10] In the fifth case, A. I. R. (11) 1924 Pat. 673 it was observed that apart from O. 47, R. 1, the Court has inherent power under the new S. 151, Civil P. C. of 1908 to make such orders as may be necessary for the ends of justice and thus to review its wrong orders or decisions passed previously. This observation was also made in connection with an interlocutory order of the trial Court about the payment of court-fees and it has no application to the present case. In the last case A. I. R. (17) 1930 Bom. 294 it was held by a Single Judge of that Court that an interlocutory order made in Chambers can be reviewed by the Court under S. 151, and ought to be reviewed if the ends of justice require it; even though the application for such purpose does not expressly fall within the language of O. 47. This observation was made in connection with a particular procedure of that Court and it again does not help the opposite party.

[11] In the matter before us, there was not a mere procedural question before the Collector. His predecessor had given his decision after hearing both the parties and according to S. 12, Jaipur Rent Control Order, it was final. The present appellate authority thinks that an interpretation of law made by his predecessor was not correct and that he had also committed a mistake in holding that the building was used as a hotel, whereas it was used as a restaurant. It is not within the scope of the present application for us to decide whether the finding of the previous appellate authority on law and facts was correct or not. We have only to see whether the present appellate authority has jurisdiction to reverse that order even if it is found to be incorrect. It is not denied that the previous authority had the jurisdiction to decide the matter and whether its decision was right or wrong it was final so far as the Jaipur Rent Control Order was concerned. It is a well-settled principle of law that when a matter is finally disposed of by a judicial or quasi-judicial authority, that authority in the absence of any statutory provision becomes functus officio and is left with no authority to rehear and give a fresh decision unless such authority is given to it by law.

[12] The jurisdiction to reconsider the decision continues only so long as the decision is not perfected, but once it is signed and pronounced there is no power left in that authority to make any material additions or alterations to it. The right of presenting an application for a review envisaged by S. 114 and O. 47, R. 1, Civil P. C. is a substantive right given to a party by Statute and it is only within the limits prescribed by these provisions that a Court can exercise its jurisdiction and alter its order, if necessary. A review, as defined in the Law Lexicon compiled by Ramanatha Iyer.

"is a proceeding which exists by virtue of statute. It is in its nature a new trial of the issue previously tried between the parties, the cause of action being brought into Court again for trial by a new petition. The proceeding in some respects resembles a writ of error, and also a new trial."

[13] In the case of *Baijnath Ram* v. *Nandkumar*, 18 I. C. 956 (P. C.) certain plots of land were sold by auction for arrears of revenue. The Commissioner on appeal set aside the sale but on review he annulled his order and upheld the sale. The Subordinate Judge's Court and the High Court both held that the Commissioner, having once passed an order which was final, had no power to review it. On an appeal to the Privy Council also it was held by their Lordships that there was no inherent power to review. On a similar question being raised in a case under Religious Endowments Act before a Division Bench of the Madras High Court, it was observed by the learned Judge Seshagiri Aiyar in *Anantha Raju* v. *Appu Hegade*, A. I. R. (6) 1919 Mad. 244 that

"it was next argued that S. 141, Civil P. C. is indicative of a general enunciation of principle by the

Legislature that to all the judicial proceedings, the Civil Procedure Code is applicable. The Section only empowers the Judge to regulate judicial trials by rules as to summoning of witnesses, etc., which are found in the Code and not that the Code is to be applied in its entirety to such proceedings including power of appeal and of review. The last argument related to the inherent power of a judicial officer to review his own judgment. It is settled law that a case is not open to appeal unless the statute gives such a right. The power to review must also be given by the statute. Prima facie a party who has obtained a decision is entitled to keep it unassailed, unless the legislature has indicated the mode by which it can be set aside. A review is practically the hearing of an appeal by the same officer who decided the case. There is at least as good reason for saying that another tribunal should not hear an appeal from the trial Court unless such a power is given to it by statute".

This view was based on several English and Indian cases referred to in the judgment. A similar view was expressed in a Full Bench case of that Court reported in *Ramachandra* v. *Beero Pollai*, A. I. R. (23) 1936 Mad. 531 and also in a later case reported in *M. J. Kutinha* v. *Mrs. Nathal Pinto*, A. I. R. (28) 1941 Mad. 272.

[14] Thus, it is clear that apart from correcting clerical mistakes or errors arising from an accidental slip or omission, there is no inherent power to review a final decision given on merits inter partes. By his order dated 27-2-1950 the Collector does not mean to correct merely a clerical mistake or slip, but he thinks that he has a jurisdiction to reverse the finding of his predecessor after hearing the parties. In holding this view of law, he is mistaken and since he wants to exercise a jurisdiction, which is not vested in him by law, this application must be allowed. Let a writ of prohibition, therefore, issue against the Collector, Jaipur District, prohibiting him from proceeding to review the decision of his predecessor. The applicant will receive his costs from the opposite party.

[15] **Wanchoo C. J.**—I agree and have nothing to add.

V.S.B. *Application allowed.*

A. I. R. (39) 1952 Rajasthan 39 *[C. N. 19.]*

(JODHPUR BENCH)

WANCHOO C. J. AND BAPNA J.

Hari Ram and another — Applicants v. *Mt. Nathi and another—Opposite Party.*

Civil Misc. (Review) Case No. 39 of 1950, D/-26-7-1951.

(a) Civil P. C. (1908) O. 47, R. 1 — "Any other sufficient reason" — Failure to refer to certain documents in judgment.

"Any other sufficient reason" in O. 47, R. 1 should be interpreted as meaning a reason sufficient on grounds at least analogous to those specified immediately previously. The fact, therefore, that certain documents are not referred to in a judgment is, no reason for granting a review, and it would be very difficult to draw a distinction between important documentary evidence and documentary evidence which is not important : A.I.R. (9) 1922 P C. 112; A. I. R. (11) 1924 Pat. 258 (2) ; A. I. R. (20) 1933 Mad. 290 and A. I. R. (26) 1939 All. 619, *Rel. on* ; A.I.R. (19) 1932 Nag. 177, *Disting.*; 1 Mad. 396, *held no longer good law.* [Para 9]

Anno. C. P. C., O. 47, R. 1, N. 16, 16a, 16b.

(b) Civil P. C. (1908), O. 47, R. 1 – "Error apparent on the face of the record" – Appellate Court reversing finding of trial Court without deciding incorrectness thereof.

A brought a suit for redemption of a house against *B* and *C* *B* was the original mortgagee while *C* was the person in possession of the house sought to be redeemed. The defence was that the house had been sold to *B* and thereafter *B* had transferred the house to *C*. As such *C* claimed to be the owner of the house. The trial Court found that *A* had not sold the house to *B*. It also found that *A* had paid interest after the alleged sale. Eventually it decreed the suit. On appeal, the Court came to the conclusion that the sale in favour of *B* was proved. Therefore the appeal was allowed and the suit dismissed. No finding was given on the issue whether interest had been paid. In review :

Held that there was something like an error apparent on the face of the record inasmuch as it had been held by the appellate Court that there was a sale in favour of *B* without the appellate Court saying anything about the finding of the trial Court as to payment of interest. The review must, therefore, be granted : A.I.R. (17) 1930 Lah. 37, *Rel. on.* [Para 12]

Anno. C. P. C., O. 47, R. 1, N. 15.

Mulli Manohar — for Applicants ; *Radha Mohan — for Opposite Party.*

Cases referred to : —

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('22) 49 Ind. App. 144 : (A. I. R. (9) 1922 P. C. 112). [Pr. 9]

('39) A. I. R. (26) 1939 All 619 : (186 Ind. Cas. 865). [Pr. 9]

('30) A. I. R. (17) 1930 Lah. 37 : (11 Lah. 158). [Pr. 11]

('76-78) 1 Mad. 396. [Prs. 7, 9]

('33) A. I. R. (20) 1933 Mad. 290 : (141 Ind. Cas. 381). [Pr. 9]

('32) A. I. R. (19) 1932 Nag. 177 : (28 Nag. L. R. 221). [Pr. 8]

('24) A. I. R. (11) 1924 Pat. 258 (2) : (2 Pat. 765). [Pr. 9]

Wanchoo C. J. — This is an application for review of a judgment of a Division Bench of this Court. The facts which have given rise to this application, are these. A suit had been brought by Hari Ram and his son, Sukanraj, for redemption of a mortgage, against Mohan Lal and Mt. Nathi. Mohan Lal was the original mortgagee, while Mt. Nathi was the person in possession of the house to be redeemed at the time the suit was filed. The case of the applicants was that Mt. Nathi was merely a sub-mortgagee, and they were, therefore, entitled to possession from her. Mt. Nathi's case, on the other hand, was that the house had been sold orally by Hari Ram to the original mortgagee, Mohan Lal, and thereafter Mohan Lal had mortgaged the house to her, and later made a sale deed in her favour. As such, she claimed to be the owner of the house.

[2] The trial Court framed as many as ten issues, of which two, namely, issues Nos. 1 and 6, are relevant for present purposes. The first issue was :

"Whether the plaintiff Hariram as manager of the joint Hindu family sold the house in dispute to the defendant No. 1 for the benefit of the family in *Sawan Samwat* 1992?"

The sixth issue was "Whether the plaintiffs paid interest up to the end of Samwat 1995?" The trial Court found that Hari Ram had not sold the house to Mohan Lal. It also found that the plaintiffs had paid interest up to the end of Samwat 1995. Eventually it decreed the suit.

[3] There was an appeal to this Court by Mst. Nathi, which came up for hearing before a Bench consisting of Hon'ble Gupta and Trilochan Datt JJ. The judgment of the Bench, after reciting the facts, mentions the findings of the trial Court on the two issues given above, namely, that there was no sale in favour of Mohan Lal, and that interest had been paid up to Samwat 1995. The Bench then went on to consider the first issue, and came to the conclusion that the sale in favour of Mohan Lal had been proved. Thereupon, the appeal was allowed, and the suit was dismissed. No finding was given on the issue, whether interest had been paid up to Samwat 1995, as the learned Judges did not think it necessary to go into the other points raised after their decision on the question of sale to Mohan Lal.

[4] Thereafter the present application for review of the judgment was made, and the learned Judges, who decided the appeal, issued notice. As the two learned Judges are no longer Judges of this Court, the present application has come up before us for decision as to whether a review should be granted.

[5] The contention on behalf of learned counsel for the applicants is three-fold. He urges that while deciding issue No. 1, the learned Judges did not refer to certain material documents, which were on the record, and had been relied upon by the trial Court in deciding this issue. These documents are the mortgage deed by Mohan Lal in favour of Mst. Nathi of Asar Badi 12, Samwat 1992, and a receipt, Ex. P. 1, from Mohan Lal to the applicants showing payment of interest upto Samwat 1995. Further, it is urged that though the learned Judges decided that Hari Ram had made a sale in favour of Mohan Lal, they did not decide the other parts of the first issue, namely, whether Hari Ram was a member of the joint Hindu family consisting of himself and his son Sukamraj, and had sold the house for the benefit of the family as its manager. Lastly, it has been urged that issue No. 6 was very intimately connected with issue No. 1 inasmuch as it was impossible that Hari Ram should have continued paying interest up to Samwat 1995, if he had sold the house to Mohan Lal in Samwat 1992 and the learned Judges should have decided that issue also along with issue No. 1, and that the position now is that though the finding of the trial Court on issue No. 1 as to sale has been set aside the finding as to payment of interest up to Samwat 1995 has not been set aside, and this leads to illogicality.

[6] Learned counsel for the opposite party, however, contends that what the applicants want is a mere re-hearing of the appeal, and that this should not be allowed, as there are no grounds, as provided in Order 47, Rule 1 of the Code of Civil Procedure, which entitle the applicant to a review. In particular, he urges that the mere fact that certain documents were not referred to in the judgment or that certain parts of a certain issue were not specifically decided would not entitle the applicants to a re-hearing, as this does not amount to an error apparent on the face of the record, which is the ground relied upon by the applicants.

[7] So far as the first two contentions on behalf of the applicants are concerned, we are of opinion that they cannot prevail. Reliance was placed in this connection on *Mahadeva Rayar* v. *Sappani*, 1 Mad. 396. That was a case where a Munsif had overlooked an important document, and the suit was dismissed. Thereafter, there was a review application on the ground that a certain document, which had an important bearing on the case, had been overlooked, and the Munsiff granted the review. On appeal, the Subordinate Judge held that the Munsif had acted *ultra vires* in granting the review. There was a second appeal to the High Court, which was allowed, and it was held that

"Where a Judge has, in deciding a case, omitted to consider the effect of important documentary evidence filed with the plaint which was not taken issue upon, and which materially affects the merits of the case, he is competent under Ss. 376 to 378 of Act VIII [8] of 1859 to grant a review and rehear the case."

[8] The next case relied upon by learned counsel is *Mt. Rukhmabai* v. *Ganpatrao*, A. I. R. (19) 1932 Nag. 177. In that case the trial Court passed a final decree for foreclosure. Immediately after he had passed the order, he said, by another order, that he had omitted to notice certain facts, though they were on the record. He, therefore, directed the parties to appear before him again. Thereafter, he allowed a review of his previous order, and set it aside. There was an appeal to the District Judge, who allowed it, and held that the case did not disclose any reason for review under O. 47, R. 1. In second appeal, the Judicial Commissioner's Court, Nagpur, held that :

"If an omission to notice one particular provision of law is a satisfactory ground for entertaining an application for review much more so is the omission to consider important facts which are on the record and which the Judge himself immediately on passing his order realized that he had overlooked, and which in his opinion would have led him to pass an order materially different. Both are cases of an omission and not cases of misapplication or of taking a wrong view of the law on the fully considered facts of the case".

[9] So far as *Mahadeva Rayar's case*, (1 Mad. 396), is concerned, we must respectfully say that it should no longer be considered good law. The basis for decision in that case appears in the last paragraph, which reads as follows :

"It appears to us that within the provision 'for good and sufficient reason' in S. 376, and within the provisions 'or otherwise necessary for the ends of justice' in S. 378, the Munsiff was not only justified, but was bound to admit

the review, feeling, as he did, that it was necessary to ascertain whether his first decision was correct or not".

We may point out that the words "or otherwise necessary for the ends of justice" do not now appear in O. 47, R. 1, and further, that the words "for good and sufficient reason" have been substituted by the words "any other sufficient reason", and it is now well settled, after the decision of their Lordships of the Privy Council in *Chajju Ram* v. *Neki*, 49 Ind. App. 144, that these words "any other sufficient reason" should be interpreted as meaning a reason sufficient on grounds at least analogous to those specified immediately previously. The fact, therefore, that certain documents are not referred to in a judgment is, in our opinion, no reason for granting a review, and it would be very difficult to draw a distinction between important documentary evidence and documentary evidence which is not important. The recent decisions of various High Courts are practically all one way, and it has been laid down that the mere fact that a Judge has not in terms referred to certain evidence in favour of one party or the other is not a sufficient reason for granting a review. Reference in this connection may be made to *Raghu Singh* v. *Krishna Dayal*, A. I. R. (11) 1924 Pat. 258 (2), *Mottai Goundan* v. *Ramaswami Ayyangar*, A. I. R. (20) 1933 Mad. 290 and *Ranbir Prasad* v. *Sheobaran Singh*, A. I. R. (26) 1939 ALL. 619.

[10] So far as the Nagpur case is concerned, it has, in our opinion, no application to the circumstances of the present case, for, in that case, there was obviously an error apparent on the face of the record, inasmuch as certain undisputed facts, which were on the record, had not been taken into consideration. The applicant, therefore, cannot claim review on the ground that two documents were not referred to by the Bench, or that all the parts of issue No. 1 were not decided.

[11] In support of the third point, learned counsel for the applicants relies on *Jai Narain Lachmi Narain* v. *G. I. P. Rly. Co.*, A. I. R. (17) 1930 Lah. 37. That was a case where suit had been filed against a railway company for recovery of money, as one bale of cloth sent from Sholapur to Delhi was found missing. The railway company put up two defences, (i) that there had been no wilful neglect on their part or on the part of their servants, and (2) that the missing bale had been stolen from the running train. The trial Court held that no wilful neglect on the part of the railway company or its servants had been proved, and further that even if there had been any wilful neglect the circumstances pointed to theft from the running train, and the railway was not, therefore liable under the risk note. The trial Court also negatived theft by railway servants. The suit was, therefore, dismissed. On appeal, the Additional District Judge agreed with the finding of the trial Court that there had been no theft by any railway servant, but he was of opinion that there had been wilful neglect of the railway. On the question whether there had been theft or robbery from the running train, he gave no clear finding in his original judgment. Eventually, he accepted the appeal and decreed the suit. Then there was a review application on the ground that the Judge had not decided the question whether there had been theft from the running train, and that the decision of this question was necessary before a decree could be granted against the railway. The review was granted, and the decree was eventually set aside. The matter was then taken in appeal to the Lahore High Court, where it was urged that these facts did not justify a review, as they did not come within the grounds specified in O. 47, R. 1. It was held by the High Court that inasmuch as the District Judge had not decided the question of theft from the running train, and even then granted a decree merely on the ground of wilful neglect, there had been a mistake or error apparent on the face of the record, or, at any rate, a sufficient reason for review analogous to such an error in that the decree of the trial Court had been reversed without that finding of the trial Court being displaced.

[12] Learned counsel for the applicants argues that his case is exactly on all fours with the facts of this case. He urges that there were two issues before the trial Court viz., (1) whether there had been a sale by Hari Ram in favour of Mohan Lal in *Samwat* 1992, and (2) whether Hari Ram had paid interest up to *Samwat* 1995, and both these issues had been decided in the applicants' favour by the trial Court. The Division Bench upset the finding of the trial Court in the matter of sale, but said nothing in the matter of interest. It is urged that it stands to reason that Hari Ram would not have paid interest up to *Samwat* 1995, if the sale had been made in *Samwat* 1992, and that there is an error apparent on the face of the record, or, at any rate, a sufficient reason for review analogous to such an error, inasmuch as the decree of the trial Court had been reversed without the finding of the trial Court as to interest having been displaced. We are of opinion that this contention of learned counsel for the applicants is correct, and there is obviously something like an error apparent on the face of the record, inasmuch as it has been held that there was a sale in 1992 *Samwat* without this Court saying anything about the finding as to payment of interest. We, therefore, grant the review. The appeal will now be fixed in due course for hearing on the merits.

V.B.B. *Application allowed.*

A. I. R. (39) 1952 Rajasthan 42 *[C. N. 20.]*

(JODHPUR BENCH)

WANCHOO, C. J., AND BAPNA, J.

Amar Narain Mathur-Petitioner v. The State of Rajasthan and others.

Criminal Revn. No. 90 of 1951, D/- 23-4-1951.

† *(a) Criminal P. C. (1898), Ss. 494 and 439 — Withdrawal of prosecution — Discharge of accused — Right of private party to apply in revision.*

In criminal cases it is the State which is in control of the proceedings, particularly where the prosecution is launched at the intsance of the State. In cases, therefore, in which the Public Prosecutor appears it is for him to decide whether he would continue with the prosecution or withdraw from it. If he decides to withdraw, he has the power to apply to the Court under S. 494, Criminal P.C., for giving consent to his withdrawal. This power cannot be subject to the wishes of a third person even though he might be interested directly in the case. (Para 4)

Consequently, where the Court consents to the withdrawal of the prosecution and discharges the accused a private party has no 'locus standi' to apply in revision against the order. A I R (7) 1920 Pat 362 and A I R (11) 1924 Pat 283, Rel. on. (Para 6)

Anno: Cr. P. C., S. 494. N. 2, 3, 10.

(b) Criminal P. C. (1898), S. 494 — Appointment of new Public Prosecutor for withdrawal of case — Legality.

The appointment of a new Public Prosecutor for the purpose of withdrawal of cases only is unusual; there is nothing illegal in this procedure. (Para 8)

(c) Criminal P. C. (1898), Ss. 494 and 333 — Distinction — Court if can demand reasons for withdrawal under S. 494.

S. 494 must be contrasted with S. 333, Cr. P. C. Under S. 333, there is no question of the consent of the Court. The power given by that section to the Advocate-General is analogous to the power of 'nolle prosequi' in the English law, which is exercised by the Attorney-General.

The act of the Court in giving consent under S. 494 is a judicial act, and the Court is, therefore, entitled to ask from the Public Prosecutor the reasons for his withdrawal from the case in order to enable it to give its consent after a judicial consideration of the circumstances. (Para 13)

Anno: Cr. P. C., S. 494, N. 1, Pt. 4, N. 4.

† *(d) Criminal P. C. (1898), S. 494 — Grounds for withdrawal — Reasons of State — Public Prosecutor if bound to disclose reasons.*

Under S. 494, Cr. P. C., it is possible for the Public Prosecutor to withdraw from a case for reasons which are extraneous to the record, and which may, therefore, include reasons of State. A I R (19) 1932 Cal 699; AIR (23) 1936 Cal 356 (FB); AIR (36) 1949 Pat 233 (FB), Rel. on.

Even where the Public Prosecutor intimates to the Court that he wants to withdraw from the prosecution for reasons of State, it is the duty of the Court to enquire what those reasons are before it gives consent. Ordinarily, the Public Prosecutor is bound to give reasons but sometimes reasons of State may be of a very confidential nature, and it may not be possible for the Public Prosecutor to disclose those reasons. In such cases it is the duty of the Public Prosecutor to give an affidavit of some responsible officer of the State to the effect that the reasons are of a confidential nature, and it would not be in the public interest to disclose them. Where such an affidavit is given, it will be for the Court to decide whether, considering the nature of the case, it should give its consent without further disclosure of reasons. (Paras 14 and 15)

Anno: Cr. P. C., S. 494, N. 3 & 4.

(e) Criminal P. C. (1898), S. 494 — Record of reasons — If necessary.

A judge is not bound to give his reasons when consenting to the withdrawal, for S. 494, does not require the Judge to record the reasons in writing, though it is desirable that the Judge should give the reasons for recording his consent, for the order is a judicial order subject to revision by the High Court. A I R (35) 1948 Mad 422, Rel. on. (Para 15)

Anno: Cr. P. C., S. 494, N. 5.

(f) Criminal P. C. (1898), S. 494 — Revision.

Where in the trial before a special Judge under the Rajasthan Special Criminal Courts Ordinance (44 of 1949) the Special Judge allows the Public Prosecutor to withdraw from the case for reasons of State without even enquiring as to what those reasons are the order is no doubt open to objection but if in the circumstances of a case the High Court thinks that it is not necessary to call for amplification of reasons for withdrawal or to have an affidavit to the effect that the reasons cannot be disclosed, it will refuse to interfere with the order in revision. (Paras 15 and 16)

Anno: Cr. P. C., S. 494, N. 10.

S. P. Sinha, Assisted by Narain Andley and Mohd. Raza, for Petitioner; G. S. Pathak with M. R. Purohit, Govt. Advocate; for the State; C. L. Agarwal (for Nos. 2, 3 and 4), Murli Manohar Vyas (for No. 4.), Bapu Bhai Desai (for No. 5) for non-Petitioners. Non-Petitioners Nos. 7 and 8 in person.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('33) A I R (20) 1933 All 678: (34 Cri L Jour 1115 FB) (Pr 7)
('31) A I R (18) 1931 Cal 607: (33 Cri L Jour 3) (Pr 8)
('32) A I R (19) 1932 Cal 699: (34 Cri L Jour 433) ((Pr 14)
('36) A I R (23) 1936 Cal 356: (37 Cri L Jour 758 FB) (Pr 14)
('09) 4 Ind Cas 1126: (5 Mad L Tim 216) (Pr 15)
('48) A I R (35) 1948 Mad 422: (49 Cri L J 540) (Pr 15)
('20) A I R (7) 1920 Pat 362: (21 Cri L Jour 641) (Pr 4)
('24) A I R (11) 1924 Pat 283: (25 Cri L Jour 446) (Pr 5)
('49) A I R (36) 1949 Pat 233: (50 Cri L Jour 488 FB) (Prs 13, 14)
('49) A I R (36) 1949 Pat 222: (50 Cri L Jour 474 FB) (Pr 13)
('49) A I R (36) 1949 Pat 449: (50 Cri L Jour 992) (Pr 13)

WANCHOO, C. J: This is a revision by Shri Amar Narain Mathur against the order of Shri P. D. Pande, Special Judge, dated 19-1-1951, by which he allowed the Public Prosecutor to withdraw from the prosecution of five criminal cases, which were pending in that Court. Consequent upon such withdrawal, the accused in those five cases have been discharged. The contention of the applicant is that the Special Judge did not apply his mind to the facts of the cases when he consented to the withdrawal of the Public Prosecutor, & therefore, this Court should interfere & set aside the order of the Special Judge.

(2) The opposite parties in this revision are the State of Rajasthan & seven other persons. A brief history of the facts, which have led to this revision, will be useful in understanding the case. His Highness the Rajpramukh promulgated the Rajas-

than Special Criminal Courts Ordinance (No. XLIV of 1949) on 8-12-1949. Under that Ordinance a Special Criminal Court was created on 3-1-1950, for the whole of Rajasthan, & Shri Pande was appointed Judge of this Court. On 5-1-1950, five cases were allotted for trial to this Court under S. 5 of the Ordinance. The first of these cases was against Shri Jai Narain Vyas, who was, once upon a time, Chief Minister of the former Jodhpur State, & his Personal Assistant, Shri Shyam Krishna Vyas. This is now case No. 8 of 1950, of the Special Judge's Court. The second case was against Shri Mathura Das Mathur, former Education Minister of the former Jodhpur State, & Shri M. L. Sanghi. This is now case No. 6 of 1950. The third case was against Shri Dwarka Das Purohit, former Finance Minister of the former Jodhpur State, & Shri M. L. Sanghi. This is now case No. 7 of 1950. The fourth case was against Shri Mathura Das Mathur & his Personal Assistant, Shri Kapur Chand Mangal, & it is No. 9 of 1950 now. The last case was against Shri Dwarka Das Purohit & his Personal Assistant, Shri Mukand Lal, & is No. 2 of 1950 now. These cases were under various sections of the Penal Code, & some evidence was taken in one of them. The accused, however, took the objection that the Rajasthan Special Criminal Courts Ordinance was 'ultra vires' after the coming into force of the Constitution of India. This objection was disallowed, & they had gone to the Supreme Court of India, & the proceedings before the Special Judge were stayed. In the meantime, the State of Rajasthan decided to withdraw the prosecutions & consequently an application was made on 19-1-1951, under S. 494, Criminal P.C., by Shri M. R. Purohit, who had been appointed Public Prosecutor for these cases on 18-1-1951. The petition in the Supreme Court had been withdrawn on 16-1-1951, & the stay order had been vacated. The applications for withdrawal in all the five cases were in the same terms, & the Special Judge was requested to consent to the withdrawal of the Public Prosecutor from these cases "on the ground of inexpediency of prosecution for reasons of State." The Special Judge gave his consent to the withdrawal on 19-1-1951, & thereafter discharged the seven opposite parties other than the State of Rajasthan.

(3) Mr. S. P. Sinha, learned counsel for Shri Amar Narain, began to argue the petition as if Shri Amar Narain was a party to the cases, whereupon a preliminary objection was raised by Mr. Pathak on behalf of the State of Rajasthan & his contention was that the applicant had no 'locus standi', & this Court should not, therefore, hear his counsel. The argument was that the applicant, Shri Amar Narain, was a complete stranger to the proceedings, & had, therefore, no right to apply to this Court in revision. It was further urged that in a criminal case started at the instance of the State a stranger had no right to apply to this Court in revision when the Public Prosecutor had decided to withdraw from the prosecution.

(4) After hearing Mr. Pathak for the State of Rajasthan & Mr. Sinha for the applicant, we have come to the conclusion that the preliminary objection is well-founded, & the applicant has no right to apply to this Court in revision in the circumstances. In criminal cases it is the State which is in control of the proceedings, particularly where the prosecution is launched at the instance of the State. In cases, therefore, in which the Public Prosecutor appears it is for him to decide whether he would continue with the prosecution or withdraw from it. If he decides to withdraw, he has the power to apply to the Court under S. 494 Criminal, P.C., for giving consent to his withdrawal. This power cannot, in our opinion, be subject to the wishes of a third person even though he might be interested directly in the case. We may, in this connection, refer to two cases of the Patna High Court. In the first, 'Gopi Bari v. Emperor', AIR (7) 1920 Pat 362, a case had been prosecuted by the Police under S. 143, Penal Code. At a later stage the Court Sub-Inspector in charge of the prosecution applied for withdrawing from the case under S. 494. This was objected to by the complainant, & withdrawal was thereupon refused. The accused then went up to the High Court, & it was held that where a case had been started upon a police report, & the Court Sub-Inspector wanted to withdraw from prosecution, the Court acted without jurisdiction in rejecting the prayer for withdrawal, simply because the complainant wanted to proceed with the case. It was further held that in such a case the complainant had no 'locus standi' to control the proceedings.

(5) In the second case 'Gulli Bhagat v. Narain Singh', AIR (11) 1924 Pat 283, the Public Prosecutor applied for withdrawal from the case at a late stage. This prayer was allowed by the trial Court, & thereupon the complainant came to the High Court in revision. The revision was rejected with the following observations at page 284:

> "Finally there is a deeper & indeed a fundamental reason for non-interference which turns upon the position of a private prosecutor in prosecutions for cognizable offences. In our opinion, the private prosecutor has no position at all in the litigation. The Crown is the prosecutor & the custodian of the public peace & if it decides to let an offender go, no other aggrieved party can be heard to object on the ground that he has not taken his full toll of private vengeance.
>
> If, therefore, in the present case, the Court has allowed the Public Prosecutor to withdraw the case upon insufficient or improper grounds, the Local Govt. is the only authority who can take action for the correction of that error."

(6) The present applicant is even in a worse position than a private prosecutor, for he is in no way connected with these five cases. What he claims is that as a member of the public & Secretary of an Association, called 'Janta Kashta Niwarak Sangh', he is interested in seeing that these cases, which involve embezzlement of public funds in three of them & bribery in two, should be thoroughly investigated, & the gilt or innocence of the accused, three of whom hold important public offices, should be established in a Court of law. This desire of the applicant may be commendable, but we are of opinion that it gives him no 'locus standi' to come to this Court in revision. We, therefore, hold that the applicant has no 'locus standi' to be heard by counsel. We also intimated to the learned counsel for the applicant that we would only hear him as 'amicus curiae.'

(7) But this does not, however, dispose of the matter. Under S. 435, Criminal P.C., the High Court has the power to call for & examine the record of any proceeding before any inferior criminal Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. One of the ways in which the High Court can exercise this power is when the matter is brought to its notice by an application in revision by one of the parties to the proceeding in the inferior Court. But this is not the only way in which the High Court may act under S. 435. It can act under that section when the proceedings before an inferior Court come to its knowledge in any other way. In 'Shallabala Devi v. Emperor', AIR (20) 1933 All 678, Sulaiman, C. J., observed at page 680 as follows:

> "Obviously there may be many ways in which the proceeding comes to the knowledge of the Court, one being information supplied by a third party.

The Court is certainly entitled to receive such information & to act upon it at its option."

That was also a case of a third party, namely, the mother of the accused making an application to the High Court. It was held that:

"an application by a stranger informing the Court of the proceeding in the lower Court is merely by way of supplying information & bringing the fact to the knowledge of the Court, & it is nothing more."

The present application was & can only be treated as supplying information to this Court & as certain salient points were made out in the petition, the Court sent for the files & issued notice to satisfy itself as to the correctness, legality or propriety of the order.

(8) With the assistance of Mr. Pathak, we have gone through the record & the first point made out that Mr. Mansha Ram Purohit, Govt. Advocate, who made the petition to the lower Court for permitting withdrawal was not the Public Prosecutor in charge of the case is not correct. While Mr. K.C. Jain was appointed Public Prosecutor in charge of the cases before the Special Criminal Court by Govt. Notification in the Rajasthan Gazette of 5-1-1949, the order of the Govt. appointing Mr. Mansha Ram as Public Prosecutor for the cases before the Special Criminal Court is dated 18-1-1951, & was placed on record, & it was on the 19th of January that the application for withdrawal from prosecution was made. While, as observed by their Lordships of the Calcutta High Court in 'Sher Singh v. Jitendranath Sen', A I R (18) 1931 Cal 607, the appointment of a new Public Prosecutor for the purpose of withdrawal of cases only is unusual, there is nothing illegal in this procedure. It is, however, obvious that when the Govt. changes its mind, it saves the first Public Prosecutor from embarrassment.

(9) The next point made out is about the order itself. When we come to examine it, the first thing that strikes us is the nature of the reasons that were advanced by the Public Prosecutor for withdrawing from these cases. The only reason that was given was the "inexpediency of prosecution for reasons of State." The Special Judge, when dealing with the applications of the Public Prosecutor, made the following observations:

"'Reasons of State' are decidedly matters extraneous to the records of the cases & therefore matters on which, as a Judge, I should refrain from delivering any opinion for or against the applications for withdrawal. The position laid thread-bare is that the Rajasthan Govt. itself which launched the prosecutions is now, for reasons of State, anxious to withdraw them. I therefore, see no sense in refusing consent to the withdrawal of the cases."

(10) It may be pointed out that on the same day, i.e., 19-1-1951, previous to the application for withdrawal from prosecution under S. 494, Criminal P. C., an application was presented to the Court in each of the five cases by Mr. Mansha Ram, Govt. Advocate, under S. 5, of the Ordinance (XLIV of 1949), the relevant portion whereof is:

"I have been directed by the Govt. of Rajasthan to communicate their decision to withdraw all the five cases. Accordingly I hereby request this Hon'ble Court to take note of the decision of the Govt. & terminate the proceedings."

It was explained by Mr. Pathak that under S. 5 of the Ordinance the Govt. had the power to withdraw any case or cases made over to the Special Criminal Court, but it was not certain whether this power could be exercised by the Govt. by a simple communication of the order to the Court or required a notification in the Gazette. It was for that reason that the subsequent application under S. 494, Criminal P. C., was made. It may be pointed out that the withdrawal of cases from the Special Criminal Court under S. 5 of the Ordinance did not put an end to the cases, & had not the same effect as withdrawal from prosecution under S. 494 of the Code, & the application under S. 5 could only create an impression so far as the Special Judge was concerned that his jurisdiction over these cases would in any case be taken away.

(11) In the circumstances, the observations of the learned Special Judge give rise to the impression in our mind that the Special Judge thought that he could not enquire what the reasons of State were, & that he was more or less, bound to give consent without any further enquiry. If that was so, we cannot agree, & have, therefore, felt it necessary to exercise the option of looking into the cases ourselves, so that the legal position with respect to withdrawal by the Public Prosecutor for reasons of State may be made clear to the Courts below:

(12) S. 494, Criminal P.C., reads as follows:

"Any Public Prosecutor may, with the consent of the Court, in cases tried by jury before the return of the verdict, & in other cases before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of anyone or more of the offences for which he is tried..."

(13) The first question, which arises is whether the Court before whom such application for withdrawal is made is entitled to demand from the Public Prosecutor reasons for the withdrawal. We are of opinion that the Court is entitled to demand from the Public Prosecutor reasons for his withdrawing from the case. This is inherent in the fact that the Court has to give its consent to the withdrawal. This section may be contrasted with S. 333, Criminal P.C. which empowers the Advocate-General at any stage of a trial before a High Court to inform the Court that he will not further prosecute, & thereupon all proceedings have to be stayed, & the accused person has to be discharged. In that section there is no question of the consent of the Court. The power given by that section to the Advocate-General is analogous to the power of 'nolle prosequi' in the English law, which is exercised by the Attorney-General. But under S. 494 the Court is entitled to demand the reasons for withdrawal from the Public Prosecutor. It has been held in a number of cases that the giving of consent under S. 494 by the Court is a judicial act, as it results in either the acquittal or discharge of the accused. We may here refer to 'The King v. Moule Bux', A I R (36) 1949 Pat 233, which is a Full Bench decision, & where it was held that:

"An order of acquittal or discharge passed under S. 494, consequent on the withdrawal of Public Prosecutor from the prosecution of any person with the consent of Court, is a judicial order and liable to revision by the High Court, if the discretion vested in the Magistrate to give consent has been improperly or arbitrarily exercised."

In another Full Bench case, 'The King v. Parmanand', A I R (36) 1949 Pat 222, the same Court held that:

"As the effect of the withdrawal of the Public Prosecutor with the consent of the Court is either discharge or acquittal of the accused, the giving or withholding of the consent is a judicial act & the discretion conferred on the Court must be exercised judicially."

In a third case, 'The King v. K. N. Chachan', AIR (36) 1949 Pat 449, the same Court held that:

"The discretion must be based on correct legal principles & must not be exercised arbitrarily, & the High Court can & will interfere if the dis-

cretion has been arbitrarily exercised, & the matter is one which, in the public interests, requires further judicial investigation.'"

We have no doubt that the act of the Court in giving consent is a judicial act, & the Court is, therefore, entitled to ask from the Public Prosecutor the reasons for his withdrawal from the case in order to enable it to give its consent after a judicial consideration of the circumstances.

(14) The next question is whether the Public Prosecutor can ask for withdrawal for reasons of State & if so, whether he is bound to disclose those reasons. The view was once held by various High Courts that the reasons for the withdrawal must all be reasons which can be substantiated from the record, & this would have ruled out withdrawal of cases for reasons of State which must necessarily be extraneous to the record. But the present view, & if we may respectfully say so, the better view, is that it is possible for the Public Prosecutor to withdraw from a case for reasons which are extraneous to the record, & which may, therefore, include reasons of State. In this connection we may refer to two cases. In 'Giribala Dasi v. Mader Gazi', AIR (19) 1932 Cal 699, Mukerji, J., observed as follows:

"The legislature not having defined the circumstances under which a withdrawal is permissible it would not be right to attempt to lay down any hard & fast rule circumscribing the limits within which the withdrawal may be made.....S. 494, in my opinion, contemplates action to be taken, more often than not upon circumstances extraneous to the record of the case: inexpediency of a prosecution for reasons of State, necessity to drop the case on the ground of public policy, credible information having reached the Govt. as to the falsity of the evidence by which the prosecution is supported & other matters of that description."

The same learned Judge adhered to this view in the case of 'Harihar Sinha v. Emperor', AIR (23) 1936 Cal 356. The same view was taken by a Full Bench of the Patna High Court in 'King v. Moule Bux', AIR (36) 1949 Pat 233, already cited. The following passage appears at page 235:

"S. 494, Criminal P. C., has been expressed in very general terms, & no fixed rule can be laid down as to the reasons for withdrawal. In some earlier decision the view taken was that the reason must not be extraneous to the case, but later decisions make it clear that the inexpediency of a prosecution for reasons of State may be a ground for withdrawal under S. 494."

We respectfully agree with this, & are of the opinion that there may be cases in which the Public Prosecutor may withdraw from a case for reasons of State.

(15) The next question, however, is whether even where the Public Prosecutor intimates to the Court that he wants to withdraw for reasons of State, the Court can ask the Public Prosecutor to give those reasons. We are of opinion that as the Court has to give consent on judicial principles, it should ask the Public Prosecutor to give those reasons. Our attention was drawn to the case of 'Kasi Viswanadham v. Madan Singh, A I R (35) 1948 Mad 422, in this connection. The learned Single Judge, who decided that case, held, in conformity with the decision of the Madras High Court 'in re Sadayan, 4 Ind Cas 1126 (Mad)', that:

"Neither the public prosecutor nor the Judge is called on to give any reason for his action, that is, either in the application to withdraw or in granting permission to withdraw."

So far as the Judge is concerned, we agree that he is not bound to give his reasons when consenting to the withdrawal for S. 494, does not require the Judge to record the reasons in writing, though we must add that it is desirable that the Judge should give the reasons for recording his consent, for the order is a judicial order subject to revision by the High Court: But we must respectfully differ from the view that the Public Prosecutor is also not bound to give reasons for withdrawal, for as we have already remarked, it is not possible for the Court to consider the question of giving consent judicially unless it has before it the reasons which impel the Public Prosecutor to withdraw from the case. We are, therefore, of opinion that even where the Public Prosecutor intimates to the Court that he wants to withdraw from the prosecution for reasons of State, it is the duty of the Court to enquire what those reasons are before it gives consent. However, we cannot fail to recognize that sometimes reasons of State may be of a very confidential nature, & it may not be possible for the Public Prosecutor to disclose those reasons. We feel, however, that such can only be the case in a comparatively few cases, & that it should be possible for the Public Prosecutor to disclose the reasons in most cases. Where, however, the reasons are of a confidential nature, it is the duty of the Public Prosecutor to give an affidavit of some responsible officer of the State to the effect that the reasons are of a confidential nature, & it would not be in the public interest to disclose them. Where such an affidavit is given, it will be for the Court to decide whether, considering the nature of the case, it should give its consent without further disclosure of reasons. In the present case, however, the Court below never seems to have thought of enquiring from the Public Prosecutor what were those reasons of State which impelled him to withdraw from the prosecution, and inasmuch as this was not done, the order of the Court below is certainly open to objection.

(16) The next question is whether we should now ask the Public Prosecutor to disclose those reasons, or, if they are of a confidential nature to put in the affidavit of some responsible official of the Govt. to say so. It has to be borne in mind that the Govt. has already intimated its intention to withdraw the cases from the Special Criminal Court &, therefore, the Special Rule of evidence which in the circumstances pointed out in S. 9 placed the burden of proof on the accused will not apply & the ordinary rule of evidence which places the burden of proof on the prosecution to prove all the ingredients of the offence will apply. Judged in the light of this principle we feel that in four of these five cases there does not seem to be any necessity for asking the Public Prosecutor to disclose the reasons or to have an affidavit to the effect that the reasons cannot be disclosed. The first of these cases is No. 8, against Shri Jai Narain Vyas & Shri Shyam Krishna Vyas. The charge against Shri Jai Narain Vyas is that he dishonestly obtained Rs. 500/- as halting allowance for certain periods in November, 1948, from the Govt. of Jodhpur, while he had been drawing halting allowance from the Govt. of India for the same period, & further that he attempted to obtain a sum of Rs. 250/- as halting allowance for ten days in March, 1949, from the Govt. of Jodhpur, while he had drawn halting allowance from the Govt. of India for the same period. The charge against Shri Shyam Krishna is for abetting Shri Jai Narain Vyas. There is a further charge that these two embezzled Rs. 500/- out of Rs. 1,500/- taken as advance in March & April 1949. The element of dishonest intention is an ingredient of the offences both under Ss. 409 & 420, & nothing has been said in the complaint as to what the explanation of the accused was in respect of these items. So far as the charge of drawing or attempting to draw halting allowance, when it should not have been drawn, is concerned,

it seems to us that this could have happened by mistake. We also feel that if a person of the status of Shri Jai Narain Vyas were to say in a Court that the halting allowance was drawn or a bill for it was prepared & signed by oversight, the statement would, in all probability, be accepted. It seems to us, therefore, unnecessary to call for the amplification of the reasons in connection with this matter. It also does not appear worthwhile having further investigation into this matter of halting allowance in these circumstances. As to the other matter of embezzlement of Rs. 500/-, no details of it have been given in the complaint, & the question may be merely of accounting. We are, therefore, of opinion that so far as Case No. 8 against Shri Jai Narain Vyas & Shri Shyam Krishna Vyas is concerned, there is no necessity of calling for the amplification of the reasons, & that the withdrawal should be allowed & the order of 19-1-1951, with respect to this case should stand.

(17) Then we come to the two cases Nos. 6 & 7, in which Shri Mathura Das Mathur, Shri Dwarka Das Purohit, & Shri Mohan Lal Sanghi are parties. These two cases are of the same kind. The charge against Shri Mathur & Shri Purohit is that they took a Chevrolet car from Shri M. L. Sanghi, & passed a claim of his for Rs. 1,30,000/-, & this was done with improper motives, without proper consideration being paid for the cars. The complaints, however, show that each car was worth Rs. 12,000/-, & in each case Rs. 6,000/- were paid in cash. & for the balance an old car was given. There is no allegation in the complaints that the cash amount was never paid, & bogus receipts were obtained. In one case the complaint is that the old car that was given for Rs. 6,000/- was only worth Rs. 4,500/-, while in the other case, it was only worth Rs. 2,000/-. The value of an old car is after all a matter of opinion, & it seems to us that though there might be some ground for suspicion, because of the payment of a large sum of money soon after this transaction had taken place, it is not worthwhile asking the State for amplification of the reasons in the circumstances. The order, therefore, of 19-1-1951, relating to these two cases will also stand.

(18) Then we come to case No. 2 of 1950. The charge against Shri Dwarka Das Purohit & Shri Mukand Lal is that between November 1948, & April, 1949, they entered into a conspiracy to commit criminal breach of trust, & embezzled a major portion of a sum of Rs. 3,200/-, which had been drawn as Travelling Allowance Advance. We must say that the complaint in this case does not disclose any details at all, & the question would apparently be one of accounting. If in such circumstances, the State decided to withdraw the complaint, we do not think it necessary to call for any amplification of the reasons. The withdrawal is allowed, & the order of 19th January will stand.

(19) The last case is No. 9 of 1950, against Shri Mathura Das Mathur & Shri Kapur Chand Mangal. The charge against them is that they submitted false travelling allowance bills, & thereby cheated the Govt. of the former State of Jodhpur, & also embezzled a sum of Rs. 3,100/- which had been obtained by them as Advance Travelling Allowance. So far as the amount of Rs. 3,100/- is concerned, this case stands on the same footing as the case against Shri Dwarka Das Purohit & Shri Mukand Lal. If the matter stood at that, there would have been no necessity for calling for any amplification of reasons in this case either. But we further find that details have been given of amounts drawn through false travelling allowance bills, & some evidence has also been recorded. It seems to us that it is necessary to call for amplification of the reasons, which have led the Public Prosecutor to withdraw these specific charges. The nature of these charges is such that we do not think that there should be any ground for the Public Prosecutor to withhold the reasons for withdrawing these charges. It may very well be that the State is now satisfied that the travelling allowance bills were not false. But if that is so, they should say so. In any case, even if there are any confidential reasons for withdrawing this case, some responsible officer should, in our opinion, file an affidavit to that effect. So far, therefore, as this case is concerned, we call upon the State of Rajasthan to give us the reasons which impelled them to withdraw it, or to file an affidavit that they cannot disclose the reasons because they are confidential. We shall pass final orders in this revision after the above order has been complied with by the State of Rajasthan.

(20) We may, in the end, mention an argument, which was advanced on behalf of Shri Jai Narain Vyas, Shri Mathura Das Mathur, & Shri Dwarka Das Purohit. It was urged on their behalf by Mr. Chiranji Lal that the Special Judge had no jurisdiction to try these cases, & in any case, even if he had jurisdiction to try case No. 2, he had no jurisdiction to try cases Nos. 6 to 9. We do not propose to dispose of this objection at this stage. We shall do so, if necessary, after the State has complied with the order relating to case No. 9.

(21) ORDER: An application has been filed by the Govt. Advocate giving some reasons for the withdrawal of case No. 9 against Shri Mathura Dass Mathur & Shri Kapurchand Mangal. In addition, an affidavit has been filed, sworn by the Law Secretary to the Govt. of Rajasthan, to the effect that there are some other reasons of State which it would not be desirable to disclose in the public interest. In view of the reasons disclosed & also in view of the affidavit of the Law Secretary, we are of the opinion that case No. 9 against Shri Mathura Das Mathur & Shri Kapurchand Mangal should also be allowed to be withdrawn. We allow this & the order dated 19-1-1951 would stand.

(22) This revision is accordingly dismissed.

K.S. *Revision dismissed.*

A. I. R. (39) 1952 Rajasthan 46 *[C. N. 21.]*

(JODHPUR BENCH)

WANCHOO, C. J., AND BAPNA, J.

Nathmal, Appellant v. The Board of Revenue, Rajasthan, Jaipur and others, Respondents.

Civil Miscellaneous Petition No. 29 of 1950, D/- 6-9-1951.

Constitution of India, Article 226 — Certiorari, writ of against Board of Revenue — Board of Revenue Ordinance (XXII (22) of 1949), Section 13 (2) — Rules under — Rule 6 — Validity.

A second appeal was filed before the Board of Revenue. It was set for hearing before a single member, Board of Revenue, who after hearing the parties passed judgment as follows: "For these reasons as given above, I would, subject to the concurrence of my learned colleague, allow the appeal." The file of the case was passed on to the other member of the Board of Revenue who by his order agreed with the first member. The second member recorded his opinion concurring with the opinion of the first member without hearing the parties or giving notice of hearing to them.

'Held' that the Board of Revenue had acted in excess of the jurisdiction conferred upon it. Rules or general or special order of the Government could only be those consistent with the provisions of the Ordinance. Rule 6, purported to authorize two members to hear a case without forming a bench. This rule was contrary to the provisions of Sub-s. (1) of

S. 13 which provided only two modes of hearing either by a member of the Board sitting singly, or by a bench of the Board consisting of two or more members, and was therefore, invalid. Further R. 6, even as it stood did not say that the second member could express his opinion without giving a notice of hearing to the parties or hearing them should they appear and wish to be heard, and the procedure adopted was not authorized even according to the Rules as they were. The Rajasthan Board of Revenue was a body having two functions one of which was administrative and executive, and the other, judicial. The matter that came before the Board was disposed of in the exercise of its judicial function. Hence a writ of ceriorari could be issued. Case law discussed.

(*Paras 6, 8, 10, 11, 19, 23*)

Mansha Ram, for Respondent No. 1. Dashrath Mal, for Respondent No. 2.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('50) AIR (37) 1950 S C 222: (1950 S C R 621) (Pr 19)
('38) AIR (25) 1938 Cal 385: (ILR (1938) 1 Cal 476) (Pr 21)
('32) AIR (19) 1932 Mad 529: (55 Mad 942) (Prs 13, 14)
('34) AIR (21) 1934 Mad 231: (56 Mad 579) (Prs 13, 15)
('51) AIR (38) 1951 Mad 276: (1951-2 Mad L J 399) (Pr 13)
('51) AIR (38) 1951 Mad 272 (Pr 16)
('51))Writ Appln No. 44 of 1951, D/- 17-7-1951 (Raj) (Pr 18)
(1906) A C 535: (75 L J P C 73) (Pr 21)
(1915) A C 120: (84 L J K B 72) (Pr 17)
(1863) 14 C B (NS) 180: (32 L J C P 185) (Pr 21)
(1879) 11 Ch D 353: (49 L J Ch 11) (Pr 21)
(1880) 13 Ch D 346: (28 W R 367) (Pr 21)
(1880) 14 Ch D 471: (49 L J Ch 268) (Pr 21)
(1874) 9 Ex 190 (Pr 21)
(1924) 1 K B 171: (93 L J K B 390) (Pr 19)

BAPNA, J.: This is a petition for issue of a writ of certiorari in respect of a case decided by the Board of Revenue.

(2) One Nuruddin filed a suit for redemption of a mortgage of certain agricultural land against Nathmal, in the Court of Nazim, Nimbahera. The Nazim decreed the suit for redemption subject to payment of Rs. 701/- by the plaintiff. Nathmal filed an appeal before the Commissioner of Udaipur who transferred it to the Additional Commissioner, and the latter allowed the appeal and dismissed the suit. Nuruddin had died in the meantime and Khawaja Hussain and others, legal representatives of said Nuruddin, filed a second appeal before the Board of Revenue. It was set for hearing before Shri Lal Sinha Saktawat, Member, Board of Revenue, who after hearing the parties did not agree with the Additional Commissioner and passed judgment on 22nd of September 1950 upholding the decision of the Nazim of Nimbahera. The operative portions of his judgment is:

"For these reasons as given above, I would, subject, to the concurrence of my learned colleague, allow the appeal, set aside the order of the Additional Commissioner, Udaipur, dated 3-5-1950 and uphold the order of the Nazim, Nimbahera dated 5-2-1948, decreeing the suit for redemption of the appellants."

The file of the case was passed on to Shri A. A. Kherie, the other member of the Board of Revenue, who agreed with Shri Lal Sinha and the operative portions of his order is as under:

"For reasons given by my learned brother, I agree with him that there was no justification for the Additional Commissioner for disbelieving the entries in the Government record. In my opinion, the Nazim's decision is correct.

For reasons given above, I concur in the order that my learned brother proposes to make."

This order was recorded by Mr. Kherie on the 29th of September, 1950.

(3) In the present petition by Nathmal, it is contended that Shri Lal Sinha, a member of the Board of Revenue, heard the case at Udaipur on 22nd September 1950, on which date he passed the order mentioned as aforesaid. The acceptance of the appeal subject to the concurrence of his learned colleague, who did not hear the case, and was not sitting on the Bench with Shri Lal Sinha, was illegal. The passing of judgment by Shri A.A. Kherie at Jaipur on 29th September 1950 without notice to the defendant petitioner, or hearing him, has again been challenged as being illegal. It is argued that the alleged judgment of the Board of Revenue is no judgment at all and the case be sent for by the High Court for decision by that Court, or the Government of Rajasthan be directed to appoint a Tribunal consisting of members other than those who purported to decide the case as members of the Board, for decision in this case.

(4) The Board of Revenue opposed this petition and contended that the procedure adopted by the two members of the Board was in accordance with the provisions of the Board of Revenue Ordinance (No. XXII of 1949) and the Rules made by the Government on 2nd November 1950 under Section 13, Sub-section (2) of that Ordinance. Reference was also made to the distribution of work made by the Chairman, Board of Revenue, on November 4, 1949, between different members of the Board.

(5) The respondents Khwaja Hussain and others supported the Board of Revenue.

(6) On a careful consideration of the provisions of the Ordinance and the Rules made thereunder, it is clear that the Board of Revenue in this case had acted in excess of the jurisdiction conferred upon it.

(7) Section 13 of the Board of Revenue Ordinance, 1949, is as follows:

'Section 13: (1) Except as otherwise provided by or under this Ordinance or by any other law or enactment for the time being in force in the whole or any part of Rajasthan and subject to any rules made in that behalf or the general or special orders of the Government, the jurisdiction of the Board may be exercised:

(a) by the Chairman or any other member of the Board, sitting singly, or
(b) by a Bench of the Board, consisting of two or more members.

(2) Subject to any rules made in that behalf or the general or special orders of the Government, the Chairman may distribute the business of the Board and make such territorial or other divisions of its jurisdictions as he may deem fit.

(3) Every order made or act done under sub-section (1) or in accordance with the distribution or division made under sub-section (2) shall be deemed to be the order or act, as the case may be, of the Board."

(8) It may be pointed out that the restrictions to the exercise of the jurisdiction of the Board, by the Chairman, any member of the Board mentioned in the opening words of the Sub-section (1) of Section 13 of the Ordinance are two-fold; (1) "As otherwise provided by or under this Ordinance or enactment for the time being in force in the whole or any part of Rajasthan", and (2) "Subject to any rules made in that behalf or the general or special orders of the Government." It is sometimes laid down in an enactment that a particular matter shall be

heard by a Bench consisting of not less than so many members. The first restriction is of this kind. The second restriction is by rules or orders of the Government. These Rules or General or Special Orders of the Government could only be those consistent with the provisions of the Ordinance. They may, for instance, provide for particular classes of cases to be dealt with by the Chairman or any other member of the Board sitting singly or by a Bench of the Board. The provisions of Sub-section (2) to a certain extent overlap the provisions of Sub-section (1), inasmuch as, the Chairman is also authorised to distribute the business of the Board subject to any rules made in that behalf or the general or special orders of the Government. According to Sub-section (2) also, there can be rules or any general or special orders of the Government as to what classes are to be dealt with by the Chairman, any member of the Board sitting singly or by a Bench of the Board. But the Rules or the general or special orders of the Government in this case also have to be consistent with the provisions of the Ordinance. The Chairman of course under Sub-section (2) distributes business to particular members at his discretion. Such distribution of business was done by him by Notification No. 45/BR of 4th November 1949 appearing in the Rajasthan Raj-Patra of the same date. None of the restrictions mentioned in Sub-section (1) have however been brought to our notice and it is, therefore, clear that where a case is dealt with by the Chairman or a single member or a Bench, the decision of the Chairman, the member or the Bench is that of the Board and would be final under S. 11 of the Ordinance. There is no provision in the Ordinance whereby any case is heard by a single member could be operative and valid (sic). The procedure adopted in this case was sought to be supported in the rules framed by the Government by Notification No. F-20-(10) Rev/50, dated 2nd November 1950. These rules purport to have been framed under Sub-section (2) of Section 13 of the Ordinance, and are as follows:

Rule 1. The following classes of cases may be heard and disposed of by a single member:

(1) Miscellaneous applications.
(2) Applications for setting aside an order of dismissal for default by the Board or an ex parte decision given by the Board.
(3) Applications for review of judgments or orders passed by a single member of the Board.
(4) Applications for transfer of cases under the relevant sections of the different Tenancy and Land Revenue Acts.

Rule 2. The orders passed by a single member in cases of the nature specified in rule (i) shall be final.

Rule 3. In other cases, where a single member hearing a case upholds the decree of the lower Court, his decision shall be final.

Rule. 4. No decree or order coming under the consideration of the Board on appeal, revision or reference, shall be modified or reversed without the concurrent judgment of two members.

Rule 5. Whenever an order or decree is modified or reversed on appeal, revision or reference, the judgment or order shall be signed by both members concurring therein.

Rule 6. The members who hears a case singly and considers that the decree or order of the lower Court should be reversed or modified, shall record his judgment or order as the case may be, and send it to the other member for expression of opinion. If the other member concurs, the judgment or order shall be deemed to be the judgment or order of the Board. In cases of disagreement between the two members, the case shall be referred to the Chairman and be disposed of in accordance with the provisions of Section 15 of the Ordinance.

Rule 7. If any case heard by a single member involves any question of law, or custom having the force of law, or of the construction of any document it may be referred to a Full Bench in accordance with Section 14 of the Ordinance."

(9) The numbering of the rules has been done by us, but does not appear in the Notification.

(10) The above Rules, when closely examined, show that in Rule 1 certain matters were authorized to be heard and disposed of by a single member. These matters do not include a second appeal. Rule 2 refers to orders in cases described in Rule 1 Rule 3 purports to make the decision of a single member final in any case where he upholds the decree of the lower Court. No express power is conferred by the Rules upon a single member to hear an appeal or revision against a decree but Rule 3 may be construed as giving an implied power to do so. Rule 4 purports to lay down that a single member of the Board could not by himself modify or reverse a decision of the lower Court on appeal, revision or reference to the Board, but such reversal or modification required a concurrent judgment of two members. Rule 6 lays down the procedure to be followed by a single member hearing a case and coming to the conclusion that the judgment of the lower Court requires to be reversed or modified. The rule says that a single member shall record his judgment or order as the case may be and send it to other member for expression of his opinion. If the other member concurs, the judgment or order shall be deemed to be judgment or order of the Board. Rule 6, thus, purports to authorize two members to hear a case without forming a bench. This rule is contrary to the provisions of Sub-section (i) of Section 13 which provides only two modes of hearing, (i) either by a member of the Board sitting singly, or (ii) by a bench of the Board consisting of two or more members, and is, therefore, invalid.

(11) Again, in the present case, it is conceded that the second member Mr. Kherie recorded his opinion concurring with the opinion of Mr. Lal Sinha without hearing the parties or giving notice of hearing to them. If the concurrence judgment referred to in Rule 4 was one which had to be given by two members forming a bench, there is do doubt that the parties would have been given notice of hearing and if they had appeared, the Bench would also have given them a hearing. But Rule 6, even as it stands, does not say that the second member can express his opinion without giving a notice of hearing to the parties or hearing them should they appear and wish to be heard, and the procedure adopted is not authorized even according to the Rules as they are.

(12) It appears reasonable that if the case is to be heard by two members, the party should have an opportunity of convincing either of them about the strength of his case. It is possible that while the member who first heard the case could not be convinced by a party, the second member could be so convinced and in that case the party would secure a disagreement between the two members and have thereafter, the right to address the third member before whom the case may be placed under Section 16 of the Ordinance. It was, therefore necessary in this case that notice of hearing should have been issued to the parties and opportunity allowed to them to be heard by the second member as well.

(13) The learned Government Advocate relied on 'Khumaraswami Mudali v. Muniratna Mudali', AIR (19) 1932 Mad 529; 'Ratnamala Pattamahadevi v. Rayats of the Mandasa Zamindari', AIR (21) 1934

Mad 231, and 'In re V. Shanmuga Mudaliar', AIR (38) 1951 Mad 276 for his contention that the Board of Revenue had not acted without jurisdiction or in excess of its jurisdiction. All these cases are distinguishable on facts.

(14) In AIR (19) 1932 Mad 529, the rules of procedure before the Board of Revenue provided for hearing of parties in certain matters, but provided that it will not hear either petitioners or their counsel in person in other matters. The matter before the Board was one in which the Board laid down that it will not hear tbe petitioner. In that view, it was held that the Board of Revenue had not exceeded its jurisdiction in giving a judgment without hearing the parties.

(15) In AIR (21) 1934 Mad 231, the case was under the Madras Estate Land Act (1908), and the appeal had been presented under Section 171 of that Act. The learned Judges referred to Sections 169, 170 and 172 of the Act in which provisions existed for giving reasonable notice to the parties and affording opportunity to hear them; while under Section 171 such a provision was missing and their Lordships held that this could not have been by chance and that, therefore, the Board of Revenue had not exceeded its jurisdiction in not hearing the petitioner in the case.

(16) In AIR 1951 Mad 272, the petition before the Board of Revenue was one in revision and it was held that the party was not entitled as of right to be heard by the Board. There is also mentioned that the petitioner had stated all the grounds of objection in his petition and it was deemed that the party had sufficient opportunity to state its case.

(17) Another case cited by the learned Government Advocate was 'Local Government Board v. Arridge', (1915) A C 120. This case is also not relevant as the decision was based on the particular language of the Housing Town Planning Act of 1909. According to their Lordships, the Government Board had handled the case with extreme patience, with scrupulous regard to their statutory duties and to the rights of all concerned. The Government Board, in this case, was an organisation with executive functions and resembled a department of the State.

(18) After the arguments were over, another case 'Rajaram v. The Revenue Board of Rajasthan', (Writ Appln. No. 44 of 1951), decided on 17th of July, 1951, by the Jaipur Bench came to our notice. The learned Judges were of opinion that there was no illegality in the procedure adopted by the Board of Revenue in accordance with Rule 6 of the Rules framed by the Government on 2nd of November 1950, referred to in the earlier part of the judgment. The decision is, however, distinguishable as the case before the Board was a revision arising out of a petition filed before a Sub-divisional Officer under Section 7 of the Rajasthan (Protection of Tenants) Ordinance, 1949 (No. IX of 1949.) Under S. 10 (1) of that Ordinance, it was provided that no appeal shall lie from any order of the Sub-Divisional Officer passed under the Ordinance. The interference by the Board of Revenue was provided in Sub-section 2 which is as follows:

"The Board of Revenue may of its own motion or on an application made to it in that behalf call for the record of any case disposed of by the Sub-divisional Officer or other Officer of equal status under this Ordinance and may pass such orders thereon as may appear to the Board to be just and expedient."

The power to be exercised by the Board of Revenue in Sub-section 2 is very wide and more or less as a Court of revision and the parties had obviously no right to be heard in those proceedings.

(19) As to the power of this Court to issue writ of Certiorari reference may be made to 'Province of Bombay v. Khushaldas Advani', AIR (37) 1950 S C 222. Their Lordships of the Supreme Court followed the dicta of Atkin, L. J., in the 'King v. Electricity Commissioners', (1924) 1 K B 171:

"Where anybody of persons having legal authority to determine questions affecting the rights of subjects and having authority to act judicially act in the excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

Das J., at page 250 further observed that the law is now well settled that a writ of certiorari will lie to control a statutory body if it appears to act without jurisdiction or in excess of it or in violation of the principles of natural justice that on a true consideration of Statute creating a body, it can be said to be a quasi-judicial body entrusted with quasi-judicial functions. It need hardly to be stated that the Rajasthan Board of Revenue is a body having two functions one of which is administrative and executive, and the other is judicial. The matter that came before the Board and with which we are now dealing, was disposed of in the exercise of its judicial function.

(20) It was not brought to our notice that the Rajasthan Board of Revenue had framed any Rules under Section 18 of the Ordinance regulating the procedure of the Board in the transaction of its business. In the absence of any such Rules, in a case like the present which was a second appeal in a suit for redemption of agricultural land, it would be safe to presume that the Board in the exercise of its judicial function was to follow the procedure laid down in the Code of Civil Procedure in the matter of hearing appeals, and the Board was, therefore, bound to afford an opportunity to support the judgment of the lower Court before proceeding to reverse that judgment.

(21) Leaving aside the applicability of the procedure laid down in the Code of Civil Procedure in appeals of this kind, this one principle of natural justice is firmly established that where judicial functions are to be exercised by a Court or by a Board, it is necessary that they must always give a fair opportunity to those who are parties in the controversy to correct or to contradict any relevant statement prejudicial to their view. Reference may be made to 'Indumati Devi v. Bengal Court of Wards' AIR (25) 1938 Cal 385, wherein Panckridge, J., observed at page 389 that where departments of Government or statutory bodies are given judicial or quasi judicial functions, the Court will interfere to prevent the exercise of such functions in a non-judicial manner. The obligation to give notice and hear the party affected was recognised in the case of 'Cooper v. Board of Works for the Wandsworth District', (1863) 14 C B (NS) 180. His Lordship then referred to the observations of Lord MacNaghten in 'Lapointe v. L Association De Bienfaisance Et De Retraite De La Police De Montreal', (1906) A C 535, at P 539:

"The learned counsel for the appellant referred to two well-known Club cases before Sir George Jessel, M.R., 'Fisher v. Keane', (1879) 11 Ch D 353 and 'Labouchere v. Earl of Wharncliffe', (1880) 13 Ch D 346. It may be worthwhile to mention a later case before the same learned Judge, in which he refers to the case in 'Wood v. Wood', (1874) 9 Ex 190, in the Exchequer and express regret that he was not acquainted with that case when those Club cases were decided See 'Russell v. Russel', (1880) 14 Ch D 471."

"It contains" he says:

"a very valuable statement by the Lord Chief Baron as to his view of the mode of administering justice by persons other than Judges who

have judicial functions to perform which I should have been very glad to have had before me on both those Club cases that I recently heard namely the case of 'Fisher v. Keane', and the case of 'Labourchere v. Earl of Wharncliffe.' The passage I mean is this, referring to a committee: "They are bound in the exercise of their functions by the rule expressed in the maxim 'Audi alteram partem', that no man should be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal, or body of persons invested with authority to adjudicate upon matter involving civil consequences to individuals."

(22) The petition is therefore allowed. The decision of the Board, dated 22nd of September by Shri Lal Sinha and the concurrent judgment dated 29th of September 1950 by Mr. Kheri are, therefore, set aside. The case will go back to the Board of Revenue for a re-hearing in accordance with law.

(23) We are aware that provisions similar to Rule 4 of the Rules exist in the U. P. Land Revenue Act, but even in that Act, there is no provision that the two members of the Board shall proceed to pass a judgment without hearing the parties. It was stated at the Bar by the Government Advocate that in Uttar Pradesh there was a practice similar to that followed in this case. Whatever may have been the practice, the illegality is apparent, and Article 226 of the Constitution authorized the High Court to interfere and pass proper orders, and to issue a writ in a proper case for correction of the illegal exercise of jurisdiction by judicial tribunals. There will be no order as to costs.

D.H. *Petition allowed.*

A. I. R. (39) 1952 Rajasthan 50 *[C. N. 22.]*

(JODHPUR BENCH)

WANCHOO, C. J. AND BAPNA, J.

Keshav Lal, Petitioner v. Gaveria, Opposite Party.

Criminal Misc. Case No. 7 of 1951, D/- 20-8-1951.

Criminal P. C. (1898), Ss. 369, 561A — Dismissal of criminal case for default — Restoration — Power of High Court.

So far as the question of restoration, strictly so called, is concerned, there is no provision in the Code of Criminal Procedure which empowers a criminal Court to restore a criminal case once it has been finally decided. The power of restroation has to be specifically conferred, as is the case in the Code of Civil Procedure, before it can be exercised by a Court.

It is, however, the duty of the Court on the criminal side to decide a criminal matter on the merits whether a party or his pleader is present or not and though there can be no restoration in a criminal case, the High Court has the power under S. 561A to make such orders as are necessary in the interests of justice.

Thus, where a Criminal revision is dismissed for default without going into its merits and there is no fault on the part of the applicant's lawyer who was waiting in the Court in which the case was listed, the High Court should exercise its power under S. 561A to secure the ends of justice so that the revision may be disposed of after considering the grounds raised. (*Paras 4, 7*)

Anno: Cri. P. C., S. 369 N. 5, S. 561A N. 5.

Pyara Lal, for Petitioner; Sumerdan, Public Prosecutor, for Opposite Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases)

('48) AIR (35) 1948 All 106: (49 Cri L Jour 56) (Pr 5)

('49) AIR (36) 1949 All 176: (50 Cri L Jour 228) (Pr 6)

('09) 3 Ind Cas 393: (10 Cal L Jour 80) (Pr 4)

WANCHOO, C. J.: This is an application by Keshav Lal in the following circumstances:

(2) The applicant had filed a revision in this Court. That application was listed for admission on the 17th of January, 1951. The order of Gupta J. on that date was in these words:

"Petitioner and his counsel absent despite service. There is no one to press this petition which is hereby dismissed, in limine."

Thereupon, the present application was made on the same day by Keshav Lal in which it was pointed out that the case was listed in the list of Bapna J. The counsel therefore waited in the Court in which Bapna J. was working in a Division Bench. Before, however, Bapna J. could be free from the Division Bench, the counsel was surprised to learn that the case had been sent to the Court of Gupta J. The counsel then rushed to the Court of Gutpa J. but by then the revision had been dismissed by the order which has been set out above. Consequently, it was prayed that the revision be restored.

(3) The matter came up before Gupta J. on 24th of January, 1951. He has referred the question, whether a criminal revision dismissed for default as in this case should be restored, to a Division Bench and that is how the matter has come before us.

(4) So far as the question of restoration strictly so called, is concerned, there is no provision in the Code of Criminal Procedure which empowers a criminal Court to restore a criminal case once it has been finally decided. The power of restoration has to be specifically conferred, as is the case in the Code of Civil Procedure, before it can be exercised by a Court. But this, however, does not dispose of the matter. We have already set out the order passed by Gupta, J., and the contention of the learned Counsel for the applicant is that it is the duty of a criminal Court which is seized of a criminal appeal or revision, to decide it on the merits. This is implicit in the words of Section 369 which forbids a Criminal Court from in any way altering or reviewing its judgment when it has been signed except to correct a clerical error. We may, in this connection, refer to the case of 'BIBHUTY MOHAN ROY v. DASIMONIDASSI', 3 Ind Cas 393. There also a revision which had been admitted was dismissed for default. The learned Judges held that in those circumstances, there had been no judgment and the Court had not considered the grounds on which the rule had been granted and had not come to the conclusion whether all or any of those grounds failed. It was also pointed out that it was open to the Court to determine the questions raised without hearing Counsel but the learned Judges did not do this for on the face of the order it appeared that it was made only because no one had appeared. It was further held that the Court had jurisdiction to rehear the case and give a judgment under these circumstances.

(5) No reference was made to Section 561-A in this judgment because it is of the year 1909. The position today is much stronger because Section 561-A provides that the High Court has power to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to

secure the ends of justice. We may in this connection refer to two recent cases decided by the Allahabad High Court. The first of these is 'SRI RAM v. EMPEROR', AIR (35) 1948 All 106. In that case, a revision had been heard on the merits and dismissed. Later, an application was made to the effect that a certain provision of the law had been overlooked the effect of which was that the maximum sentence to which the applicants could be sentenced was three months. In fact, the applicants were sentenced to more than eighteen months rigorous imprisonment. When this fact was brought to the notice of the Court, the sentence of imprisonment was reduced from eighteen months to three months' rigorous imprisonment under the provisions of Section 561-A. In fact, therefore, there was an alteration of the previous judgment but the learned Judges pointed out that this power was vested in the High Court particularly in view of the words "Save as otherwise provided by this Code" with which Section 369 begins.

(6) The next case is 'CHANDRIKA v. REX', AIR (36) 1949 All 176. That was an appeal before the High Court and the Counsel was told that it would be fixed for hearing on the 5th of July, 1948. By mistake it was fixed for hearing on the 25th of June and the Counsel naturally failed to appear. Thereupon, it appears, that the Government Advocate was heard and the appeal was decided on merits. Later the Counsel applied that there had been a mistake of the office in listing the appeal for hearing on the 25th of June and prayed that he might be heard. Under the proviso to Section 421 (1), the appellant or his Pleader has to be given a reasonable opportunity of being heard in support of the appeal before it is dismissed. It was held that in view of the mistake made by the office, the appellants' Counsel had not been given a reasonable opportunity of being heard in support of the appeal. Thereupon, the order which had been passed dismissing the appeal was set aside and the appeal was put down for re-hearing. The learned Judge relied upon Section 561-A of the Code of Criminal Procedure and pointed out that in the interests of justice, it was necessary that the appeal should be re-heard.

(7) In the present case also it is, in our opinion, the duty of the Court on the criminal side to decide a criminal matter on the merits whether a party or his Pleader is present or not. In the present case, this has not been done and it is obvious from the order passed by Gupta, J., that he has dismissed the revision not on merits but on the ground that Counsel was absent. It is true that in a revision, the High Court is not bound to hear Counsel and if Gupta, J., had dismissed this revision on the ground that there was no force in it, the applicant could not ask us to set aside that order. But the order shows that the revision was not dismissed on the merits. As such we are of the opinion that though there can be no restoration in a criminal case, the High Court has the power under Section 561-A to make such orders as are necessary in the interests of justice. As the revision was dismissed without going into the merits, we are of opinion that we should exercise our power under Section 561-A to secure the ends of justice so that the revision may be disposed of after the grounds raised have been considered. We may point out that in this case also, there was no fault of the lawyer who was waiting in the Court in which the case had been listed. We, therefore, allow this application and direct that the order dated the 17th of January 1951, be set aside, and the revision may be put up for admission in due course.

D.R.R.

Application allowed.

A. I. R. (39) 1952 Rajasthan 51 *[C. N. 23.]*

(JODHPUR BENCH)

WANCHOO C. J. AND BAPNA J.

Hukmi Chand Appellant v. Mt. Bhanwari, Respondent.

Civil Misc. First Appeal No. 2 of 1950, D/- 13-7-1951.

Succession Act (1925), S. 278 — Grant of letters of administration with will annexed—Duty of Court — Right of testator to dispose of property under will — Whether can be considered in grant of letters.

In proceedings relating to probate or to the grant of letters of administration with the will annexed, it is not the business of the Court to take into consideration the property which may be devised by the testator or whether he had a right to dispose of his property under the will. All that the Court has to decide in such cases is that the will had been executed by the testator and he had the capacity to understand the nature of the Act, or that the Act was not vitiated by fraud, or undue influence, or defects of that nature. A I R (28) 1941 Bom 60 and AIR (18) 1931 Lah 130, Rel. on. (*Para 3*)

Anno: Succession Act, S. 278 N. 1.

Radha Mohan, for Appellant; Chand Mal, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('29) A I R (16) 1929 P C 45: (8 Pat 382) (Pr 4)

('37) A I R (24) 1937 P C 101: (64 Ind App 92) (Pr 4)

('41) A I R (28) 1941 Bom 60: (192 Ind Cas 681) (Pr 3)

('31) A I R (18) 1931 Lah 130: (132 Ind Cas 527) (Pr 3)

BAPNA J.: This is an appeal against an order of the District Judge, Nagaur, refusing to grant letters of administration with the will annexed in respect of the estate of one Lakshmi Chand of Nagaur.

(2) Hukmi Chand, who is the brother of the deceased Lakshmi Chand, applied to the District Judge for grant of letters of administration with the will annexed, and produced a will stated to have been executed by Lakshmi Chand on the 15th of January, 1948. The will was a registered one, having been registered on the 23rd of January, 1948. Lakshmi Chand died on the 11th of February, 1948, and the petition was presented on the 31st of August, 1948. The petition was opposed by Mt. Bhanwari, widow of Lakshmi Chand. The learned District Judge found that the will had been duly executed by Lakshmi Chand, and that Lakshmi Chand was not so ill on the date as not to be in full possession of his senses. He, however, refused to grant the letters of administration with the will annexed on the ground that the testator purported to dispose of the property which was a coparcenary property of Lakshmi Chand and his brother Hukmi Chand. He has also observed that the deceased made no provision for the maintenance of his widow in the will, which practically amounted to defeating her legal right to maintenance, which he had no authority to do. He also held that (amongst?) Digamber Jains, a person could not device his property in favour of his brother when he had a wife living. The petitioner Hukmi Chand, has come in appeal.

(3) It may be stated at once that in proceedings relating to probate or to the grant of letters of administration with the will annexed, it is not the business of the Court to take into consideration the property which may be devised by the testator or whether he had a right to dispose of his property under the will. All that the Court has to decide in such cases is that the will had been executed by the testator and he had the capacity to understand the nature of the act, or that the Act was not vitiated by fraud, or undue influence, or defects of that nature. Reference may be made to 'Bai Parvatibai v. Raghunath Lakshman', A I R (28) 1941 Bom 60 and 'Bua Ditta Mal v. Devi Ditta Mal', A I R (18) 1931 Lah 130. The learned counsel for the respondent accepted the proposition of law as stated above, and could not support the judgment of the lower Court on the basis it was given. He, however, contended that looking to the circumstances of this case and the disposition of the property made by the deceased leaving nothing for his widow, it should be held that the testator was not in a sound and disposing state of mind. He argued that it was most unnatural for a person to make no provision for a young wife when there was no quarrel or enmity between the husband and the wife. It was also stated that the testator had been suffering from tuberculosis for about five months, and he must have been in a very feeble state of mind, and could not realise the nature of his act. He referred to the evidence recorded in the case, and argued that the testator was so ill during the period when the will had been executed that he could not understand that he was disposing of all his property without leaving anything for his wife. It was also argued that under the will, Hukmi Chand took the entire benefit of the estate of Lakshmi Chand, and as he was the person who sent for the scribe and took a leading part in the execution and registration of the will, the burden of proof lay heavily upon him to show that the deceased fully understood the nature of the disposition.

(4) We have gone through the entire evidence, and we agree with the lower Court that it has been fully proved that Lakshmi Chand had a sound and disposing state of mind at the time of the execution of the will, and that the will was brought into existence under the instructions and at the instance of Lakshmi Chand himself. (After discussing the evidence the judgment proceeded:) In 'Sarat Kumari Bibi v. Sakhi Chand', A I R (16) 1929 P C 45, a certain provision in the will which was in favour of the scribe was held inoperative as on the evidence it was held that it had been inserted after the draft had been approved by the testator, and the final document had not been read over to him. In 'Mt. Biro v. Atma Ram', A I R (24) 1937 P C 101, the question was whether the will had been executed by the testator. The evidence of the scribe and attesting witnesses was full of contradiction and the document itself was propounded after a lapse of 22 years, and had not been produced on various previous occasions, when it was natural to except that it would be produced.

(5) The argument that no provision had been made for the wife and on that account it should be held that it was not the testator's wishes which had been incorporated in the will, is also not correct. It is mentioned in the will that certain jewellery had been taken away by the wife and was not being returned under the influence of the father of the lady, and it may have been thought proper by the testator to bequeath his estate to the brother rather than to the wife. Be that as it may, the evidence led by the petitioner is quite sufficient to prove that Lakshmi Chand was in a sound and disposing state of mind at the time of execution of the will, and the respondent has failed to substantiate her objections.

(6) The appeal is, therefore, accepted, the order of the lower Court is set aside, and letters of administration with a copy of the will annexed in respect of the estate of Lakshmi Chand mentioned in the petition be granted to Hukmi Chand. In view of the fact that the respondent is the wife of the deceased testator, we make no order as to costs.

V.B.B. *Appeal allowed.*

A. I. R. (39) 1952 Rajasthan 52 *[C. N. 24.]*

(JODHPUR BENCH)

WANCHOO C. J. AND BAPNA J.

Udai Chand, Appellant v. Mt. Bakka and others, Respondents.

Civil R.: 1st Appeal No. 16 of 1950, D/- 17-10-51.

Bikaner State Pre-emption Act (1 of 1919), S. 10(1) Cl. (8) — 'Community', meaning of — (Words and Phrases).

The word 'Community' as used in S. 10 (1), Cl. (8) has not been used in its widest but restricted meaning viz. 'people organised into a social unit'.

Persons belonging, for example, to the Christian or Moslem religion will form communities by themselves. But in the case of Hindus, the restriction will have to go further because there are four well recognised 'Varnas' among Hindus each of which may be said to consist of a body of persons organised into a social unit.

Hence where both the pre-emptor and the vendor are Hindus it must further be seen whether the two belong to the same 'varna'. In this sense a 'Suthar' and an 'Oswal' cannot be said to belong to the same community for purposes of S. 10 (1), Cl. (8). (*Para 7*)

Ugam Raj, for Appellant; Ganpat Singh, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('48) Appeal No. 2 of 1948, D/- 1-10-1948 (Raj) (Pr 4)

('48) Appeal No. 49 of 1948, D/- 23-1-1948 (Raj) (Pr 4)

WANCHOO, C. J.: This is an appeal by Udaichand against the decree of the District Judge of Bikaner dated 26th of May 1950 dismissing the suit brought by the plaintiff-appellant for pre-emption.

(2) The suit related to the pre-emption of a house in the city of Bikaner. It belonged to one Ghewarchand Suthar. This man sold the house to Mt. Bakko wife of Senskaran Oswal. The plaintiff-appellant claimed pre-emption on the ground that his house was contiguous to the house of Ghewar Chand and opened on the same side and he was of the same community as Ghewar Chand and was therefore entitled to pre-empt. Pre-emption was also claimed on another ground based on Cl. 7 of S. 10 (1) of the Bikaner State Pre-emption Act (No. I of 1919) but that ground is not being urged before us in appeal. Reliance is being placed entirely on Cl. 8 of S. 10 (1) of the Act.

(3) The suit was opposed by Mt. Bakko. She admitted that the plaintiff's house was contiguous to that of her vendor and that the two houses opened on the same side but she denied that the plaintiff was of the same community as the vendor. She therefore, said that he could not take advantage of the eighth clause of S. 10 (1). The only question for decision, therefore, before the Court below was whether the plaintiff belonged to the same community as the vendor and that is the question which we have also gone into.

(4) Before we turn to answer that question, we should like to set out the eighth clause of S. 10 (1) which reads as follows:

> "The right of pre-emption shall vest eighthly where the sale is of a property contiguous to other properties in the owners of such of the latter properties as are contiguous to the property sold and open in the same direction: provided that only those bearing relationship to the vendor and failing them, those of the same community as the vendor, shall have a right of pre-emption."

The trial Court relying on a decision of the High Court of the former State of Bikaner dismissed the suit on the ground that the pre-emptor did not belong to the same community as the vendor. The contention on behalf of the appellant before us is that the pre-emptor and the vendor, in fact, belong to the same community because they are both Hindus. The argument is that the word "community" used in this section is a very wide word and should be given the widest application and that, therefore, every Hindu should be deemed to be a member of the same community. This view, however, was not accepted by the High Court of the former Bikaner State in an unreported case 'Rangla v. Hanumanprasad', Appeal No. 2 of 1948. In that case, the vendors were Agarwals and the pre-emptor was a Brahmin. It was held that the two did not belong to the same community. In that case, reference was also made to an earlier decision of the Judicial Committee of the former State of Bikaner, 'Bajranglal v. Gani', Appeal No. 49 which was decided on the 23rd of January 1948'. In that case, the vendor was an Agarwal and the pre-emptor Bajranglal was a Maheshwari. It was held in that case that the two belonged to the same community.

(5) We have in this case to interpret the word "community". It may be mentioned that the Bikaner Act does not define the word "community" anywhere and we have, therefore, to find its meaning as best as we can by reference to dictionaries and the circumstances in which the word has been used in the particular section. In the Shorter Oxford English Dictionary, the word "community" has been given a number of meaning as below: (1) The commonalty, (2) A body of people organised into a political municipal or social unity, (3) The body of persons living together and practising community of goods. In 'Webster's New International Dictionary of the English language also, the word "community" has various meanings of which the following appear relevant for our purpose: (1) The society at large. (2) A commonwealth or state, (3) A body politic, (4) The public or peoples in general, (5) Restrictedly, the people of a particular place or region as a town, village or neighbourhood, (6) A body of people having common organisation of interest or living in the same place under the same laws and regulations as a community of monks.

(6) It will appear from these meanings that in its widest sense, the word "community" will include all the members of the public in the whole country but the word also has a restricted meaning and may apply either to all persons living in a particular place, for example, a town or a village or to all persons knit together by certainties which may be political, municipal or social.

(7) It seems to us that the word "community" as used in the eighth clause of S. 10 (1) has not been used in its widest but in its restricted sense. The word appears in a proviso in that clause and the proviso is meant to restrict what would otherwise have been a general right given to everyone who has property contiguous to the property sold and opening in the same direction. The restriction that has been placed in the proviso is twofold. In the first place, the right of pre-emption has been given to relations and secondly, failing the relations, to persons of the same community. It seems to us, therefore, that the meaning to be attached to this word in the context in which it has been used should be restricted to people organised into a social unit. If that meaning is given, it is clear that persons belonging, for example to the Christian or Moslem religion will form communities by themselves. But in the case of Hindus, it seems to us that the restriction will have to go further because there are four well recognised 'Varnas' among Hindus each of which may be said to consist of a body of persons organised into a social unit. Further, considering that the right of pre-emption is given to the members of the same community when relations do not exist, it is clear that the restriction among Hindus must refer to these four well-defined Varnas. The judgment of the Judicial Committee of the former Bikaner State in which it was held that "Agarwals and Maheswaries belong to the same community" can be reconciled only on this principle with the later judgment of the High Court in which it was held that a Brahmin and an Agarwal belong to two different communities. We are, therefore, of opinion that where both the pre-emptor and the vendor are Hindus, we have to restrict the meaning of the word "community" a little than in the case of say, Moslems or Christians and must take into account whether the two parties belong to the same Varna or not. Applying this principle to the present case, we find that the vendor is a suthar while the pre-emptor is an Oswal. The two, therefore, do not belong to the same community and the trial Court was right in dismissing the suit for pre-emption. The appeal is hereby dismissed with costs to the vendees respondent.

K.S. *Appeal dismissed.*

A. I. R (39) 1952 Rajasthan 53 *[C. N. 25.]*

(JODHPUR BENCH)

WANCHOO C. J. AND BAPNA J.

Shamsuddin, Applicant v. The State of Rajasthan and others.

Civil Misc. Case No. 58 of 1951, D/- 19-9-51.

Municipality — Elected member sending his resignation — Revocation of resignation — Competency of — Clubs.

A letter of resignation sent by a member who is duly elected to a Municipal Board takes effect on receipt of the letter by the appropriate authority. And unless there is any law or gene-

ral principle to the contrary, the member cannot contend that the authority has no authority to act upon the letter of resignation when he had withdrawn it. Halsbury's (Hailsham) Laws of England, Vol. IV, para 905 and Vol. XXI, paras 224 and 335, Rel. on. (*Paras 3, 4*)

Chand Mal, for Applicant; Sumer Dan, for the State; Govind Narain, for Respondent No. 2.

WANCHOO, C. J.: This is an application by Shamsuddin under Art. 226, Constitution of India, for the issue of a writ in the nature of 'mandamus' or prohibition or 'certiorari' to the State of Rajasthan.

(2) The facts, which have led to this application, are not in dispute. The applicant, Shamsuddin, was elected as a member of the Nagaur Municipal Board on 10-9-1949 and his election was notified in the Rajasthan Raj-Patra dated 21-12-1949. The applicant worked as a member of the Board till January, 1951. Thereafter, it appears that he had to go to Bombay and stay there for a long time in connection with his business. He, therefore, sent his resignation from the membership of the Board by post from Bombay to the Collector of Nagaur on 8-6-1951, and this was received by the Collector on 12-6-1951. Shortly afterwards, the applicant found that he would not have to stay longer in Bombay. Therefore, on 23-6-1951, he sent a telegram to the Collector of Nagaur withdrawing his resignation which he had despatched on 8-6-1951. He also sent a letter on 25-6-1951, confirming his telegram and withdrawing his resignation. It appears that the resignation of the applicant, along with the letter withdrawing it, was forwarded to the Government of Rajasthan by the Collector. It further appears that the Government of Rajasthan accepted the resignation on 23-7-1951, and did not attach any weight to the letter withdrawing the resignation. The applicant's contention before us is that in view of the fact that he had withdrawn his resignation, the Government had no authority to act upon it, and the order of the Government accepting the applicant's resignation was clearly illegal, 'ultra vires', and void, and could not be enforced.

(3) Learned counsel for the applicant has admitted that there is no law in force with respect to the Municipality of Nagaur, except Act No. XXI (21) of 1949, which prescribes the manner in which elections to Municipal Boards in District towns in the former State of Jodhpur would be held. This Act, however, makes no provision for any other matter except the election of members to such Boards. The matter of resignation from such membership is thus left entirely unprovided for, and there is no law in support of the applicant's contention that the Government had no authority to act upon the letter of resignation, when he had withdrawn it.

(4) We may, in this connection, refer to certain passages in Halsbury's Laws of England, Hailsham Second Edition. In Volume IV, at page 491, para. 905, dealing with unincorporated bodies, the following observations occur:

> "Subject to any provision in the rules to the contrary, a member of an unincorporated members' club may at any time terminate his membership, and if desirous of doing so must communicate to the secretary his intention to resign. The resignation does not require any acceptance by the committee, and cannot, in the absence of a bye-law to the contrary, be withdrawn or revoked. A member who sends a letter of resignation thereupon ceases to be a member, and can only be reinstated by re-election."

The law relating to corporate bodies is to be found in Volume XXI (21), at page 128, para. 224, where the following passage occurs:

> "A person elected to a corporate office may at any time resign the same by writing signed by him and delivered to the town clerk, the resignation taking effect upon receipt by the town clerk of the notice."

Further, in para. 335, at page 179, we find the following passage:

> "Either the chairman or the councillors may resign by notice in writing delivered respectively to the parish council in the case of the chairman, or to the chairman in the case of a councillor, and such resignation takes effect on receipt of the notice."

It is true that these two passages relating to corporate bodies are based on certain provisions in the Local Government Act of 1933; but learned counsel has not been able to point out to us any general principle by which the Government was bound to take into account the letter withdrawing the resignation. It is not even clear whether the Municipal Board of Nagaur is a corporate body or an unincorporated association. Whatever may be the position of the Municipal Board of Nagaur, in the absence of any law, we are unable to issue a writ of any kind.

(5) The application is hereby dismissed. The stay order is withdrawn. We pass no order as to costs.

V.S.B. *Application dismissed.*

A. I. R. (39) 1952 Rajasthan 54 *[C. N. 26.]*

(JAIPUR BENCH)

RANAWAT, J.

Abdul Shakur v. State.

Criminal Ref. No. 163 of 1951, D/- 16-8-1951.

Criminal P. C. (1898), Ss. 109, 499 — Order of Court silent about attendance of accused — Security bond both for attendance and for good behaviour — Validity.

Where the Security bond which was executed by the Surety was both for security for good behaviour of the accused and also for his attendance in the Court of the Magistrate during the enquiry of the case under S. 109, Criminal P.C., but the order of the Magistrate demanding security from the accused was silent as regards the arrangement for his attendance:

'Held' that in accepting the bond which was executed by the surety the action of the Court clearly indicated that it accepted the bond and considered the arrangement therein stated regarding the attendance of accused during the further proceedings against him. Simply because no express record of the proceedings was made regarding the fact of taking a surety bond from the accused under S. 499, Criminal P.C., the security bond executed by the surety and accepted by the Court should not be considered to be void. The latter was bound by the terms of his security bond and he could not escape the liability on account of defect in the record of the proceedings of the Court. (*Para 3*)

Anno: Criminal P.C., S. 109, N. 2, S. 499, N. 1.

Ram Avtar Gupta, Govt. Advocate, for the State.

ORDER.: This is a reference of the Additional Sessions Judge, Jhalawar. A chalan was presented in the Court of the Sub-Divisional Magistrate, Jhalawar, by the police against one Fakir Mohammad under Section 109, Criminal P.C., on the 13th

of February 1950, the Sub-divisional Magistrate made an order under Section 112, Criminal P.C., calling upon Fakir Mohammad to show cause why he should not be asked to furnish security for good behaviour. At the same time, an order under Section 117 (3) Criminal P.C., was also made demanding Security from Fakir Mohammad for good behaviour until the conclusion of the proceedings under Section 109, Criminal P.C. Fakir Mohammad who was in detention at that time agreed to furnish security as was desired by the Court and Abdul Shakur stood surety for him. Fakir Mohammad was released after a bond was executed by Abdul Shakur both for his good behaviour and for his attendance in Court during the further proceedings in the case. On the next date which was fixed in the Court of the Sub-divisional Magistrate, Fakir Mohammad failed to appear and it was found that he had gone to Pakistan. Abdul Shakur was therefore ordered to show cause why his surety bond be not forfeited. After taking the explanation of Abdul Shakur the Sub-Divisional Magistrate forfeited the security bond in part to the extent of Rs. 105/- only. An appeal was filed in the Court of the District Magistrate, Jhalawar, which was dismissed. The petitioner Abdul Shakur then applied to the Court of the Additional Sessions Judge Jhalawar who has made this reference. The learned Additional Sessions Judge has held that the security bond for the attendance of Fakir Mohammad was not in accordance with any order of the Court and hence it has been recommended that the bond ought not to have been forfeited.

(2) The security bond which was executed by Abdul Shakur is both for security for good behaviour of Fakir Mohammad and also for his attendance in the Court of the Sub-divisional Magistrate during the enquiry of the case under Section 109, Criminal P.C. The order of the Sub-divisional Magistrate demanding security from Fakir Mohammad was silent as regards the arrangement for the attendance of Fakir Mohammad in Court during the enquiry. It simply referred to the security bond regarding good behaviour of Fakir Mohammad. It is, therefore, urged on behalf of Abdul Shakur that the condition of his bond regarding the attendance of Fakir Mohammad should not be enforced against him.

(3) It may be observed that even though the Court of the Sub-division did not record in its proceedings expressly anything on the subject regarding attendance of Fakir Mohammad during the course of the enquiry yet, in accepting the bond which was executed by Abdul Shakur the action of the Court clearly indicates that it accepted the bond and considered the arrangement therein stated regarding the attendance of Fakir Mohammad during the further proceedings against him. Simply because no express record of the proceedings was made regarding the fact of taking a surety bond from Fakir Mohammad under Section 499, Criminal P. C., the security bond executed by Abdul Shakur and accepted by the Court should not be considered to be void. Abdul Shakur is bound by the terms of his security bond and he cannot escape the liability on account of any defect in the record of the proceedings of the Court. The proceedings against Fakir Mohammad related to S. 109, Criminal P. C., and after he had left India and had gone to Pakistan there remained no necessity for continuing the proceedings against him. In view of this fact it was no longer necessary for the Court of the Sub-divisional Magistrate to hold any further enquiry or to require the attendance of Fakir Mohammad. The proceedings could be shelved at that stage on that account. This should be considered a good in favour of Abdul Shakur. The amount of Rs. 105/- appears to be excessive in the light of the aforesaid observation. A nominal amount only need be recovered from Abdul Shakur. The security bond has been forfeited and in pursuance of it an amount of Rs. 20/- only need be recovered from the surety in place of Rs. 105/- ordered to be collected from him by the Courts below. With this variance the order of the first Court is confirmed and this reference is partly disallowed.

D.H. *Order accordingly.*

A. I. R. (39) 1952 Rajasthan 55 [C. N. 27.]

(JODHPUR BENCH)

TRILOCHAN DUTT, J.

Premraj, Petitioner v. The State.

Criminal Revision No 29 of 1950 D/- 24-4-1950.

(a) Criminal P. C. (1898), S. 252 (2) — Non-compliance with.

Under S. 252 (2) the Magistrate is bound to ascertain from the complainant or otherwise the names of any persons likely to be acquainted with the facts of the case, and to be able to give evidence for the prosecution.

Where the Prosecuting Inspector never closed his evidence and the case was adjourned for framing a charge-sheet when the Prosecuting Inspector was pressing for examining a few more witnesses:

'Held' that as the names of those witnesses were not ascertained by the Magistrate, the Prosecution was entitled to examine the witnesses. AIR (32) 1945 Lah, 201, Rel. on. **(Paras 5, 10)**

Anno: Criminal P. C., S. 252, N. 7.

(b) Criminal P. C. (1898), S. 256 — "Remaining witnesses for prosecution."

Under Section 252 (2), the complainant is required to give in a list of prosecution witnesses. Under S. 254, the Magistrate may examine all those witnesses and then frame a charge-sheet or he may frame a charge-sheet before he has examined all those witnesses. If he adopts the latter course and certain witnesses remain from the list who have not been examined, then those witnesses are the remaining witnesses under S. 256 (1) and the complainant has a right to produce them. But if the Magistrate has examined all the witnesses for the prosecution in the list under S. 252 (2) and has then framed a charge-sheet, there are no witnesses remaining who would come under the description in S. 256 (1). Hence, after this stage, the complainant cannot claim to produce an entirely new witness. AIR (32) 1945 Lah 201; AIR (24) 1937 All 189, Rel. on. AIR (31) 1944 Mad 169, Diss. from. **(Para 8)**

Anno: Criminal P.C., S. 256, N. 9.

Manakmal, for Petitioner; Laxminarain, for Govt. Advocate, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('37) AIR (24) 1937 All 189: (38 Cri L J 394) (Pr 8)

('45) AIR (32) 1945 Lah 201: (47 Cri L J 143 FB) (Prs 5, 7, 10)

('44) AIR (31) 1944 Mad 169: (45 Cri L J 401) (Pr 7)

ORDER.: The case, out of which this revision petition has arisen, is pending in the Court of the Sub-divisional Magistrate, Barmer. A criminal case under Sections 379, 414 and 409 was registered on 20th of October 1948 in the Court of the said Magistrate against the two petitioners, Premraj, Ramanlal and one Bhagirath, on a Police report.

A list of 36 prosecution witnesses was attached to this Police report under Section 173 of the Criminal Procedure Code. Out of these 36 witnesses, the prosecution was able to examine 27 upto 4th of August 1949, i.e., within 10 months . On 8th of June 1949, the Prosecuting Inspector presented an application before the Magistrate requesting him to issue summons in the name of 14 witnesses. All these witnesses were included in the list of 36 witnesses mentioned above. This application of the Prosecuting Inspector for issuing summons in the name of 14 witnesses was rejected by the Magistrate on 29th of June 1949 but time was granted to the prosecution to bring these 14 witnesses in the Court on their own responsibility and examine them on the next hearing. Out of these 14 witnesses, 11 were examined till 4th of August 1949 and 3 were given up by the Prosecuting Inspector and on this date, the Magistrate was again requested by the Prosecuting Inspector to grant time for the examination of a few more witnesses which request was disallowed and the case was kept for framing the charge-sheet. On 6th of August 1949, the charge-sheet was framed and on the refusal of the accused to plead guilty, the case was adjourned for the next date. On the next date, the accused expressed their desire to further cross-examine all the prosecution witnesses. This cross-examination of the prosecution witnesses was finished on 7th of November 1949, and the order which was passed by the Magistrate on this date carries with it a special significance as far as the decision of the present petition before me is concerned. The learned Magistrate passed orders calling upon the prosecution to examine the remaining witnesses, on which the prosecuting Inspector put in a list of six witnesses and requested the Magistrate to issue summons in their names. In this list, three witnesses, Mana, Dhura and Rugnath were entirely new, while the other three, Baluram, Kunjraj and Mahadan were the witnesses whose names were included in the list of 36 witnesses given under Section 173 of the Criminal Procedure Code. The accused objected to the right of the prosecution to examine these witnesses at this stage and the case was adjourned for the next day for giving decision on the application of the Prosecuting Inspector. On the next day, i.e., on 8th of November 1949, the learned Magistrate refused to issue summons in the name of any witness, but allowed the prosecution to examine 3 witnesses, who were entirely new, provided they could bring them to the Court on their own accord, and refused permission to examine the other three whose names were included in the list tendered under Section 173, Criminal Procedure Code, on the ground that the application of the prosecution to summon & examine these witnesses had once been rejected by him, and hence, these witnesses do not fall within the category of the remaining witnesses, as provided in Section 256 of the Code of Criminal Procedure. The accused were not satisfied with this order of the Magistrate and hence they preferred a revision petition in the Court of the Sessions Judge, Balotra. The learned Sessions Judge dismissed this petition on 19th of December 1949 upholding the order of the Sub-divisional Magistrate, Barmer. The decision of the learned Sessions Judge on the revision petition of the accused was given in the following words:

"The Section 256, Criminal Procedure Code, clearly enables the Crown to examine witnesses who have not been examined or whose names have not been disclosed. The expression "remaining witnesses for the prosecution" in Section 256, Criminal P. C. presumably means the remaining witnesses that the prosecution wishes to examine. The prosecution is at liberty to examine whomsoever it pleases until the prosecution case nas been closed. The prosecution is not closed until the defence begins."

(2) The accused were not again satisfied with this order of the learned Sessions Judge and hence they have given the present petition in this Court, with the prayer, that the order of the Sub-divisional Magistrate, dated 8th of November 1948, giving the prosecution an opportunity to examine, entirely new witnesses, after the framing of a charge-sheet, should be set aside, as the view of both the lower Courts that these witnesses fall within the category of "remaining witnesses for the prosecution" is wrong.

(3) Shortly put, the whole question in this case hinges upon the interpretation of the expression "remaining witnesses for the prosecution' occurring in Section 256 of Criminal Procedure Code. Section 256 of the Criminal Procedure runs as follows:

"256. (1) If the accused refuses to plead, or does not plead, or claims to be tried, he shall be required to state, at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be be recalled and, after cross-examination and re-examination (if any), they shall be discharged. The evidence of any remaining witnesses for the prosecution shall next be taken, and, after cross-examination and re-examination (if any), they also shall be discharged. The accused shall then be called upon to enter upon his defence and produce his evidence."

(4) The case in which the question nas arisen is a warrant case and the procedure to be adopted in warrant cases is set forth in Sections 251 to 259 of the Criminal Procedure Code. The relevant sections which need consideration in the present case are Sections 173 (1) (a), 251, 252 (1) and (2), 253 (1), 254 and 256 (1). In order to understand the question fully, it is bettter to set out these Sections in the exact context. Section 256 (1) has been given above. The other sections run as follows:

"173. (1) Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer in charge of the police-station shall:

(a) forward to a Magistrate empowered to take cognizance of the offence on a police-report a report, in the form prescribed by the (Provincial Government), setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in custody or has been released on his bond, and, if so, whether with or without sureties, and....."

251. The following procedure shall be observed by Magistrates in the trial of warrant cases;

252. (1) When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution:

Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.

(2) The Magistrate shall ascertain, from the complainant or otherwise the names of any persons likely to be acquainted with the facts

of the case and to be able to give evidence for the prosecution, and shall summon to give before himself such of them as he thinks necessary.

253. (1) If, upon taking all the evidence referred to in Section 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

254. If, when such evidence and examination have been taken and made, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try, and which, in his opinion could be adequately punished by him, he shall frame in writing a charge against the accused."

(5) According to Section 173 (1) (a), it is imperative on the Police Officer to set forth in the report forwarded to the Magistrate empowered to take cognizance of the offence on a police report the names of the persons acquainted with the circumstances of the case. In the present case, the names of 36 witnesses were set forth in the report presented to the Sub-divisional Magistrate, Barmer. According to Section 251, it is imperative on a Magistrate trying a warrant case to follow the procedure laid down in Sections 252 to 256. The provisions of this section are mandatory. There are two Sub-sections of Section 252. According to Subsection (1) the Magistrate is bound to take, when the accused appears or is brought before him, all such evidence as may be produced in support of the prosecution. This evidence can be no other evidence but that the list of which was given by the prosecution in challan cases under Section 173 (1) (a), or any evidence which a complainant himself produces at the very first instance, if the cognizance of the offence was taken on a complaint. Subsection (2) of Section 252 is very important for the purposes of the present case before me. This Sub-section is peculiar to the trial of warrant cases, and perhaps is one to which a large majority of the Magistrates trying warrant cases in this Province pay little heed. It will not be wrong to say that there are very few magistrates who care to read and understand S. 252 of the Criminal Proceduer Code. According to Sub-section (2) of this section, it is obligatory on a Magistrate trying a warrant case, to ascertain from the complainant or from the officer conducting the prosecution, if the cognizance of the case was taken on a police report the names of any persons likely to be acquainted with the facts of the case and after ascertaining, to issue summons in the names of such of them, as he thinks necessary, to appear before him and give evidence. From the perusal of Section 252, it will appear that there are two obligations enjoined upon a Magistrate trying a warrant case. He is, by reason of sub-section (1) of this section, bound to take all evidence that may be produced by the Prosecutor in support of the prosecution and by reason of Sub-section (2) he is further bound to ascertain from the complainant or otherwise the names of any persons likely to be acquainted with the facts of the case, and to be able to give evidence for the prosecution, and then to summon to give evidence before himself such of them as he thinks necessary. This point came up for consideration before a Full Bench of the Lahore High Court in 'HEMAN RAM v. EMPEROR', AIR (32) 1945 Lah 201. On page 204, Monir, J., observed as follows:

"The provision requiring the Magistrate to proceed in this manner (manner prescribed by Section 252 (2)) is mandatory, and it seems to be clear that before the stage of Section 254 is reached, i.e., before the accused is discharged or charged, the Magistrate must, in the manner laid down in Section 252 (2) ascertain the names of all the persons who may be able to give evidence for the prosecution. In cases where the offence is taken cognizance of on a police report, the police in submitting their report under Section 173 of the Code are required by the form which is prescribed in this Province for that report to give a list of all the witnesses for the prosecution. The mere existence of this list, however, does not relieve the Magistrate of the duty to ascertain the names of the witnesses under Section 252 (2) and he is bound to question the complainant or the officer in charge of the prosecution about the matter."

(6) According to Section 253 (1), a Magistrate is bound to take all the evidence referred to in Section 252, i.e., the evidence cited by the prosecution under Section 173, and the evidence ascertained by the Magistrate under S. 252 (2). Under S. 254, the Magistrate, if he is of opinion that there is ground for presuming that the accused has committed an offence, shall frame a charge-sheet either after taking all the evidence referred to in Section 252 or at any previous stage of the case, i.e., at any time before the finishing of the evidence referred to in Section 252. Under Section 256, the accused will be provided with an opportunity of further cross-examining the prosecution witnesses who were examined before the framing of the charge-sheet and then an opportunity will be given to the prosecution to examine the remaining prosecution witnesses.

(7) The words "remaining witnesses for the prosecution" are the subject of discussion in the present suit. In 'CROWN PROSECUTOR, MADRAS v. RAMANJULU NAIDU', AIR (31) 1944 Mad 169, a very wide interpretation was put on this expression. It was held in that case that:

'the expression 'remaining witnesses for the prosecution' in Section 256 (1) presumbly means the remaining witnesses that the prosecution wishes to examine. The prosecution is at liberty to examine whomsoever it pleases, until the prosecution case has been closed. The prosecution case does not end with the framing of the charge. The prosecution is not closed until the defence begins."

It seems that the learned Sessions Judge, Balotra gave his decision on the authority of this ruling although he did not cite the ruling in his judgment. I feel much difficulty in agreeing with the view taken in 'AIR (31) 1944 Mad 169.' In the first place, if this view is accepted, there will be no end to the production of prosecution witnesses and the case of the prosecution will have to be begun anew after the framing of the charge-sheet. When the law has given two opportunities to the prosecution, in warrant cases to put in the list of the prosecution witnesses, and has made it obligatory on the Magistrate to ascertain from the prosecution, the names of any other persons likely to be acquainted with the facts of the case and to summon them to appear and give evidence before him, there seems to be no reason to give, after the framing of a charge, such a wide rope to the prosecution as has been given by 'AIR (31) 1944 Mad 169.' The soundness of this view was not accepted by a Full Bench of the Lahore High Court in 'AIR (32) 1945 Lah 201', referred to above. In the Full Bench case, after considering all the authorities for and against on the point and after

going into the history of legislation on the point, the learned Judges held as below:

"Under Section 254 the Magistrate may examine all those witnesses whose names have been ascertained under Section 252 (2) and then frame a charge-sheet, or he may frame a charge-sheet before he has examined all those witnesses. If he adopts the latter course and certain witnesses remain from the list who have not been examined, then those witnesses are the remaining witnesses under Section 256 (1) and the complainant has a right to produce them after the cross-examination of those witnesses who have previously been examined."

(8) In the Full Bench case, above referred to, reliance was placed on 'RAGHUBIR SAHAI v. WALI HUSAIN KHAN', AIR (24) 1937 All 189, in which it was held that:

"Under Section 252 (2) the complainant is required to give in a list of prosecution witnesses. Under Section 254 the Magistrate may examine all those witnesses and then frame a charge-sheet or he may frame a charge-sheet before he has examined all those witnesses. If he adopts the latter course and certain witnesses remain from the list who have not been examined, then those witnesses are the remaining witnesses under Section 256 (1) and the complainant has a right to produce them. But if the Magistrate has examined all the witnesses for the prosecution in the list under Section 252 (2) and has then framed a charge-sheet, there are no witnesses remaining who would come under the description in Section 256 (1). Hence, after this stage, the complainant cannot claim to produce an entirely new witness."

(9) The view taken by the Allahabad and Lahore High Courts seems to be correct and reasonable and I respectfully agree with it. The learned Government Advocate has not shown his opposition to this view but rather frankly admitted it. Hence, the propositions established are:

(1) A Magistrate trying a warrant case must take all the evidence brought by the complainant along with him at the very first instance or the list of which was given by him along with his complaint and in cases registered on police report must take all the evidence, the list of which was given by the prosecution under Section 173 of the Criminal Procedure Code;

(2) In addition to the recording of the evidence mentioned in (1), it is obligatory on the Magistrate to ascertain at any time before the framing of the charge-sheet from the complainant or from the Officer-in-Charge of the prosecution of otherwise the names of any persons likely to be acquainted with the facts of the case and then after ascertaining to summon such of them as he thinks necessary to appear and give evidence before himself;

(3) The Magistrate may frame a charge either after taking all the evidence mentioned above or after examining some of the witnesses if he is satisfied that a prima facie case has been established against the accused. If the Magistrate adopts the latter course and frames a charge-sheet, the prosecution will be entitled to examine all the witnesses which were not examined before the framing of the charge-sheet. These are the witnesses who fall under the category of "remaining witnesses" as mentioned in Section 256 (1). If the Magistrate has adopted the former course, i.e., he framed a charge after examining all the witnesses, there is no witness left who may be called a "remaining witness for the prosecution."

(10) Now coming to the case, out of which the present petition has arisen, the most glaring defect that is visible on the face of the file is that the Sub-divisional Magistrate, Barmer never cared to ascertain from the Prosecuting Inspector or otherwise the names of any persons likely to be acquainted with the facts of the case. He never adopted the procedure laid down in Sub-section (2) of Section 252, and the Prosecuting Inspector also never put in a list of witnesses under Section 252 (2). His application to summon 14 witnesses out of the list of 36 cannot be considered to be a new list under Section 252 (2). The Prosecuting Inspector never closed his case but he had been pressing all through that more witnesses for the prosecution should be examined. On the 4th of August 1949 he clearly stated in Court that he wants to examine a few more witnesses and requested for an adjournment but the learned Magistrate refused to grant time and moreover, he did not care to ascertain the names of those "few more witnesses." Who were these "few more witnesses", nobody knows. If the Magistrate had asked the Prosecuting Inspector to put in a list of these "few more witnesses", then this list would have been a list under Section 252 (2) of the Criminal Procedure Code. It is just possible that the names of these three witnesses, Mana, Dhura and Rugnath would have appeared in that list. In 'AIR (32) 1945 Lah 201', also the names of the witnesses were not ascertained by the Magistrate as directed under Section 252 (2) but in that case, the Prosecuting Officer gave a statement that all the witnesses for the prosecution had been examined and there was none left. It is not so in the present case. The Prosecuting Inspector never closed his evidence. The case was adjourned for framing a charge-sheet when the Prosecuting Inspector was pressing for examining a few more witnesses and as the names of those witnesses were not ascertained by the Magistrate, the Prosecution is entitled to examine the witnesses for the prosecution for which the permission has been given by the Sub-divisional Magistrate. For the the reasons given above, the revision petition fails and the order of the Sub-divisional Magistrate, dated 8th of November 1949 is not disturbed with the remark that he should in future be more careful in adopting the procedure laid down in Section 252, Criminal Procedure Code.

D.H. *Revision dismissed.*

A. I. R. (39) 1952 Rajasthan 58 *[C. N. 28.]*

(JODHPUR BENCH)

KSHEM CHANDRA GUPTA, J.

Widow of Harikishan and another, Appellants v. Bheek Singh and others, Respondents.

Second Appeal No. 16 of 1950, D/- 4-10-1950.

Execution — Money decree — Execution of — Council Resolution of 1921 fixing time-limit whether applies to decrees made before passing of Resolution.

An application for execution of a decree obtained on 10-4-1912, was dismissed on the ground that the period of more than 24 years had elapsed even after the Council Resolution dated 8-4-1921, whereby decrees could be kept alive only for 24 years or for another 6 years in exceptional cases. It was contended in appeal that the Council Resolution had no retrospective effect and could not apply to the decrees passed before the passing of the resolution.

'Held' that no exception in the Council Resolution had been made in favour of the holders of decrees passed before those years. (*Para 2*)

Mangimal, for Appellants; Chandmal, for Respondents.

JUDGMENT.: This is a miscellaneous Second Appeal in execution proceedings. The appellants had obtained a decree on the 10th of April, 1912 for Rs. 355/4/- against the respondents. The petition for its execution out of which this appeal arises was filed on the 22nd of December 1948, in the Court of the Munsiff, Phalodi. It was considered as barred by time and dismissed on the ground that a period of more than 24 years had elapsed even after the Council Resolution dated the 8th of April, 1921, published in English in the Marwar Gazette of May 21st 1921, and in Hindi in the same Gazette of May 28, 1921, whereby decrees could be kept alive only for 24 years, and for another 6 years in exceptional cases. An appeal was taken to the Additional Sub-Judge, Jodhpur, who also dismissed the same on the 5th of October 1949. Hence this appeal.

(2) It is contended on behalf of the appellants that the above mentioned Council Resolution had no retrospective effect and could not apply to decrees passed before the passing of the said resolution. The learned Counsel for the appellants supported his argument by a judgment of the Full Bench of the Chief Court of Jodhpur, dated the 27th of February 1946 which undoubtedly supports his contention. Mr. Chand Mal who was appointed amicus curiae by the Court, on the contrary argued, that no exception in the Council Resolution of 1914 or of 1921 had been made in favour of the holders of decrees passed before those years. On the contrary, the language of the resolutions was clear and it showed the intention of the legislature to limit the period during which such decrees could be executed to 24 years or to 30 years in exceptional cases. In support of his argument, he cited the judgment of the Judicial Committee. Izlai-i-Khas, Jodhpur, dated the 27th of March, 1948, signed by His Highness the Maharaja Sahib Bahadur on the 22nd of December 1948, by which the said Full Bench judgment has been overruled. When the said Judgment of the Judicial Committee was brought to the notice of the learned Counsel for the appellants, he conceded that his appeal had no force.

(3) In the circumstances of the case, this appeal is rejected. As the respondents have not put in any appearance, no order for costs is made. In the end, I express my appreciation of the keen interest taken and the labour put in by Shri Chand Mal in tracing out the unpublished Judicial Committee judgment.

V.S.B. *Appeal dismissed.*

A. I. R. (39) 1952 Rajasthan 69 *[C. N. 29.]*

(JAIPUR BENCH)

RANAWAT AND DAVE, JJ.

Ramachandra, Applicant v. Daulatram, Opposite Party.

Civil Revn. No. 88 of 1950, D/- 31-10-1950.

(*a*) *Civil P. C. (1908), S. 115 — "Subordinate Court" — Civil Court — Test.*

Every type of a body or a tribunal cannot be a civil Court, simply because it possesses certain trappings of a Court. Similarly it is not true that every decision given by an officer who is ordinarily a presiding officer of a judicial Court is a decision of a civil Court. One of the main tests to be applied is whether the matter had come to the judicial officer for decision only as a part of his ordinary jurisdiction or by reason of a special jurisdiction conferred upon him. It should be further seen whether the legislature meant to give a finality to his decision or to keep the appellate and revisional powers to another administrative or executive body or it was meant that the High Courts should continue to exercise their revisional powers and treat that officer as their subordinate in respect of the matter in which the decision was given. (*Para 4*)

Anno: C. P. C., S. 115 N. 6.

(*b*) *Houses and Rents — Matsya Premises (Rent Control) Ordinance (1948), Ss. 3 and 10 — Controller and Appellate Authority if Civil Courts subordinate to High Court — Civil P. C. (1908), S. 115.*

It is clear from Ss. 3 and 10 that a Controller or an Appellate Authority need not be a judicial officer. It also appears from the language of S. 10 that the decision of the Appellate Authority and subject to his decision the order of the Controller is final. This again shows that both the Rent Controller and the Appellate Authority under the Ordinance are not Civil Courts subordinate to High Court. (*Para 7*)

Anno: C. P. C., S. 115 N. 6.

Jagan Prasad, for Applicant; Ram Avtar Gupta, for Opposite Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('50) AIR (37) 1950 Cal 263: (54 Cal W N 389) (Pr 7)

('50) AIR (37) 1950 E P 181: (52 Pun L R 1 F B) (Pr 7)

(1931) A C 275: (100 L J P C 55) (Pr 4)

DAVE J.: This is an application in revision under S. 115 C. P. C. by a tenant named Ram Chandra against the appellate order of the District Judge, Alwar, dated the 30th March 1950, reversing the order of the Rent Controller Alwar, dated the 23rd November 1949.

(2) Mr. Ram Avtar appearing for the opposite party has raised a preliminary objection that this Court is not authorised to interfere with the order complained of under S. 115 C. P. C. According to him, the District Judge, Alwar, who was appointed as an appellate authority under S. 10 of the Rent Control Order was a persona designata and while deciding the appeal he was not functioning as an officer of the civil Court subordinate to the jurisdiction of the High Court. The applicant's advocate has urged in reply that there were two parties before the District Judge; he was discharging a judicial function in deciding the dispute between them; he was therefore working as a Court and he being subordinate to this High Court, his decision was certainly subject to revision under S. 115 C. P. C.

(3) The first point for our determination therefore is whether the District Judge while deciding the appeal was a persona designata or a civil Court subordinate to the jurisdiction of this Court within the meaning of S. 115 of the Civil P. C.

(4) To my mind, the objection put forward by the advocate for the opposite party is correct and, should, therefore, be allowed to prevail. The reply given by the applicant's advocate seems to make a little confusion between the powers of this Court under Art. 226 of the Constitution of India & S. 115 of the Civil P. C. It must be clearly borne in mind that the powers of this Court under S. 115 C. P. C. are not wholly identical with those conferred by Art. 226 of the Constitution of India. In order to enable the High Court to interfere under S. 115 C. P. C. it is necessary that the decision sought to be revised should be that of a civil Court

subordinate to it. It was observed by their Lordships of the Privy Council in 'SHELL COMPANY OR AUSTRALIA, LTD. v. FEDERAL COMMISSIONER OF TAXATION', (1931) A. C. 275 that:

"the authorities are clear to show that there are tribunals with many of the trappings of a Court which, nevertheless, are not Courts in the strict sense of exercising judicial powers."

It follows that every type of a body or a tribunal cannot be a civil Court, simply because it possesses certain trappings of a Court. Similarly it is not true that every decision given by an officer who is ordinarily a presiding officer of a judicial Court is a decision of a civil Court. There may be cases in which Judicial officers may be entrusted with some special powers of a quasi-judicial nature by special legislation and if they proceed to decide a certain matter in that capacity, it does not necessarily mean that it is a decision of a civil Court. In cases where a certain decision is given by a person who is ordinarily a judicial officer, the question whether the matter was decided by him as a civil Court or as a persona designata is not free from difficulty. The distinction in most cases is very fine and it is not easy to draw a clear line of demarcation in definite terms. To my mind, one of the main tests to be applied is whether the matter in which the decision has been given was meant by the legislature to be decided by a civil Court in the exercise of its ordinary jurisdiction or whether it meant to reserve its authority to entrust the matter to any executive or administrative body. In other words, it should be seen whether the matter had come to the judicial officer for decision only as a part of his ordinary jurisdiction or by reason of a special jurisdiction conferred upon him. It should further be seen whether the legislature meant to give a finality to his decision or to keep the appellate and revisional powers to another administrative or executive body or it was meant that the High Courts should continue to exercise their revisional powers and treat that officer as their subordinate in respect of the matter in which the decision was given.

(5-6) Looking from this angle of vision, it becomes quite clear that the matter had gone to the District Judge, Alwar, not in his ordinary capacity of a judicial officer but as a persona designata.

(7) Section 3 of the Matsya Premises (Rent Control) Ordinance, 1948, says that "controller" means the officer appointed for the time being by the Government of the United State to be the Rent Controller for the area specified in the order. This definition makes it quite clear that a Controller need not be a judicial officer and the Government is free to appoint any officer as such. Then S. 10 provides that any person aggrieved by an order of the Controller may within one month from the date of the communication of the order, present an appeal in writing to such officer as the Government of the United State may appoint. The decision of such officer and subject to such a decision, the order of the Controller shall be final. It is also clear from the language of S. 10 that the Government is free to appoint any person as an appellate authority and he need not necessarily be a judicial officer. The mere fact that the District Judge of Alwar was under this section appointed as an appellate authority would not, therefore make him a civil Court subordinate to the jurisdiction of this High Court. It would further appear from the language of this section that the decision of the appellate authority and subject to his decision the order of the controller is final. This again shows that both the Rent Controller and the appellate authority under this Ordinance are not civil Courts. A similar question had come up for discussion in the case reported in 'PITMAN'S SHORTHAND ACADEMY v. B. LILARAM & SONS', AIR (37) 1950 E P 181 (F B) and it was held by a Full Bench of that High Court that the Rent Controller and the appellate authority appointed under the Punjab Urban Rent Restriction Act of 1947 did not constitute civil Courts subordinate to the appellate jurisdiction of the High Court and, therefore, their orders were not subject to revision. It was remarked in that case that a non-official or even an official may be appointed as a persona designata to perform certain functions which may in some respects be judicial but he does not thereby become a civil Court. In another case reported in 'INDIAN HOMEOPATHIC MEDICAL ASSOCIATION, CALCUTTA v. KANAI LAL PAL', AIR (37) 1950 Cal 263 a similar view was expressed by their Lordships of that High Court and it was held that the order of the Chief Judge of the Court of Small Causes modifying on appeal an order of the Rent Controller fixing the standard rent for certain premises not being one mentioned in S. 32(6) was not open to revision by the High Court.

(8) The objection of the opposite party is, therefore, allowed and the application is dismissed with costs.

(9) RANAWAT J.: I agree.

G.M.J. *Application dismissed.*

A. I. R. (39) 1952 Rajasthan 60 *[C. N. 30.]*

(JAIPUR BENCH)

RANAWAT AND SHARMA JJ.

Rampal, Applicant v. Mangia, Opposite Party.

Criminal Revn. No. 192 of 1949, D/- 7-11-1950.

(a) Criminal P. C. (1898), Ss. 256, 258 — Warrant case — Charge framed — Date fixed for cross-examination of prosecution witnesses — Witnesses absent on date of hearing — Magistrate purporting to act under S. 258 acquitting accused — Order if justified.

In a warrant case the trial Court, after recording the prosecution evidence, framed a charge against the accused, and fixed a date for cross-examination of the prosecution witnesses. The complainant paid the process fee and applied for the issue of process for summoning his witnesses. When the case was called out on the date fixed for hearing, the complainant and his witnesses were absent. The Court refused to consider the evidence of the prosecution witnesses examined before the framing of the charge on the ground that they were not subjected to re-cross-examination and concluded that there was left no evidence against the accused and acquitted them. On a revision filed by the complainant:

'Held' that in the trial of a warrant case after the framing of the charge, the duty of recalling the prosecution witnesses under S. 256 is cast upon the Magistrate trying the case, and the complainant should not be penalised for their absence when he was not at fault. In this view the order of the trial Court was not according to law: AIR (36) 1949 All 428; AIR (24) 1937 All 127; AIR (29) 1942 Mad 552 (1); AIR (30) 1943 Sind 148 and AI R(12) 1925 Oudh 306 (1) Rel. on; AIR (35) 1948 Cal 83, Dissent. *(Paras 4, 10)*

Anno: Cri. P. C., S. 256 N. 8; S. 258 N. 4.

(b) Criminal P. C. (1898), S. 256 — Recalled — Meaning.

The use of the word 'recalled' in section 256 contemplates resummoning of the witnesses if they were not actually present in Court or were not

bound down to reappear. AIR (24) 1937 All 127 (Para 9) Rel. on.
Anno: Cri. P. C., S. 256 N. 8.

D. P. Mathur, for Applicant; J. B. Saxena, for Opposite Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('30) AIR (17) 1930 All 795 (2): (32 Cri L Jour 366) (Pr 4)
('37) AIR (24) 1937 All 127: (38 Cri L Jour 361) (Prs 2, 4, 9)
('49) AIR (36) 1949 All 428: (50 Cri L Jour 674) (Prs 2, 4, 9)
('48) AIR (35) 1948 Cal 83: (49 Cri L Jour 12) (Prs 3, 4, 8, 9)
('42) AIR (29) 1942 Mad 552 (1): (44 Cri L Jour 171) (Prs 2, 5)
('25) AIR (12) 1925 Oudh 306 (1): (26 Cri L Jour 264) (Prs 2, 6)
('43) AIR (30) 1943 Sind 148: (44 Cri L Jour 768) (Prs 2, 7)

RANAWAT J.: Rampal lodged a complaint against Mangia and Lakkha of offences under Ss. 447 and 504 P. C. in the Court of the First Magistrate, Sawai Madhopur, on the 19th of October, 1948, alleging that in his absence on the 14th October, 1948, the accused entered his premises and after having demolished his house took possession of his land. After issuing process for the attendance of the accused, and after holding an enquiry, the learned Magistrate, on the 15th June, 1949, framed charges against both the accused under Ss. 447 and 504 P. C., and fixed the 27th of July, 1949, for further proceedings in the case. The accused had asked for re-cross-examination of the prosecution witnesses and the Magistrate therefore directed the complainant either to produce his witnesses himself or to apply before a date fixed by the Court for issue of summons for his witnesses. The complainant paid the process fee, and applied for the issue of processes for summoning his witnesses, and on the date fixed for the hearing, the complainant and his witnesses did not turn up, and the accused attended the Court. The Magistrate thereupon held that as the statements of the prosecution witness had not been subjected to re-cross-examination which was demanded by the accused, that part of the evidence could not be read against the accused to secure their convictions and taking this view of the case, the learned Magistrate acquitted the accused. The complainant filed a revision in the Court of the Assistant Sessions Judge, Gangapur, against the order of acquittal passed by the Magistrate, which was dismissed on the 10th October, 1949. The complainant has now filed this revision.

(2) The learned counsel for the complainant has argued that the order of the Magistrate, which purported to be under S. 258 of the Cri. Procedure, was not according to law. He further urged that after the framing of the charges in the trial of a warrant case, it was the duty of the Court to re-summon the prosecution witnesses, and if the prosecution witnesses after having been duly served failed to attend the Court, it was for the Magistrate to compel their attendance and it was not proper for the Magistrate to have acquitted the accused under these circumstances. He has put reliance on the rulings of cases reported in 'HAR KISHAN v. EMPEROR', AIR (24) 1937, All. 127; SAGHIR UDDIN v. MT. MUNNI', AIR (36) 1949 All 428; 'VARADARAJULU v. JANAKIRAMA', AIR (29) 1942 Mad 552(1); 'EMPEROR v. NAZO', AIR (30) 1943 Sind 148 and 'RAM BAKSH v. JAIRAM DAS', AIR (12) 1925 Oudh 306(1).

(3) The counsel for the accused has cited the case reported in 'SADEK MAHAMMAD v. JYOTISH CHANDRA', AIR (35) 1948 Cal., 83, and has argued that as the order of the learned Magistrate was on the merits of the case, and it was not an order made in default of the attendance of the complainant, it was according to law and this Court should not now revise it.

(4) It may be observed that the facts of this case are similar to those in the case reported in AIR (36) 1949 All. 428. In that case, which was filed on a complaint under Ss. 494 and 498 P. C., the trial Court, after recording the prosecution evidence, framed a charge against the accused, and fixed a date for cross-examination of the prosecution witnesses. When the case was called out on the date so fixed, the complainant and his witnesses were absent, and at the request of the counsel for the complainant the case was adjourned to another date. On that date also, the complainant was absent and his counsel again sought an adjournment, but the Court rejected the application, and refused to consider the evidence of the prosecution witnesses examined before the framing of the charges on the ground that they were not subjected to re-cross-examination and concluded that there was left no evidence against the accused and acquitted them. On a revision filed by the complainant, a Division Bench consisting of Wanchoo and Desai JJ. held that in the trial of a warrant case after the framing of the charge, the duty of recalling the prosecution witnesses under S. 256 Cri. P. C. is cast upon the Magistrate trying the case, and the complainant should not be penalised for their absence when he was not at fault. The decision of 'Benett J. in 'HARIKISHAN v. EMPEROR', AIR (24) 1937 All 127, was relied upon on this point. It was further observed that the duty of procuring the attendance of the witnesses cannot be laid upon the complainant's shoulders. The opinion expressed by Boys J. in a previous case 'EMPEROR v. NAZIR HUSAIN', AIR (17) 1930 All. 795(2) which was practically on the same lines as the decision in 'AIR (35) 1948 Cal. 83', and which is now cited by the counsel on the opposite side, was not considered to be good law. The revision in that case was allowed, and the order of acquittal was set aside, and the case was remanded for re-trial from the stage of the charge.

(5) The case in 'AIR (29) 1942 Mad. 552(1)', is also of the same nature. In that case, on the date after the charge was framed the complainant was absent. The Magistrate thereupon passed an order purporting to be one under S. 258(1) Cri. P. C. acquitting the accused. It was held by Horwill J. that where a Magistrate has framed a charge, he cannot dismiss the case for default.....The only section, which deals with the procedure upon default of appearance of the complainant in warrant cases, is S. 259, Cri. P. C. The Magistrate could not have acted under that section, because the charge had already been framed, and the accused could not have been discharged after the charge is framed. The Magistrate therefore acted illegally.

(6) Similarly in 'AIR (12) 1925 Oudh, 306(1), it was held that an order of acquittal in a warrant case can be passed only under S. 258, i.e. on a finding that the accused is not guilty. The accused cannot be acquitted merely because the complainant is absent.

(7) In 'AIR (30) 1943 Sind 148', Davis C. J. and Weston J. held that the acquittal of the accused under S. 359, after the charge has been framed, on the ground of the complainant's absence, is wrong, because S. 259 does not provide for acquittal of an accused person in the absence of the complainant,

but for his discharge, and such order of discharge can only be made at a time before a charge in the case has been framed. When the charge has been framed, the absence of the complainant has no effect, and the Magistrate is bound to proceed to dispose of the case on the merits. In this case the Magistrate purported to act under S. 259 Cri. P. C., which was obviously wrong.

(8) In the present case, the Magistrate has purported to act under the provisions of S. 258, and he has expunged the prosecution evidence for want of re-cross-examination, and has therefore passed an order of acquittal in favour of the accused. Such an order has been suggested to be a correct one in these circumstances according to the judgment delivered by a Division Bench of the Calcutta High Court in the case reported in 'AIR (35) 1948 Cal 83. The observations in that case are in the following terms:

"Where after a charge has been framed and the complainant and his witnesses are absent on the day fixed for their cross-examination, it is not proper to discharge the accused, as there is no provision for discharge of an accused after the charge has been framed.

The proper order to pass is:

As the prosecution witnesses are absent and cannot be cross-examined, their evidence in examination-in-chief should be expunged, and as there is no evidence in the case, the accused is acquitted."

(9) The Magistrate, in the present case, has made an order exactly in the same terms as has been suggested in the judgment of 'AIR (35) 1948 Cal. 83'. The question therefore is whether an order made on merits regarding acquittal of the accused after the framing of the charge and on account of the absence of the complainant and his witnesses is, according to law. It may be pointed out that the suggestion made in the judgment of the case 'AIR (35) 1948 Cal. 83', was really not necessary for the decision in that case. In that case, a complaint was filed against the accused for an offence under S. 504 P. C., and after the charge was framed, the case was adjourned for cross-examination of the prosecution witnesses, but on the date so fixed and on a subsequent date, the complainant and his witnesses were absent. The complainant did not even pay process fee for summoning his witnesses. The Magistrate therefore made an order discharging the accused. The complainant then filed another complaint against the accused for the same offence, and it was objected to by the accused on the ground that the previous order of the Magistrate, even though it purported to be one for discharge, was in law an order of acquittal, and the complainant therefore could not revive the proceedings against the accused. The High Court held that the previous order even though it was that of discharge should be construed to be for the acquittal of the accused, as after the framing of a charge, the accused could not have been discharged, but they could only be acquitted. The second complaint filed by the complainant was therefore held to be not competent. In dealing with this subject, the Court perhaps went out of its way to have suggested the type of an order to be made by a Magistrate in case the complainant & his witnesses are absent, & the complainant does not even care to take steps for summoning his witnesses through the Court. But any way, the opinion expressed in the judgment was gratuitous and cannot be taken to be authoritative. Section 259 Cri. P. C. lays down the procedure to be followed when in the trial of a warrant case before the framing of a charge a complainant is absent, but in such case, after the framing of a charge, the procedure does not provide for the dismissal of the case merely on the ground of the absence of the prosecution witnesses or the complainant. The Code of Criminal Procedure casts a duty upon the Magistrate trying a warrant case of ascertaining from the complainant the names of his witnesses and of summoning them, vide S. 252, and after recording the prosecution evidence if he considers that there are grounds for presuming that the accused has committed an offence triable as a warrant case, he is to frame a charge and after recording the plea of the accused he has to find out from the accused if he desires to cross-examine any of the prosecution witnesses, and if the accused so desire to re-cross-examine the prosecution witnesses. Section 256 requires that the witnesses named by the accused shall be recalled and after cross-examination and re-examination, if any they shall be discharged. The provisions in this behalf of S. 256 are mandatory, and it should be considered to be duty of the trial Court to recall the prosecution witnesses. The absence of the complainant or his witnesses under these circumstances should not be considered to afford an opportunity to the trial Court to acquit the accused simply on the ground of the absence of the complainant and his witnesses. In the present case, the complainant had done all that was within his powers to do for procuring the attendance of his witnesses. He had paid the process fee. Their summons were duly served and the witnesses failed to appear. The complainant therefore was not at fault in this respect. He could not therefore have been penalised for his non-attendance as has been done by the trial Court. The case in 'AIR (36) 1949 All. 428', has discussed several rulings of that Court on this subject, and appears to be a sound decision. The argument that 're-called' does not mean 'resummoned' in the meaning of S. 256 Cri. P. C. does not appear to be sound. The use of the word 're-called' in S. 256 contemplates resummoning of the witnesses if they were not actually present in Court or were not bound down to reappear. The judgment of Bennet J. in AIR (24) 1937 All 127 is in accord with this view.

(10) The order of acquittal made by the trial Court in view of the aforesaid discussion was not justified, and this revision is therefore accepted, and the order of acquittal is set aside, and the case is remanded to the trial Court with a direction to try the case from the point of re-examination of the prosecution witnesses after the framing of the charge.

(11) SHARMA J.: I agree.

V.B.B. *Case remanded.*

A. I. R. (39) 1952 Rajasthan 62 *[C. N. 31.]*

(JAIPUR BENCH)

DAVE AND MEHTA JJ.

Naharsingh and another, Appellants v. Pirthisingh, Respondent.

Misc. First Appeal No. 4 of 1950, D/- 21-11-1950.

Civil P. C. (1908), S. 38 — Power of executing Court to go into question of jurisdiction.

The executing Court can go into the question of the jurisdiction of the Court passing the decree if it has not been agitated and decided on the original side. But in a case where the question of jurisdiction has been already agitated and decided not only by the trial Court but also by the appellate Court it is not open to the parties to reagitate the matter in the executing Court. The executing Court cannot sit in judgment over the decision of the High Court of Jaipur and turn down its decision on the question of jurisdiction, simply because

a later Full Bench of the High Court had taken a different view of the law in another case. 'Case law discussed.' (Paras 3, 5)

Anno: C. P. C., S. 38 N. 8.

Gulabchandra Kasliwal, for Appellants; Durga Prasad Mathur, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('33) AIR (20) 1933 All 751(2): (147 Ind Cas 874) (Pr 3)

('25) AIR (12) 1925 Cal 907: (53 Cal 166 FB) (Pr 3)

('31) AIR (18) 1931 Cal 546: (134 Ind Cas 80) (Pr 5)

('41) AIR (28) 1941 Cal 493: (196 Ind Cas 534) (Pr 4)

('49) Kalu v. Balu, decided by a Full Bench on 5-11-1949 (Jaipur) (Pr 1)

('36) AIR (23) 1936 Pat 198: (14 Pat 633) (Prs 4, 5)

(1926) AC 94: (95 L J P C 33) (Pr 4)

DAVE J.: The facts giving rise to this appeal are that the respondent Thakur Pirthisingh, instituted a suit in the Court of the District, Judge, Jaipur City, for recovery of possession of certain plots of land situated in the village Korhi. Amongst other objections, it was pleaded by the defendants that the matter was exclusively triable by the Revenue Court, and that the civil Court had no jurisdiction to try and decide it. The District Judge dismissed this objection but at the same time he also dismissed the suit on other grounds. The plaintiff went in appeal to the High Court of Jaipur. There it was again contended by the defendants-respondents that the appellate Court had no jurisdiction to hear the appeal and it should be transferred to the Revenue Board under sub-s. (2) of S. 3 of the Jaipur State Grants Land-tenures Act. It was held by Verma C. J. and Ibrahim J. who constituted the Division Bench of the Jaipur High Court that the word "proceeding" appearing in sub-s. (2) of S. 3 of the Jaipur State Grants Land Tenures Act of 1947 did not include an appeal from a decision in a civil suit and that they were competent to hear and decide that appeal. The learned Judges accordingly heard the appeal and decreed the suit with costs throughout. The plaintiff respondent then took out proceedings to get the said decree executed in the Court of the District Judge, Jaipur. Two separate applications were thereupon presented by the present appellants objecting to the execution of the decree on the ground that the appellate Court had no jurisdiction to pass the decree and therefore it was a nullity. It was pointed out that in the case of 'KALU v. BALU' and others subsequently decided by a Full Bench of the Jaipur High Court on 5th November 1949, it was held that the question of jurisdiction in the present case was not correctly decided. Both these applications were dismissed by the learned District Judge by an order dated the 22nd December 1949 on the ground that the question of jurisdiction having been once decided inter partes was res judicata.

(2) The appellants' advocate, Mr. Kasliwal contended that an executing Court can go behind the decree to see if the Court which passed the same had jurisdiction to hear and decide the suit. He has proceeded to argue that an erroneous decision on a question of law like that of jurisdiction even though inter partes is not res judicata. The advocate for the respondent has contested this argument with equal vehemence.

(3) The appellants' advocate has referred to 'GORACHAND v. PRAFULLA KUMAR ROY', AIR (12) 1925 Cal 907 and 'SARABJIT PRATAP v. INDERJIT PRATAP', AIR (20) 1933 All 751. In the first case it was held by a Full Bench of the Calcutta High Court that:

> "where the decree presented for execution was made by a Court which apparently had no jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's persons to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction."

In the second case also it was held by a Division Bench of the Allahabad High Court that it was open to the judgment-debtor even at the stage of execution of decree to raise the plea that the Court which passed the decree had no jurisdiction to try the suit. It is well settled law that the executing Court can go into the question of the jurisdiction of the Court passing the decree if it has not been agitated and decided on the original side but the point for our determination in this case is whether in a case where the question of jurisdiction has been already agitated and decided not only by the trial Court but also by the appellate Court, is it still open to the parties to reagitate the matter in the executing Court. The learned advocates for the parties have not been able to cite any authority having a direct bearing on this specific point. In the two cases cited above this point was not directly in question. In the first case 'AIR (12) 1925 Cal 907', the learned Judge had very cautiously used the expression by a Court which apparently had not jurisdiction" and then he followed the above quotation by saying that within these narrow limits the executing Court was authorised to question the validity of the decree. In a case where the parties have exhausted their arguments on the question of jurisdiction and the Court has given its decision it cannot be said that "apparently" it had no jurisdiction.

(4) The appellants' learned advocate has next referred to 'DIST. BOARD OF DARBHANGA v. SURAJ NARAIN', AIR (23) 1936 Pat 198 and 'MEGHRAJ GOLABCHAND FIRM v. CHANDRA KAMAL', AIR (28) 1941 Cal 493, both of which are decisions of single Judges. In the first case 'AIR (23) 1936 Pat 198' a former suit between the parties had reached the District Judge in appeal and it was held by him that the action was not maintainable in the civil Court and that the District Magistrate was the competent authority to hear it according to Bengal Ferries Act. In a subsequent suit between the same parties for other arrears the plea of res judicata about the jurisdiction of the civil Court was raised by the other party. Relying on the authority of 'BROKEN HILL PROPRIETARY Co. LTD. v. MUNICIPAL COUNCIL OF BROKEN HILL', (1926) A C 94, it was decided by the learned Judge that the previous decision on the question of jurisdiction was not res judicata. It was further added that in the question of jurisdiction not only the parties but the Court and the public had an interest. In the second case 'AIR (28) 1941 Cal 493 an application for execution of a decree was dismissed by the Court on the ground that it had no jurisdiction. In a subsequent application for execution when the question of res judicata about the jurisdiction was raised, it was held that the principle of res judicata had no application on the question of jurisdiction. It would appear from both these decisions that the claim or the application in the subsequent case was not in respect of the same relief which was asked for in the former suit or application. In the case of 'BROKEN HILL PROPRIETARY CO. LTD. v. MUNICIPAL COUNCIL OF BROKEN HILL', (1926) AC 94 referred to above, the applicants were occupiers of a mine of lead and

silver within the Municipality of Broken Hill and the respondents were the rating authority of the Municipality. On a question of res judicata being raised by the respondents on the basis of a previous decision of the High Court of Australia between the same parties for the previous years, it was observed by their Lordships that

"the decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question namely, the valuation for a different year and the liability for that year. It is not eadem questio and therefore the principle of res judicata cannot apply."

(5) It is quite clear from the above observations that so far as the decision of the High Court about the valuation and the liability of taxation in the previous year was concerned, it was clearly held that so far as that year was concerned "the decision could not be disputed. This authority therefore on which 'AIR (23) 1936 Pat 198' is based goes against the appellants' argument instead of supporting it. In 'SARAT CHANDRA v. JOY SANKAR', AIR (18) 1931 Cal 546, it was held that the question whether the appeal before the High Court was competent or not is not a question which can be gone into in the execution proceedings. In the present case also what the appellants really wanted to contest in the executing Court was that the appellate authority which passed the decree was not a competent Court of jurisdiction. To my mind, the executing Court could not sit in judgment over the decision of the High Court of Jaipur and turn down its decision on the question of jurisdiction, simply because another Bench of the High Court had taken a different view of the law in another case. If all the previous decrees of the Courts are thus set aside, because a different view on a certain question of law is taken in some other case by the High Court, it would cause an utter confusion and there would be no end to litigation. For instance, what would happen if the latter decision of the High Court is again dissented from in another case by another Bench of the same High Court. There is, therefore, no good reason to interfere with the decision of the Court below.

(6) The appeal is dismissed with costs.

(7) MEHTA J.: I agree.

D.H. *Appeal dismissed.*

A. I. R. (39) 1952 Rajasthan 64 *[C. N. 32.]*

(JAIPUR BENCH)

SHARMA J.

Gajanand, Appellant v. Biharilal, Respondent.

Civil Appeal No. 40 of 2006, D/- 30-8-1950.

Accounts — Settlement of — Reopening.

Once the account is settled between the parties, it cannot be re-opened, unless on the ground of fraud or substantial mistake.

There was a partnership between defendant and plaintiff, which was dissolved on 18-4-1948, and a writing was made evidencing the dissolution of partnership and stating that Rs. 1246/- were due from the plaintiff to the defendant and were paid, and that an accounting was yet to be made about a transaction of 80 bags of sugar. It was agreed that the plaintiff would be entitled to inspect the Bahi Khatas within 20 days from the date of the document and he would be entitled to recover any sum which might be found due on their inspection. It was also provided that if there was any mistake in accounting, the parties would be entitled to pay and receive whatever sum might be correctly found out from the accounts. The plaintiff brought a suit within 20 days of the agreement on the allegation that he called upon the defendant to give him an inspection of the account-books according to the agreement, but the latter did not comply with the request. The accounts should, therefore, be gone into and the plaintiff should be awarded whatever was found due to him.

'Held' that the question did not arise of re-opening the accounts, because the accounts had not been finally settled. The door was kept open for 20 days from the document. The suit was, therefore, not liable to be dismissed. 'Case law discussed.' (*Paras 11, 14, 15*)

Bhandari, for Appellant; Agarwal, for Respondent.

Cases referred:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

(1851-54) 5 Moo Ind App 372: (8 Moo P C 278) (Pr 5)

('19) AIR (6) 1919 All 1: (42 All 230) (Pr 8)

('08) 32 Bom 353: (10 Bom L R 281) (Pr 7)

('44) AIR (31) 1944 Nag 124: (ILR (1944) Nag 101) (Pr 11)

('33) AIR (20) 1933 Oudh 557: (9 Luck 230) (Pr 9)

(1878) 9 Ch 529: (50 L J Ch 147) (Pr 6)

JUDGMENT: This is the defendant's appeal against the order of remand made by the learned Civil Judge Nim-ka-thana and arises under the following circumstances: There was partnership between Gajanand defendant-appellant and Biharilal plaintiff-respondent, which was dissolved on 18-4-1948, and a writing was made evidencing the dissolution of partnership and stating that Rs. 1246/- were due from the plaintiff to the defendant and were paid, and that an accounting was yet to be made about a transaction of 80 bags of sugar. It was agreed that the plaintiff would be entitled to inspect the Bahi Khatas within 20 days from the date of the document and he would be entitled to recover any sum which might be found due on their inspection. It was also provided that if there was any mistake in accounting, the parties would be entitled to pay and receive whatever sum might be correctly found out from the accounts. The exact words used in Hindi are "Bhul chuq leni deni". The plaintiff brought the present suit on 6-5-1948, i.e., within 20 days of the agreement on the allegation that he called upon the defendant to give him an inspection of the account-books according to the agreement, but the latter did not comply with the request. The accounts should, therefore, be gone into and the plaintiff should be awarded whatever is found due to him.

(2) The defendant contended, inter alia, that the document dated 18-4-1948 recorded a settlement of accounts and the plaintiff was not entitled to call for accounts of any other transaction excepting that of 80 bags of sugar.

(3) The learned Munsif Nim-ka-thana dismissed the suit on the ground that the accounts, excepting those relating to 80 bags of sugar, had been settled and could not be re-opened, unless the plaintiff could point out any fraud or substantial mistakes in the accounts. He, therefore, dismissed the whole suit.

(4) The plaintiff went in appeal and the learned Civil Judge Nim-ka-Thana, who heard the appeal, reversed the decree of the first Court and remanded the suit to it for decision according to law. Against this order of remand the defendant comes in appeal to this Court.

(5) It has been urged by the learned counsel for the appellant that the document dated 18-4-1948 recorded a settlement of accounts and the accounts

could not be re-opened, because the plaintiff has not alleged any fraud or substantial mistakes in the accounts. It was conceded that the decree of the first Court was bad inasmuch as the whole suit was dismissed. The suit should have been decreed only for accounts relating to 80 bags of sugar. I have been referred to the ruling reported in 'HENRY McKELLAR v. JOHN WALLACE AND JOHN SPENCE', 5 Moo Ind App 372, in which their Lordships of the Privy Council held that either when the accounts have been settled or a compromise has been made at a particular figure without going into the accounts, no suit lies for rendition of accounts. In that case a particular sum had been agreed upon between the parties and a bill had been given in respect of it. It was found that the parties had settled the accounts or they had compromised on the particular figure, for which the bill was made. The plaintiff could not, therefore, re-open the accounts in the absence of fraud.

(6) Reliance was next placed upon "WILLIAMSON v. BARBER', (1878) 9 Ch 529, in which it was held that where the accounts are impeached and it is shown that they contain error of considerable extent, both in number and amount whether caused by mistake or fraud, the Court will order such accounts, though extending over a long period of years, to be opened, and will not merely give liberty to surcharge and falsify, and supposing that a fiduciary relation exists between the parties, the Court will make a similar order if such accounts are shown to contain a smaller number of errors or if they contained any fraudulent entries.

(7) The ruling reported in 'MAGNI RAM KHUP CHAND v. LAXMI NARAYEN RAM PRATAP', 32 Bom 353 is also to the effect that the accounts, once settled, can be re-opened only on the ground of fraud or substantial mistake. In that case a promissory note was given by the plaintiff to the defendant and it was held that it was either the result of a settled account or settlement by compromise and so the accounts could not be opened in the absence of fraud or important mistake.

(8) The learned counsel for the appellant also referred to 'BHAGWAN BAKSH SINGH v. DAMODAR JOSHI', AIR (6) 1919 All 1. In that case, too, it was found that the accounts had been settled between the parties and it was held that the settled accounts between the two parties may be re-opened on the ground of substantial error or fraud.

(9) Reliance was also placed on "BACHELAL v. GUNDUMAL', AIR (20) 1933 Oudh 557. In that case, too, a sarkhat for Rs. 2000/- had been executed by the defendant in favour of the plaintiff's sons and a promissory note for Rs. 2000/- in favour of the plaintiff. The plaintiff alleged that the amount of the Sarkhat had been paid, but Rs. 1500/- were the balance out of the principal and Rs. 135/3/- on account of interest on the promissory note. The defendant contested the suit on the ground that there were numerous mistakes in the account. It was, however, found that there were no mistakes and the account could not be re-opened in the absence of substantial mistakes.

(10) My attention was also drawn to '(VATAKKAM CHIRAYEL PURKUM) KURINDALYAMAL v. T.P.E.N. KUNHIKAMMA', AIR (20) 1933 Mad 142 (Sic). In that case, too, the accounts were settled between the partners & a promissory note was executed by one of them in favour of the other. A suit for accounts was brought on the ground that fraud had been practised upon the plaintiff and holding that fraud had been practised, the accounts were re-opened.

(11) Lastly reliance has been placed upon 'BAJRANGLAL v. ANANDILAL', AIR (31) 1944 Nag 124. In that case also the accounts were settled and then followed a promise to pay the amount found due. It was held that the promise afforded a fresh cause of action, on which a suit could be instituted. It was further held that when the parties settled accounts, the presumption is that they have settled the accounts with their eyes open and that they knew what the accounts contained and then decided what the settlement ought to be. A party, who wishes to reopen a settled account, has therefore to make out a very strong case on the ground of either fraud or substantial mistake of both the parties. Mere unreasonableness of some items is no ground for re-opening the accounts. If a party wishes to settle the accounts, he has to specify clearly the grounds, on which he claims permission to re-open and the items to which he takes objection as being entered fraudulently or through mistake. He has then to prove that those items had been entered fraudulently and through mistake. Errors have to be properly alleged and proved.

(12) It has been contended that in the plaint there is no mention that there had been any fraud or error in the accounts. The plaintiff inspected the Bahi Khatas which were in possession of the receiver appointed by the Court in the case and yet he could not point out any mistake or fraud Under these circumstances, the suit, excepting that portion of it which related to 80 bags of sugar, was rightly dismissed.

(13) The learned counsel for the respondent agreed to the proposition of law enunciated by the learned counsel for the appellant and supported by the authorities cited by him. He, however, argued that the document, Ex. P-1, dated 18-4-1948, did not record the settlement of accounts. The accounts had not been gone into and only a sum of Rs. 1246/- was provisionally found against the plaintiff, and it was paid. It was stipulated that the plaintiff had a right to inspect the accounts within 20 days & on inspecting the accounts, if any sum was found due to any party, he would be entitled to get it. The defendant did not give inspection of the account books within 20 days as agreed and therefore the plaintiff was entitled to bring the suit for the recovery of the sum which might be found due to him on the basis of the accounts. It was further contended that the accounts were to be finalized only after the Bahi Khatas had been inspected, as stipulated by the document, Ex. P. 1.

(14) So far as the proposition of law is concerned, there is no difference between the parties. Both of them agreed that, once the account is settled between the parties, it cannot be re-opened, unless on the ground of fraud or substantial mistake. The only difference is about the nature of the document, Ex. P-1. Whereas the defendant contends that it records the settlement of accounts, the plaintiff contends that it was only a provisional arrangement and the accounts were to be finalized only after the accounts were inspected. I have, therefore, read the document with great care and have come to the conclusion that it does not record a final settlement of accounts. No doubt, a sum of Rs. 1246/- has been mentioned therein as due from the plaintiff to the defendant which was paid, but it has nowhere been mentioned that this amount was found against the plaintiff after he had scrutinized or even gone through the accounts. The only thing mentioned is that according to the Khata this amount was due from the plaintiff. The document, however, does not say that the accounts had been settled or that the plaintiff had accepted the balance in the Khata as the final word. On the contrary, it has been stipulated that the plaintiff

shall have a right to go through the accounts within 20 days from the date of the document, and if any mistake or error is found out, it would be rectified. (Bhul chuk leni deni). This clearly shows that the accounts had not been finally settled. The door was kept open for 20 days from the document Ex. P-1.

(15) The plaintiff brought the present suit within 20 days, alleging that he had not been allowed to inspect the accounts and find out what sum was actually due and from which party. The question, therefore, does not arise of re-opening the accounts because they had never been closed. It may be that if the plaintiff had not asked for the inspection of the accounts, within 20 days, it might have been taken, after the expiry of that period, that he had acquiesced in the arrangement which was arrived at as per document Ex. P-1, but the plaintiff did not acquiesce and brought the suit within 20 days. The suit was, therefore, not liable to be dismissed. The learned original Court made one very obvious mistake inasmuch as it threw out the whole suit because according to both the parties at least an account had to be taken with respect to 80 bags of sugar.

(16) To my mind, the learned lower Court was perfectly justified in holding that the suit had been wrongly dismissed. The appeal has no force. It is dismissed with costs to the contesting respondent.

D.H. *Appeal dismissed.*

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(JAIPUR BENCH)

SHARMA, J.

Mangilal, Appellant v. Raghubar Dayal, Respondent

Civil Miscellaneous Appeal No. 28 of 1949, D/- 28-8-1950.

(a) *Civil P. C. (1908), S. 48 — Revival of execution application — Limitation Act (1908), Art. 182.*

If the relief in a subsequent application made more than 12 years after the decree money became payable, is substantially different from the relief in the previous application, the subsequent application cannot be treated as a continuation of the previous application. (*Para 13*)

Where the previous execution application was for rateable distribution and the subsequent application is for attachment of movable and immovable property and also for the arrest of the judgment-debtor, the relief prayed for in the subsequent application is substantially different from relief claimed in the previous application, and the subsequent application must be treated as a fresh application. (*Para 15*)

Anno: C. P. C., S. 48, N. 7; Limitation Act, Art. 182, N. 143.

(b) *Limitation Act (1908), Art. 182 — Final order — Order transferring application by decree-holder for rateable distribution.*

In the case of rateable distribution final orders could be made only after the assets were distributed between different decree-holders or when the application of the decree-holder, in which properties were attached, was dismissed. An order sending the application for rateable distribution to the Court executing the decree under which properties were attached, is not a final order. (*Para 16*)

Anno: Limitation Act, Art. 182, N. 129

(c) *Limitation Act (1908), Art. 182 (5) — Court passing decree abolished — Application for execution in Court having jurisdiction to entertain suit — Application if in accordance with law.*

Where the Court which had passed the decree, had been abolished when the decree was put into execution, and the Courts in which the decree was executed, had jurisdiction to entertain the suit, if it were filed, on the dates when the execution applications were made, the decree executed in them is executed in accordance with law. (*Para 17*)

Anno: Limitation Act, Art. 182, N. 52.

(d) *Limitation Act (1908), Art. 182 (5) — Application for rateable distribution — No prayer for attachment — Application if not in accordance with law.*

Merely because there is no prayer for attachment of property, in an application for rateable distribution, it cannot be said that the application is not in accordance with law: AIR (18) 1931 All 92, Rel. on. (*Para 19*)

Anno: Limitation Act, Art. 182, N. 52.

(e) *Civil P. C. (1908). S. 48 — Application giving supplementary list of properties to be attached — Application is one for amendment — Application if made within 12 years and before previous application is disposed of, is not against law — Limitation Act (1908), Art. 182 (5).* (*Para 20*)

Anno: C. P. C., S. 48 N. 7; Limitation Act, Art. 182, N. 52.

Umrao Lal, for Appellant; Maksudan Lal, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('29) AIR (16) 1929 P C 209: (118 Ind Cas 268) (Prs 7, 8)

('31) AIR (18) 1931 All 92: (53 All 125) (Prs 13, 19)

('38) AIR (25) 1938 Cal 162: (174 Ind Cas 569) (Prs 7, 11)

('28) AIR (15) 1928 Lah 808: (120 Ind Cas 622) (Prs 7, 9)

('41) AIR (28) 1941 Pat 635: (191 Ind Cas 492) (Prs 7, 12)

('43) AIR (30) 1943 Pat 127: (21 Pat 838) (Prs 7, 10)

JUDGMENT.: This is the judgment-debtor's appeal against the appellate judgment and order of the learned Additional District Judge, Alwar, and arises out of execution proceedings. The facts are as follows: A decree was obtained by Data Ram against Chetram for the recovery of Rs. 2,130/6/6 on the 13th December 1923 from the Civil Court at Alwar. Rs. 130/6/6 were paid at the time of the decree and five annual instalments of Rs. 400/- were fixed. We are concerned with the last two of them, i.e., the 4th and the 5th. The fourth instalment was payable on Magsir S. 2, St. 1984, corresponding to 26th November 1927, and the fifth and the last instalment was payable on the 4th December 1928. After the decree both the original decree-holder and judgment-debtor died. Raghubar Dayal, a grandson of the original decree-holder, applied in execution on the 21st September 1928 for the recovery of the fourth instalment which had become due and was not paid. The execution was filed against Mangilal, son of Chetram, original judgment-debtor deceased. It was prayed that the amount be recovered by rateable distribution from the sale-proceeds of half the share in a house, a Nohara and two shops, which had been attached in the case, 'NANAGRAM v. MANGILAL', of the Court of the Nazim Madawar. Another application was made for the recovery of the 5th instalment on the 3rd January 1929, and in that application also a prayer for rateable distribution out of the sale proceeds of Nanagram's case was made. For certain reasons,

which are not necessary to mention, the amount of neither of these instalments could be recovered upto the 28th October 1940, and consequently on the said date Raghubar Dayal (who would hereinafter be referred to as decree-holder) made an application that the following property be attached in execution of the decree and the judgment-debtor be also arrested. It was also mentioned that he did not desire the share in t e sale proceeds of Nanagram's execution.

(2) Mangilal (who will hereinafter be referred to as judgment-debtor) objected that no proceedings could be taken upon the application as it was made more than 12 years from the date the fourth instalment became payable and also more than 3 years from the date of the final order on the application for execution of the 4th and the 5th instalments.

(3) It may be mentioned that when the application dated the 28th October 1940 was made, the office made a report that the fourth instalment had become time-barred and issued process only in respect of the fifth instalment.

(4) The learned Additional Munsiff, Alwar, in whose Court the execution was pending on the date of the application dated the 28th October 1940, repelled the objections of the judgment-debtor and held the application in continuation of the previous application for execution. He consequently dismissed the objections and ordered the execution to proceed.

(5) The judgment-debtor went in appeal to the Court of the District Judge, Alwar, but it was held that no appeal lay. He went in second appeal to the High Court at Alwar where the appeal was allowed and the case was sent back to the Court of the District Judge for decision in accordance with law. This time the appeal came before the Additional District Judge, Alwar, who upheld the judgment and order of the learned Munsiff and dismissed the appeal.

(6) The judgment-debtor has come in Second Appeal to this Court.

(7) It has been argued on behalf of the judgment-debtor that the application dated the 28th October 1940 could not be said to be in continuation of the previous application. In this application a fresh relief was sought and it was more than 12 years after the date, on which the fourth instalment became payable. He further argued that the application was beyond time even in respect of the fifth instalment as it was made more than 3 years after the date of the final order. I was referred to the rulings reported in 'RAM RATAN v DATAR KUAR', AIR (15) 1928 Lah 808; 'GAJANAND SHAH v. DAYANAND THAKUR', AIR (30) 1943 Pat 127; AZIZ REHMAN v. BIPIN BIHARI', AIR (25) 1938 Cal 162, 'MAHARAJ BAHADUR v. A H. FORBES', AIR (16) 1929 P C 209 and 'RAM RAN BIJAYA PRASAD SINGH v. KESI'O PRASAD', AIR (28) 1941 Pat 635.

(8) In 'AIR (16) 1929 P C 209', referred to above, a decree for arrears of rent was obtained in 1896 against one Chhatarpal Singh. In May 1908, the decree-holder applied for execution against Patnidar and got the property attached and sold. The sale was ultimately set aside in February 1909. In January 1915 the decree-holder again applied for execution, requesting to convert the rent decree into money decree. The execution was alleged to be barred by limitation. In March 1917 the decree-holders, on the footing of the decree being merely a money decree, applied for attachment of other property belonging to the judgment-debtor. Again in November 1918, the decree-holders, on the footing of the decree being a money decree, applied for and obtained an order that certain personal property of another purchaser of the Patni might be attached and sold and from such sale proceeds their claim be satisfied. The last application to attach the Patni was made on the 2nd December 1922. It was held that the applications of January 1915, March 1917 and November 1918 were essentially different in character from the application of May 1908. The combined effect of these previous applications marked such a substantial departure from the original application of May 1908 as to make it impossible to hold that the application of December 1922 was a continuation of the application of May 1908.

(9) In 'AIR (15) 1928 Lah 808', cited above, the decree was passed on the 13th June 1904. The last application for execution was presented on the 16th April 1913, when the decree-holder applied for execution by attachment & sale of a garden and certain agricultural land, but on the judgment-debtor's representation that he was a member of an agricultural tribe, it was held that these properties could not be sold. The decree-holder then tried to have temporary alienation of the land effected, but the executing Court refused the prayer. It was, however held by the High Court that Civil Courts had power to order a temporary alienation of the land of the judgment-debtor. In accordance with that decision, steps were taken to effect a temporary alienation. In October 1918 the Collector sanctioned a temporary alienation of this land. On the 18th November 1925, the decree-holder presented an application in the executing Court stating that the land of the judgment-debtor, which he had attached, had not been sold for no fault of his, that the land which he was likely to get by the temporary alienation of the land, would not be sufficient to meet his demand, and that the other property of the judgment-debtor be attached and sold and the sale proceeds applied towards the satisfaction of the decree. It was held that the second application was in substance a fresh application to proceed against the properties which had not been included in the former application and was barred by time, having been filed after 12 years from the decree.

(10) In 'AIR (30) 1943 Pat 127', the decree-holder wanted to substitute a new property which was quite different from the property, against which he wished to proceed in the first instance. It was held that his application must be regarded as a fresh application for execution and that the decree-holder could not be allowed after the period of limitation to execute his decree against the property not mentioned in the execution application originally presented by allowing him to substitute it in the execution petition.

(11) In 'AIR (25) 1938 Cal 162, the first application for execution prayed for the arrest of the judgment-debtor and sale of the holding, if necessary. Subsequently when the decree had been barred by limitation, another application for attachment of moveables was filed. It was held that the application for attachment of moveables marked a substantial departure from the previous petition and not a continuation of the execution initiated by the previous petition and so could not be allowed after limitation.

(12) In 'AIR (28) 1941 Pat 635, it was held that an application by which it is sought to proceed against properties other than those mentioned in the first execution petition is a fresh application within the meaning of Section 48 and no such application is entertainable after 12 years from the date of the decree sought to be executed.

(13) It would thus be clear that according to these rulings if the relief in a subsequent appli-

cation made more than 12 years after the decree money became payable, is substantially different from the relief in the previous application, the subsequent application cannot be treated as a continuation of the previous application. The learned Additional District Judge, has given no reasons why he differed from the view taken in these rulings. He has simply derived support from the ruling reported in 'MT. DEORAJI KUER v. JADUNANDAN RAI', AIR (18) 1931 All 92. I have read the ruling and I do not know how it helps the decree-holder on the question of limitation. In that ruling it was simply held that when an application for rateable distribution is made after the attachment has already taken place, the attachment really enures for the benefit of all claimants and is as effective as if it had been brought about separately by each of them, provided they had, before the assets were realised, applied for execution of their decrees. In such a case it is quite sufficient for them to ask that the sale should take place and the sale-proceeds distributed among them proportionately. If the case were before me that the applications dated the 21st September 1928 and 3rd January 1929 were not against law simply because no prayer for the attachment of any property was made, this ruling would have had a bearing on the point, but it was not decided in that case that an application made more than 12 years after the decree became executable could be treated to be a continuation of the previous application, in which relief claimed was quite different from the subsequent application. I fail to see how this ruling could help the decree-holder on the point of limitation.

(14) The learned Additional District Judge has treated the application dated the 28th October 1940 as a continuation of the previous applications, because in his opinion they had not been finally disposed of by that time. This would, however, make no difference. In the Lahore case mentioned above also, the second application for a different relief was made during the pendency of the previous application, but as it was made 12 years after the decree had become executable, it was held that it was time-barred and no action could be taken upon it.

(15) It was conceded by the learned counsel for the decree-holder that so far as relief for arrest is concerned, it is a relief substantially different in character from the relief in the previous applications. No process for arrest could, therefore, be issued. But so far as the attachment is concerned, it was argued that proceedings could be taken and they could not be time-barred. I do not agree to this contention of the learned Counsel. The previous applications were for rateable distribution and the application dated the 28th October 1940 was for attachment of certain moveable and immovable property, and also for the arrest of the judgment-debtor. The relief prayed for in the application dated the 28th October 1940 was, therefore, substantially different from the relief claimed in the applications of 1928 and 1929. Whether the application dated the 28th October 1940 is treated as a fresh application for execution or as an application for amendment, proceedings could not be taken in accordance with it. So far as the fourth instalment was concerned, as the recovery of the said instalment had become time-barred by virtue of Section 48 of the Code of Civil Procedure. It is significant that the executing Court itself did not proceed in respect of the fourth instalment in accordance with the application dated the 28th October 1940.

(16) Coming to the fifth instalment, it has been admitted by the learned Counsel for the judgment-debtor that it was not barred by 12 years rule of limitation under Section 48 of the Code of Civil Procedure. It was, however, argued that the previous application of the 3rd January 1929 had been finally disposed of more than 3 years before the application dated the 28th October 1940 was made. I do not agree with this argument of the learned Counsel. Final orders on the said application had not been made even upto the 28th October 1940. Nothing had been received by the decree-holder by rateable distribution till that date. It was argued that the application of 1929 should be deemed to have been finally disposed of as soon as an order was made sending that application to the Court executing Nanagram's decree. This does not appeal to me. In the case of rateable distribution final orders could be made only after the assets were distributed between different decree-holders or when the application of the decree-holder, in which properties were attached, was dismissed. Neither of these two things occurred in the present case. I would, therefore, hold that the application dated the 28th October 1940 was not barred under Art. 182 (5) of the Limitation Act, and that an action could be taken upon it so far as the fifth and the last instalment is concerned.

(17) It was further argued that the previous applications were not made to the proper Court and in accordance with law, as the decree was of the Civil Judge's Court, Alwar, and the present applications were filed in the Court of the Munsiff, Madawar, and finally came to the Court of the Additional Munsiff, Alwar. I do not think this argument has any force. The Civil Judge's Court (Adalat Diwani) which had passed the decree, had been abolished when the present decree was put into execution, and the Courts, in which the decree was executed, had jurisdiction to entertain the suit, if it were filed, on the dates when the execution applications were made. The decree executed in them was, therefore, executed in accordance with law.

(18) It was next argued that the decree ought to have been executed in the Court of the District Judge as the property in Nanagram's case was attached by the District Judge and out of the sale proceeds of this property rateable distribution was prayed. This too has no force. There was no bar to the decree being executed in the Court which had jurisdiction to entertain the suits at the time of the execution, simply because rateable distribution of assets held by a different Court was claimed.

(19) The third argument of the learned Counsel was that the applications of 1928 and 1929 were not in accordance with law as only rateable distribution was claimed and no prayer for attachment of property was made. On this account, however, it cannot be said that the applications were not in accordance with law. I am supported in this view by the ruling reported in 'MT. DEORAJI KUNWAR v. JADUNANDAN RAI', AIR (18) 1931 All 92.

(20) The last contention was that the application dated the 28th October 1940, was not in a tabular form and was, therefore, not in accordance with law. I do not agree to this view as well. The application was only an application giving a supplementary list of the properties to be attached and was, therefore, in effect an application for amendment. It was made within 12 years and before the previous application was disposed of. I, therefore, hold that the application was not against law and an action can be taken upon it, so far as the last instalment is concerned.

(21) The appeal is partly allowed. The order of the lower Court is modified in that the decree shall be executed in accordance with the application dated the 28th October 1940 only in respect of the fifth and the last instalment. It shall not be executed in accordance with that application so far as the fourth instalment is concerned. In the circumstances of the case the parties shall bear their own costs throughout.

V.B.B. *Appeals partly allowed.*

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RANAWAT AND SHARMA, JJ.

Dwarka Prasad, Appellant v. Gopi Nath and others, Respondents.

Civil Appeal No. 385 of 1949, D/- 19-12-1950.

Civil P. C. (1908), O. 34, R. 1 — Redemption suit — Failure to join necessary party, when fatal to suit.

Order 34, R. 1 is a rule of mere procedure and it is controlled by the provisions of O. 1, R. 9. A suit for the enforcement of the mortgage security or for the redemption of mortgage is not necessarily liable to dismissal if all persons having an interest either in the mortgage security or in the right of redemption have not been made parties. If an effective decree can be passed and rights of those parties not before the Court can be properly safeguarded even in the absence of some of the parties, suitable relief shall not be denied to the plaintiffs. In some cases it is possible that in the absence of the interested parties Courts may not be able to give such a relief, and so the presence of all the parties interested might be insisted upon.

It is not the law in India that one of several mortgagors cannot redeem more than his share unless the owners of the other shares consent or do not object. Subject to proper safeguarding of the right to redeem, which these owners may possess, one of several mortgagors can redeem the entire mortgage. Thus even when no consent has been obtained of all the mortgagors only some of the mortgagors can redeem the mortgage. If however, such consent has been obtained then the case of redemption by some only of the mortgagors would be much stronger. AIR (8) 1921 P C 125, Relied on.

In a suit for redemption, the defendants contended that one of the sons of the mortgagors who was a necessary party was not joined as a party and that the suit therefore did not lie. It was found that the redemption suit was being conducted by this son as a mukhtiar khas of the plaintiffs. In the witness-box he gave out that he had been adopted in another family and that he had no interest in the mortgaged property and that he did not want any safeguarding of his rights, that even if he had any interest, he consented to the bringing of the suit for redemption of the entire property by the plaintiffs.

'Held' that the suit was maintainable. (*Para 16*)

Anno: Civil P.C., O. 34, R. 1, N. 5, 19.

Brij Bhushan Lal, for Appellant; B. K. Bhargava, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('19) AIR (6) 1919 P C 24: (47 Cal 175) (Pr 14)
('21) AIR (8) 1921 PC 125: (48 Cal 22) (Pr 14)
('85) 7 All 376: (1885 All W N 63) (Prs 9, 10)
('11) 7 Ind Cas 156: (33 All 51 FB) (Pr 10)
('50) AIR (37) 1950 All 598: (1950 All L J 632 FB) (Prs 9, 15)
('85) 9 Bom 128 (Prs 9, 10)
('86) 10 Bom 648 (Prs 9, 10)
('74) 21 W R 428 (Prs 9, 10, 14)
('05) 2 Cal L J 202 (Pr 10)
('97) 7 Mad L J 226 (Pr 10)
('99) 9 Mad L J 49 (Pr 10)
('37) AIR (24) 1937 Mad 136: (168 Ind Cas 899) (Pr 12)
('02) 5 Oudh Cas 146 (Pr 10)
('10) 13 Ind Cas 984: (15 Oudh Cas 22) (Pr 10)
('34) AIR (21) 1934 Oudh 220: (10 Luck 70) (Prs 10, 15)
('40) AIR (27) 1940 Oudh 235: (15 Luck 399) (Prs 11, 15)
('43) AIR (30) 1943 Oudh 218: (207 Ind Cas 72) (Pr 11)
('16) AIR (3) 1916 Pat 310: (1 Pat L J 468) (Prs 9, 13)
('46) AIR (33) 1946 Pat 225: (222 Ind Cas 439) (Prs 9, 13)

SHARMA, J.: This is one of the defendants' appeal and arises out of a suit for redemption filed by the plaintiff respondents against the defendant appellants in the Court of the Munsiff, Bharatpur.

(2) It was alleged that certain shops in the town of Bharatpur were mortgaged by Shankerlal, father of the plaintiff No. 1, Gopi Nath, plaintiff No. 2 Bal Kishen, and grandfather of Prem Narain minor, plaintiff No. 3, on the 28th of June 1910 for a consideration of Rs. 500/- in favour of the defendants Chhoteylal, Nand Kumar, Badri Prasad & Dwarka Prasad. The rate of interest agreed upon was Rs. 1/4/- per cent. per mensem. It was recited in the mortgage deed that the rent of the mortgaged property at the time of the mortgage was Rs. 5/- per mensem. This rent would be credited towards interest. If the rent realized in future exceeded the amount of monthly interest, the excess would be credited towards principal.

(3) The plaintiffs alleged that Rs. 300/- were paid towards the mortgage money and the rent of the mortgaged property had been in excess of the monthly interest. Therefore, nothing was due to the mortgagees on account of principal and interest of the mortgage. On the contrary, something would be found due to the mortgagors on an account being taken. It was alleged that Shanker Lal had died and the plaintiffs were his legal representatives. They asked the defendants to redeem the property, but they refused. It was, therefore, prayed that the property be redeemed and that an account be taken from the mortgagees and whatever amount was found due to the plaintiffs be awarded to them.

(4) The defendants admitted the mortgage, but pleaded, inter alia that they were not given possession at the time of the mortgage but it was delivered to them after the floods of 1924. The payment of Rs. 300/- was denied and it was also pleaded that a sum of Rs. 2,767/3/- was due to the defendants, out of which only Rs. 97/- had been paid. The plaintiffs could not, therefore, redeem the property without payment of Rs. 2,670/3/-. It was finally pleaded that the suit was bad for non-joinder of necessary parties as one of the sons of Shankerlal mortgagor, namely Jugal Kishore was not joined as a party to the suit.

(5) The learned Munsiff held that Rs. 300/- had been paid by the mortgagors and that the balance of the mortgage money and interest had been realized out of the rent realized by the mortgagees and that Rs. 196/- were due to the plaintiffs from the defendants. He further held that Jugal Kishore had been adopted by Lalita Prasad and was, therefore, not interested in the mortgage. His joinder was not necessary. He consequently de-

creed the suit for redemption as well as for the recovery of Rs. 196/- against the defendants.

(6) The defendants went in appeal and the learned Civil Judge, Bharatpur, upheld the decree of the first Court and dismissed the appeal. The defendants went in second appeal to the High Court of Matsya which framed an issue on the point whether Jugal Kishore had been validly adopted by Lalita Prasad and remanded the case to the first appellate Court to record the evidence which the parties chose to adduce on the point of the alleged adoption of Jugal Kishore and submit the evidence as well as its findings to the High Court within the time fixed in the Judgment.

(7) The learned appellate Court recorded the evidence of the parties on the point of adoption and submitted the record with the evidence and its finding on the issue of adoption. Its finding is that Jugal Kishore was validly adopted by Lalita Prasad.

(8) We have heard the learned Counsel for both the parties. So far as the question as to what is due to the mortgagors from the mortgagees is concerned, it was conceded by the learned Counsel for the appellants that it has become a finding of fact and it cannot be challenged in second appeal. The only point that was argued was that Jugal Kishore was a necessary party and his non-joinder in the suit was fatal. The suit should, therefore, have been dismissed. On behalf of the respondents it was argued that Jugal Kishore had been validly adopted by Lalita Prasad and the finding of the learned Civil Judge was correct on this point. It was further argued that even assuming that he was not adopted, his non-joinder was not fatal to the suit as only some of the heirs of the mortgagor were quite competent to bring a suit for redemption. In the particular circumstances of the case Jugal Kishore has himself sworn on oath that he was adopted by Lalita Prasad and had no interest in the property left by Shankerlal. In the circumstances of the case, therefore, there was absolutely no justification that the suit should be dismissed for the non-joinder of Jugal Kishore.

(9) I have considered the arguments of the learned counsel for both the parties, each of whom cited a number of rulings in support of his contention. On behalf of the appellant reliance was placed on the provisions of O. 34 R. 1 of the Code of Civil Procedure. It was argued that all the persons having either interest in the mortgage security or in the right of redemption should be joined as parties to any suit relating to the mortgage. Reliance was placed on 'RAM BAKSH SINGH v. RAM LAL', 21 W R 428; 'FAKIR BAKHSH v. SADAT ALI', 7 All 376; 'RAGHO SALVI v. BAL KRISHNA', 9 Bom 128; 'NARO-HARI v. VITHAL', 10 Bom 648; 'GIRWAR NARAIN v. MAKBUL-UL-NISA', A I R (3) 1916 Pat 310; 'RAM CHARITAR v. BAWAN PRASAD', A I R (33) 1946 Pat 225 and 'RAMESHWAR BAKHSH SINGH v. GANGA BUX SINGH', AIR (37) 1950 All 598.

(10) I have carefully gone through all these authorities. So far as the rulings reported in '21 W R 428'; '7 All 376'; '9 Bom 128' & '10 Bom 648', are concerned, they were given under S. 85 of the T. P. Act before O. 34 R. 1 of the Code of Civil Procedure of 1908 was enacted. In S. 85 of the T. P. Act, the word 'must' was used, but in R. 1 of O. 34 the word 'must' was dropped and the word 'shall' has been used. Moreover the words, 'subject to the provisions of this Code' with which R. 1 opens have been substituted for words 'subject to the provisions of the Civil P.C., S. 437', (now O. 31 R. 1,) which found place in S. 85 of the T. P. Act. The word 'must' is much more imperative than the word 'shall'. Moreover, R. 1 of O. 34 has been made subject to other provisions of the Code which include O. 1 R. 9. Order 1 R. 9 runs as follows:

> "No suit shall be defeated by reason of the misjoinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards in rights and interests of the parties actually before it."

This difference in the wordings of S. 85 of the T. P. Act and R. 1 of O. 34 of the present Code has been noticed in a number of cases decided after the present Code of Civil Procedure came into force. In 'MOHD. ALI KHAN v. ALI MIRZA KHAN', AIR (21) 1934 Oudh 220, the learned Judges of the Division Bench observed as follows:

> "The preliminary objection of the learned counsel for the plaintiffs respondents is that as all the heirs of the sub-mortgagor are not party to the appeal, so it cannot lie. We do not see any force in this contention. The argument rests on rulings reported in 'KESAVAN v. SANKARAN NAMBUDRI', 7 Mad LJ 226; 'MANEKLAL VASUDEVAN v. COLLECTOR OF MALABAR', 9 Mad L J 49; 'SURJIRAM v BRAHMDEO Pd.', 2 Cal L J 202; 'ZAHARIA v. DEBIA', 7 Ind Cas 156 (All); 'MATHURA SINGH v. JAGAT SINGH', 5 Oudh Cas 146, and 'WALI ULLAH v. EJAZ ALI', 13 Ind Cas 984 wherein in view of the provisions of S. 85, T. P. Act it was held that non-joinder of necessary parties was a fatal defect to the case or appeal, but now the procedure as regards the necessary parties to a mortgage suit is regulated by the provisions of R. 1 of O. 34, Civil P. C. which enacts that subject to the provisions of this code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. The same code provides in R. 9 of O. 1 that no suit shall be defeated by reason of mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. Failure to join some of the heirs is not, in the circumstances, fatal to the appeal and a decree can be passed which will bind all the heirs of the deceased mortgagor."

(11) In 'LASA DIN v. MOHD. ABDUL SHAKUR', AIR (27) 1940 Oudh 235 also it was held that non-compliance with the provisions of O. 34 R. 1 is not necessarily fatal to the suit to enforce a mortgage and O. 1 R. 9 applies to mortgage suits as well. It is, therefore, wrong on the part of the Court to dismiss the mortgage suit on the ground that some parties, whom it considers necessary were not impleaded. The same view prevailed in a later Oudh case reported in 'GUR CHARAN v. RAM BHAROSE SINGH', AIR (30) 1943 Oudh 218. The learned Judges observed as follows:

> "No doubt the object in enacting R. 1 of O. 34 is to prevent multiplicity of suits by bringing all the parties before the Court either as plaintiffs or as defendants, but the intention of the legislature is not to visit the non-inclusion of certain defendants by the plaintiff with the dismissal of the suit. O. 34 R. 1 does not profess to impose any such penalty, nor can the rule of procedure be construed to have such an effect. The test is to determine in each case whether relief cannot be granted to the plaintiff without impleading other persons who have not been joined as defendants to the suit. Although all the heirs of a deceased mortgagor are proper parties to a suit for mortgage, where they are not so joined, the Court would not be precluded from granting the effective relief to the plaintiff. The provisions of O. 34 R. 1 are subject to the provisions

of O. 1 R. 9 which clearly lay down that the suit is not liable to be defeated by reason of the non-joinder of parties."

(12) In 'PERIA KARUPPA PILLAI v. SATYA NARAIN MURTHI', AIR (24) 1937 Mad 136 it was held that inspite of the integrity of the mortgage being broken by the mortgagee, one of the several mortgagors or a purchaser of a portion of an equity of redemption in the mortgaged property is entitled to redeem the whole of the property subject to the equities which other persons may have, due provisions being made for their rights. If a person interested in the equity of redemption is known, he ought to be made a party in order to safeguard his right, but if he is not known or if it was not possible to make him party, due provision may be made in the decree for safeguarding his right. Even if he is deliberately omitted, relief can be given to the parties before the Court."

(13) The trend of the decisions after the enactment of the present Civil P. C., which incorporates O. 34 R. 1, has been that O. 34 R. 1 is a rule of mere procedure and it is controlled by the provisions of O. 1 R. 9. A suit for the enforcement of the mortgage security or for the redemption of mortgage is not necessarily liable to dismissal if all persons having an interest either in the mortgage security or in the right of redemption have not been made parties. If an effective decree can be passed and rights of those parties not before the Court can be properly safeguarded, even in the absence of some of the parties, suitable relief shall not be denied to the plaintiffs. In some cases it is possible that in the absence of the interested parties Courts may not be able to give such a relief. In some of the cases cited on behalf of the appellant this was not found possible, and so the presence of all the parties interested was insisted upon. In 'AIR (3) 1916 Patna 310' cited on behalf of the appellant the suit was for the enforcement of the mortgage security against only some of the descendants of the original mortgagors. Ten descendants were, however, left out. It was found that no effective decree could be given in the absence of the ten persons left out, and they could not be added as defendants because at the time when the question was raised, the claim had become barred by time against them. The request for adding them as defendants was refused on the ground of the expiry of the period of limitation and it was found that the mortgage being indivisible, the property could not be sold in their absence. The suit was consequently dismissed. In the particular circumstances of that case the decision appears to have been justified. In so far only as it says that O. 1 R. 9 is subordinate to O. 34 R. 1 it is against the view taken in the majority of the cases of the various High Courts. In substance, however, under the particular circumstances of that case, the dismissal of the suit was justified, but as shall be shown later, the ruling does not apply to the facts of the present case. Reliance was also placed on the ruling reported in 'AIR (33) 1946 Patna 225'. In that ruling also it was held that in order to decide whether a suit can proceed in the absence of certain proper parties, true tests have been laid down: (1) Can the rights of the parties on the record be fully determined in their presence?, and (2) Can that determination be made necessarily affecting the rights of those absent? In that case the suit was for redemption of a usufructuary mortgage of a certain property made for a consideration of Rs. 17000/-. Out of the sum of Rs. 17000/-, 13000/- were left for payment to one person and Rs. 4000/- to another. The plaintiff alleged that only Rs. 13000/- were paid out of the mortgage consideration and Rs. 4000/- were not paid. The defence was that the entire consideration was paid and the suit was bad for non-joinder of necessary parties inasmuch as one half share in the enquiry of redemption was subsequent to the mortgage transferred by the mortgagors to seven persons who were not made parties. Out of those seven one had transferred his interest to a third party who was also not impleaded. The Learned Judges dismissed the suit on the following grounds:

"It might well have been then, if these persons had been impleaded that some of the mortgagors as parties would admit the receipt of the full consideration. In the circumstances the character of the suit would have been largely changed, and the defendants that is to say, the present appellants would have been in a very much stronger position. Indeed it is difficult to say now the suit for redemption could have succeeded without the payment of full Rs. 17000/-, the mortgage being indivisible and incapable of redemption piecemeal, nor can the Court have allowed one part to be redeemed upon one basis and another part to be redeemed on a different basis. Thus it is apparent that the position of the defendants may well have been prejudiced by the plaintiff's failure to implead these people .....we have no means of knowing what the case of these vendees might have been, had they been impleaded. They might have admitted that the entire Rs. 17000/- was payable, but it is also conceivable to take extreme case that they might have pleaded that the entire mortgage had been redeemed by them according to their contract and that nothing was due. Thus, it is conceivable that had they been parties they could have obtained a more favourable result than the plaintiffs have done, that is to say, it is possible that the position of the absentees, vis-a-vis the mortgagees may have been prejudicially affected by the failure to implead them. They are left, as a result of the suit, if it succeeds with no remedy against the mortgagees."

(14) The facts of the present case are distinguishable from the facts of the two rulings of the Patna High Court quoted just above. In the present case, the objection regarding non-joinder is based upon the non-impleading of Jugal Kishore alone. This Jugal Kishore has come into the witness box to support the case of the plaintiffs that he has been adopted in another family and has no interest in the property left by Shankerlal, the mortgagor. Not only this, but he has acted as a Mukhtar Khas of the plaintiffs in this case and has signed the plaint on behalf of some of the plaintiffs. He accepts the case of the plaintiffs in toto, and does not claim any interest in the property in suit or in the right of redemption. It cannot, therefore, be said that there is any danger of future litigation by Jugal Kishore. Jugal Kishore himself does not claim any interest in the property and does not ask for any safeguarding of his rights. Even if he has any interest in the equity of redemption, he has consented to the bringing of the suit for the redemption of the entire property by the present plaintiffs. There is no other person, besides Jugal Kishore, whom the defendants allege to be interested in the right of redemption. Under these circumstances, it was not necessary that Jugal Kishore should have been joined either as a plaintiff or as a defendant in order to safeguard any right alleged in him or to prevent the defendants from the multiplicity of suits. According to their Lordships of the Privy Council in 'MIRZA YADALLI BEG v. TUKA RAM', AIR (8) 1921 PC 125 it is not the law in India that one of several mortgagors cannot redeem more than this share unless the

owners of the other shares consent or to do not object. Subject to proper safeguarding of the right to redeem, which these owners may possess, one of several mortgagors can redeem the entire mortgage. Thus according to their Lordships' view even when no consent has been obtained of all the mortgagors only some of the mortgagors can redeem the mortgage. If, however, such consent has been obtained, then the case of redemption by some only of the mortgagors would be much stronger. The ruling reported in '21 W R 428' relied upon by the Learned Counsel for the appellant suggests that with the consent of all the mortgagors only can make a valid tender for the redemption of the entire property. In 'SUNITI BALA DEVI v. DHARA SUNDARI DEVI', AIR (6) 1919 P.C. 24, it was held that where a mortgage is made by one mortgagor to two tenants in common, the right of either mortgagee who desires to realize the mortgaged property and obtain payment of the debt, if the consent of the mortgagee cannot be obtained, is to add the co-mortgagee as a defendant to the suit and to ask for the proper mortgage decree. This also suggests that if the consent of the remaining mortgagors or mortgagees, as the case may be, has been obtained by some of the mortgagors or mortgagees, they can file a suit for redemption of for the realization of the mortgage security without joining such mortgagors or mortgagees.

(15) The learned counsel for the appellant relied upon a recent ruling of the Allahabad High Court reported in 'AIR (37) 1950 All 598' but that ruling too has no application to the facts of the present case. In that case there was no question of the consent of the persons left out. Moreover, the ruling does not apply to a case for redemption. The Learned Judges in that case were considering the effect of some of the mortgagors not having been joined in a suit to enforce the mortgage security. The following remark of theirs is significant:

"'MAHMOOD ALI KHAN v. ALI MIRZA KHAN', 10 Luck 70: (AIR (21) 1934 Oudh 220, was also a suit for redemption by one of the mortgagors. This was followed in 'LASA DIN v. MOHD. ABDUL SHAKOOR', AIR (27) 1940 Oudh 235: 15 Luck 399. Cases of redemption are governed by entirely different consideration."

(16) To my mind, the objection about non-joinder had no force. In the circumstances of the present case the suit was rightly decreed.

(17) On the view which I have taken on this question, there is no necessity to decide whether Jugal Kishore was validly adopted by Lalita Prasad

(18) The appeal has no force and is dismissed with costs, to the contesting respondents.

(19) RANAWAT J.: I agree.

R.G.D. *Appeal dismissed.*

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(Jodhpur Bench)

NAWAL KISHORE J.

Narain Das and others, Appellants v. Rikhab Chand and others, Respondents.

Second Appeal No. 241 of 1950, D/- 27-7-1951.

(a) Civil P. C. (1908), O. 6 R. 2 — Pleadings — Point not taken in pleadings — Issue framed — Objection in second appeal.

Generally speaking it is true that unless there is a pleading a Court has no jurisdiction to frame an issue and even if the parties lead evidence on that issue, the Court is not entitled to look at it. But where the raising of a point by an application was not objected to by the defendant and an issue is framed upon it, it is late to object to it in second appeal on that ground. AIR (17) 1930 P C 57 (1), Ref. (Para 5)

Anno: Civil P. C., O. 6 R. 2 N. 9.

(b) T. P. Act (1882), S. 84 — Tender — Production of money not always necessary — Redemption suit — Mortgagee pleading that he had bought property outright — Liability of mortgagee for mesne profits — Contract Act (1872), S. 38.

It cannot be laid down as a general proposition that in order that it may be a legal tender, actual money must be produced under all circumstances. If the creditor by his conduct dispenses with the production of the money, he cannot afterwards object that there was no valid tender. In other words, where by express words or conduct he shows his determination not to accept the money offered and the production of it is shown to be useless, it must be held that the creditor dispensed with the production. 'AIR (4) 1917 Low Bur 122; AIR (10) 1923 P C 26, Rel. on; AIR (16) 1929 Rang. 271, Expl. (Para 6)

Where the mortgagee refused to allow redemption saying that he had bought the property outright and it is found that the mortgagee's case was not true, the mortgagee can be ordered to account for what he had received after the institution of the suit. 'AIR (4) 1917 Low Bur 122, Applied'. (Para 6)

Anno: T. P. Act, S. 84 N. 5.

Than Chand, for Appellants; Hukmi Chand, for Respondent No. 1.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('23) AIR (10) 1923 P C 26: (46 Mad 108) (Pr 6)

('30) AIR (17) 1930 P C 57(1): (121 Ind Cas 204) (Pr 5)

('17) AIR (4) 1917 Low Bur 122: (33 Ind Cas 735) (Prs 3, 4, 6, 7)

('29) AIR (16) 1929 Rang 271: (124 Ind Cas 257) (Pr 7)

(1845) Hunter v. Deniel, (1845-4 Hare 420) (Pr 6)

JUDGMENT: This is a defendant's second appeal and although the question involved is short, the narration of a few facts appears to be indispensable in order to show how it emerges. The defendants are the mortgagees with possession of a half share in two shops, the mortgage having been effected in their favour on 19th of March 1920 by Lalchand for Rs. 600/-. One of the terms of the mortgage was that interest and rent will be equal and will be adjusted against each other. On 19th of August 1930, Lalchand sued for possession of the shops by redemption and succeeded in obtaining a decree in spite of the resistance offered to him by the defendants, on 6th of February, 1934 on payment of Rs. 617/14/6. Nearly 9 years after this decree, an application was made by Rikhabchand, legal representative of Lalchand, who had in the meantime died, praying for extension of time for deposit of the amount fixed by the decree. The application was rejected on the ground that it was barred by time. In the circumstances, a final decree was not framed in the previous suit.

(2) On 23rd of January 1945, Rikhabchand filed the suit out of which this appeal arises, for possession by redemption of the property in dispute. Defendants resisted the suit on all possible grounds. They pleaded that the mortgage was not redeemable as money had not been paid in time, nor had execution been taken out within limitation. Accordingly, the mortgage had extinguished and the defendants had become absolute owners. They

also pleaded the bar of res judicata, and in the end prayed that if a decree was passed, they had spent a certain amount of money on repairs which may be included in the decree. Trial Court dismissed the suit as barred by res judicata and so also the lower Appellate Court. The plaintiff filed a second appeal in this Court, and since the question involved was of importance, it was referred to a Full Bench and the latter decided on '29th of September 1948' that second suit for redemption was competent and was not barred by res judicata. Accordingly, the suit was sent back to the trial Court for fresh decision on the merits.

(3) While the suit was pending in the trial Court on 4th of May, 1949, plaintiff filed an application that a decree for mesne profits may also be passed in his favour. This was contested by the defendants and, in the circumstances, an issue was framed on the point. Ultimately, it was held by the Courts below that the plaintiff was entitled to mesne profits and, therefore, a decree was passed for possession by redemption on payment of Rs. 671/14/6 and a direction was added to the effect that an enquiry may be made into mesne profits from the date of the suit till delivery of possession. Before the learned District Judge, in appeal, a question was raised to the effect that since no valid tender of the money had been made, the question of the plaintiff claiming mesne profits did not arise. A number of authorities were cited to the effect that the liability of the usufructuary mortgagee to account for mesne profis arose only from the date the mortgage money was actually tendered to him. The learned District Judge came to the conclusion following 'MAUNG PO TUN v. MAUNG E KHA', AIR (4) 1917 Low Bur 122, that the filing of a suit for possession by redemption was a sufficient offer and that if the defendant contested the suit and his defence was found to be untenable, he should be ordered to account for what he has received after the institution of the suit. The result was that the decree passed by the trial Court was upheld by the learned District Judge.

(4) In this appeal, the learned counsel for the appellant has put forward the following two contentions:

1. that in the plaint there was no prayer for mesne profits and no allegation either that because a valid tender had been made the plaintiff was entitled to claim mesne profits;
2. that MAUNG PO TUN v. MAUNG E KHA', AIR (4) 1917 Low Bur 122, did not lay down a correct proposition. Accordingly, it must be held in this case that there was no valid legal tender.

(5) So far as the first contention is concerned, generally speaking, it is true that unless there is a pleading, a Court has no jurisdiction to frame an issue and as held in 'SIDDIK MAHOMED SHAH v. MT. SARAN', AIR (17) 1930 P C 57 (1), even if the parties lead evidence on that issue, the Court is not entitled to look at it. The facts of this case are, however, different and the above proposition is not applicable. After the case had been remanded by the former High Court of Jodhpur, as stated above, the question relating to mesne profits was raised by means of an application filed on 4th of May, 1949. This was hotly contested by the defendant and even an issue was framed upon it. The raising of this point by means of an application was not objected to by the defendant and he never stated that unless the defendant amended his 'Jababdaba', it should not be allowed to be raised and an issue should not be framed upon it. Now it is rather late in the day, after the case had been fully developed on the above point, on either side to raise this point at this stage. In the circumstances I consider, the question was properly raised and gone into in this case and cannot be thrown out merely on the ground that there was no pleading.

(6) The second question turns on an interpretation of the term "tender" occurring in S. 84 of the T. P. Act. According to this section, interest on the principal money ceases from the date when the mortgagor has tendered or deposited in Court the amount due on the mortgage. It goes without saying in accordance with the above that the liability of the usufructuary mortgagee to account for mesne profits will arise only when money is tendered to him. In order that a tender may be a valid offer, it must be made under circumstances that the person to whom it is made may have reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do. It must of course be unconditional. It has been held in a number of cases that money must be actually tendered but as found in 'MAUNG PO TUN v. MAUNG E KHA', AIR (4) 1917 Low Bur 122, it cannot be laid down as a general proposition that in order that it may be a legal tender, actual money must be produced under all circumstances. There is a citation in this judgment from the Ghose's Law of Mortgages in India, and Commentaries on the T. P. Act by Shephard and Brown, according to which it appears that if the creditor by his conduct dispenses with the production of the money, he cannot afterwards object that there was no valid tender. In other words, where by express words or conduct he shows his determination not to accept the money offered and the production of it is shown to be useless, it must be held that the creditor dispensed with the production. It was held in the above authority that under these circumstances the appellant may be said to have done all he could and should as a production of the money would not have tempted the respondent to change his mind. In that case the mortgagee refused to allow redemption saying that he had bought the property outright and the mortgagor contended that the mortgagee had ceased to have any further rights from the date of his refusal to allow redemption and was, therefore, accountable for his gross receipts from the property in his possession. It was on these grounds that it was held that the suit for redemption was nothing more or less than an offer to redeem and when the defendant in the suit contested it and it was found after due enquiry that his case was not true, he was held to have been rightly ordered to account for what he had received after the institution of the suit. The facts of this case are, in my opinion, on all fours with facts of the present case. The above proposition finds support from the following quotation from 'HUNTER v. DANIEL', (1845-4 Hare 420) in 'VENKATARAYANIM GARU v. VENKATA SUBADRAYAMMA', AIR (10) 1923 P C 26:

> "The practice of the Courts is not to require a party to make a formal tender where from the facts stated in the Bill or from the evidence, it appears the tender would have been a mere form and that the party to whom it was made would have refused to accept the money."

(7) Their Lordships held that that was a true and accurate expression of the law. The position is the same where a mortgagee unequivocally refuses to receive payment if tendered on a due date as thereafter the mortgagor is relieved from the duty of actually tendering the amount and the mortgagee cannot recover interest subsequently accruing. The reason is that the conduct of the mortgagee is such as not to entitle him to the interest accru-

ing after the date of the tender. This is not the exact point arising in this appeal, but the principle is almost the same. In 'MAUNG PO THET v. DAW SHWE', A I R (16) 1929 Rang 271; 'MAUNG PO TUN v. MAUNG E KHA', AIR (4) 1917 Low Bur 122, was distinguished on the ground that the mortgagee denied the mortgage and the principle was accepted that for that reason there was no use in tendering money to a mortgagee who did not even accept the position of the mortgagee. From the reasons given in this judgment, it is clear that 'AIR (4) 1917 Low Bur 122' is fully applicable to the facts of this case. In the circumstances, the view taken by the learned District Judge is correct. The appeal fails and is hereby dismissed with costs.

V.B.B. *Appeal dismissed.*

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(Jodhpur Bench)

WANCHOO, C. J., AND BAPNA J.

Nathmal and another, Applicants v. Commissioner, Civil Supplies, Rajasthan and others.

Civil Misc. Appln. No. 3 of 1951, D/- 19-10-1951.

(a) Rajasthan Food Grains Control Order (1949), Cl. 25 — Not void as contravening Art. 14 of the constitution — Constitution of India Art. 14.

Clause 25 of the Rajasthan Food Grains Control Order is equally applicable to all persons who come within the purview of the Order and therefore there is no discrimination in the law itself. It may be that an individual officer may exercise his discretion dishonestly, arbitrarily or capriciously and in contravention of Art. 14 of the constitution but then the officer would be going contrary to law.

The Court may not in such a case be powerless to give the subject protection against a dishonest officer, but that protection cannot be sought under Art. 14 or under Art. 226 of the Constitution. Clause 25, therefore, of the Rajasthan Foodgrains Control Order is not hit by Art. 14 of the Constitution, and cannot be declared void on that ground. AIR (38) 1951 Bom 132, Rel. on. (1886) 118 U S 156 Dist. (Pr 6)

(b) Constitution of India, Arts. 19(1)(f) and 31 — Art. 19(1)(f) has no application in a case where Art. 31 is also invoked for challenging a particular law as void. (Para 7)

(c) Rajasthan Food Grains Control Order (1949), Cl. 25 — Validity — Constitution of India Arts. 13, 19(1)(g) and (6).

Clause 25 of the Rajasthan Food Grains Control Order gives powers to various officers mentioned therein to freeze any stocks of foodgrains held by any person. The clause does not say that no reasons need be assigned; but it gives this power without the necessity of assigning any reasons for such action. It is thus possible for any of the officers named in the clause to freeze the stock of any dealer without assigning any reason, and thus completely paralyse his trade or business. Such power is an arbitrary power, and cannot be said to be a reasonable restriction on the fundamental right conferred by Art. 19 (1) (g) of the Constitution.

The provision of requisitioning foodgrains or directing their disposal under the last portion of Cl. 25 at Government procurement rate, which is bound to be much lower than the ceiling price, would prevent people from carrying on trade or business which could be lawfully done at ceiling price. The last portion of Cl. 25 is thus a restriction on carrying on trade or business which is a fundamental right under Art. 19 (1) (g) of the Constitution of India, and the said restriction is not at all reasonable. Hence Cl. 25 is not saved by Art. 19 (6), and, therefore, it being not in conformity with Part III of the Constitution is void. AIR (38) 1951 Cal 90 and AIR (38) 1951 S C 118, applied. (Paras 10, 11)

(d) Constitution of India, Art. 31 — "Compensation", meaning of — (Words and Phrases.)

Under Art. 31 of the Constitution of India the compensation to be provided by law, when property is taken away, should be fair compensation which means equivalent in value of the property taken or acquired, subject only to this qualification that such equivalent need not be paid in money. AIR (38) 1951 All 674 Rel. on. (Pr 14)

(e) Rajasthan Food Grains Control Order (1949), Cl. 25 — Order was not in existence prior to 26-7-1948 — Cl. 25 is not saved by Art. 31(5) of the Constitution — Constitution of India Art. 31(5).

Even though the Essential Supplies (Temporary Powers) Act might have been passed in 1946 orders passed thereunder must be held to have been passed on the day on which they were passed. Even, therefore, when the Essential Supplies (Temporary Powers) Act, 1946, became applicable to Rajasthan from the 17th of August, 1950, and the Rajasthan Foodgrains Control Order, 1949, became an order under the Act of 1946, after its application to Rajasthan, the date of the Rajasthan Foodgrains Control Order could not be changed from what it actually is, namely the 12th of August, 1949. Therefore, any provision in the Rajasthan Foodgrains Control Order, 1949, as to compensation would not be saved by Art. 31(5), as that Order came into force long after the 26th of July 1948. (Para 15)

(f) Rajasthan Food Grains Control Order (1949), Cl. 25 — Cl. 25 offends Art. 31 (2) of the Constitution and is void — Constitution of India Art. 31(2).

Clause 25 of the Rajasthan Food Grains Control Order which provides for requisitioning of stocks at the rate fixed for purposes of Government procurement, is void, as it offends Art. 31(2) of the Constitution, as fair compensation has not been fixed in the law for acquiring the food grains. (Para 17)

(g) Constitution of India Art. 226 — Application under — Two persons against whom two different orders under Cl. 25, Rajasthan Food Grains Control Order were passed joining in one petition — Application is maintainable when their case is exactly the same — Affidavit filed by one of applicants in support of application held was sufficient. (Paras 18, 19)

(h) Constitution of India Art. 226 — Power under Art. 226 is unfettered by the restrictions given in S. 45, Specific Relief Act — High Court in a proper case can order Government to pay compensation to the applicant especially when there is no other remedy open to applicant — Government freezing and acquiring stocks of grain in possession of applicant under Cl. 25, Rajasthan Food Grains Control Order, 1949 — Grain sold away by Government — Action of Government held illegal — Government was ordered to pay to applicant a sum of money in respect of stocks acquired at prevailing market rate as fair compensation. (Para 20)

Hasti Mal, for Applicants; B. B. Desai, for the State of Rajasthan.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('51) AIR (38) 1951 S C 118: (1950 S C R 759) (Pr 9)

('51) AIR (38) 1951 All 674: (1951 All L J 365 F B) (Pr 12)
('51) AIR (38) 1951 Bom 132: (53 Bom L R 393) (Pr 6)
('51) AIR (38) 1951 Cal 90 (Pr 9)
(1886) 118 U S 356 (Pr 5)

WANCHOO, C. J.: This is an application by Nathmal and Mithalal under Art. 226 of the Constitution of India for a direction, order, or writ in the nature of 'mandamus', prohibition, 'quo warranto' and 'certiorari', or any of them, to be issued against the State of Rajasthan and certain officers of the State, who have been made parties to the application.

(2) The facts, which have led to this application, are these. The petitioners are merchants at Raniwara, and deal in foodgrains for which they hold licences. On the 7th of October, 1950, the petitioners were informed by the Sub-Divisional Officer, Bhinmal, that their stocks of 'bajra' were frozen by him under orders of the Deputy Commissioner, Civil Supplies, Jodhpur. Later, they were informed by the Tehsildar of Jaswantpura that their stocks of 'bajra' were requisitioned by the Government, and they were ordered to sell it at the rate of Rs. 9/- per 'maund'. The petitioners made various representations to the Deputy Commissioner and Commissioner, Civil Supplies, and the Hon'ble Minister for Supplies but with no effect. Their contention is that 'bajra' is being allowed to be freely purchased and sold in the market, and no ceiling prices have been fixed by the Government. The stock of 'bajra' with the petitioners was purchased by them at prevailing market rates, namely, about Rs. 17/- to Rs. 18/- per 'maund', and was held by them in the usual course of business. No reasons had been assigned why the stocks of the petitioners had been frozen and requisitioned at procurement rate, and no principles had been laid down in the Rajasthan Foodgrains Control Order, 1949, for freezing and requisitioning of the stock of foodgrains with any dealer. Further, it was said that stock of certain other grain merchants had also been frozen, but all that stock had been released. The Civil Supplies authorities had no authority to freeze and requisition the stock of 'bajra' with the petitioners arbitrarily without assigning any reason, and, in any case, if they had any such discretion, it had been highly abused so as to discriminate between one person and another. The action taken under the Foodgrains Control Order was void, in view of Articles 14, 19 (1) (f), 19 (1) (g), and 31 of the Constitution, read with Article 13.

(3) The application was opposed by the State of Rajasthan. It was urged that separate orders were passed against Nathmal and Mithalal, and as such, a single petition was not maintainable. It was also urged that the application had not been filed on behalf of the respective firms, and that the affidavit had been verified by one of the applicants, viz., Nathmal, and not by the other, Mitha Lal. Further, the order freezing and requisitioning the stock of 'bajra' was justified under Clause 25 of the Rajasthan Foodgrains Control Order, 1949, and the payment of Rs. 9/- per 'maund' was justified under Clause 4 of the Rajasthan Foodgrains (Kharif) Procurement Order, 1949. This circumstances in which the 'bajra' was freezed were that the applicants had applied for permits to export this 'bajra' outside the district of Jalore. The matter was referred to the Commissioner, Civil Supplies, for instructions, as a large quantity of 'bajra' was intended to be sent out of the district. Thereupon the Government of Rajasthan ordered that the stock of 'bajra' of all merchants who applied for export permits should be freezed. The power was exercised under Clause 25 of the Rajasthan Foodgrains Control Order in order to prevent the creation of an unwarranted scarcity in Jalore. Compensation had been paid for the 'bajra' that had been requisitioned and, therefore, the applicants had no case.

(4) The main attack of the applicants is on Clause 25 of the Foodgrains Control Order. That clause reads as follows:

"Notwithstanding anything contained in this Order, the Commissioner, the Director, the Deputy Commissioner, the Nazim, the Assistant Commissioner, the Sub-divisional Officer, the Senior Officer of a Jurisdictional Thikana, the Enforcement Officer or such other officer as may be authorised by the Commissioner in this behalf, may freeze any stocks of foodgrains held by any person, whether in his own behalf or not, and such person shall not dispose of any foodgrains out of the stock so freezed except with the permission of the said authority. Such stocks shall also be liable to be requisitioned or disposed of under orders of the said authority at the rate fixed for purposes of Government procurement."

(5) It has been urged, in the first place, that the clause is 'ultra vires', because it offends against Article 14 of the Constitution of India. We are, however, of opinion that the clause, as it stands, is equally applicable to all who are covered by the Rajasthan Foodgrains Control Order, and it cannot be said that there is any discrimination in the law itself. It is conceded on behalf of the applicants that there is no discrimination in the clause itself; but it is urged that the manner in which the clause has been applied amounts to an abuse of the law, and is, therefore, hit by Article 14. Reliance in this connection has been placed on the case of 'YICK WO v. HOPKINS', (1886) 118 US 356. That was a case relating to an ordinance passed by the City of San Francisco, which required all persons desiring to establish laundries in frame houses to obtain the consent of certain municipal officials. It was found that in giving consent the municipal officials had acted unfairly and that the policy of the administration was directed exclusively against a particular class of persons, viz., the Chinese. On those facts the Supreme Court of the United States held that:

"though a law be fair on its face, and impartial in appearance, yet, if it is administered by public authority with an evil eye and unequal hand, so as practically to make illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

In that case all the Chinese, who had applied for permission, were refused such permission, while all Americans, except one, were given permission. There was a wholesale abuse of the law in that case, and in those circumstances, the law was held to be invalid. In the present case, there is no proof of any such wholesale abuse of the provisions of Clause 25 of the Foodgrains Control Order by the State of Rajasthan, and, therefore, 'YICK WO'S CASE', has no application.

(6) We may, in this connection, refer to the case of 'DHANRAJ MILLS, LTD. v. B. K. KOCHER', AIR (38) 1951 Bom 132. In that case, the learned Judges while dealing with the question whether a particular law was hit by Article 14 said that there could be three possibilities. Firstly, the law itself might permit discrimination, in which case even though the law may appear to be fair and indiscriminatory, the Court may interfere. Secondly, the law may vest discretion in certain

authorities, and in exercising that discretion the State may, as a policy of administration, require its officers to exercise the discretion unfairly and unequally. Even in such a case the Court may interfere and say that although administrative orders are being challenged, the administrative orders suggest behind them a policy of the state of discrimination. Thirdly, the challenge may only be against a specific act of an individual officer as being in contravention of Article 14. In such a case, if the officer exercises his discretion dishonestly, arbitrarily or capriciously, he is really going contrary to law. The Court may not be powerless to give the subject protection against a dishonest officer, but that protection cannot be sought under Article 14 or under Article 226 of the Constitution. We respectfully agree with this analysis, and are of the opinion that at the best the present case comes under the third category. Clause 25, therefore, of the Rajasthan Foodgrains Control Order is not hit by Article 14 of the Constitution, and cannot be declared void on that ground.

(7) Then we come to the contention that Clause 25 is void in view of Article 19 (1) (f), which provides that all citizens shall have the right to acquire, hold and dispose of property. We are of opinion that this Article has no application in a case where Article 31 is also being invoked, as is being done before us. The real question in this case is whether the compensation that has been given is such as is covered by Article 31. Learned Counsel for the applicants also concedes that in view of what he was going to urge under Article 31, Article 19 (1) (f), would have no application in the present case.

(8) Learned Counsel for the applicants, however, urges strongly that Clause 25 is void in view of Article 19 (1) (g), which provides that all citizens shall have the right to practise any profession, or to carry on any occupation, trade or business. This is subject to Article 19 (6), which provides that:

"nothing in Sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said Sub-clause."

The argument is that the restrictions provided by Clause 25 are not reasonable restrictions within the meaning of Article 19 (6), and, therefore, this clause is void as not being in conformity with Part III of the Constitution It is said that this clause gives an arbitrary power to the Commissioner and various other officers to freeze any stocks of grains held by any person without assigning any reason therefor, and thereafter such person cannot dispose of the stocks freezed except with the permission of the authority passing the freezing order. This, it is urged, cannot be called a reasonable restriction on the right of a citizen to carry on trade or business. As to the reasons given on behalf of the State for passing the freezing order, it is said that the State might have passed the order for the reasons disclosed in the affidavit filed on their behalf; but the clause, as it stands, does not provide that any reason has to be given for freezing the stocks of dealers and interfering with their business, and as such, is an example of naked and arbitrary power, which cannot be justified as a reasonable restriction.

(9) Reliance in this connection is placed on the case of 'ANUMATHI SADHUKHAN v. A. K. CHATTERJEE', AIR (38) 1951 Cal 90. That was a case relating to the West Bengal Rice Mills Control Order, 1949. The petitioner in that case was the licence-holder of three husking mills, and had been carrying on the business of husking paddy at the said mills for the last 20 years. He had obtained the licence in 1945, and thereafter the quantity of paddy permitted to be husked in his mills was reduced from time to time. On the 7th of December 1950, a general notice was issued to the effect that the husking mill owners were authorised to husk half of their previous permitted quantities up to 14-12-1950, and thereafter no husking mill should be run without obtaining further orders. This order, and the law on which it was based, was challenged as void under Article 19 (1) (g). The order was based on Clauses 9 and 13 of the West Bengal Rice Mills Control Order, 1949, which were as follows:

"9. Notwithstanding anything contained in this order, the Commissioner may, without assigning any reason, direct any application for the issue of a licence, or for the renewal of a licence be refused."

"13 (1) No licensee shall contravene any of the conditions of his licence. If any such licensee contravenes any of the said condition, then without prejudice to any other action that may be taken against him, his licence shall be liable to be cancelled, or suspended by the Commissioner.

(2) Notwithstanding anything contained in Subpara. (1) the Provincial Government may, in special circumstances, without giving any previous notice, or without assigning any reason, cancel or suspend a licence issued under this Order."

The case of the petitioner there was that the order of the 7th of December 1950, in effect suspended or cancelled his licence, and his business had come to a standstill, and the mills had to be closed down. The learned Judge observed at page 92 as follows in connection with Clauses 9 and 13:

"Clauses 9 & 13 of the Rice Mills Control Order no doubt empower cancellation or refusal of a licence already issued & refusal to issue a new licence without assigning any reasons. But there can be no doubt that these provisions overstep the limits of reasonableness & must be held to be invalid in the face of the written Constitution of India. These provisions do not give any opportunity to the licence-holder to make any representation against the action taken by the authorities concerned, or to protect their interest against any wrongful action of the authorities & they further provide scope for the exercise of the power conferred on the authorities in an arbitrary and capricious manner, if they so choose to do it. It is clear law that an arbitrary or capricious exercise of the power is no exercise at all. If no reasons are assigned, it is not possible to know or judge whether the order is a valid or a mala fide or arbitrary order."

It was, therefore, held that the order dated 7-12-1950 was in excess of the powers of the opposite party. Reference was made in this case to 'CHINTAMANRAO v. STATE OF MADHYA PRADESH', AIR (38) 1951 S C 118, where it was held that the Act in imposing total prohibition of carrying on the business of manufacture of 'bidis' during the agricultural season arbitrarily interfered with private business and could not be said to be a reasonable restriction on the fundamental rights conferred by Article 19 (1) (g), and, therefore, was not saved by Article 19 (6). That being so, it was not in conformity with Part III of the Constitution, and was void.

(10) We think that the principle of these two cases applies to the present case. Clause 25 of

the Foodgrains Control Order gives power to various officers, including the Commissioner, the Director, the Deputy Commissioner, the Nazim, the Assistant Commissioner, the Sub-divisional Officer, the Senior Officer of a Jurisdictional Thikana, the Enforcement Officer, or such other officer as may be authorized by the Commissioner in this behalf, to freeze any stocks of foodgrains held by any person. The clause does not say that no reasons need be assigned; but it gives this power without the necessity of assigning any reasons for such action. It is thus possible for any of the officers named in the clause to freeze the stock of any dealer without assigning any reason, and thus completely paralyse his trade or business. It seems to us that such power is an arbitrary power, and cannot be said to be a reasonable restriction on the fundamental right conferred by Article 19 (1) (g) of the Constitution. The fact that in this particular case the applicants applied for export of the stock, which was eventually freezed, and that was the reason why the Government ordered freezing of the stock, would not, in our opinion, save the law, as it stands, from being arbitrary. It would have been a different matter if, for example, the law provided that the Commissioner or any of the officers mentioned therein may freeze any stocks of foodgrains held by any person in any district in order to conserve stocks in that area and prevent prices from rising. We are, therefore, of opinion that Clause 25 is not saved by Article 19 (6), and, therefore, it being not in conformity with Part III of the Constitution is void.

(11) The last portion of the clause which provides for such stocks being requisitioned or disposed of at the rate fixed for purposes of Government procurement is also void for more than one reason. It is void, firstly, because the earlier part relating to the freezing of the stock is void. The second ground of invalidity becomes clear by a reference to Clauses 23, 24 and 25 of the Control Order. Broadly stated, Clause 23 empowers the Commissioner and certain other officers to fix ceiling prices at which foodgrains shall be sold in the area to which the Rajasthan Foodgrains Control Order, 1949, was applicable. Purchase and sale or trade or business at ceiling prices was thus permitted. Clause 24 authorizes the Commissioner and certain other officers to direct any person in possession to sell the foodgrains or part thereof to any person at such price as may be fixed under Clause 23. This clause does not entail any unreasonable restriction as the seller gets the ceiling rate for his stock, and when he purchased it, he knew that he would not lawfully get more than the ceiling price. Clause 25 may be divided in two portions. The first portion authorizes the Commissioner and certain other officers to freeze the stock of foodgrains held by any person. The last portion empowers the said officers to requisition the stock of freezed foodgrains or to direct its disposal at Government procurement rate. In the first place, there is a contradiction between Clause 24 and Clause 25. If the officers choose to issue an order under Clause 24 directing sale of foodgrains held by any person, the price paid would be the ceiling price; but if they prefer to pass the same order under Clause 25, which they are authorized to do after freezing the stocks, the same person will not get the ceiling price but the Government procurement rate which would obviously be less than the ceiling price. Secondly, when the ceiling price is fixed, it means that people are free to buy and sell or carry on trade or business at such price. The provision of requisitioning foodgrains or directing their disposal under Clause 25 at Government procurement rate, which is bound to be much lower than the ceiling price, would prevent people from carrying on trade or business which could be lawfully done at ceiling price. It would be absurd to suppose that any trade could be carried on by buying at ceiling price and selling at Government procurement rate. In this case it has been admitted that the Government procurement rate was Rs. 9/- a maund, the Government's selling rate was Rs. 13/5/4 per 'maund', and the free market rate was Rs. 17/- or 18/- per 'maund.' The last portion of Clause 25 is thus a restriction on carrying on trade or business which is a fundamental right under Article 19 (1) (g) of the Constitution of India, and the said restriction is not at all reasonable, and is not saved by Clause (6) of that Article. The provision in the last sentence of Clause 25 is, therefore, void.

(12) We now come to the argument with respect to Article 31. This argument is particularly directed against the later part of Clause 25, which is as follows:

> "Such stocks shall also be liable to be requisitioned or disposed of under orders of the said authority at the rate fixed for purposes of Government procurement."

Learned Counsel urges that under Article 31 (2), no property, whether movable or immovable, can be taken possession of or acquired for public purposes under any law authorizing the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given. It is urged that under this provision it is the duty of the State to provide for fair and just compensation, and reliance is placed on the following observations in 'SURYAPALSINGH v. THE U P. GOVERNMENT', AIR (38) 1951 All 674 at p. 685 (FB):

> "The absence of the qualifying adjective "just', "fair", "adequate" is, to our minds, not of consequence; nor can we see any ground on principle or authority for attributing to the word "compensation" the meaning suggested by the State, namely such amount as the Legislature itself considers reasonable. If it had been the intention to make so radical a change in the meaning of the word compensation — a change which wholly destroys the basis upon which it was previously understood that compensation would be determined. — It is reasonable to expect that fact to have been clearly stated in the Constitution. If the amount of compensation was left entirely to the discretion of the Legislature, and was not to be justiciable, Art. 31 (2), which is a restraint on legislative power, would cease to be of use to protect the fundamental rights to property. Nor does the conferment of power to determine the principles on which compensation shall be given enable the Legislature to depart from the basic rule. That provision is intended to enable the Legislature to lay down rules for the assessment of compensation in cases where its determination may be difficult or where different persons may take divergent views as to what is the equivalent in value of the property acquired."

(13) Learned Counsel for the State, on the other hand, urges that, in the first place, Article 31 (5) protects this provision, and, in the second place, as the word "compensation" has not been qualified by the word "fair", "just" or "adequate", any compensation fixed by the Legislature is the com-

pensation to which a person is entitled under Article 31 (2).

(14) So far as the second argument is concerned, it is fully disposed of by the observations of the learned Judges of the Allahabad High Court in the case cited above, with which we respectfully agree. We may add that if it was the intention of the framers of the Constitution that compensation provided under Article 31 (2) should not be justiciable, and that whatever was fixed by the Legislature would be the proper compensation, it would have been unnecessary to provide Article 31 (4) and Article 31 (6). These provide for saving certain Bills pending at the commencement of the Constitution or passed by a State within 18 months before the coming into force of the Constitution. If the compensation fixed by virtue of Article 31 (2) were not justiciable, it would not have been necessary to provide specifically for certain Bills and Acts under Article 31 (4) and Article 31 (6). The presence, therefore, of these two provisions in our opinion, enforces the argument of the learned Judges of the Allahabad High Court quoted by us above. We are, therefore, of opinion that the compensation to be provided by law, when property is taken away, should be fair compensation, which means equivalent in value of the property taken or acquired, subject only to this qualification that such equivalent need not be paid in money.

(15) Before we turn to the question whether the compensation paid in this case is fair or not we should like to dispose of the first argument, namely, that Article 31 (5) protects this provision of Clause 25. That Article protects the provisions of any existing law which had come into force 18 months before the coming into force of the Constitution. In other words, if a law was in existence before the 26th of July, 1948, its provisions would not be hit by Article 31 (2). We have, therefore, to see whether this law, viz., the Rajasthan Foodgrains Control Order, 1949, was in existence before the 26th of July 1948. Obviously an order passed in 1949 could not be in existence before the 26th of July 1948. But learned Counsel for the State argues that the Essential Supplies (Temporary Powers) Act, 1946, was brought into force in Rajasthan by the Essential Supplies (Temporary Powers) Amendment Act, 1950, on the 17th of August 1950. By Section 10 of this Act, any law in force in a Part B State, before the coming into force of this Act, stood repealed; but any order made and in force immediately before that day in the said State was to continue in force and be deemed to be an order made under this Act. Therefore, on the coming into force of this Act, the Rajasthan Essential Supplies (Temporary Powers) Ordinance (No. XIII of 1949), came to an end; but all orders passed under it including the Rajasthan Foodgrains Control Order, 1949, were continued as orders under this Act. Learned Counsel's argument is that as the Essential Supplies (Temporary Powers), Act was originally passed in 1946, it should be understood that the Rajasthan Foodgrains Control Order, 1949, was passed in 1946, i.e., before the 26th of July, 1948. We must say that we have not been able to understand this argument. Even though the Essential Supplies (Temporary Powers) Act might have been passed in 1946, many orders must have been passed under that Act after 1946. Those orders, must be held to have been passed on the day on which they were passed. Even, therefore, when the Essential Supplies (Temporary Powers) Act, 1946, became applicable to Rajasthan from the 17th of August 1950, and the Rajasthan Foodgrains Control Order, 1949, became an order under the Act of 1946, after its application to Rajasthan, the date of the Rajasthan Foodgrains Control Order could not be changed from what it actually is, namely, the 12th of August 1949. Therefore, any provision in the Rajasthan Foodgrains Control Order, 1949, as to compensation would not be saved by Article 31 (5), as that Order came into force long after the 26th of July 1948.

(16) Finally, we come to the question whether the compensation in this case was fair. In this connection certain facts are admitted. The first is that the procurement price fixed by the Government is Rs. 9/- per 'maund.' The second is that the Government is selling 'bajra' in rationed areas at Rs. 13/5/4 per 'maund.' The third is that in the open market 'bajra' was being sold at Rs. 17/- per 'maund', as appears from paragraph 10 of the reply filed on behalf of the Government. The fourth is that no ceiling prices have been fixed by the Government, as provided in Clause 23 of the Rajasthan Foodgrains Control Order.

(17) Clause 25 provides compensation to all persons including dealers like the applicants at the procurement price. This price is fixed at Rs. 9/- per 'maund' under the Rajasthan Foodgrains (Kharif) Procurement Order, 1949. It should be remembered that this is the price to be paid to the primary producer. It is well-known that the price paid to a primary producer is always less than the price at which dealers sell between themselves or in the open market to the consumer. Obviously, therefore, payment of the procurement price to a dealer could not be fair compensation, for that price is meant for the primary producer and not for a dealer who may have himself purchased the grain through various intermediaries between himself and the primary producer. To our mind, the ceiling price or some price in its neighbourhood, which is provided in Clause 23, would be the fair compensation for the dealer, as that would be equivalent in value of the property taken to him. But no ceiling price for 'bajra' has been fixed under Clause 23, and one method, therefore, of knowing the equivalent in value is not open to us. Procurement price, as we have already said, cannot be called fair compensation for a dealer, and that leaves us with only two criteria, viz., (1) the price at which Government is selling in rationed areas, i.e., Rs. 13/5/4 per 'maund', and (2) the price which was apparently prevailing in the open market, viz., Rs. 17/- per 'maund.' The affidavit of the applicants is that they had purchased this grain at about Rs. 17/- to 18/- per 'maund.' This has not been specifically denied on behalf of the State, and we are, therefore, of opinion that in the absence of a ceiling price, the fair compensation in the present case is Rs. 17/- per 'maund', and, in any case, it cannot be less than Rs. 13/5/4 per 'maund'. Clause 25, therefore, when it provides for requisitioning of stocks at the rate fixed for purposes of Government procurement, is void, as it offends Article 31 (2) of the Constitution, as fair compensation has not been fixed in the law for acquiring this movable property.

(18) We may now briefly dispose of the technical objections raised on behalf of the State. The first is that two persons on whom two different orders were passed have joined in one petition. We see no objection to this course when the case of these two persons is exactly the same.

(19) The next objection is that the petition has been filed by the applicants in their own names, and not on behalf of their firms, and that Mithalal did not file any affidavit. The applicants have mentioned in the hearing that they are partners of their respective firms. This, in our opinion, is sufficient to show that the applicants are interested in the stocks concerned. It was unnecessary for

Mithalal to swear another affidavit when the application was one, and one of the applicants had sworn an affidavit in support of it.

(20) The last question is as to what order should be passed in this case. The difficulty has arisen because the grain has been sold, and cannot now be returned in kind. Learned Counsel for the applicants urges that he should be ordered to be paid the equivalent of the grain in money to be fixed by this Court. He says that it would not be possible for him to recover the money in a Civil Court, as the suit would be barred under Section 16 of the Essential Supplies (Temporary Powers) Act, 1946, which is now in force in Rajasthan. Learned Counsel for the State draws our attention to Section 45, proviso (g), of the Specific Relief Act, which prohibits the making of an order under that section to enforce the satisfaction of a claim upon the Crown. The matter is not free from difficulty; but the power under Article 226 is unfettered by the restrictions given in Section 45 of the Specific Relief Act. Further, there appears to be no other remedy open to the applicants, and it is not possible for us now, in view of the fact that the grain has been sold, to order its return to the applicants. As we are holding that Clause 25 of the Rajasthan Foodgrains Control Order is void, as it is against the provisions of Part III of the Constitution, the only possible relief that can now be given to the applicants is to order that fair compensation should be given to them, as the grain cannot be returned. We consider that in the circumstances of this case, Rs. 17/- a 'maund' is the fair compensation, and we direct that the State of Rajasthan shall either return the equivalent in grain to the applicants, or, if it cannot do so, pay compensation to them at Rs. 17/- per 'maund.'

(21) The applicants will get their costs of this proceeding from the State.

K.S. *Application allowed.*

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(JODHPUR BENCH)

WANCHOO, C. J., AND BAPNA, J.

Firm Udairaj Bankatlal, Applicant v. The Commissioner Civil Supplies Rajasthan and others.

Miscellaneous Application No. 6 of 1951 (Writ.) D/- 19-10-1951.

(a) Constitution of India Art. 226 — Application under — Delay — Grain freezed in March 1949 — Applicant making representation to Government — On 3-1-1951 applicant ordered by Government to sell grain at certain rate to certain person — Applicant taking time to make certain representations and after failure of such representations making application under Art. 226 of 28-2-1951 — Under the circumstances held time had really to be counted from 3-1-1951 — Application held could not be dismissed on ground of delay. (Para 6)

(b) Constitution of India Art. 226 — Another remedy open — Application on ground that Rajasthan Foodgrains Control Order, 1949 was 'ultra vires' and freezing of grain improper — Remedy by way of suit held barred by S. 16 of Essential Supplies (Temporary Powers) Act, (1946) — Hence application could not be dismissed on ground of another remedy being open. (Para 7)

(c) Constitution of India Arts. 14, 19, 31 — Rajasthan Foodgrains Control Order (1949), Cl. 25 — Validity.

Order freezing stock of applicant passed in March 1949 under Marwar Foodgrains Release Order (1946) — But order to sell freezed stock at certain rate per maund to certain person passed on 3-1-1951 — Order for sale of the grain must be deemed to be an order under Clause 25 of the Rajasthan Foodgrains Control Order, 1949 — Arts 14 and 19 (1) (f) of the Constitution held had no application, for the freezing took place before the Constitution came into force — But that part of Clause 25 of the Rajasthan Foodgrains Control Order, 1949, which provided that freezed stocks shall be liable to be requisitioned or disposed of under orders of the appropriate authority at the rate fixed for purposes of Government procurement was void in view of Art. 19 (1) (g) of the Constitution — Further, this part of Clause 25 was also void under Art. 31 (2) of the Constitution AIR (39) 1952 Raj 74, Foll. (Para 10)

Mag Raj, for Applicant; B. B. Desai, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('51) AIR (38) 1951 S C 128: (52 Cri L J 860) (Pr 8)

('51) Miscellaneous Application No. 3 of 1951: (AIR (39) 1952 Raj 74) .. (Prs 5, 10)

WANCHOO, C. J.: This is an application by Firm Udairaj Bankatlal under Article 226 of the Constitution of India for a direction, order, or writ in the nature of 'mandamus', prohibition, 'quo warranto', and 'certiorari', or any of them, to be issued against the State of Rajasthan and certain officers of the State, who have been made parties to the application.

(2) The facts, which have led to this application, are these. The petitioner is a merchant at Parbatsar, and deals in foodgrains, for which it holds a licence. 103 bags of barley, which were lying in the petitioner's godown in Basroli, were freezed in March 1949, under the orders of the Deputy Commissioner, Civil Supplies, Jodhpur. This happened before the United State of Rajasthan was formed. The grain remained freezed for some time, while the petitioner made representations to Government. Eventually the petitioner was asked to sell the grain at Rs. 9/- per 'maund' on the 3rd of January, 1951. The petitioner seems to have asked for time to make representations. Eventually the present application was filed on the 28th of February 1951, as the petitioner apparently failed in his representations to Government.

(3) The contention of the petitioner is that barley was being allowed to be sold freely in the market, and no ceiling prices had been fixed by Government. The petitioner had purchased its stock at market rates on about Rs. 17/- or 18/- per 'maund', and held it in the usual course of business. No reasons had been assigned why the stock of the petitioner had been freezed and requisitioned at procurement rate, and no principles had been laid down in the Rajasthan Foodgrains Control Order, 1949, for freezing and requisitioning of the stocks of foodgrains with any dealer. It was contended that the Civil Supplies authorities had no authority to freeze and requisition the stock of barley with the petitioner arbitrarily without assigning any reason, and that, in any case, if they had any such discretion, it had been highly abused so as to discriminate between one person and another. Reliance was placed on Articles 14, 19 (1) (f), 19 (1) (g), and 31 of the Constitution, read with Article 13, in this connection, and it was urged that law under which the action was taken was void and 'ultra vires.'

(4) The application was opposed by the State of Rajasthan. Their case is that the barley in ques-

tion had been imported from Bikaner at a time when Bikaner was a separate State. As the movement of foodgrains from State to State was banned, except on Government to Government basis, the stock was freezed, the import being in contravention of the law in force. The freezing order was passed under Clause 4 (1), of the Marwar Foodgrains Release Order, 1946, and no reasons were necessary to be assigned for freezing and requisitioning grain under that Order. It was also urged that similar powers were vested in the State under the Rajasthan Foodgrains Control Order, 1949, and the Rajasthan Foodgrains (Kharif) Procurement Order 1949, and the action taken was in accordance with law. Further, compensation was being paid, as provided by law, and the law under which the State had acted was not void in any manner. Lastly, it was urged that there was delay in the application, and, therefore, it should be dismissed on that ground, and that, in any case, an alternative remedy was open to the applicant.

(5) This case is similar to the case of 'NATHMAL v. COMMISSIONER, CIVIL SUPPLIES, RAJASTHAN', Miscellaneous Application No. 3 of 1951 (Raj). We do not, therefore, propose to repeat in detail what we have said in that case with respect to the application of Articles 14, 19 (1) (f), 19 (1) (g), and 31 of the Constitution, and shall indicate our decision briefly with particular reference to the facts of this case.

(6) We shall first deal with the objection that the application has been made with a great deal of delay, and, therefore, should be dismissed on that ground alone. It is no doubt true that the grain was freezed as far back as March, 1949, and the present application could have been made soon after the 26th of January 1950, when the Constitution came into force. But it appears that the applicant was making representations to Government, and its real grievance arose after the 3rd of January 1951, when it was ordered to sell the grain at Rs. 9/- per 'maund' to Messrs. Deoraj Dolatraj Rationing Agents, Makrana. It seems that after this order the applicant took time to make certain representations, and when those representations also apparently failed that the present application was made on the 28th of February 1951. Under these circumstances, time has really to be counted from the 3rd of January 1951, and it cannot be said that there was a delay of two years in this case. We are not prepared to dismiss the application on this ground.

(7) The next point that is urged is that another remedy was open to the applicant, and it could file a suit. So far as that is concerned, it is enough to say that the suit would be barred under S. 16 of the Essential Supplies (Temporary Powers) Act, 1946, which is now in force in Rajasthan. There is, thus, no alternative remedy open to the applicant, and the application cannot be dismissed on this ground.

(8) The next contention on behalf of the State is that the order freezing the grain was passed in March, 1949, under the Marwar Foodgrains Release Order, 1946, and cannot now be challenged, as the act of freezing was complete, and any fundamental rights that might have been conferred on the applicant in 1950, by the coming into force of the Constitution would not affect what had been done and completed. In this connection reliance is placed on the case of 'KESHAVAN MADHAVA MENON v. STATE OF BOMBAY', AIR (38) 1951 SC 128, where it was held that "Article 13 (1) can have no retrospective operation but is wholly prospective", and that

> "if an act was done before the commencement of the Constitution in accordance with the provisions of any law which, after the Constitution, becomes void, with respect to the exercise of any of the fundamental rights, the inconsistent law is not wiped out so far as the past act is concerned, for to say that it is, will be to give the law retrospective effect."

So far, therefore, as the order freezing the stock of the applicant is concerned, it was passed under the Marwar Foodgrains Release Order, 1946, in March, 1949, before the Constitution came into force, and must ,therefore, be upheld.

(9) It is further contended on behalf of the State that Cl. 4(2) of the Marwar Foodgrains Release Order, 1946, gave power to order sale of freezed stock to such persons as may be indicated in the order, and, therefore, the order to the applicant to sell the grain to a certain person as it was passed before the Constitution came into force, cannot also now be challenged.

(10) There is, however, no proof that the order to sell the freezed stock at Rs. 9/- per 'maund' was passed before the 26th of January, 1950. Learned Government Advocate had taken time to show this, but was unable to do so. It seems to us that the order to procure the grain at Rs. 9/- per 'maund' was passed some time in February or March, 1950, and finally the applicant was notified on the 3rd of January, 1951, that it was to sell the grain to Messrs. Deoraj Dolatraj. All this happened after the coming into force of the Constitution, and also after the Rajasthan Foodgrains Control Order, 1949, had been passed in August, 1949. The order, therefore, for the sale of the grain to Messrs. Deoraj Dolatraj must be deemed to be an order under Cl. 25 of the Rajasthan Foodgrains Control Order, 1949. There it is provided that freezed stocks shall be liable to be requisitioned or disposed of under orders of appropriate authority at the rate fixed for purposes of Government procurement, in this case Rs. 9/- per 'maund'. This brings us to the question whether this provision of the law under which this order must be deemed to have been passed is void in view of certain provisions in Part III of the Constitution relating to fundamental rights. So far as the present case is concerned, we are of opinion that Arts. 14 and 19(1)(f) of the Constitution have no application, for the freezing took place before the Constitution came into force; but for reasons given in 'NATHMAL'S Case', Civil Misc. Appln. No. 3 of 1951 mentioned above, we are of opinion that that part of Cl. 25 of the Rajasthan Foodgrains Control Order, 1949, which provides that freezed stocks shall be liable to be requisitioned or disposed of under orders of the appropriate authority at the rate fixed for purposes of Government procurement is void in view of Art. 19(1)(g) of the Constitution. We are, further, of opinion that this part of Cl. 25 is also void under Art. 31(2) of the Constitution for reasons which we have already given in 'NATHMAL'S Case', and which we need not repeat here.

(11) We, therefore, allow the application and set aside the order of the Civil Supplies Department conveyed through the Tahsildar Parbatsar on 3-1-51 directing sale of the freezed stock of 103 bags of barley belonging to the petitioner to Messrs. Deoraj Dolatraj at procurement rate. The applicant will get his costs of this proceeding from the State.

D.H. *Application allowed.*

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(Jodhpur Bench)

WANCHOO C. J. AND BAPNA J.

Kishan Lal and another, Appellants v. Bhanwar Lal, Respondent.

Civil Appeal No. 6 of 1950, D/- 11-9-1951.

(a) Contract Act (1872), Ss. 23, 30 and 49 — 'Forbidden by law' — Forward contracts in bullion — Contract silent as to place of performance — Determination of place of performance — Contract forbidden by law of the place where part of it was to be performed — Enforceability — Defence of India Rules (as applied to Marwar), R. 90-C.

The plaintiff owned two firms one in Jodhpur and the other at Indore who were acting as commission agents. The defendant a resident of Jodhpur entered into certain forward transactions in bullion with the Indore firm. Though the purchases and sales of bullion were to take place at Indore, no specific terms were settled between the parties as to the place where the profits or losses resulting from the transactions were to be paid. The transactions resulted in loss and therefore the plaintiff brought a suit for recovery of the same from the defendant in the Jodhpur Court. A notification dated 3-6-1943 issued by the then Jodhpur Government under the Defence of India Act added a new rule 90-C to the Defence of India Rules as applied to Marwar. According to this notification forward contracts relating to sale and purchase in bullion were forbidden to be made or performed in whole or in part in Marwar. This notification was in force in Jodhpur when the contracts were entered into and the suit was filed but expired sometime later after the filing of the suit.

'Held' (i) that in the absence of specific terms in the contract the general law will apply in deciding the place where the profits and losses were to be paid. According to the general law the debtor must find his creditor and in that view it must be held that part of the contract was that on accrual of profits they were to be paid by the Indore firm to the defendant at Jodhpur, or in other words, that a part of the contract was to be performed in Marwar. Similarly if losses occurred they were to be paid by the defendant to the Indore firm at Indore: 33 Bom. 364, Rel. on; (Para 13)

(ii) the agreement having been prohibited by law and having been declared an offence punishable under R. 90-C (3), Defence of India Rules was illegal and could not be enforced in view of S. 23 Contract Act; (Para 16)

(iii) the contract being illegal at its inception it could not become valid after expiry of the notification. (Para 17)

Anno: Contract Act, S. 23, N. 3, 32, 33; S. 30, N. 2; 4; S. 49, N. 1.

(b) Defence of India Rules (as applied to Marwar), R. 90-C — Scope — Contract made outside Marwar and to be performed entirely outside Marwar — Contract is not illegal and can be enforced by Marwar Courts — (Conflict of laws).

Rule 90-C (2) of the Defence of India Rules as applied to Marwar can only be interpreted to mean that persons were only prohibited to enter into contracts in Marwar or such contracts as were to be performed in whole or in part in Marwar. The prohibition in the rule is not general in its nature. Hence a contract of agency to deal in forward transactions in bullion which is made outside Marwar and is to be performed entirely outside Marwar will not come within the scope of the rule and is not illegal as being contrary to law of Marwar and will be enforced by Marwar Courts. (Paras 20, 25)

Sohan Lao, for Appellants; Inder Nath, for Respondent.

Cases referred to:

('09) 33 Bom 364: (10 Bom L R 1230) (Pr 14)
(1949) 1 All E R 146 (Pr 24)
(1860) 125 R R 919: (1860-8 C B (N S) 861) (Pr 21)

BAPNA, J.: This is an appeal by Kishanlal and Satya Narain, minors under the guardianship of their mother, against the judgment of a Division Bench of the High Court of the former Jodhpur State, dated the 24th of September, 1949. The applicants were plaintiffs in suit No. 49 of 1945-46, which was decided on the original side of the High Court of the former Jodhpur State. After the decision of the Division Bench, there was an application to the High Court for leave to appeal which was granted. That is how the present appeal has come up before us.

(2) The plaintiffs' suit was for recovery of Rs. 10,342/3/3. The plaintiff owned two firms, one in Jodhpur, called Kan Mal Suraj Mal, and the other in Indore, called Kan Mal Kishan Lal, and both these firms were acting as commission agents. The plaintiffs' case was that the defendant, Bhanwar Lal, who is a resident of Jodhpur, entered into certain forward transactions in bullion with their Indore Firm. These transactions resulted in a loss, a part of which was paid up. The suit was filed for recovery of the remainder of the loss consisting of Rs. 9,861/13/6 as principal and Rs. 480/5/9 as interest.

(3) The suit was resisted by the defendant on a number of grounds, and seven issues were framed by the trial Judge. There was a total denial by the defendant of any contract having been entered into between him and the plaintiffs' firm at Indore. It was also alleged that the transactions were of a wagering nature, and further that in view of a Notification, dated the 3rd of June, 1943, the transactions were illegal, and no decree could be passed by the Courts in Jodhpur State in consequence.

(4) The plea as to the illegality of the contracts was considered by the Court as a pure question of law and the Court after hearing arguments on the question upheld the plea of the defendant that the contracts were illegal by virtue of the provisions of the Notification of 3rd June, and dismissed the suit.

(5) The Notification of 3rd June, 1943, was issued by the Jodhpur Government under the Defence of India Act and Rules as in force in the former State of Jodhpur. It related to forward transactions in bullion where the date of delivery was more than 12 days after the contract, and provided a punishment for breach of its provisions. The Notification remained in force till the 30th of September, 1946, when it came to an end by efflux of time. The present suit was filed on the 19th of August, 1946, and was decided by the trial Court on the 2nd of March, 1948.

(6) The trial Judge held that the consideration of these contracts was not lawful as it was of such a nature that, if permitted, it would defeat the provisions of the Notification of the Jodhpur Government dated 3rd of June, 1943, and, therefore, in view of S. 23 of the Contract Act and S. 13 of the Code of Civil Procedure the suit was liable to be dismissed as it involved a violation of the Notification of the 3rd of June, 1943, and it would not be proper for the Courts of Jodhpur State to allow a claim which definitely and clearly contra-

vened the rule embodied in that Notification, as the rule in question was a part of the substantive law and not a mere matter of procedure. He did not go into the question whether any part of the contract was entered into or performed within Jodhpur State.

(7) When the matter came in appeal before the Division Bench, three points, which were formulated as below, were agitated:

"1. That since the contracts were neither made nor intended to be performed in part or in whole in Marwar and were, on the contrary, made and performed in Indore where they were not forbidden by law, the notification dated 3rd of June, 1943 was not applicable to them and therefore was not a bar to the competency of the suit in the Court of Marwar.

2. That since the contracts were neither made nor intended to be performed in Marwar, their enforceability here should not be affected by the mere fact that they were inconsistent with the law prevailing for the time being in Marwar, for the notification in question was only of a temporary character and the various contracts were not in conflict with the fundamental law of India on which the permanent law of Marwar was grounded.

3. That lastly if it be held that the contracts came within the mischief of the notification, before the suit was dismissed the notification had already spent its force, and, therefore, could not affect the maintainability of the suit.

(8) The Division Bench did not decide the second of these points as in the view that they were taking on the first point the question did not arise. On the first point the Division Bench held that part of the contracts was performed in Marwar according to the settlement between the parties, and the Notification of the 3rd of June, 1943, was fully applicable. On the third point the Division Bench held that as part of the contracts had been performed in Marwar the Notification of the 3rd of June, 1943, was applicable to them, and what was illegal when the contracts were entered into or performed could not become legal after the 30th of September, 1946. In this view the appeal was dismissed.

(9) The main contention that has been urged on behalf of the appellants is that the Division Bench went wrong in holding that part of the contracts was performed in Marwar as settled between the parties. This, it is said, was an issue of fact on which evidence was required, and as no evidence was taken in the trial Court, the Division Bench should not have decided this issue of fact without evidence. It is further urged that there was no admission on the part of the appellants that part of the contracts was to be performed in Marwar. As a matter of fact it is urged that a persual of the plaint shows that the plaintiffs' case was that the contracts were entered into and were to be performed in Indore. In particular, reference was made to paragraph 8 of the plaint where it was said that the Marwar Courts had jurisdiction not because the cause of action arose in Marwar, but because the parties resided in Marwar. It is also urged that the second point, which was left undecided by the Division Bench, raises an important question of law, and should have been decided by the Division Bench but for the erroneous view that was taken on the first point formulated by the Bench.

(10) It does appear to us that the first point formulated by the Division Bench raised a question of fact, namely whether the contracts were entered into in Marwar or any part of the contracts was intended to be performed in Marwar. Further, there seems to be no doubt that the parties were not at one that any contracts were entered into in Marwar or any part was intended to be performed in Marwar. Paragraph 8 of the plaint shows that the plaintiffs' case was that the Marwar Courts had jurisdiction because the defendant resided within Marwar, and not because the cause of action, wholly or in part, arose in Marwar. The defendant, on the other hand, completely denied that any contract had been entered into at all with the Indore firm. There is no doubt, therefore, that the first point, formulated by the Division Bench, raised an issue of fact, on which the parties were not agreed, and to decide which it was necessary to take evidence and, of course, consider the circumstances of the case.

(11) It was urged on behalf of the defendant-respondent that the appellants, if they wanted evidence to be taken on the point, should have taken this stand before the Division Bench, but as they did not do so, they could not be allowed an opportunity for further evidence at this stage. The respondent's contention is not correct. The trial Court had framed seven issues in the case of which the fifth issue which is relevant was as follows:

"Issue No. 5. Whether the transactions were illegal under the Notification of 3-6-1943 referred to in para 11 of the written statement and as such the suit in respect of such transactions was not entertainable?"

Now para (11) of the written statement did not at all mention the plea that the contracts were made in Marwar or were to be performed in whole or in part in Marwar. The plea in that para was that

"according to law in Marwar mentioned in Notification dated 3-6-43, all forward business in Bullion where delivery was to be given beyond 12 days was illegal in St. 2002 and as such the suit should be dismissed."

The trial Court had considered issue No. 5 as one of law only and had decided that the suit was not maintainable on the view that although the entire contract was to be performed at Indore, yet the contract was illegal according to the law in Marwar. The plaintiff was challenging the decision of the trial Court on the facts accepted by it that the entire contract was to be performed at Indore. The attack was on two grounds, viz., 1. that the enforceability of the contract which was made or performed outside Marwar was not affected by the law of Marwar, and (2) that the Marwar Notification had expired before the decision of the suit, and had, therefore, lost its force. It was the respondent who raised this question of fact for the first time in appeal that the contract with the Indore firm was to be performed in part in Marwar. It may be mentioned that according to the written statement, the defendant had denied any contract with the Indore firm, and he could, therefore, only argue on the pleadings in the plaint, and it was not open to him to travel beyond the plaint and rely on stray facts, without the plaintiff being given an opportunity to explain those facts the plaintiff could not know whether the Court would accept his arguments on questions of law, and his grievance only came into existence when the judgment was pronounced and he found that the Court had given a finding of fact, without his being given an opportunity to explain the circumstances which had influenced the Court to find against him. The Devision Bench of the High Court of the Covenanting State of Jodhpur should have, therefore, either framed a specific issue or if the issue as framed was considered as sufficient, should have given opportunity to the parties to lead evidence for arriving at a finding whether the contract was to

be performed in whole or in part in Marwar. We were inclined to remand the case for evidence as to the term of the contract of agency entered into between the parties in relation to the transactions in dispute; but learned counsel for the appellants, during the course of arguments, made a statement that no terms of any kind were settled at the time when the relationship of principal and agent was brought into existence between the parties. It was stated that the first step taken in the direction of bringing about the two parties in contract was by a telegram by the defendant from Jodhpur to the plaintiff's firm at Indore on the 5th or 6th of September, 1945, asking them to sell 500 tolas of gold and the plaintiff accepted the business of the agency by carrying out the order. No terms of any sort were settled between the parties and the business was to be conducted according to the custom and usage of the market. In the circumstances, it would be useless to grant any opportunity for further evidence and the point whether the contract was to be performed in whole or in part in Marwar is to be decided on the pleadings and certain admitted facts together with the general law applicable to transactions of this nature.

(12) The lower Court has taken into consideration only one fact in holding that a part of the contract was to be performed at Jodhpur, viz., that the losses were paid by the defendant to the plaintiffs' firm at Jodhpur. It was contended that this was done by the defendant under the instructions of the Indore firm as alleged in the plaint, and need not necessarily have been a part of the contract. The explanation is plausible and the fact that the defendant paid to the Jodhpur firm money due to the Indore firm is not sufficient to hold that it was part of the contract that moneys which would become payable to the Indore firm will be paid by the defendant at Jodhpur.

(13) There is, however, another aspect of the case. While it is true that according to the allegations in the plaint the purchases and sales of bullion were to take place at Indore, but this was not the whole matter in the contract of agency. The contract of agency implied that if as a result of the transactions profits accrued, they were to be payable by the plaintiff to the defendant, and if losses occurred, they would be paid by the defendant to the plaintiffs. The defendant, like any other reasonable person, entered into this business with an expectation of profit though losses might occur. The payment of profits to defendant or losses to plaintiffs must be deemed to be part of the contract of agency. As no specific terms have been alleged to have been settled between the parties, the general law will apply in deciding the place where these profits or losses were to be paid. The general law is that the debtor must find the creditor and in that view it must be held that part of the contract between the parties was that on accrual of profits they were to be paid by the Indore firm to the defendant at Jodhpur, or in other words, that a part of the contract was to be performed in Marwar. It may equally be held that part of the contract was that if losses occurred, they were to be paid by the defendant to the Indore firm at Indore. The fact that they were actually paid at Jodhpur under instructions of the Indore firm does not indicate, as already stated, that it was part of the contract to do so at Jodhpur. The Indore firm may have, for instance on the occurrence of losses, arranged with any Bank at Jodhpur to receive payments from the defendant, but unless this may have been done as part of the original contract, it is of no consequence in arriving at the place of performance of this part of the contract.

(14) The view taken by us is supported by a decision of the Bombay High Court in 'KEDAR MAL BHARMAL v. SURAJ MAL GOVIND RAM', 33 Bom 364, where it has been held that in the case of pakki Adat agency primarily the place of payment of profit is the place where the constituent resides. In the present case also the plaintiffs have alleged themselves to be pakka Adhatias in para 4 of the rejoinder.

(15) The relevant portion of the Notification dated 3-6-1943 which was issued by the then Government of Jodhpur under the Defence of India Act as applied to Marwar and is alleged to vitiate the contract of agency, may now be examined. By this Notification, Rule 90 C was added to the Defence of India Rules. Sub-r. (2) of R. 90 C laid down that "no person shall enter into forward contract or option in bullion". In sub-r. (1) of R. 90-C, "forward contract" was defined to mean

> "a contract for the delivery of bullion at a future date such date being later than twelve days from the date of the contract",

and the word "contract" was defined to mean "a contract made, or to be performed in whole or in part in Marwar relating to the sale or purchase of bullion". By sub-r. (3), the breach of the provisions of sub-r. (2) was declared an offence punishable with fine or imprisonment or both. At first sight, it may appear that what was forbidden to be done in Marwar was the making of the contract for sale or purchase of bullion in Marwar involving delivery beyond 12 days or its performance in whole or in part in Marwar. This is true so far as it goes but it is not only the contracts of sale and purchase which (were forbidden but contracts 'relating to' sale and purchase) were also forbidden to be made or performed in whole or in part in Marwar. It is conceded by learned counsel for the appellant that in the case of contracts which have given rise to this suit, they were all for delivery of bullion beyond 12 days and related to the period when the Notification was in force in Marwar.

(16) As discussed above, a part of the contract of agency relating to sale and purchase of bullion, of which delivery was to be given later than 12 days, was to be performed in Marwar. Such an agreement having been prohibited by law, and having been declared an offence punishable under sub-r. (3) of the Notification dated 3-6-43 was illegal and under S. 23 of the Contract Act, it could not be enforced. The suit to recover monies due on an illegal contract must fail.

(17) We agree with the finding on the third question as well that if the contract was illegal at its inception, it could not become valid after the expiry of the Notification.

(18) The second question arises on the assumption that the contract was neither made nor was to be performed in whole or in part in Marwar. It is conceded that the contract was a legal and valid contract in Indore, and the question for determination is: If according to the law in force where the contract is entered into or is to be performed, the contract is valid, but is invalid according to the law where the remedy is to be enforced, is the suit maintainable? The question is not free from considerable difficulty, but depends upon certain principles of private international law. These principles are stated as Rules or sub-rules in Dicey's Conflict of Laws, Chapter 24, and may be stated as under:

"1. When the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention determines the proper law of the contract, and, in general overrides every presumption.
2. When the intention of the parties is not expressed in words, their intention is to be inferred from the terms and nature of the

contract, and from the general circumstances of the case and such inferred intention determines the proper law of the contract.

3. In the absence of countervailing considerations, the following presumption as to the proper law of a contract have effect;
(a) Prima facie the proper law of the contract is presumed to be the law of the country where the contract is made ('lex loci contractus');
(b) When the contract is made in one country and is to be performed either wholly or partly in another, then the proper law of the contract is presumed to be the law of the country where the performance is to take place ('lex loci solutionis').
4. These rules were subject to the overriding consideration that the validity or invalidity of a contract must be determined in accordance with the law of the forum ('lex fori') independently of the law of any foreign country if and so far as the application of foreign law would be opposed to the public policy of the 'lex fori' or the provisions of a Statute which apply to the contract.

(19) The learned commentator observes that:

"it is a general principle of the conflict of laws that the Courts of a State will not apply any foreign law if and so far as its application would lead to results contrary to the fundamental principles of public policy of the 'lex fori'. The Courts of all countries insist, on the other hand, on applying to a case otherwise governed by foreign law those principles of their own law which, in their own view, express basic ideas of morality." (Page 605 Dicey on Conflict of Laws 6th Edition)

(20) On the assumptions made in this case, that the contract was enforceable by the 'lex contractus' or 'lex solutionis' the matter for consideration is whether the contract was unenforceable in Jodhpur as being contrary to the public policy or the law in Marwar. In the present case, the contract cannot be said to be opposed to any basic ideas of morality or public policy, and it is to be seen whether the contract was contrary to the provisions of the law in Marwar. The only law referred is of course the Notification of 3rd June 1943. Sub-r. (2) of the Notification was widely worded in so far as it laid down that "no person shall enter into any forward contract or option in bullion." But the word "contract" was given a restricted meaning in sub-r. (1) so as to limit its operation to contracts entered into in Marwar or to be performed in whole or in part in Marwar. Sub-rule (2), therefore, can only be interpreted to mean that persons were only prohibited to enter into contracts in Marwar or such contracts as were to be performed in whole or in part in Marwar. The prohibition in the Notification was not general in its nature, and, therefore, the contract on the assumptions made was outside the scope of the Notification and could not, therefore, be said to be contrary to the provisions of the law in Marwar. Dicey observes at page 609 of his aforesaid treatise:

"If the statute is silent, the general rule of interpretation comes into play, according to which an English statute is not to be deemed to have any extra-territorial operation, unless such operation is required by the express terms of the Act or by its 'object matter or history'."

In the present case, the statute was specifically made applicable only to contracts made in Marwar or to be performed in whole or in part in Marwar and as such on the assumption made, the contract of agency in this case could not be said to be contrary to the law in Marwar.

(21) In 'SANTOSH v. ILLIDGE', (1860) 125 R R 919, a Brazillian sued an English firm trading in Brazil for the non-delivery of slaves under a contract for the sale of them in that Country, which was valid by Brazillian law. The only question discussed was whether the sale was or was not under the circumstances made illegal by the operation of the statute against slave trading: and in the result the majority of the Exchequer Chamber held that it was not. It may be pointed out that the case was decided directly with regard to the provisions of the British statute in force at the time and it had not been contended in that case that at Common Law, the Court must regard a contract for the sale of slaves as so repugnant to English principles of justice that wherever made it could not be enforced in England.

(22) In the treatise on Conflict of Laws by Rabel (Michigan Legal Studies-1947 Edition) certain cases are cited at page 562 embodying the principles elaborated in the American Courts before Prohibition in the application of the laws of "dry" states against the sale of intoxicating liquor. It has been mentioned that a Court of a "dry" State as a matter of course, had to enforce its own Statute for the purpose of general welfare. When a Court, however, was not bound by a Statute it would not refuse to entertain such an action merely because the sale if made at the forum would have been invalid; when there was no intention to violate or evade the law of the forum. Thus a sale made outside the State was commonly enforced even though the order was solicited by an agent in the State.

(23) Pollock in his book on Contracts (12th Edition) has stated at page 348:

"The Municipal laws of a particular State, specially laws of a prohibitory kind, are as a rule direct only to things done within its jurisdiction. But a particular law may positively forbid the subjects of the State to undertake some particular class of transactions in any part of the world: and where such a law exists, the Courts of that State must give effect to it."

(24) The distinction is noted in a recent case 'BOISSEVAIN v. WEIL', reported in 1949-1 All E R 146 where the Defence (Finance) Regulations 1939 as they originally stood prohibited transactions in foreign currency by any person in United Kingdom, except with the permission of the Treasury were subsequently amended by deleting 'in United Kingdom' and as the said Regulations were applicable to all British subjects in any part of the world except certain territories a transaction entered into by a British subject in Monaco, which was not an excepted territory, was held to be unenforceable in England.

(25) Therefore, the finding on the second question is that as the law stood in Marwar the contract, assuming that it was made outside Marwar and was to be performed entirely outside Marwar, was not illegal under the Notification of 3rd June, 1943.

(26) As a result of our finding on the first question, however, this appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

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JODHPUR BENCH

WANCHOO. C. J. AND BAPNA, J.

Mt. Tulchhi, Appellant v. Suraj Mal and another, Respondents.

Appeal No. 51 of 1950 (L. P.), D/- 16-10-51.

(a) Houses and Rents — Bikaner Prevention of Eviction Order (1942), Cl. 3—Clause applies to cases where notice to quit is served after 30-6-1942.

Though the year 1942 does not appear in Clause 3 of the Order the reasonable interpretation to be put on it is that it applies to all cases based on notice of eviction after the 30th of June 1942. (Para 6)

(b) Houses and Rents — Bikaner Prevention of Eviction Order (1942), Clause 3 — Notice of eviction, meaning of.

The words "notice of eviction" in Clause 3 cannot mean a mere demand to vacate the premises whether oral or otherwise.

The clause contemplates a notice to quit which has to be served in writing on the tenant, and prescribes that no action under such a notice to quit would be taken in Court or otherwise.

The clause pre-supposes that the notice is earlier than the action to be taken under it, and it cannot therefore, be said that the mere filing of the plaint would amount to notice of eviction for the purposes of this clause. (Para 7)

(c) Houses and Rents — Bikaner Prevention of Eviction Order (1942), Clause 3 — Tenancy for fixed period — Expiry of term — Notice to quit not necessary — Clause does not apply.

Clause 3 of the Order could apply only to those cases where a notice to quit was necessary, because it only invalidated the notice to quit and prohibited the Courts to act on a notice to quit. It could not apply to those cases where no notice to quit was necessary. (Para 9)

Where a tenancy for a fixed term (one year) comes to an end by efflux of time, notice to quit by landlord is not necessary and therefore Clause 3 of the order would not apply so as to prevent the landlord from bringing a suit for ejectment against the tenant on the ground of expiry of the term of the lease. The failure to vacate the building on the expiry of the period fixed in the contract of tenancy does not constitute a material breach of the terms of the tenancy within the proviso to Cl. 3. (Paras 8, 9)

Sohan Nath, for Appellant; Bal Krishna, for Respondents.

Cases referred to:

('50) 1950 Raj L W 279: (AIR 1950 Raj 56) (Pr 5)

Law Report, Raj Shri Bikaner, Vol. 20, Parts 1 and 2, page 16 (Pr 8)

WANCHOO, C. J. : This is an appeal by Mt. Tulchhi against the decree of a learned Single Judge of this Court in second appeal.

(2) The facts of the case are these. An ejectment suit was instituted by Mt. Tulchhi in the Court of Munsif, Sujangarh, against Suraj Mal and Jugraj. The suit related to three shops situated in Chhapar. These shops were rented to Suraj Mal and Jugraj, defendants-respondents by Mt. Tulchhi for a fixed period of one year on 'Asoj Sud 12, Samvat' 2003. The respondents did not vacate the shops after the period of one year was over, and consequently the present suit was brought for ejectment and recovery of Rs. 79/- as damages for use and occupation.

(3) The suit was resisted by the defendants-respondents on the ground that they were protected under Clause 3 of the Bikaner Prevention of Eviction Order, 1942, and could not, therefore, be ejected.

(4) The suit was decreed by the trial Court, and the decree was upheld by the first Appellate Court. There was a second appeal to this Court by the defendants, which was allowed by the learned Single Judge, who, however, gave permission for leave to appeal to a Division Bench under Section 18 (2) of the Rajasthan High Court Ordinance. The present appeal has been filed in view of that permission.

(5) The matter in dispute now is only about ejectment. Clause 3 of the Bikaner Prevention of Eviction Order, 1942, reads as follows:

"No notice of eviction served by a landlord on his tenant requiring him to vacate his house on or after the 30th day of June shall be valid, and no action would be open under it either in Court or otherwise.

Provided that nothing herein contained shall be a bar to eviction for non-payment of rent or for any other material breach of the terms of the tenancy."

The question that falls for consideration is whether the defendants-respondents are protected under this provision. The learned Judge of this Court was of opinion that this clause applied to the present case, and the defendants-respondents were protected. His interpretation of the clause is that whenever a notice is given before the 30th of June in any year, the notice is valid, and the tenant can be ejected; but if the notice is given after the 30th of June in any year the notice becomes invalid, and no ejectment can take place. He has further come to the conclusion that the notice of eviction mentioned in Clause 3 need not be a notice in writing at all, and that these words merely mean a demand for eviction, and that this demand can be oral, and that it may even be presumed from the fact that a suit had been filed for ejectment. The learned Judge gave leave to appeal, because in an earlier case, 'BALCHAND v. BANSIDHAR', 1950 Raj L W 279, one of us gave a different interpretation to this clause. The view taken in that earlier case was that Clause 3 of the Bikaner Prevention of Eviction Order, 1942, applied only to such suits for ejectment which were based on a notice to quit, and would not apply to such suits in which no notice was necessary. It was also held that this clause applied in every case based on a notice to quit after the 30th June, 1942. On both points, therefore, there was a difference of opinion between two learned Judges of this Court.

(6) The order in question was passed on the 26th June, 1942. Clause 3 of that Order mentions 30th of June, but not the year. It seems to us, however, that it would be absurd to interpret the Order to mean that for the first six months of each year it was open to the landlord to eject the tenant without any hindrance and that in the last six months, the landlord could not do so. We are certain that no legislative authority would pass a law which would be one thing for the first six months of the year, and a different thing for the last six months. We are, therefore, of opinion that though the year 1942 does not appear in Cl. 3, the reasonable interpretation to be put on it

is that it applies to all cases based on notice of eviction after the 30th of June, 1942.

(7) The next and more important question is as to what meaning should be attached to the words "notice of eviction" in this case, and whether this clause only applies to those cases in which a notice to quit is necessary. We are of the opinion that the words "notice of eviction" in Clause 3 cannot mean a mere demand to vacate the premises whether oral or otherwise, when we look to certain words in this clause. We may mention that the clause requires notice of eviction to be served by a landlord on his tenant. To our mind this notice of eviction, which has to be served on the tenant, must be a notice in writing. Service implies some kind of process in writing, and therefore, the notice of eviction in Clause 3 can be no other than the notice to quit, which is prescribed in Section 106 of the Transfer of Property Act. Further, the later part of this clause provides that no action would be open under it viz., the notice. This, in our opinion, presupposes that the notice is earlier than the action to be taken under it, and it cannot therefore, be said that the mere filing of the plaint would amount to notice of eviction for the purposes of this clause. Reading, therefore, Cl. 3 as a whole, there can be no doubt that this clause refers to a notice to quit which has to be served in writing on the tenant, and prescribes that no action under such a notice to quit would be taken in Court or otherwise.

(8) The next question which arises is whether this clause applies at all to those cases in which no notice to quit is required under the law. It has been urged that the Transfer of Property Act was not in force in the former State of Bikaner, and the distinction, therefore, between cases in which notice to quit is necessary and in which it is not necessary should not be drawn. There is no doubt that the Transfer of Property Act was not in force in the former Bikaner State; but it used to be held by the High Court of the former Bikaner State that though the Transfer of Property Act was not in force in the State, the principles of that Act were applicable in suits for ejectment vide 'BALIDAN v. BHENRUNDAN', Law Report, Raj Shri Bikaner, Vol. 20, Parts I & II, p. 16. It is true that the technical provisions of the Transfer of Property Act relating to ejectment may not be applicable in the former State of Bikaner; but the general principles of that Act were apparently applied by the High Court of the former Bikaner State. It is one of the general principles of the Transfer of Property Act that in the absence of a contract, or local law or usage to the contrary, no tenant of immoveable property would be ejected without notice. Section 106 goes on to provide for compliance with certain other matters, and these may not be applicable to the former Bikaner State; but the general principle that in the absence of a contract or local law or usage to the contrary, the tenant would not be ejected without notice, was applicable in the former Bikaner State, as shown by the case of 'BALIDAN v. SETH BHENRUNDAN', mentioned above. Another general principle in the Transfer of Property Act is that notice is not necessary for leases for a fixed term, which are determined by efflux of time. We are of opinion that even in the former Bikaner State, though the Transfer of Property Act was not applicable, a distinction was drawn between those tenancies in which no notice was necessary for the purpose of ejectment and those in which such notice was necessary. We have, therefore, to interpret Clause 3 of the Bikaner Prevention of Eviction Order, 1942, in the light of this background. This clause invalidates all notices to quit served after the 30th of June, 1942 and prohibits any action in Court or otherwise on such notices. It follows, therefore, that in all cases of ejectment where a notice to quit is necessary, no ejectment was possible after the 30th of June, 1942, except in cases covered by the proviso, namely, where there was non-payment of rent or any material breach of the terms of the tenancy. The present case is not covered by the proviso, because it is not based on non-payment of rent; nor can it be said to be based on any material breach of the terms of the tenancy. It was urged that there was a material breach of the terms of the tenancy, inasmuch as the tenants did not quit after the period of one year, which was the period fixed in the lease. We are of opinion that this could not be called a material breach of the terms of the tenancy, and the failure to vacate the building on the expiry of the period fixed in the contract of tenancy does not constitute a material breach of the terms of the tenancy.

(9) The question, however, still remains whether Clause 3 was meant to apply to all cases of ejectment or only to those cases in which notice to quit was necessary. Considering the language of this clause, we are of opinion that it could apply only to those cases where a notice to quit was necessary, because it only invalidated the notice to quit and prohibited the Courts to act on a notice to quit. It could not, in our opinion, apply to those cases where no notice to quit was necessary. It may be that the legislative authority in Bikaner may have thought it fit to give protection only in those cases where the tenancy was for an indeterminate period, and a notice to quit was necessary. It may not have thought it wise to protect those tenants who had taken the premises for a fixed period, and may have left them to the remedies of the ordinary law. If the intention was to protect the tenants generally, a more general provision would have been made, such as one finds in many other laws of the same kind. In this connection we may refer to the words of the Patna House Rent Control Order, 1942, and the Marwar House Rent Control Act. In the former it was laid down that

> "no order for the recovery of possession of any house shall be made so long as the tenant pays or is ready and willing to pay rent to the full extent allowable by the Order and performs the conditions of the tenancy."

In the latter, it was provided that

> "no tenant shall be evicted from a house which he holds on rent except upon one of the following grounds: (which were mentioned therein)."

But the Bikaner Order merely invalidates the notice to quit, and prohibits action on such notice. There can be no doubt, therefore, that where no notice to quit is necessary, as in the present case, Cl. 3 of the Bikaner Prevention of Eviction Order, 1942, does not apply. In the present case, the tenancy was for a fixed period of one year, and came to an end by efflux of time, and no notice to quit was necessary.

(10) The result, therefore, is that the appeal must be allowed. We, therefore, allow the

appeal, set aside the order of the learned Single Judge, and restore the order of the trial Court and the first Appellate Court. The appellant will get her costs from the respondents throughout.

K.S. Appeal allowed.

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(JODHPUR BENCH)

WANCHOO, C. J. AND BAPNA, J.

Khot, Applicant v. The Rajasthan State and others, Respondents.

Civil Misc. Appln. No. 51 of 1951, D/- 31-8-1951.

Municipalities — Jodhpur Municipal Act (1943), Ss. 232, 8, 233 — Power to appoint authority in place of Board dissolved under S. 9 (2).

Section 232 merely gives power to the Government to order execution of any work, for example the making of a drain, or the doing of any act, for example, the shifting of a primary school from 'Mohalla' A to 'Mohalla' B, and does not empower it to constitute an authority to carry on all the powers and duties of the Board which was brought to an end under S. 9 (2). (Para 10)

Nor can such an order be passed under S. 8 or S. 233 of the Act. (Para 11)

It is only when a Board is 'superseded' that the Government have power to appoint another authority to carry on the functions of the Board. (Para 11)

Where the Board is brought to an end by the use of S. 9 (2), there is no provision in the Act for the appointment of an authority to carry on the functions of the Board, while the new Board is in the process of constitution. (Para 12)

When an elaborate law exists, as the Jodhpur Municipal Act, the action of the Government must be justified within the four corners of that law. If it cannot be so justified, the action must be held to be 'ultra vires'. (Para 14)

Hasti Mal, for Applicant; Shri Dhar, for the State; Raj Narain, for Respondent No. 10.

WANCHOO, C. J.: This is an application by Khot alias K. G. Lakhani under Art. 226 of the Constitution of India praying that a writ in the nature of 'quo warranto', or such other order as may be appropriate, be issued against the Rajasthan State and 13 others, calling upon them to show cause by what authority opposite parties Nos. 2 to 14 claim to act as convener and members of an 'ad hoc' committee exercising the powers of President and members respectively of the Municipal Board, Jodhpur, and forbidding them from so acting, if they are unable to show such authority.

(2) The facts, which have led to this application, may be briefly narrated. There is a Municipal Board established for the City of Jodhpur under the Jodhpur Municipal Act, 1943. This Municipal Board has been constituted under Section 7 of the Act of 1943 as a body corporate having perpetual succession and a common seal and the power of acquiring, holding and transferring property, movable or immovable & of contracting. The Board was in existence up to the 13th of May, 1950. On that date an order was passed under Sec. 9, sub-s. (2) of the Act of 1943, which was published in the Rajasthan Gazette of the 20th of May 1950, in the following terms:

"In pursuance of sub-sec. (2) of S. 9 of the Jodhpur Municipal Act, 1943, it is hereby notified for general information that the Government have been pleased to terminate the term of the office of the present members of the Jodhpur Municipality with effect from the date of the publication of this notification in the Rajasthan Raj-Patra.

It is further notified for general information that Government have been pleased to direct that fresh elections for the reconstitution of the Jodhpur Municipal Board be held within three months and that during this period the Collector, Jodhpur, be appointed as Administrator of the Municipal Board, Jodhpur, under Section 233 of the Jodhpur Municipal Act, 1943 for the execution of the duties of the said Board."

(3) It appears that the elections could not be held within three months, and we are told that the term of office of the Collector as Administrator was extended from time to time, though there seems to have been no notification to this effect.

(4) On the 6th of January, 1951, an order dated the 9th of December, 1950, was published in the Rajasthan Gazette, by which the Government fixed under Section 8 of the Act of 1943 the number of seats for the Jodhpur Municipal Board as 34, viz., 32 elected & 2 nominated, and divided the city into a number of wards. Thereafter, it appears that fresh elections were held on the 8th and 9th of April, 1951, and results of the election were announced on the 21st of April, 1951. There was, however dispute about Ward No. 8, and no election was held in this Ward. Consequently, an order was passed on 18th of April 1951, extending the term of the Collector of Jodhpur as Administrator till the 15th May, 1951, or the formation of the Municipal Board, whichever was earlier. Then on the 28th of May, 1951, another order was passed extending the term of the Collector of Jodhpur as Administrator till the 31st of July, 1951.

(5) Now we come to the order in dispute. It was passed on the 21st of June, 1951, and was published in the Rajasthan Gazette of the 23rd of June, 1951 in the following terms:

"In exercise of the powers conferred by Section 232 of the Jodhpur Municipal Act, 1943 and in modification of Notification No. P. 1 (3) L. S. C./50, dated the 13th May, 1950, the Government of Rajasthan is pleased to appoint, with effect from the date of publication of this Notification in the Gazette, an 'ad hoc' Committee consisting of the marginally noted personnel as the Authority to exercise and perform all powers and duties of the Board under the said Act until the said Board is re-constituted.

The Government is further pleased to order that Shri Rameshwar Singh shall be the Convener of the said Committee."

16 names were mentioned in the margin. Of these 13 are opposite parties Nos. 3 to 14, 5 of these, viz., Mr. Makhtoor Mal, Mr. Komal Mal and Mrs. Parvati Lakhani refused to serve on the 'ad hoc' Committee, and that is why only

the remaining 13 have been made parties to this application. As these 13 persons were acting or going to act as provided in the Notification, the applicant, who is one of the 31 persons, who have been elected in the last elections, got an interim order restraining these 13 persons from acting as an 'ad hoc' committee for the purpose of exercising all powers and duties of the Municipal Board of Jodhpur. It appears that after this interim stay order, the Government re-appointed the Collector of Jodhpur on the 26th of July, 1951 as Administrator in exercise of the powers conferred by Section 232 of the Jodhpur Municipal Act, 1943.

(6) The main contention on behalf of the applicant is that the Government had no power under Section 232 of the Jodhpur Municipal Act or under any section of that Act to appoint an 'ad hoc' Committee of the kind which was appointed by them by their order of the 21st of June, 1951, and therefore, this Court should prohibit these persons from exercising the powers of the Municipal Board conferred on them by the order of the Government.

(7) The application has been opposed on behalf of the State of Rajasthan, and also by some of the other opposite parties. The contentions in the two replies are the same, and it would, therefore, be enough to deal with the reply on behalf of the State. It is contended on behalf of the State that it had power under Section 232 of the Act of 1943 to pass such an order. Further power is claimed under Ss. 8 and 233 of the Act, even if it is held that there is no power under Section 232. Lastly it is urged that even if there is no express provision to meet such a contingency, the Rajasthan Government, which is responsible for the local administration, can, irrespective of the provisions of the Jodhpur Municipal Act, set up any machinery for the purpose of carrying on the administration of the Jodhpur Municipality.

(8) The Jodhpur Municipal Act contains 234 sections, and makes provisions in detail for election, for the duties of the various officers of the Municipal Board, and for the functions which the Municipal Board is to exercise, and for various miscellaneous matters dealing with the control over the Municipal Board. The sections providing for control over the Municipal Board are three, viz., Sections 231, 232 and 233. Section 231 provides that

> "The Minister-in-charge may by order in writing suspend the execution of any order of the Board or prohibit the doing of any act which is about to be done or is being done in pursuance of or under cover of this Act, if in his opinion the order or act is in excess of the powers conferred by law or the execution of doing of the act is likely to lead to a breach of the peace, or to cause injury or annoyance to the public or to any class or body of persons."

This section thus gives a veto to the Minister-in-charge, and now this veto must be deemed to be vested in the Government of Rajasthan.

(9) Then comes S. 232, which is as follows:

> "In case of emergency the Minister-in-charge may provide for the execution of any work or the doing of any act which the Board is empowered to execute or do and the immediate execution or doing of which is in his opinion necessary for the safety of the public and may direct that the expense of executing the work or doing the act shall be forthwith paid from the Municipal fund."

It is this section which is being relied upon by the State in support of the order of the 21st June, 1951, which is being challenged. As we read this section, it appears to us to be the converse of S. 231. That section has given power to the Government to veto any act or order of the Board, while this section gives power to the Government in an emergency to order the execution of any work or doing of any act under certain conditions. It has, in our opinion, nothing to do with the dissolution or supersession of the Board and orders consequent thereon, or with the termination of the membership of the Board under S. 9 (2) and the orders consequent thereon. Section 232 contains the positive overriding power of the Government, while S. 231 contains the negative overriding power of the Government. We have no doubt that S. 232 cannot be used for appointment of either an Administrator or an 'ad hoc' Committee to exercise all the powers and duties of the Board. This will be perfectly clear, if we compare the language used in S. 232 with the language used in S. 233, which we now set out.

> "233 (1) If the Board is, in the opinion of the Government, incompetent or persistently makes default in the performance of the duties imposed on it by or under this Act, or any other enactment, or exceeds or abuses its power, the Government may, after giving an opportunity to the Board to show cause why action under this section should not be taken either:
>
> (a) if the Board is wholly or partly elected, dissolve it from such date as may be specified in the notification.
>
> (b) supersede it from such date and for such period as may be specified therein.
>
> (2) Where the Board is dissolved, the member including the President shall vacate their seats on the date fixed for dissolution in the same manner as if their periods of office had expired in the ordinary way on that date (save such members as held office during the pleasure of Government) and members shall be elected or nominated to fill their places in the manner provided in this Act:
>
> (3) Where the Board is superseded:
>
> (a) all members, including the President shall from such date as may be specified in that behalf in the notification vacate their seats.
>
> (b) all powers and duties of the Board shall, until the Board is reconstituted, be exercised and performed subject to the conditions, restrictions and limitations imposed on the Board by or under this Act by such authority as the Government may appoint in that behalf.
>
> (c) * * * *
>
> (d) * * * * "

(10) It is clear that if the intention was to give Government power under S. 232 to appoint an authority in place of the Board, which was brought to an end under S. 9 (2), the words used in S. 232 would have been similar to the words of S. 233 (3) (b). The matter, to our mind, is so clear that no further labouring is necessary to show that S. 232 merely gives power to the Government to order execution of any work, for example, the making of a drain, or the doing of any act, for example, the shifting of a primary school from Mohalla A to Mohalla B, and does not empower it to con-

stitute an authority to carry on all the powers and duties of the Board. We are, therefore, of opinion that the Government had no authority to pass the order dated 21st June, 1951, under S. 232 of the Jodhpur Municipal Act.

(11) We now turn to the question whether such an order could be passed under S. 8 of the Act. That section is as follows:

"The Board shall consist of members nominated by the Government either by name or office or members elected from the inhabitants or partly of the one and partly of the other as the Government may by notification decide, provided that, unless the Government shall otherwise direct, the nominated members shall not exceed one-third of the whole Board."

A bare look at the words of this section is sufficient to come to the conclusion that it has nothing to do with the conferment of any power on Government to appoint an authority to exercise the powers and duties of the Board, after it is brought to an end under S. 9 (2). Section 8 merely gives Government power to specify the constitution of the Board, viz., how many members shall be elected and how many shall be nominated, and this the Government did under their Notification No. F. 1 (432) L. S. G./50-II of the 9th of December, 1950, published in the Rajasthan Gazette of the 6th of January, 1951. The Government, therefore, could not pass the order of the 21st June, 1951, under the power that they had under S. 8 of the Act. Then it was urged that the order could be passed under S. 233 of the Act. We have already set out the relevant portion of that section. It provides certain action by Government in case it finds the Board at fault. This action is taken after the Board's explanation has been considered. No action under S. 233 can be taken unless the Board's explanation has been called. It is not the case of the State that any action under S. 233 was taken against the Municipal Board of Jodhpur, when it was brought to an end on the 20th of May, 1950. The order bringing the Board to an end was issued under S. 9 (2), and not under S. 233. Section 9 (2) is a peculiar provision which could only be found in a Municipal Act passed by an autocratic State. But in any case the law has to be accepted as it stands, and the Government has power under S. 9 (2) to bring the Board to an end; but having brought the Board to an end under S. 9 (2), the Government cannot take the benefit of the provisions of S. 233, which can only come into play if the Board is either dissolved or superseded. We may further point out that there is a difference in the consequences which ensue when a Board is dissolved and when a Board is superseded. When a Board is dissolved, the consequences are given in S. 233 (2). That sub-section does not give any authority to Government to appoint an authority in place of the Board to carry on its functions. Learned counsel urged that there was a colon and dash after the end of sub-section (2), and, therefore, the provisions of Clauses (a) to (d) of sub-section (3) also applied to dissolution. We are of opinion that this is not so. It appears to us that the colon and dash at the end of sub-s. (2) is a misprint for a full stop. Learned counsel has not been able to cite a single statute where a sub-section ends with a colon and dash. The edition which we have got of the Jodhpur Municipal Act contain two other printing mistakes in this very section. The word "or" is omitted after the word "notification" in Cl. (a) of S. 233 (1). Further, in sub-s. (2), the word "member" in the first line is in singular, though it should be in plural. Therefore, it is only when a Board is superseded that the Government have power to appoint another authority to carry on the functions of the Board. In this case, the Board was never superseded under S. 233, and therefore, the order of the 21st of June, 1951, cannot be justified under S. 233 (3) (b).

(12) It may be mentioned that when the Board is brought to an end by the use of S. 9 (2), there is no provision in the Act for the appointment of an authority to carry on the functions of the Board, while the new Board is in the process of constitution. Learned counsel for the State urges that there is thus a lacuna in the Act, which could not have been intended, and, therefore, even if the Board is brought to an end under S. 9 (2), the Government should be held to have the authority to exercise power under S. 233 (3) (b), because the effect of acting under S. 9 (2) and superseding the Board is the same, namely that the Board comes to an end. The Jodhpur Municipal Act of 1943, as we have already pointed, contains 234 sections, and is an elaborate statute. If it was the intention of the framers of the Act that powers similar to those under S. 233 (3) (b) should be conferred on Government when bringing a Board to an end under S. 9 (2), this could have been easily provided by adding another sub-section to S. 9. This has, however, not been done. Similarly, if the intention of the framers of the Act was that when a Board was dissolved under Section 233(2), the Government would have power to appoint an authority to carry on its functions till a new Board was constituted, such provision could have been made in S. 233 (2). There also, however, no such provision has been made. The reason for this, in our opinion, is not far to seek. It may have been the intention of those who framed the Act that in cases of termination of a Board under S. 9(2) and dissolution under Section 233 (2), there should not be an interregnum between the last Board and the new Board, and that the termination or the dissolution should take place when the new Board had been constituted. This could be easily provided by fixing a date of termination under Section 9(2) after the elections had been held, and a date for dissolution under Section 233 (1) (a) also after the elections had been held. The absence, therefore, of a provision like Section 233 (3) (b) in these two cases may be due to the fact that the framers of the Act in their wisdom thought that there need not be any interregnum, which needed the appointment of an authority to carry on the functions of the Board in those two cases.

(13) Learned counsel for the State, however, urges that an interregnum has now, in fact, occurred, and, threfore, there must be some power in Government to fill up that interregnum. He is, however, unable to point out to us any section in this Act which gives such power to Government, except S. 233 (3) (b), with which we have already dealt. In any case, if such a difficulty has been created, it is due to the action of the Government itself. It was not necessary to terminate the Board which was in existence upto the 20th of May, 1951, before elections were held. If that had not been done, none of these difficulties would have arisen. In any case, whatever the diffi-

culties, the Jodhpur Municipal Act has to be interpreted as it stands, and the only remedy left to Government is to amend the Act.

(14) We may finally consider the argument that has been put forward in paragraph 7 of the additional statement in the written statement filed on behalf of the State. It is said that

> "where no express provision to meet such a contingency is provided, the Rajasthan Government, which is responsible for the local Government administration, can, irrespective of the provisions of the Jodhpur Municipal Act, set up any machinery for the purpose of carrying on the administration of the Jodhpur Municipality."

We are of opinion that this argument cannot be accepted. When there is a statute of 231 sections providing for all kinds of contingencies, we cannot presume that there is any residuary power left in the Government to act beyond the provisions of the statute. That would, in our opinion, be a negation of the rule of law, and would arm Government with powers which would be above the law. When, therefore, an elaborate law exists, as in this case, the action of the Government must be justified within the four corners of that law. If it cannot be so justified, the action must be held to be 'ultra vires.' We may point out in this connection that in the Punjab and the U. P. Municipal Acts, there are provisions to provide for all contingencies, and if the Jodhpur Municipal Act does not have similar provisions, the fault lies with those who framed the Act. For example, Section 13 of the Punjab Municipal Act provides in sub-section (3) that

> "notwithstanding anything contained in sub-s. (2) or in any rules made by the Local Government thereunder, an outgoing member shall, unless the Local Government otherwise directs, continue in office until the date fixed for the meeting at which his successor is required to take the oath of allegiance."

Further, S. 30 of the U. P. Municipalities Act gives power to the Provincial Government to dissolve or supersede a board. Section 31 provides for consequences of supersession. Section 31A provides for consequences of dissolution. There it is provided that on dissolution the President of the Board shall continue. This has been provided so that the executive work of the Board may be carried on. It is also provided that elections shall be held and nominations and co-options made of members or the President, as the case may be, on a date which shall be a date prior to the date of dissolution. In the U. P., therefore, the law itself provides that the dissolution will not come into effect till the new members have been elected or nominated or co-opted. The Jodhpur Municipal Act is silent on these points; but even so, if the orders had been passed carefully, a date of termination under Section 9(2) could have been so fixed that the elections were held before that date. The interregnum, therefore, that has occurred is due, in this case, to Government's own acts. Section 232 or any other provision of the Jodhpur Municipal Act cannot, in the circumstances of the present case, be availed of by the State to create any authority to carry on the administration of the Municipal Board, and only such action can be carried on as may be done by the officers or officials of the Board under the powers vested in them by the statute. We may point out that though the order, which is being directly challenged, is the order of the 21st of June, 1951, the consequence of our decision with respect to that order also hits the order of the 13th of May, 1950, and the last order of the 26th of July, 1951. If the Government have not the power to appoint an 'ad hoc' Committee under S. 232, as we are satisfied that they have not, they cannot have the power to appoint the Collector as the Administrator under that section.

(15) We, therefore, allow this application & hold that the order dated 21st June, 1951, published in the Rajasthan Gazette of 23rd June, 1951, is 'ultra vires' the powers of the State of Rajasthan. We, therefore, prohibit opposite parties Nos. 2 to 14 from exercising and performing the powers and duties of the Jodhpur Municipal Board, as they have no warrant to act as such under that order. The applicant will get his costs of this proceeding from the State.

V.B.B. Application allowed.

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JODHPUR BENCH

WANCHOO, C. J. AND BAPNA, J.

Nauratan Mal and others, Applicants v. Hari Singh and others, Respondents.

Civil Misc. Case No. 21 of 1950, D/- 26-7-51.

(a) Civil P. C. (1908), O. 19, R. 3 — Affidavit — Swearing of.

It is the duty of a person swearing an affidavit to state separately what parts of it he is swearing on personal knowledge and what parts on belief or information received. When the endorsement merely is that the person read the affidavit from the beginning to the end, and admitted that facts mentioned in it were correct and entered on his instructions this is quite inadequate for the purpose. (Para 4)

Anno : C. P. C., O. 19, R. 3 N. 1a.

(b) Limitation Act (1908), S. 5 — Delay — Satisfactory explanation.

An applicant praying for indulgence under Section 5 has only to explain the delay of those days which are beyond the period of limitation, and the antecedent inaction or negligence is not material, and should not be taken into consideration. But it is the duty of the applicant in such cases to explain each day's delay satisfactorily and if he fails to do so, he cannot get the benefit of S. 5. AIR 1931 Cal 298, Rel. on. (Paras 5, 7)

Anno : Limitation Act, S. 5 N. 8.

Tej Singh Mehta, for Applicants; H. S. Mardia, for Respondents.

Case referred to :

(31) AIR 1931 Cal 298: (58 Cal 549) (Pr 5)

WANCHOO, C. J. : This is an application by Nauratan Mal, Vallabh Dass, and another under Section 5 of the Limitation Act, praying that the delay in the filing of the appeal be condoned. The decree against which the appeal is filed was made on the 17th of March, 1949. The application for copy was made on the 14th of April 1949, and copy was ready on the 23rd of April, 1949, and was taken away on the

same day. The appeal was filed on the 4th of July, 1949. It was within time upto the 25th of June, 1949, and was thus filed 9 days beyond time.

(2) The applicants filed an affidavit in support of their application, in which they showed the following grounds for the delay: (1) Nauratan Mal had been ill from before the 19th of May, 1949, and remained in hospital from the 19th of May, 1949 to the 23rd of June 1949 and was bedridden. (2) The father of the counsel, who was appearing in the trial Court, died about the 19th of May, 1949 and the counsel himself fell ill on the 25th of May 1949. (3) As soon as Nauratan Mal came out of the hospital, he instructed his son Vallabh Das, who is also an appellant, to file the appeal. Vallabh Das went to Udaipur on the 29th of June 1949; but there was curfew in Udaipur on the 30th of June and 1st and 2nd July. 3rd of July was a sunday, and, therefore, the appeal was filed on the 4th of July, 1949.

(3) Learned counsel for the opposite party, however, urges in the first place, that the affidavit, which has been filed, is no affidavit at all, or at any rate, is of no value, and that the grounds disclosed in it are entirely insufficient to make out a case for any indulgence in favour of the applicants.

(4) The affidavit, in this case, has certainly not been properly sworn. The endorsement merely is that Vallabh Das read the affidavit from the beginning to the end, and admitted that the facts mentioned in it were correct and entered on his instructions. This is, in our opinion, quite inadequate for the purpose. It is the duty of a person swearing an affidavit to state separately what parts of it he is swearing on personal knowledge and what parts on belief or information received. However, we need not throw out the application on this ground alone, as we shall show just now that accepting the affidavit, even as it stands, as correct, it is quite insufficient to make out a case in favour of the applicants.

(5) We have already mentioned that the copy was taken by the applicants as far back as the 23rd of April, 1949, but no attempt was made to file the appeal earlier than the end of June. No doubt an applicant praying for indulgence under Section 5 of the Limitation Act has only to explain the delay of those days which are beyond the period of limitation, and the antecedent inaction or negligence is not material, and should not be taken into consideration. We may, in this connection, refer to the case of 'KARALI CHARAN v. APURBA KRISHNA', AIR 1931 Cal 298, with which we respectfully agree.

(6) In the present case, however, the applicants have practically given no good reason for the delay which took place between the 26th of June and the 3rd of July. The illness of Nauratan Mal or of his counsel is quite immaterial, because Nauratan Mal had got well by the 23rd of June, and we do not know when the counsel got well. It should also be remembered that the certificate, which has been filed in support of Nauratan Mal's illness, is merely to the effect that he had been suffering from Amoebic Hepatitis. It does not show that Nauratan Mal was not in a position to give direction to his son about filing the appeal before the 23rd of June, 1949, nor does it show that Nauratan Mal was so seriously ill that he could not look after his affairs before the 23rd of June, 1949. Vallabh Das is also an appellant, and he apparently was quite well. There was, therefore, no good reason in this case for the appeal not having been filed by the 25th of June, 1949.

(7) As to the delay from the 26th of June onwards, it is the duty of the applicants in such cases to explain each day's delay satisfactorily and if, they fail to do so, they cannot get the benefit of Section 5 of the Limitation Act. In this case the affidavit discloses no reason for the delay from the 26th of June to the 29th of June. There is no explanation why Vallabh Das could not reach Udaipur earlier than the 29th of June. Further, there is no reason why, if Vallabh Das had reached Udaipur on the 29th of June, he could not file the appeal on that very day. The reason for not filing the appeal on the 30th of June, and 1st and 2nd of July is that there was curfew order in force in Udaipur. It is not stated, however, that the curfew order was in force for all the twenty-four hours; for example, if the curfew order was in force for the night, there is no reason why the appeal could not be filed in day time on any of these three days. It is also not stated that the Courts were closed on these three days on account of curfew order. There is thus no satisfactory explanation whatsoever for the delay of nine days in filing the appeal. The applicants appear to be well to do persons and we do not see why they should not have been able to arrange for the filing of the appeal before the period of limitaiton. We, therefore, see no reason to extend the period of limitation in this case, and reject the application under Sec. 5 of the Limitation Act. In consequence, the memorandum of appeal is also rejected.

D.H. Application and appeal rejected.

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JODHPUR BENCH

BAPNA, J.

Dalu, Appellant v. Juharmal & another, Respondents.

Appeal No. 299 of 1950, D/- 16-3-1951.

(a) Civil P. C. (1908), S. 100 — Admissibility of documentary evidence.

Where in deciding certain questions of fact the lower appellate Court held inadmissible certain documentary evidence such as copies of state records, the questions become questions of law. (Para 5)

Anno : C. P. C., S. 100 N. 27.

(b) Evidence Act (1872), S. 35 — "In discharge of his official duty."

Where in certain copies of the Settlement records prepared in Samvat 1983 and 2002 and produced by the plaintiff in a suit for redemption of a mortgage, the defendant's possession was mentioned as that of a mortgagee:

Held that the plaintiff was bound to show that under the rules or the law in force in Mewar in Samvat 1983 and Samvat 2002, it was a part of the duty of the officer preparing these revenue records to mention the facts which appeared in those documents. (Para 6)

Anno : Evidence Act, S. 35 N. 3.

(c) Evidence Act (1872), S. 63(5) — "Oral accounts of contents of documents."

The statement as to the contents of a document by a witness who has not himself read the document is not secondary evidence of the contents of the document within the meaning of S. 63. AIR 1947 P C 15, Foll. (Para 7)

Anno : Evidence Act, S. 63 N. 7, 8.

(d) Evidence Act (1872), S. 114(g) — Non-production of material evidence.

From the failure by the defendant in a redemption suit to produce the receipts of rent paid by him in Government treasury it may be presumed that if produced they would go against the defendant but it cannot be presumed that the rent was paid on account of the plaintiff. (Para 7)

Anno : Evidence Act, S. 114 N. 11.

(e) Evidence Act (1872), Ss. 13, 40 — Judgment not inter partes — Decision of Mehadraj Sabha being not inter partes — Fact of adoption of one F held not relevant in that case — Decision held inadmissible in evidence to prove adoption of F. (Para 10)

Anno : Evidence Act, S. 13 N. 10; S. 40 N. 2.

Tej Singh Mehta, for Appellant; Chandmal and Harnarain Bansal, for Respondents.

Cases referred to :

('47) AIR 1947 P C 15: (ILR (1946) Nag 917) (Pr 7)

Devilal v. Ganga Das (Raj) (Pr 9)

JUDGMENT : This is a second appeal in a suit for redemption of a mortgage.

(2) The appellant sued the respondents for redemption of a mortgage alleged to have been effected by Kela Bhajja in favour of Daya Ram. According to the plaint, a plot of land 17 bighas and 14 biswas bearing Survey Record No. 207 in village Rewara, Tehsil Rashmi, was mortgaged somewhere about Samvat 1956 for Rs. 25/-. It was alleged that the defendants who are the sons and heirs of Daya Ram had not only paid themselves off, but had enjoyed an excess income of Rs. 2,200/- since the date of the mortgage. It was alleged that the plaintiff Dalu was the heir and legal representative of the mortgagor and redemption was prayed without any payment of money or such payment of money to which the defendants may be entitled under the mortgage. The defendants denied the mortgage and set up their own title on account of a sale alleged to have been executed by Megha Sawai Ram in favour of Sola. It was alleged that they were in possession of the property in dispute since generations and for a portion thereof held a sale-deed dated Poh Sudi 7, Samvat 1950 in their favour. The trial Court accepted the genuineness of the sale-deed relied upon by the defendants which was in respect of 7 bighas, but decreed the suit for redemption of 10 bighas and 14 biswas of land without any payment to the defendants. Both the parties being dissatisfied with the judgment of the Munsif, Kaparin, filed appeals to the Court of District Judge at Chittorgarh. The learned District Judge came to the conclusion firstly that the mortgage relied upon by the plaintiff had not been proved and secondly that the plaintiff had failed to prove that he was successor in interest of Kela Bhajja. He accordingly accepted the defendants' appeal and dismissed the suit. The appeal of the plaintiff was automatically dismissed.

(3) In this appeal, it is urged that the plaintiff produced two copies of the settlement records of Samvat 1983 and Samvat 2002 in which the defendants' possession is mentioned as that of a mortgagee, and that the lower Court has erred in not relying on that evidence. It was also argued that the defendants who were in possession of the land must have been paying rent to the State, but they failed to produce the receipts and it should be presumed that rent was paid by them to the account of the plaintiff. Reliance was also placed on oral evidence which has been held to be unreliable by the learned District Judge. An order of the Tehsildar in mutation proceedings by which the plaintiff Dalu was directed to be entered as Khatedar in place of Kela Bhajja, on 9th February 1946 was also relied upon.

(4) As to the next question of Dalu plaintiff being the successor in title to Kela Bhajja, reliance was placed on a decision of Mehdraj Sabha dated 19th May 1911.

(5) On behalf of the respondents, it was contended that both the points on which the District Judge dismissed the suit were points of fact and could not be raised in second appeal. It may be stated at the outset that the points raised by learned counsel for the appellant become questions of law in so far as certain documentary evidence such as copies of state records were not held admissible by the District Judge. It was argued by the learned counsel for the appellant that under the law in Mewar known as Kanune Mal Mewar, which was Act No. 5 of 1947, records prepared under the old laws or rules have been declared to have the same effect as prepared under Section 3 (2) of the Act. The relevant portion says that documents relating to rights or other documents which had been prepared according to the revenue rules in force prior to the enforcement of the Kanune Mal Mewar, will so far as may be deemed to have been prepared under this Act. The Act itself provides for certain documents to be prepared at the time of settlement and in the Chapter relating to Settlements, it is mentioned that at the time of making settlement of any village or District, certain documents will be prepared. In S. 55, sub-Cl. (2), item No. 2 relates to preparation of a Khasra which is to contain the name of the cultivator or the occupier of the land, the area of land, and the right under which he is in possession of that land. It is also mentioned that the officer who has to prepare these documents will also mention all those matters which under the rules may be made necessary to be entered. It is conceded that no rules referred to in this item had been framed. The lower Court has placed no reliance on these documents on the ground that they were copies of certain originals. It is explained by the learned counsel for the appellant that according to the practice in the Courts of Mewar, original documents were kept with the parties and their copies placed on record. I have found that this is the practice in Marwar also, and in the state of pleadings and procedure that was in force in Mewar, the certified copies which were with the parties could be looked into and deemed to have been produced. There is a note on the copies produced on the record that they were according to the originals; these originals, however, were the certified copies. These revenue records are admissible in evidence provided

they satisfy the conditions laid down in S. 35 of the Evidence Act. Under S. 35,

"An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact."

(6) The plaintiff, therefore, had to show that under the rules or the law in force in Mewar in Samvat 1983 and Samvat 2002, it was a part of the duty of the officer preparing these revenue records to mention the facts which appear in these documents. Mr. Tej Singh, who appears for the appellant confesses his inability to refer to any revenue rule which may have authorized the Revenue Officer to make the entries relating to the mortgage. He has stated that these revenue rules were spread over a number of years and had not been complied and it was impossible to lay hands on the rules which may have given this authority. As stated above the Kanune Mal Mewar only validates those documents which had been prepared in accordance with the Revenue Rules in force prior to the enforcement of the Act. It is impossible, therefore, to say under what law this particular fact of mortgage was entered into the two records of settlement in Samvat 1983 and Samvat 2002. There is no reference either in this record as to the nature of the enquiry made by the officer who prepared this document. There is no reference either to the 'Missul Hakiyat' which is generally the term for the file in which the enquiry is made and the statements of the various persons are recorded and on a consideration whereof such entries are made. As to the order of mutation passed by the Tehsildar, on 9th February, 1946, it may be stated at once that the defendants were no party to the mutation proceedings and no enquiry seems to have been made beyond the statement of Lambardar that Dalu who wanted the mutation to be made in his favour was successor-in-title to Kela and Bhajja.

(7) The oral evidence in this case is, as observed by the learned District Judge, worthless. Two witnesses have been produced—one is Hukumchand and the other is Bheru Lal. Hukumchand purports to say that he heard the contents of the document about 40 years ago when some dispute arose as to the redemption of the mortgage between the father of the plaintiff and Daya Ram. He, however, admits that he did not take the document in his hand or read it. As held by their Lordships in 'MUNNALAL v. MT. KASHIBAI', AIR 1947 P C 15, the statement as to the contents of a document by a witness who has not himself read the document is not secondary evidence of the contents of the document within the meaning of Section 63 of the Indian Evidence Act. The other witness Bherulal says that he saw the document about five years ago when called by Chaturbhuj to find out the document of mortgage from his Bahi, but he does not remember on whose behalf it was executed. He makes a mistake when he says that this document was in favour of Juharmal, Chaturbhuj and Daya Ram and was for securing a loan of Rs. 24/12/-. This was not the case of the plaintiff. The statement that he was called by Chaturbhuj of his own accord and in connection with Dalu's request to redeem the mortgage is untrustworthy. Dalu was not present at that time and no specific intimacy with the witness has been mentioned. As to the contention that the failure of the defendant to produce the receipts of rent paid by him in the Government Treasury, the presumption can be that if produced they would go against the defendant but it cannot be presumed from it that the rent was paid on account of the plaintiff. The plaintiff, if he relied on this fact, could produce the counter-foils or other evidence from Government records. In any case, the fact that the property was mortgaged at some time does not give a right to redeem unless it can be shown that the mortgage was subsisting at the time of the suit, and that the suit was within limitation. In the absence of any reliable evidence that the mortgage was effected in Samvat 1956, the entries in the revenue records would not prove that the mortgage was subsisting at the date of the institution of the suit.

(8) On the next question also, I agree with the learned District Judge that the plaintiff has failed to show that Kela and Bhajja were predecessors-in-title of the plaintiff. The plaintiff himself has not entered the witness-box and the only witness who makes some statement connecting the plaintiff with Kela & Bhajja, is Mayachand. It is in cross-examination of that witness that he states that Dalu's father Fatta was adopted by the widow of Kela. He has, however, not stated the means of knowledge, and the evidence is not of much value.

(9) The decision of Mehadraj Sabha relied upon was in certain escheat proceedings. Somebody had made a 'mukhbari' that Mega S/o Shambhu, brother of Kela, had died heirless. This 'mukhbari' was dismissed when it was found on enquiry that Kela's widow Mt. Nauli was alive and therefore, it could not be a case of escheat of Mega's estate to the Crown. It is mentioned in the body of the decision that Mt. Nauli had taken Fatta in adoption but that fact was not relevant according to the decision so long as Mt. Nauli was alive. It was stated to be immaterial whether she had or had not adopted any person. It was argued that this was judgment in rem, and therefore, sufficient to prove that Fatta had been adopted by Mt. Nauli. Reliance was placed on a decision of former Rajasthan High Court in an unreported case 'DEVILAL v. GANGA DAS'. On the perusal of the said judgment, however, I find that the matter was not at all discussed. It was mentioned that in S. 1980 such escheat cases were treated as cases of civil nature and the final judgment had the effect of judgment in rem. The Evidence Act having been brought into force thereafter, the observation is now not relevant.

(10) The decision of the Mehadraj Sabha being not 'inter partes' & the fact of adoption of Fatta having been held to be not relevant in that case, it is inadmissible in evidence to prove the adoption of Fatta by Mt. Nauli, widow of Kela.

(11) As a result, I agree with the learned District Judge on both the points. This appeal fails and is dismissed with costs.

D.H. Appeal dismissed.

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(JODHPUR BENCH)

BAPNA J.

Kishan Lal, Appellant v. Fakrudin, Respondent.

Civil Misc. Appeal No. 46 of 1950, D/- 20-8-51.

(a) Houses and Rents — United State of Rajasthan Building (Lease and Rent Control) Ordinance (XXII (22) of 1948), S. 7 — Retrospective effect.

Section 7 indicates that the Court is not to pass any decree in pending suits or to order eviction even in pending execution cases except in accordance with the provisions of the section. It is clear from the language used that the Ordinance was applicable not only to actions to be brought after the Ordinance but to actions which had already been brought and pending or even if they had been decreed. The language seems to indicate that the legislature did not oust the jurisdiction of the civil Courts but made it subject to certain provisions mentioned in the section. The words "provisions of this section" in sub-s. (1) have to be liberally construed. The interpretation which would be most appropriate to sub-s. (1) would be that in the pending suits or in proceedings relating to execution of decrees, the civil Court will be authorised to pass any decree or order in favour of a landlord, evicting any tenant whenever the conditions are proved to exist which may authorise the controller to pass a similar order in cases which may be instituted before him after the promulgation of the Ordinance. (Paras 12, 14, 16)

(b) Houses and Rents — United State of Rajasthan Buildings (Lease and Rent Control) Ordinance (XXII (22) of 1948), S. 7 — Action under — Saving of — Houses and Rents — Rajasthan Premises (Control of Rent and Eviction) Act (XVII (17) of 1950), S. 30.

Where the action taken by the Court in dismissing the suit under S. 7 of the Rajasthan Buildings (Lease and Rent Control) Ordinance, 1948, is correct, it would be saved under the proviso to S. 30 of the Rajasthan Premises (Control of Rent and Eviction) Act (XVII (17) of 1950). (Para 10)

Thanchand, for Appellant; Chandmal, for Respondent.

JUDGMENT: This is the defendant's second appeal in a suit for ejectment against an order of remand.

(2) The respondent Fakrudin sued the defendant-appellant in the Court of the Munsif, Chhoti Sadri for ejectment from a shop alleged to have been leased to the appellant by the respondent on Chait Sud 11 S. 2000. He also claimed Rs. 142/8/- as damages for use and occupation till the date of suit. The suit was instituted on the 31st of December, 1944. The defendant raised several pleas including (1) that the plaintiff was not the owner of the shop in dispute, (2) that the rent note had been got executed by the plaintiff by fraud and (3) that he was not liable to ejectment so long as he was ready and willing to pay the rent.

(3) During the pendency of the suit, an Ordinance was promulgated by H. H. the Raj Pramukh of the former Rajasthan known as The United States of Rajasthan Buildings (Lease and Rent Control) Ordinance, 1948 (No. XXII (22) of 1948), on 26th of July, 1948. The defendant relied on the provisions of the aforesaid Ordinance for a further contention that the suit was not maintainable. The learned Munsif found that the defendant was a tenant of the plaintiff but did not decide the other issues on a view that S. 7 of the Ordinance applied to the case and that the special rules and procedure prescribed in that section had not been complied with and the suit was, therefore, incompetent. He accordingly dismissed the suit with costs.

(4) On appeal, the learned District Judge of Chittor took the view that the Ordinance came into force on the 30th of July, 1948, and it did not affect the present suit which had been instituted on the 30th of December, 1944. The decision on the preliminary point was reversed and the case was remanded for decision on merits. The defendant has appealed against this order of remand under the provisions of O. 43, R. 1 of the Civil P. C.

(5) As the controversy hangs round the interpretation of S. 7, it would be useful to state its provisions. Section 7 of the Ordinance reads as follows:

"7 (1) Notwithstanding anything contained in any contract, no Court shall pass any decree or order in favour of a landlord whether in execution of a decree or otherwise and whether before or after the termination of the tenancy, evicting any tenant except in accordance with the provisions of this section:

Eviction of tenants.

Provided that nothing contained in this section shall apply to a tenant whose landlord is the Government of the United States of Rajasthan.

Provided further that where the tenant denies the title of the landlord or claims right of permanent tenancy, the Controller shall decide whether the denial or claim is bona fide and if he records a finding to that effect, the landlord shall be entitled to sue for eviction of the tenant in a civil Court and the Court may pass a decree for eviction on any of the grounds mentioned in this section, notwithstanding that the Court finds that such denial does not involve forfeiture of the lease or that the claim is unfounded.

(2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller after giving the tenant a reasonable opportunity of showing cause against the application, is satisfied:

(i) that the tenant has not paid or tendered the rent due by him in respect of the building, within fifteen days after the expiry of the time fixed in the agreement of tenancy with his landlord or in the absence of any such agreement, by the last day of the month next following that for which the rent is payable, or

(ii) that the tenant has after the commencement of this Ordinance without the written consent of the landlord—

(a) transferred his right under the lease or sub-let the entire building or any portion thereof, or

(b) used the building for a purpose other than that for which it was leased, or

(iii) that the tenant has committed such acts of waste as are likely to impair materially the value or utility of the building, or

(iv) that the tenant has been guilty of such acts and conduct which are a nuisance to the occupiers of buildings in the neighbourhood, or

(v) that the tenant has ceased to occupy the building for a continuous period of four months without reasonable cause,

the Controller shall make an order directing the tenant to put the landlord in possession of the building and if the Controller is not so satisfied he shall make an order rejecting the application.

(3) (a) A landlord may apply to the Controller for an order directing the tenant to put the landlord in possession

(i) in the case of a residential building if he required it for his own occupation and if he is not occupying a residential building of his own in the city, town or village concerned;

(ii) in the case of a non-residential building, if he is not occupying for purposes of a business which he is carrying on, a non-residential building in the city, town or village concerned which is his own or to the possession of which he is entitled:

Provided that where the tenancy is for a specified period agreed upon between the landlord and the tenant the landlord shall not be entitled to apply under this sub-section before the expiry of such period:

Provided further that where a landlord has obtained possession of a building under this clause, he shall not be entitled to apply again under this clause—

(i) in case he has obtained possession of a residential building, for possession of another residential building of his own;

(ii) in case he has obtained possession of a non-residential building, for possession of another non-residential building of his own;

(b) The Controller shall, if he is satisfied that the claim of the landlord is bona fide, make an order directing the tenant to put the landlord in possession of the building on such date as may be specified by the Controller and if the Controller is not so satisfied, he shall make an order rejecting the application:

Provided that the Controller may give the tenant a reasonable time for putting the landlord in possession of the building and may extend such time so as not to exceed three months in the aggregate."

(6) The rest of the provisions of this section are not relevant in this case.

(7) It is argued by learned counsel for the appellant that the provisions of sub-s. (1) are imperative and tantamount to a direction that the Court will refuse a prayer for ejectment in pending suits or execution applications, and the only mode in which ejection can be obtained is by following the procedure mentioned in sub-ss. (2) and (3) of S. 7.

(8) The learned counsel for the respondent contended that the former Rajasthan Ordinance No. XXII of 1948 was enacted long after the suit had been filed and cannot have any retrospective effect. It was argued that it was a fundamental rule of interpretation that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction. In the Ordinance it is not specifically laid down that it will apply to pending suits and the procedure mentioned in sub-ss. (2) and (3) of S. 7 could only be availed of by landlords seeking to evict the tenant after the promulgation of the Ordinance. It was further contended that during the pendency of this second appeal, fresh legislation had been undertaken; the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (Act No. XVII of 1950) was brought into force from 23rd of December 1950, and S. 30 thereof repealed the Rajasthan Buildings (Lease and Rent Control) Ordinance, 1948.

(9) It was further argued by learned counsel for the respondent that under the Rajasthan Premises (Control of Rent and Eviction) Act 1950, the restrictions as to eviction were only to be applicable in certain towns and cities of Rajasthan as were notified in the Gazette. These places had also been notified in the Gazette of 23rd December, 1950, but Chhoti Sadri had been left out. It is contended that the suit should now be decided on the merit unhampered by the previous restrictions laid down by the Rajasthan Buildings (Lease and Rent Control) Ordinance, 1948.

(10) With respect to the last argument, it may be stated at once that while Section 30 of the Rajasthan Act XVII of 1950 repeals the Ordinance No. XXII of 1948 of the former Rajasthan there is a proviso to that section viz.,

"that anything done or action taken under the laws hereby repealed shall, until varied or superseded under the Act, continue and be deemed to have been done or taken as the case may be, under or in pursuance of this Act, as if it were then in force."

Act No. XVII of 1950 also contains certain restrictions against eviction in Ss. 13 & 14 of the Act. The action taken by the Munsiff in dismissing the suit was ostensibly under Sec. 7 of the Rajasthan Buildings (Lease and Rent Control) Ordinance, 1948, and if the action taken was correct, it would be saved under the proviso to Section 30 of the Act.

(11) The crucial question, therefore, is whether the order of the Munsiff was correct and in accordance with the provisions of Ordinance No. XXII of 1948.

(12) In order to find out whether the Ordinance XXII was retrospective in its effect, its language will have to be carefully considered. The preamble of the Ordinance shows that the intention of the legislature was to regulate the letting of residential and non-residential buildings and to control the rent for such buildings and to prevent unreasonable eviction of tenants therefrom in the United State of Rajasthan and Section 7 indicates that the Court is not to pass any decree in pending suits or to order eviction even in pending execution cases except in accordance with the provisions of the section. It is clear from the language used that the Ordinance was applicable not only to actions to be brought after the Ordinance but to actions which had already been brought and pending or even if they had been decreed.

(13) The learned counsel for the appellant argued that the procedure to be followed by landlords seeking eviction had been provided in sub-sections (2) and (3) of Section 7, which empowered the Controller to deal with such matters and, therefore, the jurisdiction of the civil Court had been taken away except in cases referred to in proviso 2 of sub-section (1). It was contended that the only remedy which the plaintiffs or decree-holders in pending suits or execution applications could have was to withdraw their cases from the civil Courts and

apply to the Controller in accordance with sub-sections (2) and (3) or to the proviso to sub-section (1) of Section 7 of the Ordinance.

(14) The learned counsel assumes that the jurisdiction of the civil Courts is barred. But there is no section or provision in the Act which says so. On the other hand, sub-s. (1) of Section 7 only prohibits the Court from passing any decree or order of eviction except in accordance with the provisions of Section 7. The language seems to indicate that the legislature did not oust the jurisdiction of the civil Courts but made it subject to certain provisions mentioned in the section. It is settled law that a statute is not to be construed so as to have a greater retrospective effect than its language renders necessary. The language used in the section does not take away the jurisdiction of the civil Courts altogether as already stated. It is now to be seen whether and how far it can be exercised in accordance with the provisions of S. 7, as laid down in sub-s. (1).

(15) The contention of the learned counsel for the appellant is that the words "provisions of this Section" should mean the entire procedure laid down in the Section. But if the entire procedure is to be followed, it has to be pursued before a Controller according to sub-sections (2) and (3) of Section 7 and the authority of the civil Court to direct eviction in accordance with the provisions of the Section becomes meaningless. It was argued that the jurisdiction of the civil Court was restricted to the cases referred to in proviso to sub-s. (1) after the plaintiffs had secured a certificate from the Controller. But obtaining of the decree alone will not help the landlord if no order of eviction can be made in execution of the decree which again is not authorised to be done in the said proviso to sub-s. (1).

(16) In my opinion, the words "provisions of this Section" in sub-section (1) have to be liberally construed. The word "provision" has not been defined in the Act. In Webster's International Dictionary, one of the meaning given to it is 'that which is stipulated in advance; a condition'. If the word 'provision' is construed as 'condition', a reasonable interpretation of sub-section (1) can be easily made. The subsequent sub-sections (2) and (3) as also the provisions of sub-section (1) can be split up into two portions: one in which the conditions are given for ejectment and the other laying down the authority who can grant ejectment. The conditions for ejectment are for instance laid down in Clauses (i) to (v) of sub-section 2 and in Cls. (i) and (ii) of sub-s. 3(a) as also in the proviso to sub-section (1). In my opinion, the interpretation which would be most appropriate to sub-section (1) would be that in the pending suits or in proceedings relating to execution of decrees, the civil Court will be authorised to pass any decree or order in favour of a landlord, evicting any tenant whenever the conditions are proved to exist which may authorise the Controller to pass a similar order in cases which may be instituted before him after the promulgation of the Ordinance. This construction is harmonious as it purports to make sub-section (1) effective to the same extent as the remaining portion of that Section.

(17) The order of the lower Court that the Ordinance is not at all applicable having been promulgated after the institution of the suit is not correct. Similarly, the order of the trial Court that the civil Court has no jurisdiction to pass any decree after the Ordinance is also not correct. The correct interpretation of sub-section (1) of Section 7 is as already been indicated above and the trial Court will now proceed to decide the case on merits. The order of remand of the first appellate Court cannot, thus, be set aside although for different reasons. The appeal is dismissed but the costs of this appeal and that of the lower Court will be costs in the cause.

D.H. Appeal dismissed.

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(JODHPUR BENCH)

WANCHOO C. J.

Mt. Jarao and others v. Ajudhyanath and others.

Criminal Ref. Nos. 164 to 167 of 1951, D/- 18-1-1952.

(a) Criminal P. C. (1898), S. 528 (2) — Special Magistrate sitting in Jodhpur having jurisdiction to try cases from outside Jodhpur District is subordinate to District Magistrate of Jodhpur — District Magistrate can transfer the cases from his file — (Criminal P. C. (1898), Ss. 14 and 17).

Whatever may be the local area over which a Special Magistrate has jurisdiction under S. 14 he is subordinate under S. 17 to the District Magistrate of the area where he sits, even if he may not be subordinate to the District Magistrate of other areas from which he hears cases. The Special Magistrate sitting in Jodhpur, is subordinate to the District Magistrate of Jodhpur and the District Magistrate can transfer cases from his Court to any other Court under S. 528 (2). **(Para 4)**

Anno: Criminal P. C., S. 14 N. 2, 3; S. 17 N. 2; S. 528 N. 9.

(b) Criminal P. C. (1898), S. 192 — Applicability.

Sub-section (1) of S. 192 refers to cases in which cognizance has been taken by the District Magistrate himself. Sub-section (2) empowers the District Magistrate to authorise any first Class Magistrate who has taken cognizance to transfer cases to a special Magistrate. **(Para 3)**

Anno: Cr. P. C., S. 192 N. 1.

Zaffar Hussain, for Mt. Jarao; Laxminarain, Dy. Government-Advocate, for The State.

WANCHOO, C. J.: These are five connected references by the District Magistrate of Jodhpur and arise in the following circumstances:

(2) Shri Govindram Gupta was working as Special Magistrate, Jodhpur Division and five criminal cases which are the subject matter of these five references were pending on his file. He was transferred and was succeeded after some time by Shri Goverdhanchan Bhandari as Special Magistrate. This Magistrate, however, was given only certain limited jurisdiction by the notification appointing him as such and was authorised to deal with such dacoity cases as had been left unfinished by Shri Govindram Gupta. The five cases in which these references have been made were not dacoity cases left unfinished by Shri Govindram Gupta and could not, therefore, be tried by Sri Goverdhanchand Bhandari. He

therefore, referred the matter to the District Magistrate of Jodhpur, who ordered these five cases to be transferred to the Court of City Magistrate, Jodhpur. When these cases reached the Court of the City Magistrate, an objection was raised that the District Magistrate was not competent to transfer the cases to the City Magistrate and, therefore, the City Magistrate had no jurisdiction to try them. The City Magistrate accepted this objection and sent the cases back to the Special Magistrate. Thereupon, the Special Magistrate again referred the matter to the District Magistrate. The District Magistrate then registered five revisions against the order of the City Magistrate returning these cases to the Special Magistrate and has referred all the five revisions to this Court with the recommendation that the order of the City Magistrate returning these cases be set aside and the City Magistrate should be ordered to proceed with the trial of these five cases.

(3) The powers of the District Magistrate for transfer of cases are to be found in Ss. 192 and 528 of the Criminal P. C. Sub-s. (1) of S. 192 to which the learned District Magistrate refers has no application in the present case. That sub-section refers to cases in which cognizance has been taken by the District Magistrate himself. It is not said in these cases that cognizance was taken by the District Magistrate himself. Sub-s. (2) empowers the District Magistrate to authorise any first Class Magistrate who has taken cognizance to transfer cases to a special Magistrate and obviously does not apply. It is S. 528 (2) which must be looked into in the present case and which reads as follows

"Any Chief Presidency Magistrate, District Magistrate or Sub-divisional Magistrate may withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him, and may inquire into or try such case himself or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same."

(4) The argument which was raised in the Court of the City Magistrate was that as the Special Magistrate, in whose Court these cases were pending, had jurisdiction to hear cases of the entire Jodhpur Division and not merely of the Jodhpur District, he was not subordinate to the District Magistrate of Jodhpur and, therefore, the District Magistrate of Jodhpur could not transfer any case from his Court. This argument is, in my opinion, fallacious because whatever may be the local area over which a Special Magistrate has jurisdiction under S. 14 of the Criminal P. C., he is subordinate under S. 17, Criminal P. C., to the District Magistrate of the area where he sits, even if he may not be subordinate to the District Magistrate of other areas from which he hears cases. In the present case, the Special Magistrate used to sit in Jodhpur and as such he was certainly subordinate to the District Magistrate of Jodhpur and the District Magistrate could transfer cases from his Court to any other Court under S. 528 (2) of the Criminal P. C. Under that section, the District Magistrate may withdraw any case from any Magistrate subordinate to him, and may inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same. The Special Magistrate, in whose Court these cases were pending, was certainly subordinate to the District Magistrate of Jodhpur and the District Magistrate was, therefore, entitled under S. 528 (2) to withdraw these cases from the Court of the Special Magistrate and could inquire into or try these cases himself or refer them for inquiry or trial to any other, Subordinate Magistrate who was competent to inquire into or try all these five cases. Under these circumstances, the orders of the District Magistrate by which he has transferred these cases from the Court of the Special Magistrate to the Court of the City Magistrate are correct. I, therefore, accept the references and set aside the order of the City Magistrate by which he returned these cases to the Special Magistrate and order him to try or enquire into these cases as directed by the order of transfer of the District Magistrate.

R.G.D. Reference accepted.

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JODHPUR BENCH

WANCHOO, C. J. AND BAPNA, J.

State v. Magha, Accused.

Criminal Appeal No. 64 of 1951, D/- 29-8-51.

(a) Criminal P. C. (1898), S. 164 — Non-compliance with — Effect — Confession held not voluntary.

An accused was produced from police custody before the Magistrate, who gave him a few minutes, and then started recording his confession. Only two questions were put to him before his statement was taken down, namely that if he made the confession, it would be given in evidence against him, and whether he was making the confession voluntarily. It was doubtful whether the Magistrate even told him before taking down his confession that he was not bound to make a confession, though the certificate at the end of the confession was in the form provided in S. 164;

Held that considering that though the accused was coming direct from police custody, the Magistrate did not try to find out from him whether he had been threatened or induced to make the confession, the confession could not be regarded as voluntary. (Para 5)

Anno: Criminal P. C., S. 164 N. 14, 17.

(b) Evidence Act (1872), Ss. 114, Ill. (a) — Presumption under — When arises — Explanation by accused — Essentials.

The Court may make a presumption under S. 114, illustration (a) that an accused is a thief or a receiver of stolen goods on his being found in possession of such goods, unless he accounts for his possession. Where the explanation given by the accused is reasonable and probable, it is not necessary for him to prove by evidence that it is also correct. It is enough if the explanation given by him is not inherently or palpably false.

Thus the explanation by the accused who is a goldsmith that the ornaments alleged to be stolen property were brought to him for repairs and cleaning is a reasonable and probable explanation. AIR 1943 PC 211; AIR 1945 Cal 93 and AIR 1945 All 19, Relied on. (Paras 6, 10)

Anno: Evidence Act, S. 114 N. 7.

Sumer Dan, for The State.

Cases referred to:

('43) AIR 1943 PC 211: (45 Cri L J 241) (Pr 7)
('45) AIR 1945 All 19: (46 Cri L J 233) (Pr 9)
('45) AIR 1945 Cal 93: (46 Cri L J 465) (Pr 8)

WANCHOO, C. J.: This is an appeal by the State against the acquittal of one Magha of an offence under S. 411 of the Indian Penal Code. We have heard the Assistant Government Advocate at length, and are of opinion that the appeal should be dismissed.

(2) The prosecution story was briefly this. Sagar Mal, who was a co-accused with Magha, is the son of one Deep Chand. It is said that this Sagar Mal stole some ornaments, which were kept in a certain place in the house, while his father was away. After stealing these ornaments, he took them to Magha, who keeps a shop for groceries, and also works as a 'Sunar'. He is said to have given these ornaments to Magha, and took Rs. 3/- from him in return. When Deepchand returned home, his other children informed him that Sagar Mal appeared to be in funds. So he tried to make sure that nothing had been removed from the house, and when he was doing so, he discovered that ornaments worth Rs. 1575 had been removed. He then questioned Sagar Mal, who is said to have told him about his giving the ornaments to Magha. The matter was reported in the Thana. Later, on search, some of the ornaments were recovered from the shop of Magha. The remaining ornaments were recovered from the house of Deepchand itself, where they had been buried.

(3) Both Sagar Mal and Magha were prosecuted, one under S. 380 and the other under S. 411 of the Indian Penal Code. Both of them are said to have made confession before a Magistrate, though both later retracted these confessions. The learned Magistrate acquitted both Magha and Sagar Mal. No appeal has been filed against the acquittal of Sagar Mal; but the State has filed this appeal against the acquittal of Magha.

(4) It is the admitted case of the parties that some ornaments, which had been pawned with Deepchand, were recovered from the shop of Magha. The contention on behalf of the prosecution is that under these circumstances it should be presumed under S. 114, Illustration (a) of the Indian Evidence Act, that Magha was a guilty receiver, if not the actual thief. Magha's explanation in Court about the recovery of these ornaments was that they had been given to him by the wife of Deepchand, who was accompanied by her son Sagar Mal also, for repairs and cleaning.

(5) In the first place, once Sagar Mal is acquitted, and there is no appeal against that acquittal, it cannot be said that these ornaments were stolen by Sagar Mal, and given by him to Magha. The case against Magha, therefore, rests entirely upon the recovery of certain ornaments from his shop, and the presumption to be drawn under S. 114, Illustration (a) of the Indian Evidence Act. Over and above this, there is the retracted confession made by Magha. So far as that confession is concerned, it was not believed by the trial Court to be voluntary. We are not disposed to disagree with that view of the trial Court. We may point out that Magha was produced from police custody before the Magistrate, who gave him a few minutes, and then started recording his confession. Only two questions were put to him before his statement was taken down, namely, that if he made the confession, it would be given in evidence against him, and whether he was making the confession voluntarily. It is doubtful whether the Magistrate even told him before taking down his confession that he was not bound to make a confession, though the certificate at the end of the confession is in the form provided in S. 164 of the Code of Criminal Procedure. Considering that Magha was coming direct from police custody, the Magistrate did not try to find out from him whether he had been threatened or induced to make the confession. Under these circumstances, the estimate of the trial Court that the confession was not voluntary appears to us to be correct, and we are not prepared to place any reliance on this confession.

(6) The next question is whether a presumption should be drawn in this case under S. 114, Illustration (a), to the effect that Magha is a thief, or, at any rate, a guilty receiver, taking it for granted there had been a theft in the house of Deepchand, though even this has not been fully proved in this case. We may point out that the Court may make such a presumption, unless the person in possession of stolen goods can account for his possession. In this case Magha has given an explanation of his possession, namely, that these ornaments had been handed over to him by Deepchand's wife and son for repairs and cleaning. Considering that Magha is a goldsmith, this explanation is a very reasonable and probable one. Learned Assistant Government Advocate, however, argues that Magha has not proved satisfactorily that these ornaments were handed over to him by Deepchand's wife and son for cleaning and repairing. It is, in our opinion, not necessary for an accused to prove up to the hilt by evidence that the explanation given by him is correct. It is enough, if the explanation given by him is not inherently or palpably false. In the present case, the explanation that has been given is, as we have said, very reasonable and probable. In this connection we may refer to three cases in support of our view.

(7) The first case is 'OTTO GEORGE GFELLER v. THE KING', AIR 1943 P C 211. In that case the accused person gave an explanation as to how he came to be in possession of the stolen goods. The law with respect to such explanations was laid down by their Lordships of the Privy Council in the following terms:

> "Upon the prosecution establishing that the accused were in possession of goods recently stolen they may in the absence of any explanation by the accused of the way in which the goods came into their possession which might reasonably be true find them guilty, but if an explanation were given which the jury think might reasonably be true, and which is consistent with innocence although they were not convinced of its truth, the prisioners are entitled to be acquitted inasmuch as the prosecution would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused."

(8) The next case is 'KESHABDEO BAGAT v. EMPEROR', AIR 1945 Cal 93. There the accused was said to be a friend of the cashier of a certain firm. That cashier had made defalcations, and passed on certain cheques to Keshabdeo. Keshabdeo's explanation was that he had received those cheques through Haranandan, who was also said to be a friend of the cashier, in the ordinary course of business, and he had no idea that the cashier had committed forgery, and passed on forged cheques

to him. While dealing with Illustration (a) of Section 114 it was held in this case that

"It is not the law that if the accused fails to account for his possession of the goods said to be stolen goods he must be convicted, if the other proved facts of the case do not predicate guilt. The accused is entitled to acquittal if he can give an explanation which may reasonably be true although the jury may not be convinced that it is true. The accused is not required to prove his explanation by adducing substantive evidence. In many cases it may be impossible for him to do so, particularly if he alone knows the facts for he cannot give evidence on oath on his own behalf."

(9) The last case is 'JAGANNATH v. EMPEROR', AIR 1945 All 19. The case related to the theft of a buffalo, and the accused Jagannath's explanation was that he had purchased it from one Chandar Pal for Rs. 132/-. When Jagannath was arrested, he and Chandar Pal were going together, and Chandar Pal ran away immediately on the arrival of the police, while Jagannath was caught along with the buffalo. While dealing with Illustration (a) of S. 114 the law was laid down as follows:

"The Court is not bound to draw a presumption under Section 114, Illust. (a). It is in the option of the Court to draw it. But it does not, in any way, shift the burden of proof to the accused. The words can account for its possession do not mean that the accused must prove it positively that he received the property in the manner indicated by him. If the explanation given is not inherently improbable or palpably false and the Court or the jury trying the case find it to be reasonably true, the adverse presumption shall be deemed to have been rebutted. The meaning of the words 'reasonably true' appears to be that the explanation must be sufficient to cast a doubt on the guilt of the accused & in the case unless the prosecution proves beyond reasonable doubt that the accused received the property knowing it to be stolen, the benefit of the doubt shall go to him."

(10) Following these principles, we are of opinion that the accused Magha, in this case, has given a very reasonable and probable explanation as to how he came to be in possession of the property. That explanation throws the greatest doubt on the story of the prosecution. The prosecution has done nothing to prove that that explanation should not be believed, particularly when we remember that the main culprit Sagar Mal has been acquitted and that there is no appeal against that acquittal. We therefore, dismiss this appeal.

D.R.R. Appeal dismissed.

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(JAIPUR BENCH)
SHARMA J.

Ramjiwan, Applicant v. Maddye Khan and another, Respondents.

Criminal Revn. No. 17 of 1951, D/- 31-8-1951.

Criminal P. C. (1898), Ss. 252 (2), 253, 436 and 540 — Duty of Court under S. 252 (2) and S. 540 — Non-compliance with — Order of discharge — Legality.

In a warrant case the Magistrate after examining the witnesses produced by the complainant and after examining the accused discharged him on the ground that no offence was made out against the accused. One of the reasons for discharge was that the complainant failed to produce two material witnesses which had been examined at the stage of preliminary inquiry under S. 202, Criminal P. C.

Held that the order of discharge could not be maintained and must be set aside in revision. It was the duty of the Magistrate under Section 252 (2), Criminal P. C. to ascertain from the complainant or otherwise the names of persons likely to be acquainted with the facts of the case and able to give evidence for the prosecution and to summon such of them as he thought necessary. Moreover, under S. 540, it has been made obligatory upon the Court to summon and examine or recall and re-examine any person as a witness whose evidence appears to it essential to the just decision of the case. Having itself found that the evidence of the two witnesses was very material, the Court was wrong in discharging the accused without examining these two witnesses under S. 540. (Para 7)

Anno: Cr. P. C., S. 252 N. 7; S. 540 N. 9.

P. N. Dutt, for Applicant; H. C. Swami, for Respondent.

ORDER: This is an application by Ram Jiwan complainant, to revise the order of the learned Extra Magistrate, Jaipur District discharging the accused opposite party. The complaint was under S. 382 of the Penal Code and alleged that a pair of bullocks which had been purchased by the complainant from Sunder Lal had been forcibly seized from the possession of the complainant's son Chajju on the 14th May, 1949.

(2) The learned Magistrate took proceedings under S. 202 of the Code of Criminal Procedure in which Chajju and Ganga Bux were examined. The accused was summoned under S. 427 of the Penal Code. In the presence of the accused, the statements of Ramjiwan complainant, Sunderlal, the seller of the bullocks, Govind Narain his son and Raghunath and Panchya and Bhonrilal were recorded. Raghunath and Panchya deposed that it was in their presence that the bullocks were seized by the accused from the possession of Chajju and Ganga Bux. Bhonrilal deposed that the bullocks were sold by Sunderlal to Ramjiwan and that the witness scribed Khata Ex. P. 1 relating to the entry of the sale of bullocks. Govind Narain also deposed about the sale to the complainant.

(3) The learned Magistrate after examining the accused held that no offence was made out against the accused. One of the principal grounds for discharge was that the complainant failed to produce Chajju and Ganga Bux. The complainant went in revision to the Court of Sessions and the learned Additional Sessions Judge, Jaipur agreeing with the trial Court, dismissed the revision.

(4) The complainant has come in revision to the Court.

(5) I have heard the learned counsel for both the parties. It has been argued by the learned Counsel for the applicant that the evidence was, prima facie, sufficient for a charge at least under S. 379 of the Penal Code and the learned Magistrate was wrong in discharging the accused. It was also argued that under S. 252 (2) of the Code of Criminal Procedure it was the duty of the Magistrate to ascertain from the complainant or otherwise the names of any persons, likely to be acquainted with the facts of the case and to be able to

give evidence for the prosecution and after such ascertainment, it was his duty to summon those witnesses whom he thought necessary. The learned Magistrate discharged the accused principally on the ground that Chajju and Ganga Bux were important witnesses, but they were not examined by the prosecution. If the learned Magistrate thought so, it was his duty to examine these witnesses under S. 540 of the Code of Criminal Procedure.

(6) On behalf of the opposite party, it has been argued that the complainant closed his evidence as is disclosed by a note of the Magistrate and the Magistrate was not bound to call any evidence which had not been produced by the prosecution.

(7) I have considered the arguments of both the learned Counsel. At the stage at which the accused were discharged, it was not necessary for the Magistrate to examine the prosecution evidence with a view to finding out if there could be a reasonable doubt about the guilt of the accused. This should be done at the stage of the final judgment. At this, stage, it was only necessary for the Magistrate to be satisfied that some offence was prima facie made out. According to the prosecution, the case was prima facie made out by the evidence of the two eye-witnesses, Panchya and Raghunath, coupled with the evidence of Ramjiwan, Sunderlal, Govind Narain and Bhonrilal. On a perusal of the statements, I find, that the contention of the learned Counsel for the applicant is not altogether without force. However, even if the Magistrate was not satisfied with the evidence already recorded, he could find it out from the record that the evidence of the two witnesses Chajju and Ganga Bux was essential to the just decision of the case. In fact, the learned Magistrate has found that their evidence was very important. In criminal cases, the Court has also got to perform some duty and that is why under S. 252, a provision has been made that the Magist., after the complainant has been heard and the evidence produced by him recorded, shall ascertain from the complainant or otherwise the names of persons likely to be acquainted with the facts of the case and able to give evidence for the prosecution and shall summon to give evidence such of them as he thinks necessary. Under S. 540, it has been made obligatory upon the Court to summon and examine or recall and re-examine any person as a witness whose evidence appears to it essential to the just decision of the case. Having itself found that the evidence of the two witnesses Chajju and Gangabux was very material, the Court was wrong in discharging the accused without examining these two witnesses, under S. 540. The order of discharge, under the circumstances, cannot be maintained.

(8) The application is allowed, the order of discharge is set aside and the case is sent to the District Magistrate Jaipur to make further enquiry either himself or to send the case to some other Magistrate subordinate to him excepting Mr. Gangalahri Extra Magistrate who might be competent to hear it.

K.S. Application allowed.

A. I. R. 1952 Rajasthan 100

(JAIPUR BENCH)

SHARMA J.

Bairon Bux, Applicant v. Rajmal, Opposite Party.

Criminal Ref. No. 326 of 1950, D/- 28-9-1951.

(a) Criminal P. C. (1898), S. 145 (1) — Absence of preliminary order — Proceedings are illegal.

The essence of the proceedings under S. 145 is preliminary order under sub-s. (1). When it is wanting the proceedings are illegal. AIR 1947 Oudh 159, Rel. on. (Para 6)

Anno: Cr. P. C., S. 145 N. 15, 16.

(b) Criminal P. C. (1898), Ss. 107 and 145 — Combination of proceedings under — Legality — Proper procedure.

The procedure in case of disputes relating to immovable property under S. 145 is quite different from the procedure in security proceedings under S. 107. Both the proceedings should not, therefore, be combined and if the Magistrate considers it necessary to proceed both under S. 107 as well as S. 145 he should start separate proceedings according to law. (Para 7)

Hence, where a Magistrate after registering a case under Ss. 107 and 145, Criminal P. C. issues a notice to the opposite parties to show cause why they should not furnish securities for keeping peace and after recording the evidence of the parties passes a composite order under Ss. 107 and 145 of the Code the entire proceedings are illegal and without jurisdiction and the order must be set aside. (Paras 6, 7)

Anno: Criminal P. C., S. 145 N. 4.

Chander Mohan, for Applicant; Ram Avtar, Government-Advocate, for the Government.

Cases referred to:

('47) AIR 1947 Oudh 159: (230 Ind Cas 229) (Pr 5)

('14) AIR 1914 Sind 8: (16 Cri L J 235) (Pr 5)

ORDER: This is a reference under S. 438 of the Code of Criminal Procedure by the Additional Sessions Judge Bundi recommending that the composite order of the Magistrate 1st Class Patna in Bundi District be quashed. A complaint was made by the opposite party Raj Mal under Ss. 145 and 107 of the Code of Criminal Procedure that the field known as Bambulwala No. 620 situated in Choti Godoli was in his ownership and actual possession but the applicant Bhairon Bux and others prevented him from ploughing and sowing the field. The applicants were using force and there was apprehension of breach of peace. The possession of the opposite party be declared and retained over the field and the applicants be ordered to furnish security for keeping peace.

(2) The learned Magistrate sent this application of the opposite party to police for report and on receipt of the report he made an order that the case be registered under Ss. 107 and 145 of the Code of Criminal Procedure and the accused (Bhairon Bux and others) be given notice to show cause why they should not be called upon to furnish two sureties each in the sum of Rs. 350/- each and execute personal bonds in the amount of Rs. 700/- for keeping the peace for one year and not to trespass upon the field during the said period.

(3) After recording the evidence of the parties the learned Magistrate made the final order on the 7th January, 1950 which when translated into English runs as follows:

"1. It is declared that Raj Mal shall retain possession over the field Bambuwala No. 620 area 36 Bighas and 4 Biswas situated in village Choti Godoli till such time as he is evicted in due course.

2. The accused shall not interfere with the possession of the applicant (Raj Mal).

3. The accused shall at once deliver the possession of the field in dispute to the applicant (Raj Mal) otherwise the applicant shall be delivered possession through Court.

4. The accused Bhairon Bux and Sukh Dev shall furnish two sureties each in the sum of Rs. 250/- each for keeping the peace for one year and for not trespassing upon the field in dispute for that period and for not quarrelling or breaking the peace. In case of non-compliance they will have to undergo one year's simple imprisonment."

(4) The learned Sessions Judge has held that first of all such composite orders are illegal; secondly he says that there was no preliminary order required by S. 145(1) of the Criminal Code of Procedure and in the absence of it the Magistrate had no jurisdiction under S. 145.

(5) The learned Counsel for the applicant has adopted the argument given by the Learned Sessions Judge in his order of reference and has relied upon the rulings reported in 'LAKHPAT v. MT. MAHRANA', AIR 1947 oudh 159 and 'FARID IMMABUX v. PIRU KOURO', A I R (1) 1914 Sind 8. In the Oudh ruling it has been held that under S. 145 it is mandatory upon the Magistrate to record the grounds of his belief. If without giving any reasons and without even stating that he is satisfied that there is any apprehension of a breach of the peace the Magistrate passes an order under S. 145 (1) the order is without jurisdiction. In Sind Ruling it was held that it is very undesirable to combine proceedings under S. 107 with proceedings under S. 145 against both opposing parties in the same proceedings under S. 107.

(6) There can be no doubt that in matters relating to possession, the Magistrate has jurisdiction only when there is a danger of the breach of peace. It has been provided in S. 145(1) that whenever a District Magistrate, Sub-Divisional Magistrate or Magistrate of the First Class is satisfied that a dispute likely to cause a breach of the peace exists concerning any land or water etc. he shall make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his Court in persons or by pleader within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute. On a perusal of the file I find that there is absolutely no order whatsoever to this effect. In the absence of such an order the Learned Magistrate had no jurisdiction to proceed under S. 145. The essence of the proceedings under S. 145 is preliminary order under sub-s. 1. When it is wanting the proceedings are illegal. The order of the Magistrate so far as it concerns the possession of the field is therefore, likely to be set aside and is quashed.

(7) So far as that portion of the order is concerned which relates to the furnishing of the securities, such order could not be made under S. 145. If the Magistrate wanted to proceed under S. 107 he ought to have taken separate proceedings under the said section. The procedure in case of dispute relating to immovable property under S. 145 is quite different from the procedure in security proceedings under S. 107. Both the proceedings should not, therefore, be combined and if the Magistrate considers it necessary to proceed both under S. 107 as well as S. 145 he should start separate proceedings according to law.

(8) Reference is accepted, the order of the learned Magistrate Patna dated the 7th January, 1950 is set aside and he is directed to proceed in accordance with law if he still thinks that proceedings are necessary against the applicant Bhairon Bux and others.

K.S. Order set aside.

A. I. R 1952 Rajasthan 101

(JAIPUR BENCH)

SHARMA J.

Kishan Sahai, Applicant v. State.

Criminal Ref. No. 162 of 1951, D/- 11-10-1951.

Criminal P. C. (1898), S. 145 (5) — Cancellation of preliminary order — Magistrate has no power to order possession to a particular party.

When the proceedings under S. 145 are dropped the Magistrate becomes 'functus officio' and has absolutely no power to make an order that the property be returned to a particular party because that amounts to deciding the question of possession which the Magistrate has no right to do after dropping the proceedings. AIR 1925 Nag 297 and AIR 1925 Mad 1252, Rel. on. (Para 4)

Anno: Cr. P. C., S. 145 N. 48.

J. K. Mathur, for Applicants; R. K. Rastogi, Government-Advocate, for The State.

Cases referred to:

('25) AIR 1925 Mad 1252: (27 Cri L J 95) (Pr 4)
('25) AIR 1925 Nag 297: (26 Cri L J 1378) (Pr 4)

ORDER: Proceedings under S. 145 of the Code of Criminal Procedure were started by the Sub-Divisional Magistrate, Khetri on the application of Krishna son of Nanag Jat (hereinafter to be referred to as the opposite party). During the proceedings, property was attached. On the 17th November, 1951 learned Magistrate dropped the proceedings as in his opinion there was no longer any apprehension of the breach of peace. After the proceedings were dropped the opposite party presented an application that the land and the crop in dispute were in his possession and should be restored to him. The learned Magistrate accepted this application and directed the attached property to be handed over to the opposite party.

(2) Against this order the applicants Kishan Sahai and Ghod had went in revision to the Court of Session at Jhunjhnu. The Additional Sessions Judge Jhunjhnu has made this reference recommending that the order of the sub-Divisional Magistrate Khetri dated the 9th January, 1951 regarding the delivery of possession of the property in dispute to the opposite party Kishna be set aside.

(3) I have heard the Learned Counsel for the applicants in support of the reference. The learned Government Advocate concedes that after the proceedings under S. 145 were dropped the Learned Magistrate was functus officio and he was not authorised to make the order that the property should be delivered to the opposite party as it amounted to the decision regarding question of possession. The opposite party in spite of notice has not appeared.

(4) I am afraid the order of the Learned Magistrate is illegal and cannot be supported. When the proceedings under S. 145 were dropped the Magistrate had absolutely no power to make an order that the property be returned to a particular party because that amounts to deciding the question of possession which the Magistrate had no right to do after dropping the proceedings. In 'DASHRATH v. TARA CHAND', AIR (12) 1925 Nag 297, property was attached on account of emergency during the proceedings under S. 145 but after recording evidence, the Magistrate came to the conclusion that there was no danger of breach of peace and on that ground he dropped the proceedings. At the same time he made an order that attached property is restored to the party whose lock was found on the property at the time of attachment. It was held that the Magist. had no such

power after dropping the proceedings. In 'NARASAYYA v. C. VENKIAH', AIR (12) 1925 Mad 1252, also it was held that after the Magistrate drops the proceedings under S. 145 he is functus officio and has no jurisdiction to pass any further orders in the case e. g. with regard to the delivery of the possession of the attached property to either party. I am in respectful agreement with the views of the Judges of Madras and Nagpur High Courts and hold that the learned Magistrate's order about delivery of possession to Kishan opposite party was illegal and is liable to be vacated. The reference is accepted and the order of the sub-Divisional Magistrate Khetri dated the 9th January, 1951 regarding delivery of possession of the property to Kishna son of Nanag Jat opposite party (applicant under S. 145 proceedings) is set aside.

K.S. Order set aside.

A. I. R. 1952 Rajasthan 102

BAPNA J.

Pusaram and others, Appellants v. Manmal and others, Respondents.

Second Appeal No. 35 of 1950, D/- 28-11-1951.

Evidence Act (1872), S. 47 — Person acquainted with handwriting of another.

When a witness has stated in his examination-in-chief that he was acquainted with the handwriting of a person, it is for the other side to show by cross-examination that the witness was really incompetent to testify under S. 47.

(Para 2)

Anno: Evidence Act, S. 47 N. 2.

Mohanlal Joshi, for Appellants; Maktoormal Guardian, for minor Respondents Nos. 12, 19 to 22 and 33.

Case referred to:

('04) 28 Bom 58: (5 Bom L R 663) (Pr 2)

JUDGMENT: This is a second appeal by the contesting defendants in a suit for redemption. The respondents Nos. 1 to 5 sued the appellants on the allegations that a certain shop described in the plaint was mortgaged by Pratapmal and his sons Chhotmal and Jethmal with Roopram and Kaniram on 'Kati Vadi' 13, Smt. 1917 for a sum of Rs. 451/-. It was stated that the plaintiffs and defendants Nos. 6 to 38 were successors-in-title to the mortgagors, and defendants Nos. 1 to 5, who are now appellants, were the successors-in-title to the mortgagee. The appellants denied the fact of the mortgage and the fact of the plaintiffs being the successors-in-title to the mortgagors claiming to redeem the same. The trial Court dismissed the suit on 2nd March 1944 but the case was remanded for a fresh trial on appeal, and after re-trial the suit was decreed. The contesting defendants being successors-in-title to the mortgagees filed an appeal which was dismissed.

(2) The findng that the shop was mortgaged by Pratapmal, Chhotmal and Jethmal with Roopram Kaniram was based on certain entries of the 'Bakiyat' Department of the Government of Jodhpur. The property of Pratapmal was taken possession of by the State but on representation by Kaniram, the rent of the shop collected by the State was paid over to him on the ground that he was a mortgagee of the shop. The genuineness of these documents being established, learned counsel for the appellants has not challenged the status of the appellants as mortgagees but he urges that that fact alone will not entitle the plaintiffs to a decree unless they can establish that there was a subsisting mortgage on the date of the suit.

It was argued that there was no proof that the mortgage was made on 'Kati Vadi' 13, Smt. 1917 and that it was for Rs. 451/-. The lower Court relied upon Ex. P/A-6 which was an entry in the account-book kept by the ancestor of the plaintiffs. Learned counsel for the appellants argued that the evidence of Chhaganmal P. W. 4 relied upon by the lower Court as having proved the entry is not sufficient for that purpose. The evidence of Chhaganmal is that the said entry is in the pen of one Heerachand who was a 'munim' in the employment of the plaintiffs' ancestor and that he was acquainted with the handwriting of said Heerachand. It is contended by learned counsel for the appellant that in cross-examination the witness admitted that Heerachand had died in Smt. 1930 long before the witness was born and, therefore, he could not possibly identify his handwriting and the conditions laid down in S. 47 of Indian Evidence Act — before a person can be said to be acquainted with the handwriting of the scribe — are not fulfilled.

Learned counsel for the respondent urges that the witness had made a statement in examination-in-chief that he was acquainted with the handwriting of Heerachand and it was for the defendants to test by cross-examination in what manner he became acquainted with the handwriting of Heerachand and since all the methods in which that witness could make himself acquainted with the handwriting of Heerachand had not been exhausted in cross-examination, his evidence should be held to be sufficient to prove the document. Reliance was placed on 'SHANKERRAO GANGADHAR v. RAMJI HURJIVAN', 28 Bom 58. With great respect I agree with the view of law taken in this case, and when the witness had stated in his examination-in-chief that he was acquainted with the handwriting of Heerachand, it was for the defendants to show by cross-examination that the witness was really incompetent to testify under S. 47 of the Evidence Act.

It was urged by learned counsel for the respondents that the admission of the fact that Heerachand died long before the witness Chhaganmal was born excludes the possibilities mentioned in the explanation for becoming acquainted with the handwriting of Heerachand. He could not see him write nor could he have exchanged correspondence, nor could document be submitted to him habitually in the course of ordinary business. While the first two modes of being acquainted with the handwriting are certainly excluded, the possibility of being acquainted in the third manner is not eliminated. In the third category will also be included cases where a person having custody of family records obtains familiarity with the handwriting of persons who are dead and gone. Wigmore in his learned treatise of the Law of Evidence (1904 Edition) while dealing with this question has observed in paragraph 704:

> "Another class of persons seem properly to possess safe sources for estimating authenticity, though they have not received implied admissions from the supposed makers, namely, persons who, having the custody of official records, have thus become familiar with the official signature of a predecessor in the office, whether a superior or one of the same grade, or, having the custody of family records, thus obtain familiarity with the handwriting. The propriety of the place of custody and the general reliance upon the documents for legal, mercantile and family purposes, are a sufficient ground for belief in authenticity."

A direct question does not seem to have been put to Chhaganmal in what manner he became acqua-

inted with the handwriting of Heerachand and, therefore, it could not be said that all the modes of becoming acquainted with the handwriting of Heerachand had been negatived in cross-examination.

(3) I, therefore, agree with the lower Court in the finding that the mortgage was dated Kati Vadi 13, Smt. 1917 and was for a sum of Rs. 451/-. No other point was argued and this appeal fails and is hereby dismissed with costs.

(4) Learned counsel for the appellants wants a certificate for leave to appeal to a Division Bench. As the question relates to the interpretation of S. 47 of the Evidence Act, I grant certificate for leave to appeal to a Division Bench.

V.R.B. Appeal dismissed.

A. I. R. 1952 Rajasthan 103

(JAIPUR BENCH)

SHARMA J.

Jankiballabh, Applicant v. State.

Criminal Ref. No. 109 of 1951, D/- 27-9-1951.

(a) Municipalities — Jaipur City Municipalities Act (1943), S. 203 (4) — Conviction under — Proof.

An offence under sub-s. (4) of S. 203 can be said to be committed only if the accused uses any place in the municipality without a license for any purpose mentioned in sub-s. (1). Unless it is shown that the building or place is used as a manufactory or place of business of any other kind from which offensive or unwholesome smells, fumes or soot or dust arise or which may involve risk of fire, provisions of sub-s. (4) of S. 203 cannot be applied. The words "from which offensive or unwholesome smells.....risk of fire" qualify the word 'manufactory' and also the words "place of business of any other kind".

(Paras 7, 8)

(b) Municipalities — Jaipur City Municipalities Act (1943), S. 203 (4) — Prosecution under — Duty of Court.

For the purpose of issuing a notice under Section 203 it is the satisfaction of the Municipal Board which is required but when an accused is charged under sub-s. (4), it is for the prosecution to prove that the place was being used for the purpose mentioned sub-s. (1). Sub-section (4) does not say that the accused would be guilty simply because he is being found to be using a building, without a license, if the Municipal Board is satisfied that he was using it for any purpose mentioned in sub-s. (1). It is for the Court to see that the prosecution satisfied it that the building is being used for such purpose.

(Para 8)

C. L. Agarwal, for Accused; R. K. Rastogi, Government-Advocate, for The State.

ORDER: This is a reference by the learned Sessions Judge, Jaipur City recommending that the conviction and sentence of Jankivallabh applicant under S. 203(4) of Jaipur City Municipalities Act by the First Assistant City Magistrate, Jaipur be set aside and he be acquitted.

(2) The applicant was prosecuted on a report by the Building Inspector, Jaipur City Municipality dated 31st October 1950 that he was running a factory with an electric Motor machine of 11½ H. P. in his house without a license.

(3) It was not denied by the applicant that he was using an electric motor machine of 11½ H. P. in his house without a license, but he pleaded that he had thereby committed no offence under S. 203 (4). The learned First Assistant City Magistrate, Jaipur held that the accused was guilty of the contravention of S. 2 of the Dangerous and Offensive Trade Bye Laws and convicted him under S. 203(4) of the Jaipur City Municipalities Act 1943 (hereinafter to be referred as the Act) and sentenced him to a fine of Rs. 30/- only and in default to undergo 15 days simple imprisonment.

(4) Against this order a revision was filed in the Court of learned Sessions Judge, Jaipur who has held that simply because the applicant was using an electric motor machine of 11½ H.P. in his house without a license, he could not be convicted under S. 203(4). The prosecution has further to prove that the building was used or intended by the applicant to be used for one of the purpose given in S. 203(1) of the Act. As no such purpose was proved, the applicant could not be convicted under S. 203 (4).

(5) I have heard the learned counsel for the applicant and also the learned Govt. Advocate. The learned counsel for the applicant's argument is that even if it be supposed that the building in question was being used as a manufactory or place of business of any other kind, it was necessary for the prosecution to prove that offensive or unwholesome smells fumes or soot or dust arise therefrom or it may involve risk of fire. It was further necessary to prove that by reason of such use and of its situation the building is or is likely to be nuisance to the neighbourhood or is so used or is so situated as to be likely to be dangerous to health, life or property. Unless these things are proved, simply because a building is used as a manufactory, without a license, no offence under S. 203 (4) can be committed.

(6) The learned Government Advocate argues that the words "from which offensive or unwholesome smells, fumes, soot or dust arise or which may may involve risk of fire" do not attach to the word manufactory in Cl. (q) of sub-s. (1) of S. 203. Therefore, the mere use of the building as a manufactory without a license is punishable under sub-s. (4) of S. 203.

(7) I have considered the arguments of both the learned Counsel and have very carefully read the provisions of S. 203(4) of the Act. To my mind an offence under sub-s. (4) of S. 203 can be said to be committed only if the accused uses any place in the municipality without a license for any purpose mentioned in sub-s. (1). The learned Government Advocate says that the building was being used as a manufactory and, therefore, it can be said that it was being used for a purpose mentioned in sub-s. (1). In case of manufactory, it is not necessary to prove that offensive or unwholesome smells, fumes or soot or dust arise therefrom or that its use as a manufactory may involve risk of fire as it is necessary in a case of place of business of any other kind.

(8) Sub-s. (1) (q) says that the building or place should be used as a manufactory or place of business of any other kind, from which unwholesome or offensive smells, fumes or soot or dust arise or which may involve risk of fire. Unless it is shown that the building or place is used as a manufactory or place of business of any other kind from which offensive, or unwholesome smells, fumes or soot or dust arise or which may involve risk of fire provisions of sub-s. (4) of S. 203 cannot be applied. The argument of the Government Advocate that the words "from which offensive or unwholesome smells.....risk of fire" do not qualify the word manufactory, but only the words 'place of business of any other kind' does not appeal to me. The

punctuation mark of comma after the whole phrase "as a manufactory or place of business of any other kind" clearly shows the intention of the legislature that they go with both and not only with the orders "place of business of any other kind."

Under these circumstances, it was necessary for the prosecution to show that the building was used as a manufactory from which offensive or wholesome smells, fumes or soot or dust arise or which may involve risk of fire. The learned Government Advocate further argued that it was not for the Courts to see whether the manufactory was such from which offensive or unwholesome smells etc. arise or which may involve risk of fire, but it was for the satisfaction of the Municipal Board. I do not think that such an inference is warranted from the wordings of sub-s. (4) of S. 203. Of course for the purpose of issuing a notice under S. 203, it is the satisfaction of the Municipal Board which is required but when an accused is charged under sub-s. 4, it is for the prosecution to prove that the place was being used for the purpose mentioned in sub-s. (1). Sub-s. (4) does not say that the accused would be guilty simply because he is being found to be using a building, without a license, if the Municipal Board is satisfied that he was using it for any purposes mentioned in sub-s. (1). It is for the Court to see that the prosecution satisfied it that the building is being used for such purpose.

(9) In my opinion, the conviction and sentence cannot be maintained. The learned Government Advocate also argued that in case conviction and sentence are set aside, the case should be remanded for retrial. I, however, do not think that under the circumstances of the case, retrial is necessary. It was for the prosecution to prove all the ingredients of the offence and if it failed to prove it, it would not be fair to the accused if I make any order as to his trial after his conviction and sentence are set aside.

(10) The reference is accepted, the conviction and sentence are set aside and the applicant is acquitted. The fine, if paid, shall be refunded.

D.H. Reference accepted.

A. I. R. 1952 Rajasthan 104

(JODHPUR BENCH)

WANCHOO C. J. AND BAPNA J.

Nisar Ahmad, Petitioner v. Additional Commissioner, Jodhpur Division and another, Opposite Party.

Civil Misc. Writ Appln. No. 38 of 1951, D/- 10-1-1952.

(a) Municipalities — Jodhpur Municipal Act (1943), S. 27 — Order of officer-in-charge, Elections, rejecting objection to nomination paper and accepting nomination paper, is not appealable — Municipalities — Rajasthan City Municipal Appeals (Regulation) Act (III (3) of 1950).

There is no provision in the Jodhpur Municipal Act for filing an appeal against an order under S. 27 by which the Officer-in-charge of Elections accepts the nomination paper of a candidate and rejects the objections filed against it. Rajasthan City Municipal Appeals (Regulatoin) Act (III (3) of 1950), does not create any right of appeal but merely provides for forum for municipal appeals. (Para 3)

(b) Municipalities — Rajasthan City Municipal Appeals (Regulation) Act III (3) of 1950), S. 4 — Officer-in-charge, Elections, is not municipal authority within the meaning of the Act. There is no power of revision in Government against his order accepting nomination paper and rejecting objections — (Municipalities — Jodhpur Municipal Act (1943), S. 27). (Para 3)

(c) Constitution of India, Art. 226 — Writ of Prohibition —Inferior tribunals having no semblance of jurisdiction — Petitioner for writ unwillingly submitting due to circumstances — Prohibition can issue at his instance — (Municipalities — Jodhpur Municipal Act (1943), S. 27).

An appeal does not exist in the nature of things. A right of appeal from any decision of any Tribunal must be given by an express enactment. Where there is no appeal provided by law consent or waiver on the part of the parties cannot invest the appellate Court with the jurisdiction it did not possess. Where total absence of jurisdiction appears on the face of the proceedings before additional commissioner and minister, in entertaining appeal against the orders of the officer-in-charge, Elections under S. 27, Jodhpur Municipal Act, accepting nomination paper and rejecting objections, the High Court is bound to issue a prohibition although the applicant for the writ has due to the force of circumstances consented to or acquiesced in the exercise of jurisdiction by these authorities. AIR 1937 Cal 427; (1894) 1 Q B 552, Relied on. (Paras 11, 12)

† (d) Constitution of India, Art. 226 — Executive heads wrongly usurping appellate authority and passing orders — Writ of certiorari can issue to quash the orders — (Municipalities — Jodhpur Municipal Act (1943), S. 27).

Where a person without authority sets himself as a judicial tribunal and decides some matter a writ of certiorari will not be granted by the High Court to set aside such a person's order because the order has no force and effect in law and it is unnecessary to set it aside. But the position, is somewhat different in cases where the unauthorised persons who have usurped the jurisdiction to set aside the order of the Officer-in-charge of the elections are the Additional Commissioner and the Minister-in-charge to whom the Officer-in-charge of the elections is certainly subordinate on the executive side. It is possible for the Officer-in-charge of the elections to think that he is bound by the orders of the superior authorities who have purported to act as appellate authorities. In such a case, therefore, writ of certiorari can be issued under Art. 226. (Para 14)

† (e) Constitution of India, Art. 226 — Another remedy open — Nomination paper accepted by Officer-in-charge of elections — Executive heads usurping appellate jurisdiction and rejecting nomination paper — Aggrieved Party having his remedy by way of election petition — Yet High Court should issue writ — (Municipalities — Jodhpur Municipal Act (1943), S. 27).

The applicant's nomination paper had been accepted under S. 27, Jodhpur Municipal Act by the Officer-in-charge of the elections but that acceptance had been set aside by the Additional Commissioner which order in its turn had been upheld by the Minister and these two authorities had no business to interfere with the order of the Officer-in-charge of the elections:

Held that it would not be right to leave the applicant to the remedy of an election petition against the order of what could be considered at the best busy bodies when the order of a properly constituted authority namely, the Officer-in-charge of the elections was in his favour. There was also another danger if the High Court were to follow the principle that it should not interfere in a case like the present because it was possible to get redress by an election petition. That danger was that if some authority decided to interfere with the decisions of the Officer-in-charge of elections, or the returning officer and rejected all nomination papers accepted by him of candidates belonging to particular parties, the result would be that candidates of one particular party might get elected unopposed. It was possible to have a wholesale abuse of this kind and it was therefore, necessary for the High Court to interfere at this stage so that no authority may ever be disposed to take the course mentioned above. Therefore, even though the applicant might be able to get his remedy in this case through an election petition, there was good reason why the High Court should grant him relief at this stage. **(Para 15)**

Inder Nath, for Petitioner; Murlimanohar, for Opposite Party.

Cases referred to:
('37) AIR 1937 Cal 427: (172 Ind Cas 663) (Pr 11)
(1914) 1 K B 608: (83 LJKB 528) (Pr 7)
(1894) 1 Q B 552: (63 LJQB 474) (Pr 12)

WANCHOO, C. J.: This is an application by Nisar Ahmad under Article 226 of the Constitution of India. The applicant stood as a candidate for election from Ward No. 8 to the Municipality of Jodhpur. Haqiquatullah, opposite party, was a rival candidate for the same ward. The dates for filing nominations were February 21 and 22, 1951 and the date for scrutiny was February 23. The applicant put in his nomination on February 22. On February 23 an objection was raised to the applicant's nomination by Haqiquatullah. This objection was rejected on the same day but the Officer-in-charge, Election, gave detailed reasons for the rejection by his order, dated February 24, 1951.

(2) Thereafter Haqiquatullah made an appeal against the order accepting the applicant's nomination to the Additional Commissioner who accepted the appeal on the 7th of March 1951 and held that the nomination of the petitioner was bad and rejected his nomination paper. The applicant made an application for review before the Additional Commissioner on the ground that he had no jurisdiction to interfere with the order of the Officer-in-charge of Elections with respect to nominations but the review application was rejected. Thereafter the applicant preferred a revision before the Minister in charge of Local Self-Government in which he again raised the point of jurisdiction. The then Minister set aside the order of the Additional Commissioner and restored the order of the Officer-in-charge, Elections. Thereafter Haqiquatullah filed a review application. In the meantime, there had been a change in the Ministry and the new minister allowed the review application and set aside the order of the former minister and upheld the order of the Additional Commissioner rejecting the nomination paper of the applicant. Thereupon the present application was made in this Court under Art. 226 of the Constitution of India. The main contention of the applicant here is that the order of the Officer-in-charge, Elections accepting his nomination paper could not be questioned in any manner except by an election petition and therefore, this Court should set aside the order of the Additional Commissioner and the minister in charge.

(3) The application has been opposed by the State of Rajasthan as well as by Haqiquatullah. It is not necessary to set out the reply of the State in detail because that reply is a justification of the unjustifiable. Learned counsel appearing for the State has admitted that there is no provision in the Jodhpur Municipal Act for filing an appeal against an order under Section 27 by which the Officer-in-charge of Elections accepts the nomination paper of a candidate and rejects the objections filed against it. The position is so that the learned Counsel could not do otherwise. In this view of the matter, we do not think it necessary to examine in detail the various orders passed by the Additional Commissioner and the two ministers. It is enough to say that though the learned Additional Commissioner tried to show in the order which he passed on the review application how he had jurisdiction, he contented himself by showing that he had jurisdiction against an order passed under Section 21-A, which no one ever disputed and said nothing about his jurisdiction to set aside an order under Section 27, accepting a nomination and rejecting objection to it, which had been done by his first order of the 7th of March. We agree with the view taken by the first minister in his order dated 24th of April. It is only necessary to refer to Rajasthan City Municipal Appeals (Regulation) Act (Act No. III of 1950) in this connection to clear any mis-apprehension that the order under Section 27 was open to appeal or revision under that Act. It is enough to say that this Act mainly provides for forum for municipal appeals. Section 3 of the Act says that wherever any Municipal law provides for a Municipal appeal, the appeal shall lie to the Commissioner. Therefore, this Act, did not create any right of appeal but merely provided that the appeals under the existing Municipal Acts would lie to the Commissioner. Section 4 of the Act forbids a second appeal but provides revisory powers in Government. But this is only in cases which are open to appeal or cases in which orders have been passed by a Municipal authority. The Officer-in-charge of Elections cannot, in our opinion, be called a Municipal authority within the meaning of this Act and therefore, there was no power of revision in the Government either.

(4) Learned Counsel for the State, however, contends that we should not grant the present application for three reasons:

(1) that the applicant submitted to the jurisdiction of the Additional Commissioner and the Minister and, therefore, no writ should be granted in his favour;
(2) that the order being so obviously null and void, no writ should be granted to quash it, and
(3) that there is another remedy by an election petition and, therefore, this Court should not interfere.

(5) We shall deal with these points one by one.

(6) So far as the first point is concerned, there is no doubt that at some stage the applicant did make applications to the Additional Commissioner and the Minister. It may, however, be mentioned that it was Haqiquatullah who took the case to the Additional Commissioner and dragged the applicant there. It was only when the Additional Commissioner decided against the applicant and rejected his nomination paper that he applied to

him for review of the order. This became necessary because the Additional Commissioner had said in his earlier order that the objection as to jurisdiction had been given up, which appears rather strange to us. When the review application was rejected, the applicant certainly went in revision to the Minister. It is explained that this was done in case it was ever held that Section 4 of the Rajasthan City Municipal Appeals (Regulation) Act (Act No. III of 1950) gave revisory powers to Government. It appears, therefore that it was the force of circumstances which compelled the applicant to apply to the Additional Commissioner or to the Minister. Learned Counsel relied in this connection on Halsbury's Laws of England, Second Edition, Vol. 9, para. 1481 which is as follows:

"Although the writ is not of course it will nevertheless be granted 'ex debito justitiae', to quash proceedings which the Court has power to quash, where it is shown that the Court below has acted without jurisdiction or in excess of jurisdiction, if the application is made by an aggrieved party and not merely by one of the public and if the conduct of the party applying has not been such as to disentitle him to relief, ... The writ will never be granted to remove an erroneous order at the instance of the party in whose favour the error was made."

(7) Learned Counsel particularly relies on the words "if the conduct of the party applying has not been such as to disentitle him to relief." He also relies on 'REX v. WILLIAMS & EX PARTE PHILLIPS', (1914) 1 K B 608. That was a case where a baker was convicted in presence of two justices. He obtained a rule 'nisi' for a writ of certiorari to quash the conviction on the ground that one of the justices alleged to have taken part in the conviction was a person concerned in the business of baking. The affidavit on which the rule nisi was obtained did not state that any objection to the competence of the Court was taken at the hearing before the justices, nor did it state that at the date of that hearing the applicant was without knowledge of the facts alleged to disqualify one of the justices. It was lield that this defect in the affidavit disentitled the applicant to the issue of a writ of certiorari 'ex debito justitae.' It was also held on the facts that the granting of the writ being discretionary, the discretion should be exercised by refusing the writ

(8) In a number of cases, English Courts have refused a writ of certiorari where the objection to jurisdiction was not taken before the justices.

(9) Another case which was relied upon is at note p. of the English and Empire Digest Vol. XXII, page 176. In that, a court-martial was trying a person charged with a crime punishable with death. The law provided that one of the members of the Court-martial should be a person of legal knowledge and experience. The accused was sentenced to death. He afterwards applied to the King's Bench Division for a writ of 'certiorari' to quash the conviction on the ground that no certificate as to legal knowledge and experience as to a member of the Court was handed in. The application was refused on the ground that in the absence of any objection at the trial, there was a general presumption of law that the Court was properly constituted.

(10) A review of these cases shows either that they add cases relating to comparatively trivial matters and in such matters, the writ of certiorari which was a discretionary writ was not issued or that objection to jurisdiction depended upon proof of certain facts and was not taken at the proper time. This discretion is something analogous to the discretion which we have in India under Section 531 of the Code of Criminal Procedure.

(11) In this case, however, in the first place, the applicant never willingly submitted to the jurisdiction of the Additional Commissioner or the Minister but was forced by circumstances to do so. In the second place, this case relates to an election and the Additional Commissioner and the Minister never had the semblance of a jurisdiction to interfere with the discretion of the Officer in-charge of the elections. Under these circumstances, we are of opinion that we should interfere under Art. 226 of the Constitution of India. We may point out that it is well established that an appeal does not exist in the nature of things. A right of appeal from any decision of any Tribunal must be given by an express enactment. Where there is no appeal provided by law consent or waiver on the part of the parties cannot invest the appellate Court with the jurisdiction it did not possess. 'Vide 'PIRU PRAMANIK v. DHANABHANDAR CO. LTD. PABNA', AIR (24) 1937 Cal 427.

(12) We may also refer to the case of 'FARQUHARSON v. MORGAN', (1894) 1 Q B 552. In that case, it was held that where total absence of jurisdiction appears on the face of the proceedings in an inferior Court, the High Court is bound to issue a prohibition although the applicant for the writ has consented to or acquiesced in the exercise of jurisdiction by the interior Court. We may point out that the election in this particular Ward not yet taking place an order in the nature of prohibition is to be issued to the Returning Officer and in such a case even consent or acquiescence will not make any difference as discussed above.

(13) The next point that is urged is that we should not issue a writ to quash an order which is null and void. Reliance in this connection is placed on Halsbury's Laws of England, Second Edition, Vol. 9, para. 1482 which is as follows:

"Where grounds are made out upon which the Ccurt might grant the wr", it will not do so ..... where an unauthorised person has purported to act in a judicial capacity."

(14) There is no doubt that where a person without authority sets himself as a judicial tribunal and decides some matter, a writ of certiorari will not be granted oy this Court to set aside such a person's order because the order has no force and effect in law and it is unnecessary to set it aside. But the position, in our opinion, is somewhat different in cases like the present. Here the unauthorised persons who have usurped the jursdiction to set aside the order of the Officer-in-charge of the elections are the Additional Commissioner and the Minister in charge to whom the Officer-in-charge of the elections is certainly subordinate on the executive side. It is possible for the Officer-in-charge of the elections to think that he is bound by the orders of the superior authorities who have purported to act as appellate authorities. In such a case, therefore, we are of opinion that an order should be passed under Art. 226 of the Constitution of India.

(15) The last point that has been urged is that the applicant has another remedy, namely, he can file an election petition and, therefore, this Court should not help him. It is no doubt true that the applicant has the remedy of filing an election petition and if the applicant had come to us against the order of the Officer-in-charge of the elections rejecting his nomination paper we would not have been disposed to give him any relief. But the case here is this. The applicant's nomination paper has been accepted by the Officer-in-charge of the elections but that acceptance has been set aside by the Additional Commissioner which order in its turn has been upheld by the

Minister and these two authorities had no business to interfere with the order of the Officer-in-charge of the elections. We are of opinion that it would not be right to leave the applicant to the remedy of an election petition against the order of what we can only consider at the best busy bodies when the order of a property constituted authority namely, the Officer-in-charge of the elections is in his favour. We may also point out that there is another danger if we were to follow the principle that we should not interfere in a case like the present because it is possible to get redress by an election petition. That danger is that if some authority decides to interfere with the decisions of the Officer-in-charge of elections or the returning officer and rejects all nomination papers accepted by him of candidates belonging to particular parties, the result would be that candidates of one particular party might get elected unopposed. It is possible to have a wholesale abuse of this kind and it is, therefore, necessary for his Court to interfere at this stage so that no authority may ever be disposed to take the course which we have mentioned above. Therefore, even though the applicant may be able to get remedy in this case through an election petition, there is good reason why we should grant him relief now.

(16) We, therefore, allow the application and order that all proceedings taken before and orders passed by the Additional Commissioner and the Minister in charge after the 24h of February 1951 in connection with the nomination of the applicant are null and void and are hereby set aside and the order of the 24th of February 1951 made by the Officer-in-charge of Elections which he accepted the nomination of the applicant, stands. The Officer-in-charge of the Elections is prohibited from taking into consideration the order of the Additional Commissioner dated 7th of March 1951 or of the Minister in charge dated 16th of May 1951 and he shall proceed further to complete the election business of Ward No. 8 of the Jodhpur Municipality. The applicant will get his costs from the State and we fix Rs. 80/- per day of hearing as Counsel's fee.

R.G.D. *Application allowed.*

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(JAIPUR BENCH)

RANAWAT AND SHARMA, JJ.

Nanagram, Petitioner v. Ghinsilal, Opposite Party.

Misc. Writ Appln. No. 12 of 1950, D/- 24-9-1951.

Constitution of India, Art. 226 — Patent error of law — Houses and Rents — Jaipur Rent Control Order (1947), S. 6 (2) and Second Sch., S. 1 (b) (i).

The express meaning of S. 1 (b) (i) of the second schedule of the Jaipur Rent Control Order is that in case the premises were on hire on the 1st day of September, 1939 then the standard rent is to be fixed on the basis of the rent payable on the 1st day of September, 1939. Where the Collector in appeal held that as the shop was not given on rent on the first day of September, 1939, but was previously let out, second schedule of the Jaipur Rent Control Order did not apply to this case and the standard rent was, therefore, determined under the provisions of S. 6 (2) of the order, the Collector in deciding the appeal has committed a patent error in interpreting S. 1 (b) (i) of the second schedule of the Order and he has exercised his jurisdiction erroneously under S. 6 (2) of the Order which it was not open for him so to do, if he had not misconstrued the plain meaning of the provisions of the second schedule of the Order. Under these circumstances, it is the duty of the High Court to correct the error committed by an inferior Court and to direct it to exercise its jurisdiction according to law. The decision of the Collector acting as an appellate authority in a case under the Jaipur Rent Control Order is in exercise of his judicial or quasi-judicial functions and consequently his decision is amenable to the jurisdiction of the High Court in issuing a writ of certiorari under Art. 226 of the Constitution of India. AIR 1951 Bom 303, Rel. on. (Paras 1, 3, 5)

R. K. Rastogi, for Petitioner; G. N. Sharma, for Opposite Party.

Cases referred to:

('50) AIR 1950 Ajm 34 (1) (Pr 3)
('51) AIR 1951 Ajmer 51 (1) (Pr 3)
('51) AIR 1951 Ajm 32: (1951 AMLJ 32) (Pr 3)
('25) 27 Bom L R 877: (AIR 1925 Bom 400) (Pr 3)
('51) AIR 1951 Bom 303: (53 Bom L R 94) (Pr 4)

RANAWAT J.: This is an application under Art. 226 of the Constitution of India. The petitioners Nanagram and Ballilal are the owners of a shop in Johri Bazar of which the opposite party Ghinsi Lal is the tenant. The petitioners purchased this shop from Khavas Bala Baksh on the 30th of May, 1937 when the opposite party Ghinsilal was in possession of it as a tenant on a monthly rent of Rs. 55/- and after the purchase of the shop by the petitioners, Ghinsi Lal attorned in favour of the petitioners and executed a rent note on the 10th of July, 1937 stipulating to pay Rs. 65/- Jharsai per month. On the 11th of January, 1940, another rent note was executed by Ghinsi Lal by which the monthly rent was reduced to Rs. 50/- Indian Coin. The petitioners constructed a verandah in front of the shop on the 1st of November, 1943 at a cost of Rs. 1200/- and on the 26th March, 1948 the rent of the shop was increased to Rs. 70/- Indian Coin per month and a fresh rent note was executed by the opposite party.

On the 15th of April, 1949, the petitioners served a notice on Ghinsi Lal, informing him of their intention to increase the rent of the shop to Rs. 130/- per month which was calculated at twice the rate at which the premises were let on the first of September, 1939 and a further sum of Rs. 7/8 per month was added on account of the improvements made by the petitioners. Thus the petitioners claimed a sum of Rs. 137/8 per month from the opposite party, but Ghinsi Lal declined to accept the demand made by the petitioners. The dispute regarding the standard rent payable in respect of the shop in question was submitted to the Rent Controller, Jaipur under S. 6 of the Jaipur Rent Control Order, 1947 (hereinafter to be referred to as the Order) by an application dated the 10th March, 1949. The Rent Controller gave his decision, holding that

the rent payable on the 1st September, 1939 was Rs. 65/- kaldar per month. Consequently the standard rent of the shop in question was determined to be Rs. 130/- per month plus Rs. 2/8 per month on account of improvements.

Ghinsi Lal filed an appeal against the order of the Rent Controller in the Court of the Collector, who was the appellate authority under the Jaipur Rent Control Order. The Collector held that as the shop was not given on rent on the first day of September, 1939, but as it was previously let out to Ghinsi Lal, second schedule of the Jaipur Rent Control Order did not apply to this case and the standard rent was therefore, determined under the provisions of S. 6 (2) of the Order. The standard rent fixed by the Collector was Rs. 65/- plus Rs.. 2/8 per month on account of improvements. The petitioner, Nanagram and Ballilal have now filed this application against the judgment of the Collector, Jaipur dated 28th of April, 1950 on the grounds that: (1) The collector erroneously exercised the jurisdiction in fixing the standard rent of the shop under S. 6 (2) of the Jaipur Rent Control Order by misinterpreting the clear language of S. 1 (b) (i) of the second schedule. (2) Even under S. 6 (2) of the Order the rent was fixed arbitrarily and in disregard of the considerations specified under S. 6 (2) of the Order.

(2) Section 1 of the second schedule of the Jaipur Rent Control Order is as follows:

"1. In this schedule, 'basic rent', in relation to any premises mean:

(a) Where the fair rent of the premises has been determined or re-determined under the provisions of the Jaipur House Rent Control Order, 1943, the rent as so determined or, as the case may be, re-determined, and

(b) in any other case:

(i) the rent at which the premises were let on the first day of September, 1939 or

(ii) if the premises were not let on that date, the rent at which they were first let after that date."

(3) Under the provisions of the second schedule, basic rent in relation to any premises has got to be determined in cases not falling in subclause (a) on the basis of the rent payable on the 1st day of September, 1939 in case the premises were already let on that day and in other cases on the basis of the rent at which they were first let after that date. The Collector has misunderstood the meaning of the language of Section 1 (b) (i). According to the Collector, the premises must have been given on rent on the 1st day of September, 1939 or thereafter in order to enable the authority to fix the standard rent under the second schedule. The language used in S. 1 (b) (i) of the second schedule is that 'the rent at which the premises were let on the 1st day of September, 1939.' 'Let' means on hire. The express meaning of Section 1 (b) (i) is therefore, that in case the premises were on hire on the 1st day of September, 1939 then the standard rent is to be fixed on the basis of the rent payable on the 1st day of September, 1939. The language of Section 1 (b) (i) does not admit of the meaning which the Collector has drawn from it.

In 'DHANRAJGIRJI v. W. G. WARD', 27 Bom L R 877; 'MT. JAWAHARBAI v. KUNDANDAS', A I R 1951 Ajmer 51 (1); 'POONAM CHAND v. TIKAM CHAND', AIR 1951 Ajmer 32 and 'MADODASS BHAGWANDAS v. S. SOBHAG MAL', AIR 1950 Ajmer 34(1), standard rent has been calculated on the basis of the rent payable on the appointed day and the language of the Bombay and Ajmer Rent Control Acts was similar to the language in this behalf of the Jaipur Rent Control Order. There is, therefore, an error in the judgment of the Collector which is patent on the face of the record. A perusal of the judgment of the Collector alone, would make it evident that he has misconceived the language used by the law and has drawn a meaning which was not contemplated by the language of the law. As has already been observed above, the plain meaning of S. 1 (b) (i) of the second schedule is that if the premises were on hire on the first day of September, 1939, the rent payable on that day should be regarded as the basic rent for fixing the standard rent. In the present case, the shop was on hire on the 1st day of September, 1939 as is admitted by both the parties. The Collector ought to have, therefore, fixed the standard rent of the premises under the second schedule on the basis of the basic rent which was payable on the 1st day of September 1939.

By misconstruing the meaning of Section 1 of the second schedule, the Collector has assumed jurisdiction in fixing the rent under S. 6(2) of the Order which was not proper. Under Section 6 (2) standard rent could be fixed only in case, it was not possible for the rent control authorities to fix any rent under the provisions of the second schedule but where rent could be fixed under the provisions of the second schedule, it was not open to the authorities to fix the standard rent under S. 6(2) of the Act. Thus it becomes evident that the Collector, in the present case, has exercised his jurisdiction wrongly by misconstruing the provisions of the language of Sec. 1 (b) (i) of the second schedule.

(4) The learned counsel for the opposite party has placed reliance on 'MAHSINALI MAHOMEDALI v. STATE OF BOMBAY', AIR 1951 Bom 303, in arguing that the decision of the Collector whether right or wrong should not be interfered with by this Court in this application by issue of a writ of certiorari. Chagla C. J. has observed in 'MOHASINALI MAHOMEDALI v. STATE OF BOMBAY', AIR 1951 Bom 303, as follows:

The jurisdiction that the High Court exercises when it issues the high prerogative writ of certiorari is a limited jurisdiction. Thus, when any Court has been empowered to determine certain question and jurisdiction has been conferred upon it to determine those questions then the determination by the Ct. of those questions, however, erroneous in fact or in law, cannot call into question the jurisdiction of the High Court under its high prerogative of issuing a writ of certiorari. To this principle there are two exceptions: the first is that the Superior Court will interfere when an error of law is patent on the face of record; and the second is that the determination is arrived at mala fide in which case it will not be a determination at all and fraud or mala fides will vitiate any decision however arrived at.

(5) The principle that the jurisdiction of the High Court in issuing a writ of certiorari is limited and when any Court has been empowered to determine certain questions and jurisdiction has been conferred upon it to determine those questions, then the determination by the Court of those questions however erroneous in fact or in law cannot be called into question

is subject to two important exceptions that have been given in the passage quoted above. The first is that the superior Court has to interfere where an error of law is patent on the face of the record and the second is that the determination is arrived at mala fide.

In the present case, we are concerned with the first exception. As has been already noted above that the Court of the Collector in deciding the appeal has committed a patent error in interpreting S. 1 (b) (i) of the second schedule of the Order and he has exercised his jurisdiction erroneously under S. 6(2) of the Order which it was not open for him so to do, if he had not misconstrued the plain meaning of the provisions of the second schedule of the Order. The authority which has been relied upon by the learned counsel for the opposite party itself goes against his case. It is not disputed by either of the parties that the decision of the Collector acting as an appellate authority in a case under the Jaipur Rent Control Order is in exercise of his judicial or quasi judicial functions and consequently his decision is amenable to the jurisdiction of this Court in issuing a writ of certiorari under Article 226 of the Constitution of India.

Under these circumstances, it is the duty of this Court to correct the error committed by an inferior Court and to direct it to exercise its jurisdiction according to law. In view of the decision being in favour of the petitioner on the first point, it is not necessary to go into the second question raised by him that the rent has been fixed arbitrarily. This application is, therefore allowed and the decision of the Collector is set aside and he is directed to fix the standard rent of the premises according to law applying the provisions of the second schedule of the Order.

(6) SHARMA J.: I agree.

D.H. Application allowed.

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(JAIPUR BENCH)

WANCHOO, C. J. AND RANAWAT, J.

Sewaram, Applicant v. Government of Rajasthan, Opposite Party.

Civil Writ Appln. No. 88 of 1951, D/- 6-12-51.

Houses and Rents — Rajasthan Premises (Control of Rent and Eviction) Act (XVII (17) of 1950), Ss. 22 and 27 and 30 — Proviso — Decision of appellate authority given in a pending case — Power of Government to revise decision.

The words "before such date" appearing in the proviso to S. 30 are very important and because of these words the application of the proviso is restricted to such acts or actions which were done or taken under the laws thereby repealed before the date the new Act was made applicable and the acts or actions which are done or taken after the new Act became applicable are placed beyond the scope of Section 30. The cases pending at the time of the coming into force of the new Act are therefore governed by the provisions of S. 27 of the Act and the proviso to S. 30 would not apply to the further proceedings taken by a Controller or other authority after the commencement of the Act and the decision of the appellate authority which was given after the coming into force of the new Act shall have to be deemed to be a decision under the old law by virtue of S. 27(2). The decision given after the application of the new Act to Jaipur and in a case which was pending at the time of the commencement of the new Act, cannot be regarded to be a decision under sub-section (3) of S. 22, as there is specific provision for such cases in S. 27. As the Government is authorised to revise only such decision as falls within the scope of S. 22 (3) of the new Act, the decision of the appellate authority in the present case not being a decision under S. 22 (2) of the Act, it was not competent for the Government to revise such a decision. (Paras 9, 11)

P. D. Mathur, for Applicant; R. K. Rastogi, Government Advocate and G. C. Kasliwal, for Opposite Party No. 5.

Case referred to:

('51) 55 Cal W N 611: (AIR 1951 Cal 554) (Prs 5, 6, 7)

RANAWAT J.: This is an application for a writ of certiorari or mandamus under Article 226 of the Constitution of India.

(2) Madanlal applied to the Rent Controller, Jaipur for grant of a certificate for ejectment in respect of a house against Sewaram who was his tenant, and was in occupation of the premises. The Rent Controller granted a certificate but on appeal the Collector, on the 19th of March, 1951, cancelled the certificate. A revision application was filed by Madanlal in accordance with the provisions of Section 22(4) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 and the Government set aside the order of the Collector and restored the order of the Rent Controller on the 22nd of August, 1951, and further directed that the landlord be put into possession of the premises which were in the occupation of the tenant. Subsequently the Government amended its order and deleted that portion of it which related to the placing of the landlord into possession of the premises.

It is urged on behalf of the petitioner that the Government had no jurisdiction to hear a revision application against an order of the appellate authority deciding an appeal in a case filed under the provisions of the Jaipur Rent Control Order, 1947. It is further contended that Mr. Bhajan Lal Chaturvedi, Home Secretary to the Government, who heard and decided the revision application of Madanlal was not authorised by the Government to hear such revision applications under the rules made under the Rajasthan Premises (Control of Rent and Eviction) Act of 1950.

(3) In reply it was stated on behalf of Madanlal that the Government of Rajasthan acted within the scope of its jurisdiction in deciding the revision application under the provisions of the Rajasthan Premises (Control of Rent and Eviction) Act of 1950. The Government Advocate stated at the time of the hearing of the case that Mr. Bhajanlal Chaturvedi, Home Secretary was duly appointed by the Government under the provisions of the rules made under the Rajasthan Premises (Control of Rent and Eviction) Act of 1950 to hear revision applications which were presented to the Government under S. 22 (4) of the said Act.

(4) On the above statement of the Government Advocate, the learned counsel of the petitioner did not press the second point raised by him regarding want of jurisdiction relating to the hearing of the revision petition by the Home Secretary. This point therefore need not be decided now. The only point which remains for determination in this case is whether the Government was competent to hear a revision application under Section 22 (4) of the Rajasthan Premises (Control of Rent and Eviction) Act of 1950 against an order of the appellate authority made under the Jaipur Rent Control Order.

(5) The learned counsel of the petitioner has cited the judgment of the case in P. C. GUHA v. B. A. BASIL', 55 Cal W N 611, in support of his contention that in a case decided under the provisions of the Jaipur Rent Control Order, no revision application lay to the Government under Section 22 (4) of the new Act after the old Act had been repealed.

(6) The facts of 'P. C. GUHA v. B. A. BASIL', 55 Cal W N 611, were as follows: B. A. Basil, the landlord filed an application for fixation of standard rent under the Rent Control Act of 1948 in respect of premises occupied by P. C. Guha and others. The Rent Controller fixed standard rent of the premises & against his decision the tenants preferred appeals to the Chief Judge of the Court of Small Causes, Calcutta who transferred the cases to the file of the Small Cause Court Judge. The Small Cause Court Judge, to whom the appeals were transferred, substantially upheld the order of the Rent Controller but before the appeals were decided the Bengal Premises Rent Control Act of 1950 came into force and S. 17 (3) of the Rent Act of 1950 provided:

"If at the date when this Act comes into force proceeding for fixing standard rent is pending before the Controller or in appeal, the Controller or the appellate officer shall fix the standard rent in accordance with the provisions laid down by this Act."

In view of the provision of Section 17 (3), the tenants contended in a revision application filed by them in the High Court of Calcutta that the High Court should revise the order of the appellate tribunal under S. 32 (4) of the Rent Act of 1950, which gave the High Court jurisdiction to revise the orders of the appellate authority under the Rent Act of 1950. It was held by the High Court of Calcutta that the appeals having been filed in the appellate Court contemplated by the Rent Control Act of 1948 the appeals would have to be decided by the appellate tribunal created by the 1948 Act though in deciding the appeals that tribunal by reason of the provisions of S. 17 (3) of the Rent Control Act of 1950 would have to give effect not to the provisions of 1948 Act relating to the fixation of standard rent but to the provisions of 1950 Act relating to the same.

It was further held that apart from S. 17(3) of the Rent Control Act of 1950 there was nothing which would give the whole of that Act retrospective effect and as there was no right of revision from an order of the appellate tribunal under the Rent Control Act of 1948, the order of the appellate tribunal against which revision was filed could not be challenged by way of revision because they were the decisions of a tribunal under the 1948 Rent Act and not under the Rent Act of 1950.

(7) The learned Government Advocate has tried to distinguish the decision in 'P. C. GUHA v. B. A. BASIL', 55 Cal W N 611, by saying that the decision in that case proceeded on the basis of S. 8 (3) of the West Bengal General Clauses Act, which is exactly in the same terms as Section 6 (e) of the Jaipur General Clauses Act of 1944 and Section 6 (c) of the General Clauses Act of 1897 but these provisions of law are not applicable to the present case on account of the proviso to S. 30 of the Rajasthan Premises (Control of Rent and Eviction) Act of 1950 which lays down that

"Anything done or action taken before such date under the laws hereby repealed shall, until varied or superseded under this Act, continue and be deemed to have been done or taken as the case may be, under or in pursuance of this Act as if it were then in force."

(8) Proviso to S. 30 of the Act, he contends, gives retrospective effect to the Rajasthan Premises (Control of Rent and Eviction) Act of 1950, and consequently the decision of the appellate tribunal in a case which was pending in his Court at the time the new Act came into force should be deemed to be a decision under the new Act so as to confer jurisdiction on the Government under Section 22 (4) of the new Act to revise the judgment of the appellate authority. It may be pointed out that the argument of the learned Government Advocate done or action was taken under the Jaipur Rent Control Order of 1947 before the date on which the new Act came into force. In the present case, Sections 1 to 4 and Secs. 27 to 31 of the new Act came into force on the 28th of November 1950 and the rest of the Act was applied to Jaipur from the 23rd day of December 1950. The decision of the appellate authority in the present case is dated the 19th March 1951, which means that the action of the appellate authority in deciding the appeal was taken subsequent to the coming into force of the new Act and the proviso to Section 30 of the new Act therefore cannot govern the present case.

(9) The words "before such date" appearing in the proviso (quoted above) are very important and because of these words the application of the proviso to Section 30 is restricted to such acts or actions which were done or taken under the laws thereby repealed before the date the new Act was made applicable and the acts or actions which are done or taken after the new Act became applicable are placed beyond the scope of S. 30 of the Act.

(10) As regards pending cases, S. 27 of the Rajasthan Premises (Control of Rent and Eviction) Act of 1950 lays down as follows:

"27 Provision for pending matter:

(1) In all suits for eviction of tenants from any premises in areas to which this Act has been extended under S. 2, pending on the date specified in the notification under that section, no decree for eviction shall be passed except on one or more of the grounds mentioned in Section 13 and under the circumstances specified in this Act.

(2) Except as is otherwise provided by or under this Act all cases which are, at the commencement thereof in any area to which it has been extended under S. 2, pending before a Controller or any other authority appointed by or under any law in force therein immediately before such commencement, shall, notwithstanding anything to the contrary in this Act, be determined and disposed of by such Con-

troller or authority in accordance with such law."

(11) Sub-section (1) of Section 27 makes S. 13 and other provisions of the Act applicable to the pending cases and sub-section (2) specifically provides that all cases which were pending before a Controller or any other authority appointed by or under any law in force therein immediately before the commencement of the new Act shall notwithstanding anything to the contrary contained in the new Act be determined and disposed of by such Controller or authority in accordance with such law. According to Section 27(2) the appellate authority in the present case had to determine and dispose of the appeal, which was pending at the time of the commencement of the new Act in accordance with the provisions of the law which was applicable to the case before the commencement of the new Act. The cases pending at the time of the coming into force of the new Act are therefore governed by the provisions of S. 27 of the Act and the proviso to Section 30 would not apply to the further proceedings taken by a controller or other authority after the commencement of the Act and the decision of the appellate authority in the present case which was given after the coming into force of the new Act shall have to be deemed to be a decision under the old law by virtue of Section 27(2) and that decision cannot be regarded to be given under S. 22(3) of the new Act. Under sub-section (4) of Section 22 the Government is authorised at its own motion or on the application of any person interested to call for the record of any appeal decided by any appellate authority under sub-section (3) and to pass such orders thereon as it thinks fit. The decision given after the execution (sic) of the new Act to Jaipur and in a case which was pending at the time of the commencement of the new Act, cannot be regarded to be a decision under sub-section (3) of Sectino 22, as there is specific provision for such cases in Section 27 and as the Government is authorised to revise only such decision as falls within the scope of S. 22(3) of the new Act, the decision of the appellate authority in the present case not being a decision under Section 22(2) of the Act, it was not competent for the Government to revise such a decision. Moreover, Section 27 of the Act read with Section 6 (e) of the General Clauses Act in the present case would bring the decision of the appellate authority under the provision of the Jaipur Rent Control Order 1947, and as the decisions of the appellate authority under the Jaipur Rent Control Order were not subject to the revisional jurisdiction of the Government the Government cannot be regarded to possess revisional powers so as to interfere with the decisions of the appellate authority in the present case.

(12) The conclusion is that the decision of the appellate authority dated the 19th March 1951 was not subject to revision by applications under Sec. 22(4) of the new Act and the decision given by the Government is therefore 'ultra vires'. It is not contended that the action of the Government in dealing with Revision applications under Section 22 (4) was not a judicial or a quasi-judicial act and that it was not subject to the jurisdiction of this Court under Art. 226 of the Constitution of India.

(13) The application of Sewaram is, therefore accepted & the revisional decision of the Government is set aside and the Government is directed not to interfere with the decision of the appellate authority given on 19th March 1951. after the date of the passing of the new Act in an appeal, which was pending at that time.

D.H. Application allowed.

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(JAIPUR BENCH)

RANAWAT, J.

Hanuman Bux, Appellant v. Dev Dutt, Respondent.

Suit No. 44 of 1950, D/- 27-4-51.

Houses and Rents — (Rajasthan) Rent Control Order, Ss. 3, 5, 8 — Termination of tenancy — Liability for damages at rate mentioned in notice — Transfer of Property Act (1882), Section 106.

Sections 3 and 5 both can be made applicable to the cases where the relationship of the landlord and tenant exists between the parties. These sections do not apply to the cases where a lease has been determined & the relationship of landlord and tenant does not continue between the parties. Once the tenancy has been determined by service of a notice under Section 106 of the Transfer of Property Act, the tenancy cannot be considered to be still existing between the parties, simply because the landlord is debarred from taking the possession of the property from the tenant, by Section 8. The position of the tenant after the determination of the tenancy in such a case would be that of a licensee or a trespasser. The licensee may be liable on such a case to pay damages to the landlord at a rate mentioned in the notice served upon the licensee and impliedly accepted by him. (Para 2)

Anno : T. P. Act, S. 106 N. 32.

P. N. Dutt, for Appellant; R. C. Sharma, for Respondent.

JUDGMENT : Hanuman Bux filed a suit against Dev Dutt in the Court of Munsif, Jaipur west on the 21st July, 1948 for Rs. 30/- as arrears of rent and Rs. 100/- as damages for the use and occupation of the premises from the 1st of June 1948 to 20th of July 1948 at the rate of Rs. 2/- per day. The defendant admitted the liability of Rs. 30/- as rent but contested that he was not liable to pay any damages at the rate of Rs. 2/- per day. For the period for which the plaintiff claimed damages at a higher rate, the defendant only admitted the liability to pay at the rate of Rs. 30/- per month. The trial Court held that the defendant was liable to pay damages at the rate at which the plaintiff made a claim against him by virtue of the notice that was served by the plaintiff upon the defendant. In appeal, the District Judge reversed the finding of the trial Court and held that on account of the provisions of Sections 3 and 5 of the Rent Control Order, 1947, the plaintiff was debarred from claiming anything in excess of the amount of rent. The lower Appellate Court, therefore reduced the decree to Rs. 80/- from Rs. 130/-. The plaintiff has filed this second appeal against the judgment and decree of the Court of District Judge. It has been urged on behalf of the appellant that the lower Appellate Court was wrong in applying the provisions of Sections 3

and 5 of the Rent Control Order in this case as those provisions are applicable to cases where the relationship of landlord and a tenant exists between the parties. Sections 3 and 5 of the Rent Control Order are as follows:

"3. (1) Except where rent is liable to periodical increment by virtue of an agreement entered into before the 1st day of September 1939, or where rent is payable under a lease entered into before the 1st day of September, 1939, which has not expired before the first day of the period for which the rent is claimed, no tenant shall notwithstanding anything contained in any contract, be liable to pay to his landlord for occupation of any premises any sum in excess of the standard rent of those premises, unless such sum may lawfully be added to the standard rent in accordance with the provisions of this order.

(2) Any agreement for the payment of rent in excess of the standard rent shall be null and void and shall be construed as if it was an agreement for payment of the standard rent only.

5. (1) It shall not be lawful for the landlord or any person acting or purporting to act on behalf of the landlord or the tenant or any person acting or purporting to act on behalf of the tenant, to claim or receive, in consideration of the grant, continuance or renewal of a tenancy or sub-tenancy of any premises payment of any fine, premium, advance or other like sum in addition to rent, or save as otherwise provided in Clause 4 of Clause 6 (sic) any rent in excess of the standard rent of the premises.

(2) It shall not be lawful for the tenant or any person acting or purporting to act on behalf of the tenant, or a subtenant to claim or receive any payment in consideration of the relinquishment of his tenancy of any premises.

(3) Nothing in this section shall apply to any payment made in pursuance of an agreement entered into before the 1st day of September 1939."

(2) It will be noticed that Ss. 3 and 5 both can be made applicable to the cases where the relationship of the landlord and tenant exists between the parties. These sections do not apply to the cases where a lease has been determined and the relationship of landlord and tenant does not continue between the parties. The learned advocate of the defendant has argued that by virtue of Section 8 of the Rent Control Order, the tenancy should be deemed to have been continued after it had been determined by the service of a notice under S. 106 of the Transfer of Property Act. It may be pointed out that Section 8 of the Rent Control Order simply provides that even after the determination of the tenancy no landlord shall be entitled to eject a tenant without first obtaining a certificate of the Rent Controller on certain specified grounds mentioned in the order. In accordance with the provisions of Section 8, a landlord cannot eject a tenant even after the determination of the tenancy, but this does not mean that the relationship of landlord and tenant continues between the parties even after the determination of the tenancy. Once the tenancy has been determined by service of a notice under Section 106 of the Transfer of Property Act, the tenancy cannot be considered to be still existing between the parties, simply because the landlord is debarred from taking the possession of the property from the tenant, by S. 8 of the Rent Control Order. The position of the tenant after the determination of the tenancy in such a case would be that of a licensee or a trespasser. The licensee may be liable in such a case to pay damages to the landlord at a rate mentioned in the notice served upon the licensee and impliedly accepted by him. The defendant in the present case is therefore, liable to pay damages to the plaintiff at the rate specified in the notice served by the plaintiff upon the defendant. This appeal succeeds and decree of the trial Court is restored and the decree of the first appellate Court is amended so as to increase the amount of the damages to Rs. 100/-. The plaintiff shall be entitled to costs of this appeal and of both the Courts.

D.H. Appeal allowed.

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(JAIPUR BENCH)

RANAWAT AND SHARMA J.

Gokulchand, Petitioner v. Government of Rajasthan.

Writ Applns. Nos. 28 and 33 of 1950, D/- 20-8-1951.

Constitution of India, Art. 226 — Other remedy open.

The language of Art. 226 of the Constitution of India is certainly very wide but it cannot be so construed as to provide an alternative remedy to all sorts of civil or criminal actions. The intention of the makers of the Constitution should be understood to be to provide a remedy where no specific and adequate legal remedy would otherwise be available. The remedy provided by Article 226 is an extraordinary one and some inconvenience or delay in getting redress by filing a regular suit in the law Courts alone should not be considered sufficient to entitle a person to have recourse to the extraordinary remedy under Article 226 unless it can be shown that delay and inconvenience would be such as to make the relief nugatory. Case law discussed. (Paras 9, 12)

(Remedy by suit under S. 42 of the Specific Relief Act held available).

S. R. Pareek, for Petitioner; Ram Avtar Gupta, Government Advocate, for the Opposite Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('50) AIR 1950 S C 222: (1950 S C R 621) (Para 9)

('50) AIR 1950 S C 163: (1950 S C R 566) (Pr 10)

('51) AIR 1951 Assam 96: (ILR (1951) 3 Assam 147) (Pr 11)

('50) AIR 1950 Bom 363: (52 Cri L J 120 F B) (Pr 11)

('51) AIR 1951 Cal 420: (55 Cal W N 326) (Pr 10)

('51) AIR 1951 Nag 33: (ILR (1951) Nag 791) (Pr 11)
('50) AIR 1950 Pat 322: (52 Cri L J 610 F B) (Pr 11)
('51) AIR 1951 Pat 231 (Pr 11)
('51) AIR 1951 Rajas 94 (2): (1951-20 ITR 214) (Pr 11)
('51) AIR 1951 Vin P 41 (Prs 11, 12)
('51) AIR 1951 Vin P 3 (Pr 12)

RANAWAT J.: These are two applications under Art. 226 of the Constitution of India. As the same points are at issue in both the applications they are disposed of by one judgment.

(2) Miscellaneous application No. 33 of 1950 has been filed on behalf of Shrimati Bitto Devi and Miscellaneous application No. 28 of 1950 has been filed on behalf of Seth Gokulchand. The opposite parties in both the applications are (1) Government of Rajasthan, (2) Secretary, Local Self Government Department, Rajasthan, (3) Municipality, Dholpur.

(3) The facts of Shrimati Bitto Devi's case are that she purchased three plots of land adjacent to her house from the Dholpur Municipality on the 17th of November 1948 on payment of Rs. 413/10/-. Permission to construct houses on the three plots was obtained from the Dholpur Municipality on the 6th June 1949 which was again renewed on the 16th of November 1949. On the 6th of January 1950 a notice was served upon the petitioner by the Secretary, Municipality cancelling the sales. Objections were filed by the petitioner on the 7th of January 1950 before the Municipal Committee, Dholpur, which were rejected on the 31st of January 1950 on the ground that the Rajasthan Government had decided to cancel the sale made by the Municipality in favour of the petitioner. A representation was then filed by the petitioner but it was also rejected by the Rajasthan Government on the 18th of March, 1950. But the sale of one of the plots was accepted by the Government on the ground that constructions had already been made on it. As regards the other two plots the Government expressed its intention to cancel the sales. The petitioner has then filed an application under Art. 226 of the Constitution of India as she apprehends infringement of her fundamental rights. The petitioner's possession of the two plots of land which were purchased by her is being threatened by the opposite parties.

(4) The case of Seth Gokulchand is that he purchased a plot of land from the Dholpur Municipality on the 11th of November, 1948 on payment of Rs. 869/8/-. A patta was granted to him and the possession of the plot was also delivered. He obtained permission to construct houses on the land on the 27th of December, 1948 but the secretary of the Municipality, Dholpur, informed the petitioner by his letter No. 54 of the 13th June, 1950 that the Government of Rajasthan had cancelled the sale of the plot which was made in favour of the petitioner in November, 1948. The petitioner then served a notice on the Government as well as the Municipality that the Government or the Municipality had no jurisdiction to cancel the sale made in favour of the petitioner, and that the action of the Municipality in threatening to dispossess the petitioner was illegal. No reply was sent to this notice of the petitioner by the opposite parties. He has therefore filed an application under Art. 226 of the Constitution of India, as there is a danger of the infringement of his fundamental rights to hold property.

(5) In both these applications the prayer is that the orders of the Government of Rajasthan and the Secretary of the Local Self Government Department and the Municipality, Dholpur, regarding cancellation of the sales in favour of the petitioners may be declared null and void and be quashed and the opposite parties be prohibited from interfering with the rights of the petitioners over the plots of land sold to them which are in their possession. A further prayer has been added that the Municipality may be restrained from selling the plots of land which now belong to the petitioners.

(6) Replies were filed to both the applications by the Secretary to the Government of Rajasthan in the Local Self Government Department. The sales alleged by the petitioners in both the cases have been disputed and it is pleaded that in both the cases the Sub-Divisional Officer who made the sales had no authority whatsoever to conduct the sales on behalf of the Municipality, Dholpur. The Sub-Divisional Officer who purported to act as the Chairman of the Municipality was in fact not the Chairman of the Municipality under the provisions of the Municipal Act, Dholpur, 1936. The rights of the petitioners over the disputed plots of land have not been recognised by the Municipality. It is further said that the Municipality contemplates to sell these plots of land by auction as the previous sales made by the Sub-Divisional Officers were invalid.

(7) In both the cases validity of the sales made by the Sub-Divisional Officer, Dholpur, purporting to act as the Chairman of the Dholpur Municipality is disputed by the opposite parties. The case on behalf of the petitioners is that even if their titles be defective in some respect or the other the Municipality or the Government have not the jurisdiction to take the law into their hands and to treat the sales as nullity and to dispossess the petitioners, to whom the possession of the plots has been delivered by the Municipality, Dholpur. The action of the opposite parties is alleged to be illegal and a writ or direction under Art. 226 of the Constitution of India is sought.

(8) The learned Government-Advocate has argued that since other specific and adequate legal remedy is available to the petitioners by way of regular civil suits they are not entitled to any relief under Art. 226 of the Constitution.

(9) The language of Art. 226 of the Constitution of India is certainly very wide but it cannot be so construed as to provide an alternative remedy to all sorts of civil or criminal actions. The intention of the makers of the Constitution should be understood to be to provide a remedy where no specific and adequate legal remedy would otherwise be available. In 'PROVINCE OF BOMBAY v. KHUSHALDAS S. ADVANI', AIR 1950 SC 222 at p. 227, it has been observed by his Lordship Kania C. J. as follows:

> "The decision of the Provincial Government about public purpose is therefore an administrative act.
>
> If the Government erroneously decides that fact it is open to question in a Court of law in a regular suit, just as its action, on its decision on the facts mentioned in the proviso to S. 3 and in S. 4 is open to question in a similar way. The argument that a suit may be infructuous because a notice under S. 80, Civil P. C. is essential and that remedy is therefore inadequate is unhelpful. Incon-

venience or want of adequate remedy does not create a right to a writ of certiorari. It is clear that such writ can be asked for if two conditions are fulfilled. Firstly, the decision of the authority must be judicial, and, secondly, the challenge must be in respect of the excess or want of jurisdiction of the deciding authority."

(10) Even though this decision was in a case which arose before the Constitution of India came into force the observations made by His Lordship Kania C. J. hold good even under Art. 226 of the Constitution where a question of issuing a writ of certiorari is raised. In 'RASHID AHMED v. MUNICIPAL BOARD KAIRANA', AIR 1950 SC 163, which is a case directly under Art. 226 of the Constitution of India his Lordship S. R. Das, J. has observed that

"there can be no question that the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs, but the powers given to this Court under Art. 32 are much wider and are not confined to issuing prerogative writs only."

The position of law is more or less clear that the remedy provided by Art. 226 of the Constitution is not intended to be an alternative remedy to the normal process of a decision in an action brought in the Courts of law. The powers under this Article should be used only in those clear cases where no other specific and adequate remedy is available. In 'SHYAMAPADA v. ABANI MOHAN', AIR 1951 Cal 420, it has been observed that:

"Recourse ought not to be allowed to an extraordinary remedy when it is not really needed, and a mandamus will never be granted to enforce the general law of the land which may be enforced by action. In the case of informations or writs in the nature of Quo Warranto such informations or writs are not issued as a matter of course where there is an alternative remedy which is equally appropriate and effective. Under Art. 226, the power of the Court is not confined to the power to issue writs in the nature of Mandamus and other writs mentioned therein. Under the Article the Court has wider powers. But the power of the Court is discretionary and the proceedings under Art. 226 being of a summary and coercive nature the powers under the Article should be sparingly used and only in those clear cases where the rights of person have been seriously infringed and he has no other adequate and specific remedy available to him."

(11) Similarly in 'UNION OF WORKMEN OF R. S. N. AND I. G. N. RLY. CO., LTD. v. R. S. N. CO. LTD.', AIR 1951 Assam 96, it has been held that a remedy under Art. 226 of the Constitution is not intended to provide an additional or alternative remedy to a regular civil suit. 'BUKHTIARPUR BIHAR LIGHT RLY. CO., LTD. v. STATE OF BIHAR', AIR 1951 Pat 231; 'MANOHAR RAMKRISHNA v. G. G. DESAI', AIR 1951 Nag 33 and 'BHAGWAN PRASAD v. DY. COMMISSIONER', AIR 1951 Vin P 41, also support this view. The learned counsel of the petitioners has referred to the cases in 'JESHINGBHAI ISHWARLAL v. EMPEROR', AIR 1950 Bom 363; 'BRAJNANDAN SHARMA v. THE STATE OF BIHAR', AIR 1950 Pat 322 and 'MADANGOPAL v. UNION OF INDIA', AIR 1951 Rajas 94 (2). But in 'AIR 1950 Bom 363' and 'AIR 1950 Pat 322' it has clearly been held that in those cases there was no adequate legal remedy available to the petitioner; hence both these authorities are distinguishable and they do not support the claim of the petitioners. As regards 'AIR 1951 Rajas 94 (2)', it may be pointed out that it was a case of a writ of prohibition and these cases are not those in which writs of prohibition can be claimed.

(12) Lastly, the learned counsel of the petitioners has invited the attention of this Court to 'RAMA GOVIND SINGH v. CHIEF COMMISSIONER, V. P.', AIR 1951 Vin P 3, in which it has been held that though the objector has another remedy open to him by way of declaratory suit in the proper civil Court it would not be equally speedy, convenient & effectual & therefore; a writ of certiorari should be issued to meet the ends of justice and convenience. The remedy by an action by way of regular civil suit has been held to be lengthy, costly & very slow. It may be pointed out that the remedy provided by Art. 226 is an extraordinary one and some inconvenience or delay in getting redress by filing a regular suit in the law Courts alone should not be considered sufficient to entitle a person to have recourse to the extraordinary remedy under Art. 226 of the Constitution unless it can be shown that delay and inconvenience would be such as to make the relief nugatory. If a lenient view is taken in this behalf all the persons instead of going to the ordinary Courts of law would come to the High Court under Art. 226 of the Constitution where ordinarily they are entitled to maintain a civil or criminal action according to law. The opinion expressed in 'AIR 1951 Vin P 3, has been subsequently changed by the decision of the same Court in 'BHAGWAN PRASAD v. DY. COMMISSIONER', AIR 1951 Vin P 41, wherein it has been held that

"Article 226 is so widely worded that theoretically it can be invoked in any dispute. That is, however, not the intention of the framers of the Constitution. The remedy provided by this Article is at all events an extraordinary one. There should be either no other alternative remedy or the alternative remedy should be so inexpedient or roundabout that it would be unconscionable to drive the party to have recourse to it. But when it is a common grievance of every day happening, usually redressed by a routine machinery, it is altogether unnecessary to invoke Art. 226."

(13) The petitioners can very well maintain an action by way of a regular civil suit and get the desired relief, under S. 42 of the Specific Relief Act. A specific and adequate remedy is therefore available to the petitioners and it appears unnecessary for them to invoke the extraordinary jurisdiction of this Court under Art. 226 of the Constitution of India. Mere slight inconvenience or a little delay should not in these cases be considered sufficient to justify the issue of a writ or direction by this Court in exercise of its extraordinary powers, specially when the rights of the petitioners in these cases are disputed and not very clear.

(14) Both the applications, therefore, fail and are rejected with costs, which are taxed at Rs. 50/- in each case.

D.H. Applications dismissed.

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(JAIPUR BENCH)

RANAWAT AND SHARMA JJ.

Mt. Manphul Bai, Appellant v. Ladhuram, Respondent.

Second Appeal No. 459 of 1949, D/- 2-1-1952.

(a) Civil P. C. (1908), S. 11 — First suit dismissed on preliminary point of non-joinder of party does not operate as res judicata — Second suit beyond competence of first Court — No res judicata.

Where the first suit for rent and ejectment was dismissed on the preliminary ground that one G being mentioned in the rent note being a necessary party was not joined in spite of the order by the Court, the subsequent suit for the same relief based on the same rent note, after joining G as pro forma defendant is not barred by res judicata, the decision in the first suit not being on merits. (Para 29)

Moreover if in the above case the first suit was instituted in the Munsif's Court, and the second suit which included the cause of action which could not be included in former suit and could not be splitted, being of a higher valuation was instituted in the Court of Civil Judge, the decision in the former suit regarding the interpretation of the rent note cannot operate as res judicata so as to bar the later suit, the former Court being not competent to take cognisance of the later suit. Case law reviewed. (Paras 20, 29)

Anno: Civil P. C., S. 11 N. 79, 80, 105.

(b) Contract Act (1872), S. 45 — Rent note describing M as owner of house — G also included and described as elderly lady of house — Tenant agreeing to pay rent to M and obtain receipt from her — M and G are not joint lessors — Payment of rent to G and acceptance of the same by her, do not discharge tenant. (Paras 30, 34)

Anno: Contract Act, S. 45 N. 2.

(c) Evidence Act (1872), S. 116 — Tenant cannot deny landlord's title, unless there is fraud, coercion or misrepresentation — Tenant let in by A — A, upon his death succeeded by widow B — Tenant executing rent note in favour of B and paying rent to her — He cannot deny her title. (Paras 30, 33)

Anno: Evidence Act, S. 116 N. 9.

B. K. Bhargava and M. B. L. Bhargava, for Appellant; D. M. Bhandari, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('83) 9 Cal 439: (9 Ind App 197 PC) (Prs 8, 17)
('85) 11 Cal 301: (12 Ind App 23 PC) (Prs 7, 9, 10, 20)
('02) 29 Cal 707: (29 Ind App 196 PC) (Prs 11, 14, 21, 22, 23, 27, 28, 29)
('15) AIR 1915 PC 96: (37 All 557 PC) (Pr 31)
('37) AIR 1937 PC 251: (ILR (1938) 1 Cal 1) (Pr 32)
(1900) 24 Bom 456: (2 Bom L R 415) (Pr 23)
('21) AIR 1921 Bom 434: (45 Bom 805) (Pr 23)
('31) AIR 1931 Bom 178: (130 Ind Cas 598) (Pr 32)
('35) AIR 1935 Bom 131: (155 Ind Cas 7) (Pr 29)
('45) AIR 1945 Bom 45: (218 Ind Cas 154) (Prs 24, 25)
('67) Mt. Edun v. Mt. Bechun, (8 WR 175 FB) (Pr 7)
('01) 28 Cal 78: (5 Cal W N 483) (Pr 13)
('08) 35 Cal 353: (7 Cal L J 470) (Prs 12, 20, 21)
('26) AIR 1926 Cal 1053: (97 Ind Cas 209) (Pr 15)
('32) AIR 1932 Cal 162: (136 Ind Cas 604) (Pr 15)
('35) AIR 1935 Cal 792: (159 Ind Cas 1008) (Prs 16, 20, 25)
('85) 8 Mad 83 (Prs 21, 22)
('13) 21 Ind Cas 15: (25 Mad L J 379) (Pr 21)
('15) 27 Ind Cas 989: (AIR 1915 Mad 1215) (Pr 21)
('27) AIR 1927 Mad 273: (100 Ind Cas 40) (Pr 22)
('31) AIR 1931 Mad 147: (129 Ind Cas 449) (Pr 32)
('35) AIR 1935 Oudh 385: (154 Ind Cas 1029) (Pr 30)
('37) AIR 1937 Oudh 505: (171 Ind Cas 84) (Pr 30)
('43) AIR 1943 Oudh 338: (18 Luck 683 FB) (Pr 26)
('38) AIR 1938 Pesh 49: (177 Ind Cas 555) (Pr 31)
(1776) 2 Smith's L. C., 10th Edn., 713 (Pr 11)

RANAWAT J.: This is the plaintiff's second appeal against the judgment of the District Judge, Sawai Jaipur Gangapur, dated the 7th September 1949, by which the decree of the first Court was set aside and the suit of the plaintiff was dismissed with costs.

(2) Manphul Bai, widow of Lalchand, filed a suit against Ladhuram and Gulab Bai in the Court of the Civil Judge, Jaipur City, on the 15th of November 1943 for ejectment and for rent in respect of a shop for three years amounting to Rs. 1800/-. The rent was claimed from 28th October 1940 to 27th October 1943 at the rate of Rs. 600/- per annum on the basis of a rent note executed by Ladhuram on the 27th of August 1938, which is Ex. 21 on the record. The shop in respect of which rent and ejectment are claimed by the plaintiff is situated in Johri Bazar, Jaipur City, and is admittedly said to have been the property of one Chhogalal, who died in the month of Chait in Sambat year 1957 leaving behind him his widow Mohar Bai and an adopted son Phulchand. Phulchand died in the month of Asarh in Sambat year 1967 leaving behind him his adoptive mother Mohar Bai and his widow Gulab Bai. After the death of Phulchand, Gulab Bai is said to have adopted one Lalchand in Sambat year 1968. Lalchand also died on the 1st day of the dark half of the month of Chait in St. year 1990 corresponding to the 1st day of March 1934 leaving behind him his adoptive mother Gulab Bai and grand-mother Mohar Bai and his widow Manphul Bai. Mohar Bai died on the 21st of November 1937 and after the death of Mohar Bai the relations between the two widows Gulab Bai and Manphul Bai became strained. Originally, Manphulbai filed a suit for rent and ejectment in respect of the very same shop against Ladhuram and the suit was finally dismissed by the Jaipur High Court on the 28th of March 1941 on the ground that Manphulbai's name was mentioned in the rent note which was the basis

of the suit as a co-promisee and Manphul Bai not having been joined as one of the defendants in spite of the order of the Court in that behalf the suit of the plaintiff was not maintainable. The plaintiff Manphul Bai after the decision of that case filed this suit against Ladhuram impleading Gulab Bai as a pro forma defendant. No relief was claimed against Gulab Bai but a decree was claimed for rent and ejectment against Ladhuram only. The basis of this suit is a rent note executed by Ladhuram, which is marked Ex. 21 and which is dated the 27th August 1938. A copy of this document appears at p. 37 of the paper book. This rent note has been addressed both to Manphul Bai and Gulabbai but Manphul Bai has been described as the owner of the property and Gulab Bai as an elderly lady in the family. A notice for ejectment was given by the plaintiff to Ladhuram and on his failing to vacate the shop this suit was filed.

Ladhuram contested the suit on the ground that the rent note Ex. 21 even though executed by him was so executed on account of fraud. He pleaded that Gulab Bai was the owner of the shop and he had paid the rents in respect of the shop to Gulab Bai for the period for which the plaintiff had filed the suit. It was also stated on his behalf that the plaintiff alone could not serve a notice of ejectment without joining Gulab Bai with her. Gulab Bai also took the same defence as was taken by Ladhuram and she admitted that Ladhuram had been paying rent of this shop to her and that there was nothing due against Ladhuram on account of rent of this shop. She also denied the adoption of Lalchand and it was pleaded on her behalf that the plaintiff Manphul Bai had no locus standi to sue in respect of the disputed shop which was claimed by Gulab Bai to be her property which, she alleged, she inherited from her husband, Phulchand.

(3) The trial Court held that Lalchand's adoption was proved and the plaintiff, the widow of Lalchand, was the owner of the property. Gulab Bai who was held to be the adoptive mother of Lalchand, had no interest in the property except her claim for maintenance. Consequently, the suit of the plaintiff was decreed in full against both the defendants so far as the amount of rent was concerned and against Ladhuram only for ejectment. On appeal, the learned District Judge set aside the decree of the first Court on the ground that the suit of the plaintiff was barred by S. 11 of the Civil Procedure Code. He also held that the plaintiff failed to prove the adoption of Lalchand to Phulchand.

(4) In this appeal it has been contended on behalf of the appellant that the lower appellate Court was wrong in holding that the suit was barred by the provisions of Section 11 of the Civil Procedure Code and the following reasons have been stated in this behalf:

1. That the present suit is of a valuation which it was not competent for the Court of the Munsif which decided the former suit to entertain. The decision of the former suit being of a Court which was not competent to entertain the present suit cannot bar the decision of the present suit.

2. that the former suit was decided merely on the ground of non-joinder of the parties & the suit not having been decided on merits its decision cannot bar the decision of this suit.

(5) In reply to the above argument of the appellant it has been pleaded by the opposite side that even though the present suit being of a higher valuation could not have been entertained by the Court of Munsif, which decided the previous suit, yet as the cause of action of the present suit is divisible, decision of the issue in the previous suit that Gulab Bai was a compromisee for the purposes of the rent note Ex. 21 should be considered final, barring the decision of the same issue in this suit by virtue of Section 11, C. P. C. Further it has been added that the former suit was dismissed on account of non-joinder of the parties but the point had been decided in that suit as between the plaintiff and Ladhuram regarding the effect of the rent note which was the basis of the former suit and is also mainly in dispute in the present suit.

(6) Section 11 of the Civil Procedure Code runs as follows:

> "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

(7) In the case of 'RUN BAHADUR SINGH v. LUCHO KOER', 11 Cal 301, which was a case under the Civil Procedure Code of 1877, their Lordships of the Privy Council approved the observations of Sir Barnes Peacock in the case of 'MT. EDUN v. MT. BECHUN', 8 W R 175 (FB), which was a case relating to Sec. 2, C. P. C. of 1859, which were as follows:

> "The judgment of a Court of concurrent jurisdiction directly upon the point is as a plea, a bar, or has evidence conclusive between the same parties upon the same matter directly in question in another Court."

and "Concurrent jurisdiction" was further explained by Sir Barnes Peacock as follows:

> "In order to make the decision of one Court final and conclusive in another Court, it must be the decision of a Court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive."

(8) In the case of 'MISSER RAGHUBARDIAL v. SHIVBUX SINGH', 9 Cal 439, the Privy Council observed that:

> "In their Lordships' opinion it would not be proper that the decision of a Munsiff upon (for instance) the validity of a will or of an adoption, in a suit for a small portion of the property affected by it, should be conclusive in a suit before a District Judge or in the High Court, for property of a large amount, the title to which might depend upon the will or adoption.....by taking concurrent jurisdiction to mean concurrent as regards pecuniary limit as well as the subject-matter this evil or inconvenience is avoided."

(9) Their Lordships further observed in the case of 'RANG BAHADUR v. LUCHO KOER', 11 Cal 301 (PC), at the position of law under Section 2 of the Civil Procedure Code of 1859 as interpreted by Sir Barnes Peacock was the same as was defined by Section 13 of Act X of 1877. Their Lordships deserved in this connection as follows:

"But their Lordships state that if the case had arisen under the law as it existed before the statute, consisting of the previous somewhat imperfect statute supplemented by the general law, their decision would have been the same, and they do not construe the Act of 1877 as having altered the law."

(10) Section 11 of Act V of 1908 is almost in the same terms as S. 13 of Act X of 1877. The law in this behalf has not been changed by the new Civil Procedure Code and the observations of their Lordships of the Privy Council in 'RANG BAHADUR v. LUCHO KOER', 11 Cal 301 (PC), still are good law even under the provisions of the Civil Procedure Code of 1908. It may further be mentioned that in '11 Cal 301 (PC)', their Lordships further observed as follows:

"If this construction of the law were not adopted, the lowest Court in India might determine finally, and without appeal to the High Court, the title to the greatest estate in the Indian Empire."

(11) In the case of 'GOKUL MANAR v. PUDMA NAND SINGH', 29 Cal 707 (PC), the appeal was dismissed by their Lordships of the Privy Council on the merits but their Lordships noted in the judgment the following very important observations which have been differentially interpreted subsequently by the various High Courts in India:

"The appeal therefore fails on the merits, and it is not necessary for their Lordships to decide whether the decision of the Revenue Officer can be pleaded as res judicata on the issue as to 'GOKUL MANDAR'S' status. They will only observe in reference to arguments addressed to them that under Section 13 of the Civil Procedure Code a decree in a previous suit cannot be pleaded as res judicata in a subsequent suit, unless the Judge by whom it was made, had jurisdiction to try and decide, not only the particular matter in issue, but also the subsequent suit itself, in which the issue is subquently raised. In this respect the enactment goes beyond Section 13 of the previous Act X of 1877, and also, as appears to their Lordships, beyond the law laid down by the Judges in the 'DUCHESS OF KINGSTON'S CASE'. (1776) 2 Smith's L C 10th Edn. 713. They will further observe that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction."

(12) In 'SHIBO RAUT v. BABAN RAUT', 35 Cal 353, the facts of the case briefly stated were that

"B sold certain property to C; A brought a suit against B, C and others, in the Court of the Munsif, for recovery of possession of property so conveyed, and to have the kobala granted by B to his vendee set aside; the suit was decreed in favour of A on the ground that B had no share in the disputed land and that no relationship existed between A and B.

In a subsequent suit brought by B in the Court of the Subordinate Judge, for a declaration of his title to an eight-anna share in a certain property, a portion of which was covered by the aforesaid kobala, and for joint possession thereof with A, defence was that the suit was barred by res judicata or at least it was so with respect to that portion of the disputed property, which was the subject-matter of the previous litigation."

(13) It was held by a Division Bench of the Calcutta High Court consisting of Stephen and Mukherjee JJ. that the suit was not so barred. Stephen J. in his judgment, distinguishing the case of 'BHUGWANBUTTI v. A. H. FORBES', 28 Cal 78, proceeded to observe as follows:

"In a previous suit before a Munsiff the defendant had sued for a refund of what he had paid for road and public works cess, and the suit was decreed on the ground that the plaintiff was not liable to pay the cesses at the enhanced rate claimed. It was held that the plaintiff in the second suit could not join a cause of action on which he had been previously defeated, with new causes of action; and that such an action amounted to an evasion of Section 13. In the present case it was not open to the plaintiff to divide his cause of action as he might have done in the former case. By Section 43 he was compelled to include the whole of the claim which he was entitled to make in respect of the cause of action. The land he sued to recover was all held under one title according to his case. He might, it is true, have omitted the land which was the subject-matter of the action before the Munsif, and it may be argued that this was not the land he was entitled to make a claim in respect of. But this argument is not of sufficient force to induce me to extend the principle of the decision to a case where the facts differ so essentially. The principle makes an apparent, though not a real, inroad on the meaning of Section 13. To extend it as suggested in this case would, in my opinion be making the inroad a real one."

(14) Mukherjee J. in his judgment referred to the observations reproduced above in 'GOKUL MANDAR v. PUDMA NAND', 29 Cal 707 and placed reliance on them in deciding the case on the point of res judicata.

(15) In 'DRUPAD CHANDRA v. DINDUMOYI DASI', AIR 1926 Cal 1053, suit was brought for a declaration that certain properties were debutter and for an injunction to restrain the defendants from interfering with the plaintiff's possession therein. A previous suit was instituted before the Munsif for recovery of possession by the plaintiff of a portion of the properties which are covered by the deed of dedication. It was held in that suit that the dedication was invalid and accordingly it was urged in the subsequent suit, & further that in any case the previous decision operates as res judicata so far as the portion of the debutter properties covered by that suit is concerned. It was held that as the pecuniary value of the subsequent suit was beyond the jurisdiction of the Munsif who tried the previous suit the Munsif had no jurisdiction to deal with the relief sought in the subsequent suit with the result that the prior suit did not operate as res judicata with regard to the matters at issue in the subsequent suit. At the same time it was also held that so far as the property dealt within the previous suit was concerned that decision operated as res judicata with regard to that portion of the property only. The same principle was followed in 'PRIYNATH v. KALICHARAN', AIR 1932 Cal 162 and it was laid down that

"Where a decision has been given by a competent Court in a previous suit regarding part of the claim in the subsequent suit and Where both the suits are between the same parties and the causes of action relating to part of the claim are the same that much part of the claim should be excluded from the subsequent suit being barred by the principle of res judicata and in determining whether the Court giving decision was competent to try the subsequent claim on the same cause of action, the value of the part of the claim adjudicated upon ought to be deducted from the value of the entire claim on that cause of action in the subsequent suit."

(16) In 'SEKANDAR ALI v. SADARUDDIN', AIR 1935 Cal 792, the case law was discussed in detail on the point of res judicata and it was observed by a Division Bench as follows:

"The section (Section 11, C. P. C.) speaks of the trial of a suit as also the trial of an issue and lays down a rule under which the trial of a suit or the trial of an issue has to be regarded as barred; & the section makes it perfectly clear that the competency of the Court which tried the previous suit or issue in the previous suit depends upon its jurisdiction to try the subsequent suit.....The question is as to whether the relevant issue having been decided in the previous suit, there is a bar to the trial of that issue in the present suit, or whether the previous suit itself having been decided, the present suit or any part of it is barred by the principle of res judicata."

(17) The Court after quoting the passage reproduced above from the judgment of their Lordships in 'MISSER RAGHUBARDIAL v. SHIVBUX SINGH', 9 Cal 439, proceeded to note that the observations of their Lordships in that case were not ignored in the subsequent revision of the Code of Civil Procedure interpreting the terms of Section 11, C. P. C. and held that

"So far therefore as the trial of an issue is concerned, even though in the previous suit it had been decided but decided only by a Court which had no jurisdiction to entertain a subsequent suit, the decision, in our opinion, can never be regarded as operating as res judicata when the same issue arises in subsequent suit."

(18) As regards the second point of the trial of a suit, the law was thus laid down by the judgment in this case:

"If a suit is instituted for recovery of possession on declaration of title in respect of a small bit of land upon the allegation that the plaintiff has been dispossessed and a decision is arrived at by the Court on question of the plaintiff's title and that decision is against the plaintiff, it sometimes happens that after that decision has been delivered the plaintiff institutes another suit including therein not only the land from which he had been previously dispossessed and in respect of which he had previously instituted the suit and had failed, but a much large quantity of land. He gets the suit instituted in different Court, a Court of higher grade, and attempts to get a different decision from that Court on the question of title. With regard to cases of this description it has been decided that it is not open to the plaintiff to take such a course but that the subject-matter of the previous suit in which an adverse decision had been passed against him should be excluded from the subsequent suit and that the subsequent suit can only go on with regard to a subject-matter which did not form the subject-matter of the previous suit."

(19) Analysing the principles underlying the above statement of law, the Court went on to say that

"a party who has lost in one Court cannot be permitted to add causes of action or prayers for reliefs in another suit for the purpose of swelling the valuation of his suit and claim that the decision in the former suit does not operate as res judicata. But it appears that his subsequent suit proceeded upon a cause of action which did not exist at the date of the previous suit, or if that cause of action existed it was one which he could not have availed of at that time, having regard to the nature of the suit as it then was, the fact that he had now instituted a suit embracing the entire cause of action with the result that his suit was of a higher value would justify him in claiming that the decision in the earlier suit was not operative as res judicata. If it is possible to treat the entire cause of action upon which the latter suit is founded as divisible and if in the earlier suit one of the component parts of the case of action was relied upon, then the previous decision will stand as a bar to the extent of the matter involved in the earlier suit."

(20) In the light of the aforesaid decisions of the Privy Council and the Calcutta High Court if the facts of this case are examined on the point of res judicata it would appear that the former decision cannot operate as res judicata. It is an admitted fact that the pecuniary value of the present suit is beyond the jurisdiction of the Munsif's Court, which decided the previous suit. It may be said that the issue pertaining to the interpretation of the rent note which was the basis of the former suit was decided in the previous suit and the same issue is reagitated in the present suit which is in respect of not the same cause of action but the cause of action which arose to the plaintiff subsequently to the decision of the previous suit. The plaintiff in the present case has sued for arrears of rent for three years subsequent to the period for which rents were claimed in the previous suit. It cannot under the circumstances be said that any portion of the cause of action of the present suit was the subject-matter of the causes of action of the previous suit. The observations of their Lordships of the judicial Committee in 'RANG BAHADUR v LUCHO KOER', 11 Cal 301 (PC), which have been quoted above have a direct bearing. In case, the previous decision is held to be a bar to the subsequent suit in the present the circumstances of the present case, grave consequences would follow and as a result Courts of small jurisdiction would determine finally the question regarding title to large properties, which cannot be the intention of the law. The cause of action of the present suit cannot be regarded as divisible as it was not open to the plaintiff to leave any portion of the cause of action under the provisions of order 2, Rule 2 of the Civil Procedure Code. This view is supported by the judgment in 'SHIBO RAUT v. BABAN RAUT', 35 Cal 353. Similarly the principles that have been discussed in 'SEKANDAR ALI v.

SADARUDDIN', AIR 1935 Cal 792, which have been referred to above also lead to the same conclusion that under the circumstances of this case the cause of action cannot be regarded as a divisible one, nor can it be said on the other hand that the plaintiff has joined several causes of action in this suit. The learned counsel of the respondent has tried to show that as rent becomes due after the expiry of each month under the terms of the rent note a separate cause of action arises in favour of the plaintiff each month and these distinct causes of action are joined together in the present suit. This argument ignores the provision of O. 2, R. 2, C. P. C.

Even though a separate cause of action may be available to the plaintiff each month she cannot, even if she so desires, file separate suits for each of such causes of action after more than one of such causes of action had arisen unless she is prepared to abandon some of them. It may be that the plaintiff by waiting for three years raised the value of the suit so as to make her suit cognizable by a Court of higher jurisdiction but merely on account of delay in filing her suit she cannot be penalised by treating her cause of action to be divisible when under the provisions of Order 2, Rule 2, C. P. C. it is not open to her so to split his causes of action. No portion of the cause of action of the present suit formed the subject-matter of the previous suit and consequently no question for excluding any portion of the cause of action of the plaintiff's present suit on account of the previous suit. Both the suits were based on the same rent note and the decision regarding interpretation of the rent note in the previous suit cannot be regarded as final for purposes of the present suit and the decision of the first Court cannot in the meaning of Section 11, C. P. C. be a bar to the decision of the same issue in this suit, because the present suit was not within the competence of the Court which decided the previous suit. This is the conclusion which would be arrived at in view of the decisions of the Calcutta High Court referred to above and the observations of the Privy Council in cases arising under the former Civil Procedure Code. The Madras High Court has however taken a different view.

(21) The Madras High Court has interpreted the observations of their Lordships in 'GOKUL MANDAR v. PUDMA NAND', 29 Cal 707 (PC), differently than what has been understood by those observations by the Calcutta High Court in the cases that have already been discussed above. Vide 'SHIBO RAUT v. BABAN RAUT', 35 Cal 353. In 'T. RAMAN v. K. P. MANAKKAL', 27 Indian Cases 989 (Mad), Sadasiva Aiyar J. said that the observations of their Lordships in '29 Cal 707 (PC)', were only in criticism of an objection that the finding of a Revenue Officer in a revenue case was res judicata in the subsequent suit which was not within the revenue Officer's jurisdiction and consequently the learned Judge felt himself at liberty to follow the principle laid down in 'PATHUMA v. SALIMAMMA', 8 Mad 83, in which it was held that the principle of res judicata did apply to that part of the claim which was within the revenue officer's jurisdiction and consequently the learned Judge felt himself at liberty to follow the principle laid down in 'PATHUMA v. SALIMAMMA', 8 Mad 83, in which it was held that the principle of res judicata did apply to that part of the claim which was within the jurisdiction of the Court, which tried the first suit. He quoted in support of his view the judgment of Sir Arnold White C. J. in 'RANGANATHAM CHETTY v. LAKSHMIAMMAL', 21 Ind Cas 15 (Mad), thus:

> "Although taking all the causes of action together, the second suit may be said to be outside the jurisdiction of the original Court, still if the specific question be within the jurisdiction of the original Court and was determined by the original Court, it is no answer to say that the whole suit was beyond the jurisdiction."

(22) In 'PATTRACHARIAR v. ALAMELUMANGAI AMMAL', AIR 1927 Mad 273 the decision in 'PATHUMA v. SALIMAMMA', 8 Mad 83, was followed. It may be pointed out that with due respect to the Hon'ble Judges of the Madras High Court, who decided the case referred to above it appears that the view taken by that Court is not in keeping with the observations of their Lordships in 'GOKUL MANDAR v. PUDMA NAND', 29 Cal 707 (PC) and it is also contrary to the express terms of Section 11, C. P. C. itself which requires that the Court which decided the previous suit or the issue must be a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised. If a Court tried a suit or an issue was not competent to entertain the subsequent suit or the suit in which such issue has been raised, its decision would not have the effect of res judicata in a subsequent suit.

(23) The Bombay High Court has also adopted the same view as was taken by the Calcutta High Court in the cases referred to above in 'RAMDAYAL v. JANKIDAS', 24 Bom 456. In that case Jankidas filed a suit against Ramdayal for Rs. 3152/- being the amount of one instalment due in a bond. The suit was heard and decided by a Subordinate Judge of the Second Class who decreed the amount claimed. The plaintiff then brought another suit against the same defendant in the Court of a Subordinate Judge of the First Class to recover Rs. 6526/- being the amount of two instalments due in the same bond. In the second suit the defendant raised the same contention as in the former suit. It was held by a Division Bench of the High Court of Bombay consisting of Parsons and Ranade JJ., that the decision in the first suit did not operate as res judicata in the second suit as the Court that tried the first suit had no jurisdiction to try the second suit. In another case 'VYANKAT AWACHIT v. ONKAR NATH', AIR 1921 Bom 434, a Division Bench consisting of Macleod C. J. and Shah J. observed that

> "A decree in a previous suit cannot be pleaded as res judicata in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and decide, not only the particular matter in issue, but also the subsequent suit in which the issue is subsequently raised."

'GOKUL MANDAR v. PUDMA NAND', 29 Cal 707 (PC), was relied upon in this case.

(24) In 'SHAMAJI NARAYAN v. GOVIND RANGACHARYA', AIR 1945 Bom 45, a Division Bench consisting of Divatia and Weston JJ. laid down as follows:

> "It is true that ordinarily the decision of an issue in a Court of lower pecuniary jurisdiction will not operate as res judicata in a subsequent suit filed in a Court of superior jurisdiction and triable only by such Court,

But it is not open to a plaintiff to evade the bar of res judicata by joining several causes of action against the same defendant or defendants in a subsequent suit instituted in a Court of higher pecuniary jurisdiction. Where a decision has been given by a competent Court in a previous suit, regarding part of the claim in the subsequent suit, and between the same parties, then so much of the claim which is common to the two suits, should be excluded from the subsequent suit as barred by the principles of res judicata."

(25) The decision in 'SHAMAJI NARAYAN v. GOVINDA', AIR 1945 Bom 45, referred to above supports the view expressed in 'SEKANDERALI v. SADARUDDIN', AIR 1935 Cal 792. Thus, it would be clear that the view taken by the Calcutta High Court is not different from the view of the High Court of Bombay.

(26) Mr. Bhargava has cited the case of 'MAQSOOD ALI v. HUNTER', AIR 1943 Oudh 338, a Full Bench case, in which there was a difference of opinion among the Judges composing that Bench. Bennett J. wrote the majority judgment with which Thomas C. J., Gulam Hussain and Agarwal JJ. agreed. Madeley J. gave a dissenting judgment. The facts briefly stated in so far as they related to the question of res judicata were that Mr. Hunter, Liquidator of the Bank of Upper India purchased Bhil Wal estate at an auction-sale and was sued by the plaintiffs for a declaration of their rights in respect of their maintenance allowances and for arrears of such allowances for one year. The suit was decreed and the decision was upheld by the Oudh Chief Court. Subsequently the same plaintiff filed another suit against the same defendant to recover arrears of the maintenance allowance for a period subsequent to the period for which the previous suit had been filed. The question then arose whether the previous decision operated as res judicata in the subsequent suit as regards the objection raised by the defendant in the previous suit. The parties contested the appeal inter alia in the Oudh Chief Court on the basis of the general principles of res judicata and the case was referred to a Full Bench and one of the questions which was referred was as below:

"Whether the general principles of res judicata can be applied to the case."

(27) Dealing with this question Bennett J. extensively discussed the decisions of Calcutta, Bombay, Madras and Lahore High Courts. The parties conceded that if Section 11 does not apply the general principles of res judicata cannot apply because they would be excluded by the terms of Section 11. He therefore proceeded to examine the principles of res judicata under Section 11 of the Code of Civil Procedure and observed:

"It is clear from S. 11 that the Court which tried the earlier suit must be competent to try the later suit in which the same subject-matter is in issue and the question for consideration is whether the word 'suit' (which is not defined in the Civil Procedure Code) can be construed in the section as meaning a part of a suit. Many of the cases in which this construction is adopted suggest that the more literal construction would lead to unreasonable and even absurd results. The difficulty is enhanced by certain observations (of an obiter nature) made by their Lordships of the Judicial Committee in 'GOKUL MANDAR v. PUDMA NAND', 29 Cal 707 (PC) (at pp. 342 and 343)."

(28) The learned Judge then proceeded to discuss 'GOKUL MANDAR v. PUDMA NAND', 29 Cal 707 (PC) and the various authorities of the Calcutta, Bombay, Madras, Allahabad, Lahore and those of Oudh Chief Court. He then observed:

"Reference is made to some of the cases cited above, and it is said that if it is possible to treat the entire cause of action upon which the later suit is founded as divisible and, if in the earlier suit, one of the component parts of the cause of action was relied on, then the previous suit will stand as a bar to the extent of the matter involved in the earlier suit. It will be seen from this survey of the principal authorities on the point that they mostly favour a liberal construction of the words of Section 11 under consideration. On grounds of common sense, there certainly appears to be no reason why, when the matter has been decided by a Court of competent jurisdiction, the decision should not be regarded as conclusive between the same parties when the question arises again in a different suit, though that suit as a whole could not be tried by the Court which decided the earlier suit. In the present case the decision in the earlier suit was that the plaintiffs were entitled to annual maintenance of a certain amount as a charge upon the property. The only reason why the later suit was brought in a higher Court was that arrears amounting with interest to over Rs. 2000/- were claimed. There is no good reason in my opinion why the decision as to the right of maintenance arrived at in the earlier suit should not be regarded as conclusive between the parties, the only question to be decided on that view in the later suit being whether the arrears claimed were in fact due. I would therefore answer the question referred by saying that the principle of res judicata enunciated in Section 11, Civil Procedure Code can be applied to the present case (at page 346)."

(29) The majority decision referred to above has proceeded on a liberal and commonsense construction of the term "suit" in Section 11 of the Code of Civil Procedure, but it is evident that the view adopted by that judgment is opposed to the observations of their Lordships of the Privy Council in 'GOKULMANDAR v. PUDMANAND', 29 Cal 707 (PC), and even if these observations were obiter, yet the value of the observations of their Lordships of the Privy Council could not be minimised on that account alone. A Court of inferior jurisdiction would if the view expressed by Bennet J. is excepted be capable of deciding rights and title to very large and valuable properties which cannot be regarded to be the intention of the legislature, when the jurisdiction of such Courts is limited to suits of small value only in the present case, the Munsif's Court which decided the previous suit was not competent to entertain the subsequent suit because the subsequent suit was of higher value than the one which could be taken cognizance of by that Court and on this account the decision of the Munsif's Court regarding interpretation of the rent note cannot operate as res judicata. Further, it may be noted that the subject-matter of the present suit cannot be regarded as divisible because it is not open to the plaintiff to bring separate suits for the component parts of the subject-matter of this suit. The decision of the lower

appellate Court which was passed on the point of res judicata does not appear to be correct.

Moreover, the decision in the former suit was on the basis of non-joinder of the parties and in that decision the Court interpreted the rent note only in so far as it was necessary to decide the question of the necessary parties to the suit. The Court did not decide the case on merits and it cannot therefore be said that the decision of that case operates as res judicata in this case. In 'CHIMANLAL GANPATRAM v. NATWARLAL MAGANLAL', AIR 1935 Bom 131, it was held that where the Court refused to consider the merits of the case at all and dismissed the suit upon the threshold for misjoinder of causes of action and for misjoinder of parties, the decision did not operate as res judicata.

(30) It has been seen above that the decision of the Jaipur High Court cannot be regarded as barring the issue about the interpretation of the rent note Ex. 21 in the present suit. The rent note therefore shall have to be examined and interpreted correctly to find out whether the inclusion of the name of Gulab Bai in it would have the effect of making Gulab Bai and Manphul Bai both co-lessees. Ex. 21 purports to be a rent-note which is executed by Ladhuram son of Daulat Ram Ahir of Jaipur, who is defendant No. 1 in the present case, in favour of both Gulab Bai who is described as the widow of Phulchand Sarogi and Manphul Bai, widow of Lalchand, who is described as the adopted son of Phulchand. The executant Ladhuram after giving the description of the shop which, he says, was already in his possession agreed to pay Rs. 50/- per month as rent. Further on in this rent note Ladhuram has described the capacities of both Manphul Bai and Gulab Bai by saying for the former as the owner of the property and the latter as an elderly lady of her family. He has also entered in Ex. 21 a term that he would regularly make payments of the rent every month and would obtain a receipt thereof from the owner of the shop. The learned counsel of Manphul Bai has argued that as Manphul Bai is described as the owner and as Ladhuram has agreed to pay the rent to the owner and to obtain a receipt from her the intention of the rent note should be regarded to give the status of a lessee (lessor ?) to Manphul Bai. The name of Gulab Bai has been entered in this rent note simply because she was an elderly lady in the house. On the other hand, the counsel for Gulab Bai has contended that after addressing the rent note Ex. 21 to both the ladies Ladhuram has written that I have taken your shop on rent and from this term "Your shop" it should be inferred that Ladhuram took both the ladies to be the owners of the shop and as such they should both be regarded as joint lessees (lessors ?).

It may be pointed out that there is clear provision in the rent not as regards the capacities of both Manphul Bai and Gulab Bai. The former has been described as the owner as also she has been described as the widow of Lalchand. On the other hand Gulab Bai has been described as the widow of Phulchand being an elderly lady in the family. It is therefore not necessary to infer from the term "Your shop" appearing in the rent note the intention of treating both the ladies as joint lessees (lessors ?), because when their respective positions have been clearly described their capacities should not be misunderstood by such vague terms. The execution of Ex. 21 is admitted by the defendant Ladhuram but he has raised an objection that it was so executed on account of fraud but he has failed to prove the existence of fraud. Earlier rent notes of the same shop have been brought on the record of this case. Ex. 18 is the first rent note which was executed by Ladhuram and Chotey Lal in Sambat year 1983. The second rent note is Ex. 23 which was executed by Ladhuram only, in Sambat 1986. Thereafter, Ex. 24 was executed by Ladhuram in favour of Lalchand in Sambat year 1989. After the death of Lalchand a notice dated the 31st May 1938 was served on Ladhuram on behalf of Manphul Bai through her agent Gopichand for arrears of rent and ejectment, which is Ex. 16 on the record of this case.

After the notice (Ex. 16) was served Ladhuram, it appears, executed the rent note Ex. 21 which is the basis of this suit. Ladhuram was let into possession of this shop by the first rent note Ex. 23 which was in favour of Lalchand, the husband of Manphul Bai. Ladhuram, who is a tenant of Manphul Bai is under these circumstances estopped from challenging the title of his lessee. Section 116 of the Evidence Act provides that no tenant of immovable property or person claiming through such tenant shall during the continuance of the tenancy be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immovable property; and no person who came upon any immovable property by the license of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such license was given. In 'MT. SAJJO v. BASDEOPRASAD', AIR 1937 Oudh 505, it has been laid down that no tenant can deny the title of his landlord, unless he can prove fraud; coercion, misrepresentation or mistake. In the present case though fraud was pleaded Ladhuram failed to prove it, and in this appeal the plea of fraud has not been pressed. Though Ex. 21 is not a lease deed and it is only a rent note, yet the relationship between the plaintiff and Ladhuram has been clearly proved to be that of a landlord and a tenant. Ladhuram has also admitted his status to be that of a tenant. In 'RAMZANI v. BANSIDHAR', AIR 1935 Oudh 385, it has been held that

> "Section 116 relates also to tenancies other than those in which the tenant was first let into possession and the principle of the section would be the same whether a man was let into possession or whether he has continued in such possession by specific agreement between himself and his landlord."

(31) This decision was based on the authority of 'MT. BILAS KUNWAR v. DESRAJ RANJIT SINGH', AIR 1915 P C 96. Obviously when a notice of ejectment was served on behalf of Manphul Bai on Ladhuram in the year 1938 the parties agreed to continue the tenancy and Ex. 21 was executed as a result of such a contract. It cannot, therefore, be pleaded by Ladhuram that since he was first let into possession by Lalchand and not by Manphul Bai he cannot be estopped from questioning the title of Manphul Bai. No difference would be made in first letting him into possession and in allowing him to continue in possession after notice to quit and after determination of the previous tenancy, when by virtue of a subsequent contract he was allowed to occupy the property by Manphul Bai. Similarly in 'RAM DITTA MAL

v. CHARAT SINGH', AIR 1938 Pesh 49, it has been observed that

"Once a tenant admits the title of his landlord and acknowledges that he is the person to whom he shall pay the rent, Section 116 will apply and it does not make any difference whatsoever whether the landlord has put him into possession or whether the tenant has merely attorned to him. Of course it is open to every tenant to prove that he attorned under coercion or as a result of fraud, misrepresentation or mistake; but subject to this modification every tenant is estopped from denying the title of his landlord when with open eyes he has attorned to him and has admitted that he was entitled to receive the rent."

(32) It is argued on behalf of Ladhuram that Lalchand was a minor at the time the property was leased to him on behalf of Lalchand and consequently no lease was created. 'GOVINDA KURUP v. BEEKKU', AIR 1931 Mad 147 and 'INDIAN COTTON CO., LTD. v. RAGHUNATH HARI', AIR 1931 Bom 178, have been cited in support of this argument. It may be pointed out that even though Lalchand may have been a minor at the time Ladhuram was first let into possession yet he attorned to Manphul Bai after the death of Lalchand knowing full well that Manphul Bai was the widow of Lalchand and he executed a rent note in which he acknowledged Manphul Bai to be the owner of the property. Under these circumstances Ladhuram cannot be allowed to resile from his averment in the rent note. In 'KRISHNA PRASAD v. BARBONI COAL CONCERN LTD.', AIR 1937 PC 251, it has been laid down that:

"Section 116 of the Evidence Act does not deal or profess to deal with all kinds of estoppel or occasions of estoppel which may arise between landlord and tenant. It deals with one cardinal and simple estoppel and states it first as applicable between landlord & tenant & then as between licensor & licensee, a distinction which corresponds to that between the parties to an action for rent and the parties to action for use and occupation. The section postulates that there is a tenancy still continuing that it had its beginning at a given date from a given landlord. It provides that neither a tenant nor any one claiming through a tenant shall be heard to deny that that particular landlord had at that date a title to the property. The section applies against the lessee, any assignee of the term, any sub-lessee or licensee. What all such persons are precluded from denying is that the lessor had a title at the date of the lease and there is no exception even for the case where the lease itself discloses the defect of title. The principle does not apply to disentitle a tenant to dispute the derivative title of one who claims to have since become entitled to the reversion, though in such cases there may be other grounds of estoppel, e. g., by attornment, acceptance of rent etc. In this sense it is true enough that the principle only applies to the title of the landlord who "let the tenant in" as distinct from any other person claiming to be reversioner. Nor does the principle apply to prevent a tenant from pleading that the title of the original lessor has since come to an end."

(33) Ladhuram, in the present case is therefore estopped from disputing the title of Manphul Bai who was admitted by him in the rent note to be the owner of the property. It is common case of both the parties that the shop belonged to Chhogalal who adopted Phulchand as his son. After the death of Phulchand, it is said Gulab Bai, the widow of Phulchand, adopted Lalchand, whose adoption is disputed in the present case both by Ladhuram and by Gulab Bai. Lalchand left behind him his widow Manphul Bai, who is the plaintiff in this case. Lalchand was the person in whose name Ladhuram executed the first rent note when he was let into possession during the minority of Lalchand. The relationship of landlord and tenant continued even after Lalchand attained majority and after Lalchand's death when Manphul Bai had served a notice to quit against Ladhuram he executed the rent note Ex. 21 & was allowed to continue in possession with the consent of Manphul Bai. In such circumstances Section 116 of the Evidence Act would apply and Ladhuram would be estopped from questioning the title of Manphul Bai. Even though an issue has been framed regarding the adoption of Lalchand, it is necessary to decide that issue in the present suit. Gulab Bai is a proforma defendant and no relief is claimed against her. Ladhuram cannot challenge the title of Manphul Bai and as such the relief sought by the plaintiff can be granted to her against Ladhuram without going into the question of Lalchand's adoption. The learned lower Court has also held that it was not necessary for the purposes of this case to determine the validity of Lalchand's adoption. But at the request of both the parties it went on to decide this issue as well. In this Court the learned counsel of the appellant has admitted that it is not necessary for the purposes of this case to go into the question of Lalchand's adoption. No opinion is therefore expressed as regards the validity of Lalchand's adoption in this case. Gulab Bai has strenuously contested the issue of adoption of Lalchand but it would be improper to decide that issue in the present case.

(34) Gulab Bai has admitted that she had received the arrears of rent for the period for which Manphul Bai has brought this suit but she could not have given the discharge to Ladhuram regarding rent of the shop, which belonged to Manphul Bai as per rent note Ex. 21. Ladhuram could not elect between the two ladies and pay rent to any one of them, when it was expressly stipulated in the rent note that he would pay rent to the owner of the property only, who was described as Manphul Bai.

(35) In conclusion, it may be stated that the decision of the Jaipur High Court cannot be regarded as having the force of res judicata. As per terms of the rent note Ladhuram is liable to pay rent of the disputed shop to Manphul Bai and he is estopped from denying her title to the property. The question of the validity of adoption of Lalchand is not necessary to be decided in this case.

(36) The appeal of Manphul Bai is allowed with costs and a decree is passed against Ladhuram for arrears of rent amounting to Rs. 1800 and for ejectment.

(37) SHARMA J.: I agree.

R.G.D. Appeal allowed.

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(JODHPUR BENCH)

WANCHOO C. J. AND BAPNA J.

Balmukan and others, Appellants v. State.

Criminal Appeal Nos. 90, 91, 95, 96 of 1950, D/- 10-12-1951.

(a) Evidence Act (1872), Ss. 24 and 133 — Retracted confession accused can corroborate statement of prosecutrix which is true and vice versa in case under S. 376, I. P. C.

The statement of the prosecutrix in a case under S. 376 of the Penal Code does not stand on the same footing as statements of witnesses brought in under S. 288 of the Criminal P. C., and there is no reason why the statement of the prosecutrix if true, should not be held to corroborate the retracted confession of the accused and vice versa. So far as the statement brought on the record under S. 288 is concerned, it is damned by the fact that the maker of it has gone back on it. But this is not so in the case of the statement of a prosecutrix, which is believed to be true. 27 Cal 295; AIR 1927 Pat 257, Distinguished. (Para 13)

Anno: Evidence Act, S. 24 N. 9; S. 133 N. 8, 11.

(b) Criminal P. C. (1898), S. 238 — Charge under S. 366 A, I. P. C. — Accused cannot be convicted under S. 366.

It is not possible to convict under S. 366, Penal Code on a charge under S. 366 A, for S. 366 cannot be a minor offence as compared to S. 366 A and also inasmuch as a charge under Section 366 has certain elements which are not present in a charge under S. 366 A. Under S. 366 A, a girl below the age of 18 years has to be induced by any means whatsoever to go from any place with the intention that such girl may be forced or seduced to illicit intercourse with another person. Under S. 366, on the other hand, there has to be a kidnapping or abduction, which introduces certain elements which are not to be found in S. 366 A. (Pr 16)

Anno: Criminal P. C., S. 238 N. 1, 2.

(c) Penal Code (1860), Ss. 362 and 361 — Girl under 16 years of age willing by going out with accused for sexual intercourse — No force or inducement — There is no abduction — Since there was no intention of taking away the girl from guardianship of father, there is no kidnapping. (Para 16)

Anno: Penal Code, S. 362 N. 2, 4; S. 361 N. 2.

(d) Penal Code (1860), S. 375 — Girl not under 14 years of age — Her consent to sexual intercourse would protect the accused. (Para 17)

Anno: Penal Code, Ss. 375 and 376 N. 1.

(e) Penal Code (1860), S. 109 — A along with others charged of rape under S. 376, Penal Code — Offence of rape established against other accused but not against A — A can be convicted under S. 109, when charge under substantive offence gave full notice to A of circumstances alleged against him, though abetment is not a minor offence — (Criminal P. C. (1898), Ss. 236, 237).

Where the case is covered by Ss. 236 and 237 of the Code of Criminal Procedure, and the accused has notice of all the facts which go to make up the charge of abetment, he can be convicted of the charge of abetment, even though the charge framed against him was only of the substantive offence. Where the evidence as to the charge of abetment of the offence of rape was all before the Court in the statement of the girl, on which evidence the accused could have been charged of an offence under S. 376 read with S. 109 for abetting the offence of rape by other accused. The accused can be convicted under S. 376 read with S. 109. Case law reviewed. (Paras 31, 32)

Anno: Criminal P. C., S. 236 N. 8; S. 237 N. 1; Penal Code, S. 109 N. 7.

(f) Penal Code (1860), S. 376 — Sentence — Girl of immature age — Accused given in addition sentence of whipping.

In cases of rape of girl of immature age, it is desirable that a sentence of whipping should also be inflicted. (Para 35)

Anno: Penal Code, Ss. 375 and 376 N. 6.

Harak Lal, for Appellants; Sumar Dan, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('25) AIR 1925 PC 130: (26 Cri L J 1059) (Prs 27, 32)
('27) 49 All 120: (AIR 1927 All 35: 27 Cri L J 1118) (Prs 23, 26)
('35) AIR 1935 All 935: (37 Cri L J 247) (Pr 26)
('48) AIR 1948 All 168: (49 Cri L J 168) (Pr 30)
('74) 11 Bom HCR 240 (Pr 19)
('99) 27 Cal 295 (Pr 13)
('30) 34 Cal W N 198: (AIR 1929 Cal 807: 31 Cri L J 570) (Pr 24)
('32) 36 Cal W N 595: (AIR 1932 Cal 455: 33 Cri L J 720) (Pr 25)
('10) 33 Mad 264: (11 Cri L J 49) (Prs 21, 22)
('12) 23 Mad L J 722: (15 Ind Cas 85) (Pr 22)
('44) AIR 1944 Nag 192: (46 Cri L J 80) (Pr 27)
('47) AIR 1947 Nag 113: (47 Cri L J 968) (Pr 28)
('27) AIR 1927 Pat 257: (28 Cri L J 497) (Pr 13)
('47) AIR 1947 Pat 350: (25 Pat 562) (Pr 29)
('15) 16 Cri L J 676: (AIR 1915 Low Bur 39 (FB)) (Para 20)

WANCHOO, C. J.: These are four connected appeals from the same judgment of the Sessions Judge of Jodhpur in a case under S. 376 of the Indian Penal Code. Appeals Nos. 90 and 96 are by Balmukan, 91 by Surjia, and 95 by Sanwaria.

(2) The prosecution story was briefly this. Mt. Ramjot a young girl of about 14 years of age, had gone from her house in Mochian-ki-ghati, Jodhpur City, at about 11 a.m. on the 2nd of May, 1949, with food for her brother Narain who was working in the 'karkhana' of Narain Dass inside Sojati Gate. Sanwaria appellant is said to have met her outside Tambakoo-ki-gali, and asked her to accompany him to bring a gas lamp lying in the public park. She was told that she would be paid something for doing the job. She agreed to the proposal, as she had done such jobs for one Amaria,

who deals in gas lamps, and at whose shop Sanwaria appellant used to work. She, therefore, went to the 'karkhana' of Narain Das and left the food she had brought for her brother there, and came back to Sanwaria, who was waiting outside with a cycle. Sanwaria then took her to the public park; but there was no gas lamp there, and she enquired where she had to go for the gas lamp. Sanwaria told her that it was a short distance away, and thus enticed her away to a place near the aerodrome. There the two of them sat down under a 'neem' tree, and the girl again asked Sanwaria why she had been brought there. Sanwaria told her that he would have sexual intercourse with her; but the girl refused to agree to this.

At this stage, Surjia appellant appeared on the scene, and asked Sanwaria why he had brought the girl there, and threatened to telephone to the police. Sanwaria then begged Surjia not to take this course, and told him that he could also have sexual intercourse with the girl. The girl, however told both that she would not agree to this sort of thing. Thereupon both of them lifted her, and took her to a bath room in the Racecourse Bungalow nearby. There the third appellant Balmukan, who has some job in that Bungalow, met them, and it is said that Sanwaria offered him also that he could have sexual intercourse with the girl. Thereafter the girl was first raped by Sanwaria, then by Balmukan, and finally by Surjia. It is said that every time one man finished intercourse with her, she wanted to get out from the bath-room, but was forced back into the bath-room so that the next man may rape her. The result of this was that she began to bleed profusely from her private parts. She is said to have screamed for help; but no one came to the Bungalow.

It is said that a fourth man had come to the scene, and had rebuked the appellants, who had told him that he could also have sexual intercourse with the girl; but that man declined the offer, though he did nothing to help the girl. The clothes of the girl got blood stained, and so Sanwaria made her wash her cloths and take bath, and thereafter the clothes were allowed to dry in the sun, and then she put them on, and left the place with Sanwaria. As she was unable to walk on account of the bleeding from her private parts Sanwaria put her on the handle of his cycle after some distance, and brought her up-to a 'pyao' on the Ratanada Road, and left her there. The girl asked Sanwaria what she should say to her mother about the bleeding. Sanwaria advised her to tell her mother that she had fallen down, and had thereby got injured.

The girl was eventually taken home by some persons who live near the pyao. On arrival at her house, she told her mother that she had been injured by a fall. She was then taken to the Ummaid Hospital, where she gave the same story of (being?) injured to the lady doctor. The lady doctor, however, was not satisfied with this story of the girl, & eventually her father Champa Lal made a vague report in the thana on the 7th or 8th of May, 1949. Thereafter, a head constable went to the Hospital, and asked the girl to tell the truth. She then came out with the story, which has been narrated above. Thereafter Sanwaria was produced before the girl, who identified him to be the person who had taken (her?) away. Later, an identification parade was held, in which the girl correctly identified the other two appellants also, namely Balmukan & Surjia. All the three appellants confessed, & their confession were recorded by the Sub-Divisional Magistrate Jodhpur, and thereafter the case was sent up for trial to Court.

(3) All the three appellants pleaded not guilty. and said that they had been falsely implicated by the police.

(4) The main evidence in this case consists of the statement of the girl, Mst. Ramjot, and the retracted confession of the three appellants. Before we deal with the legal questions raised by learned counsel for the appellants we would like to consider whether the evidence of the girl can be believed. Her evidence may be divided into three parts namely, (1) about what happened before she reached the Race-Course Bungalow, (2) what happened at the Racecourse Bungalow, and (3) what happened after the Racecourse Bungalow.

(5) Learned counsel for the appellants urges that the statement of the girl should not be believed because of the discrepant statements she has made about the first part, namely, what happened before she reached the Racecourse Bungalow. Her first statement to the police in this connection was that she had been threatened by Sanwaria, and practically taken away by force from near Sojati Gate. In the Committing Magistrate's Court she, however, said that Sanwaria invited her to go away with him for sexual intercourse, and she, therefore, went with him. It was for the first time in the Sessions Court that she said that she had been enticed away by a trick that she would be paid for carrying a gas lamp. It seems to us that the statement which she made in the Committing Magistrate's Court, is the truth, and that is why these discrepancies have appeared about this part of the story. If we remember, the subsequent conduct of this girl, namely, her asking Sanwaria what excuse she should give for the bleeding, and her not coming out with the true story for five or six days and her insisting that she had been otherwise injured, there can be no doubt that she had gone away with Sanwaria that morning in order to have sexual intercourse with him. She changed her statements on this point, but the truth came out in the Committing Magistrate's Court. We are, not therefore, prepared to disbelieve her because of these discrepancies, particularly when she had come out with the truth on one occasion. Some allowance must be made for a girl of fourteen also in such circumstances.

(6) So far as the second part of the story is concerned, namely, what happened at the Racecourse Bungalow, the statement that she has made appears to us to be correct, except perhaps that part of it where she said that she was taken away by force by Sanwaria, for it appears that she was willing to have sexual intercourse with Sanwaria. We see no reason to disbelieve her statement that she was not willing to have sexual intercourse with the other two, namely, Balmukan and Surjia, whom she did not know from before, and that she came out of the bath-room after the intercourse with Sanwaria, and was then forced back into the room, so that the other two appellants might rape her.

(7) As for the third part of the story also, there seems no reason for disbelieving her statement, for what she has said has been corroborated by other witnesses as to her being taken in a tonga from the 'pyao' and as to injury to her private parts. We are, therefore, of opinion that the statement of this girl, Mst. Ramjot, is substantially true, except for the part where she suggests that Sanwaria had taken her away by a trick and that the intercourse with Sanwaria was against her will.

(8) It is, however, urged by learned counsel for the appellants that even if we believe the evidence of this girl, it would not be safe to convict the appellants on her statement as she is the prosecutrix, and there is no corroboration available of her statement. Particular stress is laid on the fact that she made no complaint immediately after the incident, and that it was only after five or six days that she came out with the story of rape. That attitude of her is, however, understandable, because she did not want to implicate Sanwaria with whom she had gone willingly for sexual intercourse. It seems to us that she did not come out with the full story because she wanted to shield Sanwaria, as is clear from the fact that she asked him what excuse she should give to her mother. It was only when the medical examination showed that it could not be a case of injury, and when the police tackled her, that she came out with the full story.

(9) The corroboration in this case consists only of the retracted confessions made by the three appellants. These confessions were recorded on the 13th of May, after each of the appellants had been given a warning as required by law. The appellants were brought into the Magistrate's Court at 11-30 a.m., and were kept there till about 3 p.m., and it was after that that the confessions were recorded. The Magistrate also said in his evidence that he enquired whether the police had threatened them into making the confession, and they said, "No". It seems, therefore, that the appellants had ample opportunity to think over matters while they were waiting in the Court room of the Magistrate for about four hours before their confession were recorded. We are, therefore, not prepared to believe that these confessions were made by the appellants because of any threat or inducement by the police or anyone else. They appear to us to be voluntary confessions, and a comparison of the three confessions would show that they are, more or less, similar on facts which would be within the common knowledge of three appellants, and thus appear to be true also.

(10) In his confession, Sanwaria said that he knew the girl intimately, and had one day suggested to her to have sexual intercourse with him; but she then refused. On the 2nd of May, the girl herself suggested that they should go out for a walk. He, therefore, came to the Sojati Gate where the girl was waiting for him, and he took her towards the aerodrome. They sat down near the Race-course Bungalow, but could not find proper opportunity, and were returning when Surjia appellant met them. He took them to the Race course Bungalow, where Balmukan appellant met them. These two suggested that Sanwaria could carry out his intention, and could have intercourse with her, and thereafter Sanwaria had sexual intercourse with the girl. He was followed by Balmukan, and Balmukan was followed by Surjia. She did not bleed on the first occasion; but after Surjia had intercourse with her, she began to bleed from her private parts. Thereafter, he took her on his cycle, and left her near the police Lines.

(11) The confession of Surjia was that he saw Sanwaria going with a girl on his cycle. After a short distance, Sanwaria sat down on the road with the girl, and they began to cut jokes with each other; but on seeing Surjia, they got up to go away. He then asked them who they were. The girl told him that she was a Mochi and Sanwaria was a Nai. Surjia then asked them to accompany him, as he would get them arrested after telephoning to the police. Then he took the two of them to the Racecourse Bungalow, where they met Balmukan Farrash. Surjia then told Balmukan that he wanted to telephone, and also informed him about the girl and Sanwaria. Balmukan then asked these people to sit down. Then Sanwaria told them that he had brought the girl for sexual intercourse, and Surjia suggested that Sanwaria should begin it, and they would follow. So Sanwaria first took the girl to the bath-room, and had sexual intercourse with her. He was followed by Balmukan, and Surjia followed Balmukan. Surjia saw some bleeding, and said that he would not have sexual intercourse with the girl. The other two, however, insisted that he should also have sexual intercourse with her. So he had to go and have intercourse with the girl. Then the girl was brought out, and had a bath and Sanwaria took her away.

(12) In his confession, Balmukan stated that Sanwaria and Surjia brought the girl to the Racecourse Bungalow. Surjia called him, and he asked Sanwaria why he had brought the girl. Sanwaria said that he had brought her for sexual intercourse. The girl was then taken to a room, where there was a telephone. Sanwaria first had intercourse with the girl. Then Balmukan went for intercourse, but could not succeed on account of his own physical incapacity, and came out after a few minutes. Then Surjia went into the room. Shortly after Surjia came out, and said that the girl was bleeding, and was taking a bath. Thereafter, Sanwaria left with the girl.

(13) These statements appear to us to be true, except that Surjia and Balmukan tried to slur their own part in the affair. They clearly corroborate the statement of the girl as to commission of rape on her by Balmukan and Surjia. So far as Sanwaria is concerned, we have already said that the intercourse by him was with the consent of the girl. Learned counsel, however, urges that a retracted confession cannot be used to corroborate the statement of the girl, because such a confession itself requires corroboration. He relies on 'QUEEN EMPRESS v. JADUB DAS', 27 Cal 295 and 'DEVENDRA BHATTACHARYA v. EMPEROR' AIR 1927 Pat 257. In the Calcutta case, it was held that it was not safe to convict an accused person on his retracteid confession standing by itself uncorroborated, or on the statements of witnesses brought in under S. 288 of the Criminal Procedure Code without independent corroborating testimony, nor could these two be joined together and held as mutually corro-

borating each other so as to justify a conviction based on them. We are, however, of opinion that the statement of the prosecutrix in a case under S. 376 of the Indian Penal Code does not stand on the same footing as statements of witnesses brought in under S. 288 of the Code of Criminal Procedure, and there is no reason why the statement of the prosecutrix if true, should not be held to corroborate the retracted confession of the accused and vice versa. So far as the statement brought on the record under S. 288 is concerned, it is damned by the fact that the maker of it has gone back on it. But this is not so in the case of the statement of a prosecutrix, which is believed to be true.

(14) The Patna case gives no reasons of its own, and merely relies on the Calcutta case cited above. But the facts in the Patna case were that the prosecution wanted to corroborate one retracted confession by another retracted confession, and it was held that this could not be allowed. In the case before us, the prosecution does not want us to corroborate the retracted confession of one accused by the retracted confession of the other. What we are asked to do is to treat the statement of the prosecutrix as the corroboration of the retracted confession of each of the accused as against him, and to treat the retracted confession of each accused as corroboration of the statement of the prosecutrix as against that particular accused. We see no reason why this cannot be done, and these two cases do not go against the view which we are taking. These confessions, therefore, corroborate the statement of the girl that she had to submit to sexual intercourse with the three appellants that day at the Race-course Bungalow.

(15) The next question is whether the appellants have been rightly convicted. So far as Balmukan and Surjia are concerned, we are satisfied that the girl had not consented or agreed to sexual intercourse with them, and they committed rape on her. We are not impressed by that part in the confession of Balmukan where he said that he was physically unable to have sexual intercourse with the girl, because we are satisfied that the girl's statement on this point is true; nor are we impressed by that part of the statement of Surjia where he said that he was forced to have sexual intercourse with the girl by the other two appellants. It seems to us that the girl had gone with Sanwaria to have a good time, and Surjia took advantage of it and threatened Sanwaria with exposition. Thereupon Sanwaria suggested to him also to have sexual intercourse with the girl, though the girl was unwilling. They then went to the Race-course Bungalow, of which Balmukan was chaukidar, and he apparently agreed to the use of the bath-room in the Bungalow, and the consideration was that he should also have sexual intercourse with the girl. But we are satisfied that the girl was not willing to have sexual intercourse with these two appellants, namely, Surjia and Balmukan, and they have been rightly convicted under S. 376 of the Indian Penal Code.

(16) We now turn to the case against Sanwaria. He has been convicted under Ss. 376 and 366 of the Penal Code. He was not charged under S. 366, but under S. 366A, and the contention of learned counsel is that under these circumstances he could not be convicted under S. 366. There is force in this contention inasmuch as a charge under S. 366 has certain elements which are not present in a charge under S. 366A. Under S. 366A, a girl below the age of 18 years has to be induced by any means whatsoever to go from any place with the intention that such girl may be forced or seduced to illicit intercourse with another person. Under S. 366, on the other hand, there has to be a kidnapping or abduction, which introduces certain elements which are not to be found in S. 366A. We are, therefore, of opinion that it is not possible to convict under S. 366 on a charge under S. 366A, for S. 366 cannot be said to be a minor offence as compared to S. 366A. Further, we may add that it cannot be said that the girl was either kidnapped or abducted in this case. There was no abduction, because we are satisfied that the girl was not compelled by force or induced by any deceitful means to go with Sanwaria. There was no kidnapping either, even though the girl is below the age of 16 years, because there never was any intention of taking the girl out of the guardianship of her father and what the two of them wanted was to go away for a short time in order to have a good time. The conviction, therefore, of Sanwaria under S. 366 cannot stand.

(17) The next question is whether his conviction under S. 376 can stand. So far as that is concerned, we have already said that the intercourse with him was with consent. It is, however, urged on behalf of the State that the girl is below the age of 14, and her consent is, therefore immaterial. We have looked into the evidence regarding the age. It is true that the medical evidence suggests that the age of the girl was about 13 years; but that evidence is not conclusive. The mother of the girl certainly said that she was 13; but she could not give the year of her birth. The statement of the father of the girl suggested that she might even be 15 or 16. In this state of the evidence, we are not prepared to hold that the girl was necessarily under 14 and in this view of the matter, her consent would protect Sanwaria so far as an offence under S. 376 of the Indian Penal Code is concerned.

(18) Lastly, it has been urged on behalf of the State that in any case Sanwaria can be convicted under S. 376 read with S. 114 of the Penal Code for abetment of rape. Learned counsel for the appellants, however, urges that as there was no charge of abetment, Sanwaria cannot be convicted under S. 376 read with S. 109 or 114 of the Penal Code. There has been difference of opinion in the High Courts whether a person can be convicted of abetment on a charge of substantive offence; but the majority opinion is that this can be done under certain circumstances.

(19) The earliest case on the subject is 'REG v. CHAND NUR', 11 Bom H C R 240. In that case it was held that it was not open to a Court to find a man guilty of the abetment of an offence on a charge of the offence itself. The reason for this view was that when a person was accused of an offence, he might not be conscious that he would have to meet an imputation of collateral circumstances constituting abetment of it, which might be quite

distinct from the circumstances constituting the offence itself.

(20) This case was considered in a Full Bench of the Lower Burma Chief Court in 'S. P. GHOSH v. EMPEROR', 16 Cri L J 676 (L B). It was explained that that case merely amounted to this that where the charge for the substantive offence did not give proper notice to the accused of what he had to meet it would not be correct to convict the accused of abetment. It was also held that that decision was no authority for the proposition that an accused charged with an offence could not, in any case, be convicted of abetment of the offence. Where therefore, the charge for the major offence gave full notice to the accused of all the circumstances alleged against him, conviction for abetment would not be improper even though there was no charge of abetment.

(21) The Madras High Court in 'PADMANABHA PANJIKANNAYA v. EMPEROR', 33 Mad 264, held that a person charged with the substantive offence could not be convicted of the offence of abetment of that offence.

(22) In a later case, 'SUBBAYYA v. EMPEROR', 23 Mad L J 722, however, it was pointed out by Sundara Aiyar J. that 'PANJIKANNAYA'S CASE', 33 Mad 264, could not be intended to lay down a universal rule that in no case would a conviction for abetment be possible where the charge was only of the principal offence. The learned Judge went on to say,

"The question is what were the facts charged. If on those facts two charges could be framed, namely, the commission of the principal offence, and the abetment, then by virtue of provisions of S. 237, the accused may be convicted of the offence of the abetment though it was not charged separately against him."

(23) The next case is 'EMPEROR v. MAHABIR PRASAD', 49 All 120. There it was laid down that abetment not being a "minor offence", S. 238, Cri P. C., would not apply, and a person charged with the offence could not be convicted of abetment of it except where the case was covered by S. 237, Criminal P. C. This would happen, if there was no element in the abetment, which was not included in the charge. Obviously, therefore, this case also rests on the basis of notice to the accused of the facts which go to make up the charge of abetment before the accused can be convicted of abetment on a charge for the offence itself.

(24) The next case is 'JANANADA CHARAN v. EMPEROR', 34 Cal W N 198. It was held that

"a person charged only with a substantive offence can be convicted of abetment thereof, if the facts proved justify such conviction and be such as were sufficient to give the accused notice of allegations of abetment, in spite of the absence of a specific charge."

The question whether the accused had notice and also the further question whether the facts proved justify the conviction for abetment depended upon the facts of each case.

(25) This case was followed in 'DEBI PROSAD v. EMPEROR', 36 Cal W N 595, where it was held that an accused person charged with an offence under S. 379, Penal Code, might be convicted under that section read with S. 114, although there might not have been any such charge. The case was held to be covered by Ss. 236 and 237 of the Code of Criminal Procedure. That was a case where a person incited a boy to steal pulley from Messrs. Burn and Company and carry it on his head. The boy did so, and the person who incited the boy, was charged under S. 379. The Magistrate, however, convicted him under S. 379 read with S. 114, as it had not been proved that the accused had actually removed the pulley. It was held that the boy's evidence gave clear notice to the accused of the facts against him, and he could be charged under S. 236 of the Code of Criminal Procedure in the alternative for abetment of the offence, and, therefore, his conviction for abetment without a charge was correct.

(26) We may next refer to 'SAMUEL JOHN v. EMPEROR', AIR 1935 All 935. This was a case where a person was charged with rape, and was convicted of abetment of rape. The learned Judge rested the conviction under section 238(2) Criminal Procedure Code, on the ground that the abetment was a minor offence. This is, however, a doubtful view, and we have already referred to the earlier case in 'EMPEROR v. MAHABIR PRASAD', 49 All 120, where it was held that such a case is not covered by S. 238.

(27) The next case is 'PROVINCIAL GOVERNMENT v. GOMAJI', AIR 1944 Nag 192. In that case a person was charged under S. 193, but was convicted of abetment thereof, and it was held that

"When an accused is charged under S. 193, Penal Code, the Courts are under law not precluded from convicting the accused for the offence of abetment if they find it established. If, however, the evidence adduced in support of the charge for the substantive offence does not, give notice to the accused of all the facts which constitute abetment he cannot be convicted of abetment."

Reliance was placed in this case on 'BEGU v. EMPEROR', AIR 1925 P C 130, where a person was charged under S. 302 and convicted under S. 201 of the Penal Code, and their Lordships of the Privy Council relied on Ss. 236 and 237 of the Code of Criminal Procedure in that connection. Section 236 was explained in these words by their Lordships:

"A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made."

(28) This case was followed in PROVINCIAL GOVERNMENT, C P & BERAR v. SAJDU', AIR 1947 Nag 113, where the same principle was laid down, and reliance was placed on S. 237 of the Code of Criminal Procedure. The principle that was laid down was that there was no bar in law to convict a person of abetment without a distinct charge if the circumstances brought the case under S. 237, and the essential facts which would have warranted the framing of the charge of abetment were all disclosed to the accused so as to give him an opportunity to meet them.

(29) The next case is 'HIRA SAH v. EMPEROR', AIR 1947 Pat 350. It was held in

this case that the abetment of an offence is not a minor offence within the meaning of S. 238; but a conviction for substantive offence could be changed into one for abetment, if the facts were such that the principles of Ss. 236 and 237 might be applicable, and if no prejudice was caused to the accused in his defence. In this case a person, other than the licensee, who could not be convicted for contravention of Cl. 5 of License Form A, Bihar Coal, Sugar and Kerosene Oil Dealers' Licensing Order, 1942, was convicted of abetment of such contravention, applying the above principle.

(30) The next case, to which we may refer, is 'CHOTEY v. EMPEROR', AIR 1948 All 168. This case was mainly concerned with the difference between Ss. 109 and 114 of the Penal Code. The learned Judge doubted if the case was covered by S. 114. It was held that it was not enough to frame a charge for the substantive offence without specifying the special circumstances which brought the case within the purview of S. 114. Eventually, the learned Judge held that the conviction of Chotey for abetment under S. 109 of the Indian Penal Code was illegal, but did not give any particular reason for arriving at that conclusion, and there was no consideration of Ss. 236 and 237 of the Code of Criminal Procedure.

(31) A review of these authorities, in our opinion clearly establishes that where the case is covered by Ss. 236 and 237 of the Code of Criminal Procedure, and the accused has notice of all the facts which go to make up the charge of abetment, he can be convicted of the charge of abetment, even though the charge framed against him was only of the substantive offence. We, therefore, propose to examine the facts of the present case on this principle.

(32) The evidence as to the charge of abetment of the offence of rape was all before the Court in the statement of the girl. In the words of their Lordships of the Privy Council in 'BEGU v. EMPEROR', AIR 1925 P C 130, a man can be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. In this case, on the evidence of the girl, Sanwaria could have been charged of an offence under S. 376 read with S. 109 of the Indian Penal Code for abetting the offence of rape by Surjia and Balmukan. The evidence of the girl is that Sanwaria suggested to Surjia, when the latter threatened him, that he could also have sexual intercourse with the girl, though the girl was not agreeable. Then there is evidence that after intercourse between the girl and Sanwaria, the girl wanted to come out of the bath-room, but Sanwaria forced the girl to go back to the bath-room as another man was coming. We are, therefore, of opinion that Sanwaria appellant can be convicted of the offence of abetment of rape by Balmukan and Surjia, even though he was not charged with it. On the facts, this offence of abetment has been proved.

(33) There is a statement of one witness Pabudan in this case, to which we have not referred. It is enough to say that he tried to pose as an eye-witness; but his evidence is utterly unreliable, and we have placed no reliance on it.

(34) Notice has been issued to all the three appellants to show cause why the sentence should not be enhanced, Surjia has been sentenced to four years' rigourous imprisonment, while the other two have been sentenced to only two years' rigorous imprisonment. We are of opinion that there was no reason for giving a less severe sentence to Balmukan and Sanwaria. Balmukan's case is equally serious, because it was his duty as Chukidar of the Race-course Bungalow to see that it was not used for commission of an offence. Instead of that, he allowed the use of Bungalow, provided he was also allowed to rape a girl. As for Sanwaria, the fact that the girl was willing to have sexual intercourse with him did not give him any right to abet the other two accused in committing rape on the girl, when he found that he was in a tight corner, and Surjia and Balmukan were going to hand him over to the police. We are, therefore, of opinion that the sentence of these two accused should be enhanced.

(35) So far as Surjia is concerned, he has been sentenced to four years' rigorous imprisonment. We consider that in cases of rape of girl of immature age like this girl, it is desirable that a sentence of whipping should also be inflicted. We think that in this case a sentence of ten stripes should be given to all the three appellants. We, therefore, dismiss the appeal of Surjia, and enhance the sentence passed on him, and order that in addition to four years' rigorous imprisonment, he will undergo ten stripes under the Whipping Act.

(36) We also dismiss the appeal of Balmukan, and enhance the sentence in his case from two to four years, rigorous imprisonment, and also sentence him to ten stripes under the Whipping Act.

(37) We partially allow the appeal of Sanwaria, and set aside his conviction under S. 366 of the Indian Penal Code. We also set aside his conviction under S. 376 of the Indian Penal Code, and instead convict him under S. 376 read with S. 109 of the Indian Penal Code. We enhance his sentence from two years' to four years' rigorous imprisonment, and also sentence him to ten stripes under the Whipping Act.

R.G.D. Order accordingly.

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(JAIPUR BENCH)

SHARMA J.

Phoolchand, Applicant v. Motilal, Respondent.

Civil Revn. Petn. No. 278 of 1950, D/- 11-9-1951.

Tenancy Laws — Jaipur Tenancy Act Ss. 100, 105 and Sch. II, No. 52 — Exclusive jurisdiction of Revenue Court — Suit by one co-sharer against another for recovery of specified sum on account of share of profits — Jurisdiction of civil Court is barred — Civil P. C. (1908), S. 9.

A suit for a specified sum on account of his share of profits, by one co-sharer against another, falls under S. 100 of the Jaipur Tenancy Act and is consequently exclusively triable by a Revenue Court by virtue of S. 105 of that Act. Merely because the plaintiff claims a specific amount and does not make a prayer for accounting

would not make the suit any other than a suit for share of profits. Civil App. No. 28 of St. 2003, D/- 18-1-1950 (Raj), Foll. (Para 2)

Anno: C. P. C., S. 9 N. 51.

K. C. Sanghi, for Applicant; P. D. Mathur, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras.

('50) Civil Appeal No. 28 of St. 2003, D/- 18-1-1950 (Raj) (Pr 2)

ORDER: This is a revision application by the defendant against the judgment and decree of the Judge, Small Causes, Jaipur City. The plaintiff and the defendant are co-sharers in a certain property in village Nevta. The plaintiff's case is that the defendant raised a sum of Rs. 237/- from the tenants of the parties, out of which the plaintiff is entitled to one-third share. He, therefore prayed that a decree for Rs. 77/13/9 on account of his share be passed. The defendant pleaded, inter alia, that the suit was not cognisable by a Civil Court, but it was within the exclusive jurisdiction of Revenue Courts. The Learned Lower Court did not record any finding on this point and decreed the suit holding it to be within time. The defendant appeals and one of the points raised is that the suit was not cognisable by a Civil Court

(2) I have heard the learned counsel for both the parties. To my mind the present suit comes under S. 100 of the Jaipur Tenancy Act which provides that a co-sharer may sue another co-sharer for settlement of accounts and for his share of profits. Under S. 105 all suits of the nature specified in the second schedule shall be heard and determined by a Revenue Court and no Court other than a Revenue Court, shall take cognisance of any such suit or application based on a cause of action in respect of which relief could be obtained by means of any such suit or application. A suit under S. 100 of the Jaipur Tenancy Act is given in schedule 2 at No. 52. The learned counsel for the opposite party admits that the parties are co-sharers but he says that the suit was neither for settlement of accounts nor for the share of profits. To my mind the suit was a suit for the share of profits and it cannot be said that it ceased to be so, because the plaintiff claimed a specified sum on account of his share and did not make a prayer for accounting. It was held by a Division Bench of this Court in 'MOTI LAL v. NANULAL', Civ. App. No. 28 of St. 2003 on the '18th January, 1950' that a suit for a specified sum on account of his share of profits, by one co-sharer against another falls under S. 100 of the Jaipur Tenancy Act and is consequently exclusively triable by a Revenue Court. This ruling is binding upon me, sitting as a single Judge. I find that the suit was exclusively triable by a Revenue Court.

(3) The application is allowed, the decree of the lower Court is set aside. Let the plaint be returned for presentation to the proper Court. The applicant shall get his costs throughout from the opposite party.

K.S. Revision allowed.

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(JAIPUR BENCH)

RANAWAT AND SHARMA JJ.

Jahangir Khan, Applicant v. Zahur and others, Opposite Parties.

Civil Revn. No. 111 of 1950, D/- 26-9-1951.

Stamp Act (1899), S. 36 — Objection in same Court — Revision.

Once a document is admitted into evidence the intention of the legislature is that it should not be questioned, at any subsequent stage of the same proceeding on the ground that the document was not admissible for want of stamp duty. It cannot be held that if an objection is raised by the opposite party soon after the order of the lower Court the provisions of S. 36 should not be considered to be a bar to a revision application by him. The promptness on the part of the opposite party is no consideration for ignoring the clear provisions of S. 36. Case law Rel. on. (Para 4)

Anno: Stamp Act, S. 36 N. 3, 5, 7.

Sagarlal, for Applicant; Gaffar Ali, for Opposite Party.

Cases referred to:

('36) AIR 1936 Cal 556: (63 Cal 1098) (Pr 3)
('29) AIR 1929 Mad 622: (119 Ind Cas 472) (Pr 3)
('37) AIR 1937 Mad 431: (169 Ind Cas 641) (Pr 3)
('37) AIR 1937 Pat 73: (16 Pat 84) (Pr 3)

RANAWAT J.: This is an application in revision under S. 115 of the Civil Procedure Code against an order of the Civil Judge, Jaipur City dated the 9th March, 1950 holding that the document which was the basis of the suit was not a pro-note but an agreement. He therefore ordered the plaintiff to pay the deficit stamp duty and on payment of such stamp duty held that the document was admissible into evidence. The plea of the petitioner in this case is that the lower Court was wrong in holding that the document was not a pro-note. According to him the requirements of S. 2 (22) of the Jaipur Stamp Act are satisfied in this case as regards the document which is the basis of the suit and it is contended that the document ought to have been held to be a pro-note. This objection was raised by the defendant in the lower Court and was disallowed.

(2) A preliminary objection has been raised by the opposite party in this revision that under S. 36 of the Jaipur Stamp Act this question cannot be re-agitated in revision that the document in question is inadmissible into evidence. Section 36 of the Jaipur Stamp Act lays down that:

"where an instrument has been admitted in evidence such admission shall not except as provided in S. 61 be called in question at any stage of the same suit or proceedings on the ground that the instrument has not been duly stamped."

(3) It is argued by the learned counsel of the petitioner that in the present case this revision was filed no sooner an order was made by the lower Court and S. 36 should therefore not stand in the way of the petitioner. The counsel on the opposite side has put his reliance on the authorities in 'SATYAVATI v.

PALLAYA', AIR 1937 Mad 431; 'VENKATESWARA IYER v. RAMANATHA DHEEKSHITAR', AIR 1929 Mad 622; 'BHUPATINATH v. BASANTA KUMARI DEVI', AIR 1936 Cal 556 and 'KRISHANA KUMAR v. MT. JAGPATI KUER', AIR 1937 Pat 73.

(4) It may be observed that once a document is admitted into evidence the intention of the legislature is that it should not be questioned, on any subsequent stage of the same proceeding on the ground that the document was not admissible for want of stamp duty. The learned counsel of the petitioner has not been able to cite any authority in support of his view directly bearing on this point that if an objection is raised soon after the order of the lower Court the provisions of S. 36 should not be considered to be a bar to such revision application. The plaintiff has, we are told, paid the deficit stamp duty and the document should be considered to have been admitted into evidence by the lower Court and we are of opinion that S. 36 bars the petitioner from re-agitating this question in revision. The promptness on the part of the petitioner is no consideration for ignoring the clear provisions of S. 36 of the Stamp Act.

(5) The preliminary objection is allowed and the revision is dismissed. Parties shall bear their own costs of this revision.

D.H. Revision dismissed.

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(JAIPUR BENCH)

RANAWAT AND SHARMA JJ.

Omprakash and another, Petitioners v. Bansidhar and others, Opposite Party.

Civil Writ Appln. No. 17 of 1950, D/- 18-9-51.

Houses and Rents — Jaipur Rent Control Order, 1947, S. 12 (2) — Duty of appellate Court — Dismissal of appeal for default without perusing record — Order is without jurisdiction and can be quashed by writ of certiorari — Constitution of India, Art. 226 — Rajasthan High Court Ordinance (1949), S. 28.

The provisions of S. 12 (2) of the Jaipur Rent Control Order are mandatory and it is the bounden duty of the appellate authority to send for the record of the case and to decide the appeal after perusing such record and making such further enquiry as it thinks fit either itself or through the Controller. There is no provision in the Jaipur Order of the dismissal of the appeal for default of the appellant. The Court of the Collector is undoubtedly an inferior Court for the purposes of a writ of certiorari and is amenable to the writ of Rajasthan High Court both under Art. 226 of the Constitution of India as well as S. 28 of the Rajasthan High Court Ordinance.

Hence, if the collector dismisses the appeal for default without perusing the record he exercises a jurisdiction not vested in him by law and his order can be quashed by a writ of certiorari. (Paras 8, 9)

R. K. Rastogi, for Petitioners; S. N. Saxena, for Opposite Party No. 1.

Cases referred to:

('23) AIR 1923 All 175 (2): (24 Cri L J 662) (Pr 7)

('30) AIR 1930 Lah 659 (1): (31 Cri L J 979) (Pr 7)

('24) AIR 1924 Pat 376: (24 Cri L J 475) (Pr 7)

('38) AIR 1938 Sind 171: (39 Cri L J 890) (Pr 7)

SHARMA J.: Omprakash and his father Gappuram have filed this application under Art. 226 of the Constitution of India and S. 28 of the Rajasthan High Court Ordinance, with a prayer that all the proceedings by the Rent Controller, Jaipur, purporting to be taken under S. 10 of the Jaipur Rent Control Order, 1947—hereinafter to be referred to as the Jaipur Order—and orders of the Rent Controller dated the 10th November and 17th November, 1949, and 3rd and 6th June, 1950 as well as the orders of the Collector dated the 4th April, and 2nd May, 1950 in connection with shop No. 231 situated in Chaura Rasta, Jaipur City, be quashed and a writ of prohibition be issued not to hand over the possession of the said shop to Bansidhar, opposite party No. 1, and the seal and lock put by the Rent Controller be removed and the possession of the shop be left to the petitioners and also a writ of certiorari or any other proper order be issued for the above purposes.

(2) This application has been filed against Bansidhar, who is the intending tenant of the shop Nathulal, the owner of the shop, the Rent Controller of Jaipur and the Collector of Jaipur.

(3) The allegations of the petitioners are that they are members of a joint Hindu family and carry on a business under the name and style of Omprakash Gappuram for supplying ration and other articles to Sawai Man Guards (a Military Battalion of the former Jaipur State). They had been doing this business since 1939 and rented a shop No. 231 situated in Chaura Rasta, Jaipur City, from the opposite party No. 2 on 6th August 1944 for the said business. This shop contained five apartments. From 6th August, 1944 to April 1948 the shop was used for the purposes of the said business as well as other businesses of the petitioners. In April 1948 Sawai Man Guards left for Kashmir on active service and petitioner No. 2 remained with the said Unit in Kashmir while petitioner No. 1 remained in Jaipur. On the 9th July 1949 Sawai Man Guards returned from Kashmir and the petitioner No. 2 returned along with it. On 15th October 1949 the opposite party No. 1 filed an application before the Rent Controller that he had come back from Calcutta and wanted to carry on business at Jaipur. The shop in question, which was vacant, be therefore allotted to him. The Rent Controller without recording his satisfaction as required by S. 10 of the Jaipur Order and without issuing a notice as required by the said section sealed the shop on the 10th November, 1949 and without giving any proper opportunity to the petitioners allotted it to the opposite party No. 1 on the 17th November, 1949, although the date for hearing was fixed as 10th November 1949. Against this order the petitioners went in appeal to the Court of the Collector Jaipur, but he dismissed the appeal for default. An application was made for restoration of the appeal but it was also dismissed.

(4) The contention of the petitioners is that the Rent Controller was not entitled to take any action under S. 10 unless he was satisfied

that the premises were vacant either on account of the landlord ceasing to occupy the same or by the termination of a tenancy or by the eviction of the tenant or by the release of the premises from requisition or otherwise, and that the applicant before him had actual necessity for the shop. Only after such satisfaction he was entitled to take action and he was in duty bound to serve a notice on the landlord with the contents required by sub-clause (i) and (ii) of clause (1) of S. 10. The Rent Controller was neither satisfied about the facts required by S. 10 (1) nor did he issue a notice as required by S. 10 (1) (i) and (ii). The proceedings of the Rent Controller were therefore without jurisdiction and should be quashed. As regards appeal, it has been contended that under S. 12 of the Jaipur Order the only power that the appellate authority had was that of sending for the record of the case from the Controller and after perusing such record and making such enquiry as it thought fit either itself or through the controller of deciding the appeal. The appellate authority has not been given any power to dismiss the appeal for default, even though the appellant be absent.

(5) On behalf of the opposite party, it has been asserted that all the provisions of S. 10 of the Jaipur Order were fully complied with. The Rent Controller was perfectly satisfied about the conditions required by the section and issued a notice to the landlord as required by the same. He also fully satisfied himself that the shop was really vacant within the meaning of S. 10 and made the order quite legally. As regards appeal, it was argued that it was within the power of the appellate authority to dismiss the appeal for default when the petitioners who were appellants before the Collector did not appear.

(6) We have heard the learned counsel for both the parties. We do not consider it necessary to express any opinion about the legality or illegality of the proceedings before the Rent Controller as, to our mind, this petition succeeds on a short point. Section 12 of the Jaipur Order provides an appeal against the order of the Rent Controller. The Collector, Jaipur, was the appellate authority for the purposes of appeal against such orders. Sub-sections (1) and (2) of S. 12 run as follows:

> "(1) Any person aggrieved by an order of the Controller may within fifteen days from the date of such order, appeal therefrom to such authority as the Government may from time to time appoint in that behalf.
>
> (2) The appellate authority shall then send for the record of the case from the Controller, and after perusing such record and making such further enquiry as it thinks fit either itself or through the Controller, shall decide the appeal."

(7) It would thus appear that the only power which has been given to the appellate authority is that of sending for the record of the case from the Controller and after perusing such record and making such further enquiry as it thinks fit either itself or through the Controller, of deciding the appeal. It has not been given any power to dismiss the appeal for default without perusing the record. A somewhat similar provision exists in S. 421 of the Criminal Procedure Code, with respect to criminal appeals. Section 421 says that on receiving the petition of appeal and copy under S. 419 or S. 420 the appellate Court shall peruse the same and, if it considers that there is not sufficient ground for interfering, it may dismiss the appeal summarily. Various High Courts have pronounced the opinion that the wordings of S. 421 do not allow an appellate Court to dismiss the appeal for default of the appellant and that it is duty of the appellate Court to peruse the petition for appeal and the copy of the judgment of the subordinate Court before deciding the appeal summarily. It would be enough to cite the following four rulings of four different High Courts in support of this view:

1. The first is a ruling of the Allahabad High Court reported in 'RAM CHANDAR v. EMPEROR', AIR 1923 All 175 (2) in which it was held that there was no provision in the Criminal Procedure Code for the dismissal of an appeal on account of the non-appearance of the appellant or his pleader. The appellate Court is bound to peruse the record and to decide the appeal judicially.
2. The second ruling is that of Patna High Court reported in 'BALDEO DUBE v. EMPEROR', AIR 1924 Pat 376 in which it was held that even though no one may appear in a criminal appeal it is the duty of the Court to examine the matter and to come to some sort of decision on the merits.
3. Lahore High Court in 'ROORA v. EMPEROR', AIR 1930 Lah 659 has held that the Code does not permit the dismissal of an appeal on the ground that the appellant does not appear to support it.
4. The fourth and the last ruling is that of Sind Chief Court reported in 'EMPEROR v. BALUMAL HOTCHAND', AIR 1938 Sind 171 in which it was held that a Court cannot dismiss an appeal summarily simply because the accused fails to prosecute his appeal. The law requires that the dismissal of the appeal shall depend upon the exercise by the Judge of his independent and impartial judgment after he has read a copy of the judgment and not upon the failure of the accused to prosecute his appeal.

(8) The provisions of S. 12 (2) of the Jaipur Order are mandatory and it is the bounden duty of the appellate authority to send for the record of the case and to decide the appeal after perusing such record and making such further enquiry as it thinks fit either itself or through the controller. There is no provision in the Jaipur Order of the dismissal of the appeal for default of the appellant. The learned Collector in dismissing the appeal for default exercised a jurisdiction which was not vested in him.

(9) The learned Collector had a duty to decide the appeal in accordance with the provisions of S. 12 (2). This duty was at any rate a quasi-judicial duty. As the learned Collector failed to perform that duty, this Court is entitled to quash his order in appeal by a writ of certiorari. The Court of the Collector is undoubtedly an inferior Court for the purposes of a writ of certiorari and is amenable to the writ of this Court both under Art. 226 of the Constitution of India as well as S. 28 of the Rajasthan High Court Ordinance.

(10) The application is therefore allowed. The order of the Collector, Jaipur, dated the 4th April, 1950 dismissing the petitioners' appeal for default is set aside. The appellate authority shall hear and decide the appeal in accordance with law. The petitioners shall get costs of this application from the opposite party No. 1. We assess the counsel's fee at Rs. 50/-.

K.S. Application allowed.

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(JAIPUR BENCH)

FULL BENCH.

WANCHOO C. J., RANAWAT AND SHARMA JJ.

Harji, Applicant v. Revenue Board of Rajasthan, Opposite Party.

Civil Original Writ Appln. No. 21 of 1951, D/— 1-2-1952.

Tenancy Laws — Rajasthan (Protection of Tenants) Ordinance (9 of 1949) — Case under, arising from territories of former Tonk State — Decision of Revenue Board of Rajasthan before passing of Rajasthan Revenue Courts (Procedure and Jurisdiction) Act of 1951 — Board cannot review its own judgment in the case — (Rajasthan Revenue Courts Procedure and Jurisdiction) Act (I (1) of 1951), S. 24.

It is a well settled principle of law that leaving exceptional cases apart, unless a Court is empowered by statute to review its own judgment it cannot review it. (Para 2)

After the passing of the Rajasthan Revenue Courts (Procedure and Jurisdiction) Act, 1951, the Rajasthan Revenue Board can review its own judgment under S. 24 of the Act in a case under S. 10(2), Rajasthan (Protection of Tenants) Ordinance, 1949. But, S. 24 does not apply to a case decided by the Board before the Act of 1951 came into force. (Para 4)

Before the passing of the Revenue Courts (Procedure and Jurisdiction) Act of 1951, the Rajasthan Board of Revenue had to follow the laws of the Integrating States which merged in the United State of Rajasthan governing the procedure and powers of the Revenue Courts and Boards of Revenue of the former States of Rajasthan. Where the case arose from the territories of the former Tonk State, the law applicable to the case would be the law of the former Tonk State governing the procedure of the Revenue Courts. (Para 4)

There was no provision of law in the Tonk State which authorised a Revenue Court or more specially a Board of Revenue functioning under the Tonk State laws to review its own judgment. (Para 3)

Section 251 of the Land Regulation of the Tonk State had no application to a case of a revenue suit in a Revenue Court. Ss. 190, 191 and 251 of the Regulation did not empower the Revenue Court to review its own judgment. (Para 3)

The practice of the Tonk State Revenue Courts before integration of Tonk State into United State of Rajasthan in reviewing their own judgments cannot give such jurisdiction, as the practice cannot be considered to be at par with a Statute. Such a practice of the Tonk Revenue Courts cannot be followed by the Rajasthan Board of Revenue when it cannot be considered to be in accordance with the recognised principle of law. (Para 3)

The Rajasthan Board of Revenue is not competent to review its own judgment in a case under the Rajasthan (Protection of Tenants) Ordinance 1949, arising from the territories of the former Tonk State, by virtue of the Land Regulations of Tonk State or the Code of Civil Procedure, before the passing of the Rajasthan Revenue Courts (Procedure and Jurisdiction) Act of 1951. (Para 7)

J. P. Jain, for Applicant; Ram Avtar Gupta, Government Advocate, for Opposite Party.

REFERENCES: Courtwar/ Chronological/ Paras.

('19) AIR 1919 Mad 244: (53 Ind Cas 56) 2

('48) AIR 1948 Mad 235: (1947-2 Mad L J 482) 4

('51) Civil Revn. No. 6 of 1950, D/- 8-1-1951: (AIR 1952 Raj 36) 2

RANAWAT, J.: The facts of this case appear in the order of reference and it is not necessary to repeat them here. It would suffice to say that an application made by Harji under S. 7 of the Rajasthan (Protection of Tenants) Ordinance, 1949, for reinstatement was allowed by the Sub-Divisional Officer, Tonk, and a revision application, which was filed by the landlord against the order of the Sub-Divisional Officer, was dismissed by the Rajasthan Board of Revenue. The landlord then filed a review application which was accepted and the order for reinstatement passed by the Sub-Divisional Officer was set aside. The tenant then filed an application under Art. 226 of the Constitution of India in this Court. The question then arose whether in a case under the Rajasthan (Protection of Tenants) Ordinance the Rajasthan Board of Revenue was competent to review its own judgment. A Division Bench of this Court, as the question was of general importance, referred the following point to a Full Bench:

"Whether the Rajasthan Revenue Board is competent to review its own judgment in a case under the Rajasthan Tenants Protection Ordinance, 1950 from the territories of the former Tonk State, by virtue of the provisions of the Land Regulations of Tonk or of the Civil P. C.?"

(2) In the Rajasthan (Protection of Tenants) Ordinance, there is no provision for the exercise of the powers of review by the Rajasthan Board of Revenue in cases which come before it under S. 10 (2) of the Ordinance. The learned counsel of the petitioner has cited a decision of this Court in 'NATHULAL v. COLLECTOR SAWAI JAIPUR', Civil Revn. No. 6 of 1950, D/- 8-1-1951 in which it has been observed that it is settled law that a case is not open to appeal unless the Statute gives such a right and the power to review must also be given by the statute. Prima facie a party who has obtained a decision is entitled to keep it unassailed unless the legislature has indicated the mode by which it can be set aside. The principles laid down in 'ANANTHARAJU SHETTEY v. APPU HEGADE', AIR 1919 Mad 244, were approved in the judgment of this Court referred to above.

In 'AIR 1919 Mad 244' it has been held that except in special cases where the previous judgment of a Court is void or it has been passed by inad-

vertence of the Court or on account of fraud or some such other grounds a Court cannot review its own decision unless it is permitted to do so by statute. It is therefore a well settled principle of law that leaving exceptional cases apart unless a Court is empowered by statute to review its own judgment it cannot review it.

The learned Government Advocate has however argued that in the present case the Rajasthan Board of Revenue was authorised to review its own judgment by virtue of Ss. 190, 191 and 251 of Tonk Regulations. Section 190 of Tonk Regulations gives a list of cases which could be entertained by the Revenue Courts of the Tonk State and it is evident that the scope of the list is wide enough to include cases relating to reinstatement of tenants. Section 191 of the Tonk Regulations provides that Civil suits hearable by the Revenue Courts shall be dealt with as laid down in Civil P. C. (Act V (5) of 1908). It is contended that the Civil P. C. is applicable to the proceedings of the Revenue Board in cases coming from the territories of the former Tonk State, by virtue of S. 191 of the Tonk Regulations. The language of S. 191, it may be pointed out, is not very clear in this behalf. Civil suits hearable by the Revenue Courts cannot mean Revenue cases or the cases specified in S. 190 of the Tonk Regulations. It may be that the Revenue Courts in the former Tonk State were authorised to hear certain Civil Suits and the provision of S. 191 of said Regulations was therefore made to govern the proceedings of the Civil suits cognizable by the Revenue Courts. It cannot therefore be inferred from S. 191 of the Regulations that the Code of Civil Procedure was made applicable to the Revenue Courts in dealing with Revenue cases coming before them. Section 251 of the Tonk Regulations is as follows:

"The definition of review and the procedure under which the review is heard are given in O. XLVII. All reviews shall be dealt with under that Order."

These sections are headed by the following words:

"The following instructions and notes are issued for the guidance of the officers and clerks concerned."

(3) It would be clear that S. 251 is intended to serve as an instruction for the guidance of the officers. It is not a substantive piece of law. Moreover, these instructions are intended to be followed in the trial of civil suits when they are heard by Revenue Courts. Section 251 of the Regulations, therefore, has no application to the case of a revenue suit in a Revenue Court. Sections 190, 191 and 251 therefore cannot help the case of the opposite party. It was further argued by the learned Government Advocate that the Rajasthan Board of Revenue inherited the jurisdiction of the Revenue Boards functioning in the various States of Rajasthan which were merged in the United State of Rajasthan. He has produced a number of records from the archives of the former Tonk State in some of which the Revenue Member of the former Tonk State reviewed his own judgments in Revenue cases. The practice of the Tonk State Courts in reviewing their own judgments cannot help the case of the opposite party as a practice cannot be considered to be at par with a statute. Such a practice of the Tonk Revenue Courts cannot be followed by the Rajasthan Board of Revenue when it cannot be considered to be in accordance with the recognised principles of law.

(4) The learned counsel of the petitioner has cited the case of 'ABDUL KHADIR v. A. K. MURTHY', AIR 1948 Mad 235 which is a case under the Madras Buildings (Lease and Rent Control) Act. In that case the Chief Judge of the Court of Small Causes, Madras, in his capacity as the appellate authority under the Madras Buildings (Lease and Rent Control) Act of 1946 allowed an appeal but subsequently the opposite party appeared and satisfied him that the summonses were not properly served upon him. He set aside his previous judgment and proceeded to rehear the case. The appellant then moved the Madras High Court for a writ of certiorari on the ground that the Chief Judge of the Court of Small Causes had no jurisdiction to review his own decision. It was held in that case that as there was no procedure prescribed in the Act to review the judgments of an appellate tribunal the Chief Judge of the Court of Small Causes was not competent to review his own judgment. It may be observed that under the Madras Buildings (Lease and Rent Control) Act of 1946 the provincial Government was authorised to confer the powers of appellate authority for the purposes of that Act upon such officers or authorities as it thought fit. In exercise of its powers the Provincial Government appointed the Chief Judge of the Court of Small Causes, Madras, to hear appeals under the Act. The Chief Judge was therefore a persona designata and the decision in that case, therefore, will not apply to the present case, because the Rajasthan Board of Revenue cannot be regarded as a persona designata in the matter of hearing revision petitions under S. 10(2) of the Rajasthan Protection of Tenants Ordinance.

Section 10(2) of the Rajasthan Protection of Tenants Ordinance invests jurisdiction in the Board of Revenue to hear revision petitions. The legislature when it invested revisional powers in the Board of Revenue must be deemed to have intended that the Board of Revenue which was a tribunal would exercise its ordinary powers which it had under the law in dealing with the cases coming before it under the Tenants Protection Ordinance. The Board performs its duties in accordance with certain rules applicable to it. Those rules are to be followed by the Board even though no mention in that behalf is made in the Protection of Tenants Ordinance. For instance, the rules regarding disposal of the Board's business by a single Member or by a Division Court or by a Full Bench of the Board have to be followed by the Board in cases of Revision arising under the Protection of Tenants Ordinance, even though in the said Ordinance nothing has been provided in this respect. Similarly, the Board would be justified in exercising its own jurisdiction in such cases, which the Board possesses under the authority of law. It has been provided by S. 24 of the Rajasthan Revenue Courts (Procedure and Jurisdiction) Act. 1951, that the Board of its own motion or on the application of a party to a suit or other proceeding, may review and may rescind, alter or confirm any decree or order made by itself or by any of its members. The Revenue Board therefore can exercise its powers under S. 24 in cases arising under the Protection of Tenants Ordinance and review its own decisions. After the passing of the Rajasthan Revenue Courts (Procedure and Jurisdiction) Act of 1951, there can be no doubt that the Rajasthan Board of Revenue can review its own judgment in a case under S. 10(2) of the Protection of Tenants Ordinance. But when this case was decided by the Revenue Board, the Rajasthan Revenue Courts Procedure and Jurisdiction Act of 1951 had not come into force and the provisions of S. 24 cannot, therefore, help the case of the opposite party. Before the passing of the Revenue Courts Procedure and Jurisdiction Act of 1951 the Rajasthan Board of Revenue had to follow the laws of the Integrating States which merged in the United State of Rajasthan governing the procedure and

powers of the Revenue Courts and Boards of Revenue of the former State of Rajasthan. As the present case arose from the territories of the former Tonk State, the law applicable to this case would be the law of the former Tonk State, governing the procedure of the Revenue Courts. The learned Government Advocate has failed to bring to the notice of this Court any provisions of the laws of the Tonk State which authorised a Revenue Court or more specially a Board of Revenue functioning under the laws of the Tonk State to review its own judgments.

(5) As has already been discussed above, it is well settled that a Court cannot review its own decision unless it is permitted to do so by statute, except in exceptional cases where the previous judgment cannot be regarded as a judgment according to law. The Board of Revenue in the present case had therefore no authority to review its own decision in a case coming before it from the territories of the former Tonk State before the passing of the Rajasthan Revenue Courts Procedure and Jurisdiction Act of 1951.

(6) The learned counsel of the petitioner has also argued that the Protection of Tenants Ordinance is an Act which should be regarded as complete in itself and the Revenue Board therefore could not have exercised its own jurisdiction to review its judgment even if it had possessed such a jurisdiction under the law. It may be pointed out that the Rajasthan Protection of Tenants Ordinance cannot be considered to be an Act complete in itself. As has already been discussed above, the intention of the legislature appears quite clear in investing the powers of revision in the Board of Revenue to permit the exercise of the ordinary jurisdiction of that tribunal in cases coming before it under S. 10(2) of the Protection of Tenants Ordinance.

(7) The answer to the question referred to this Bench therefore is that the Rajasthan Board of Revenue was not competent to review its own judgment in a case under the Rajasthan Protection of Tenants Ordinance, 1949, arising from the territories of the former Tonk State, by virtue of the Land Regulations of Tonk State or the Code of Civil Procedure, before the passing of the Rajasthan Revenue Courts Procedure and Jurisdiction Act of 1951. The position would however be different after the passing of the Rajasthan Revenue Courts Procedure and Jurisdiction Act of 1951.

(8) SHARMA J.: I agree with the opinion of my learned brother Ranawat J. and have nothing to add.

(9) WANCHOO, C. J.: I agree and have nothing to add.

R.G.D. Answer accordingly.

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(JODHPUR BENCH)

WANCHOO C. J. AND BAPNA J.

Harlal and others. Petitioners v. Subhkaran and others, Respondents.

Misc. Case No. 7/1950, D/- 8-2-52.

(a) Civil P. C. (1908), O. 47, R. 2 — Application for review filed before Ijlas-i-Khas — Notice under O. 47, R. 4 (2) issued by Rajasthan High Court — High Court as successor to Ijlas-i-Khas cannot dispose of application.

Where an application for review was made to the Ijlas-i-Khas (His Highness the Maharaja) of the former State of Jodhpur, to which Order 47, R. 2 applied, but notice under O. 47, R. 4 (2), proviso (a) was not issued by His Highness the Maharaja but was issued by the new High Court of Rajasthan which was the successor to the Ijlas-i-Khas.

Held that the application must be disposed of subject to the provisions of O. 47, Rule 2 and the fact that the successor Court was a High Court would not affect the application of O. 47, R. 2. (Para 4)

As the notice was not issued by His Highness the Maharaja (the Ijlas-i-Khas) who passed the decree, the High Court which was the successor to the Ijlas-i-Khas could not dispose of this application for review in view of O. 47, Rule 2. (Para 4)

Anno: C. P. C., O. 47, R. 2 N. 2.

(b) Ijlas-i-Khas Rules, Rule 3 — Pending appeals — High Court cannot exercise power reserved under Rule 3.

Rule 3 of the Ijlas-i-Khas really lays down the prerogative of the Ruler and that prerogative has not become vested in the High Court which is his successor when dealing with pending matters. (Para 5)

Thanchand, for Petitioners; Sumerchand, for Respondent No. 1.

WANCHOO, C. J.: This is an application by Harlal for review of judgment of the Ijlas-i-khas of the former State of Jodhpur and has come to us for disposal in view of the provisions of Ordinance No. XL of 1949 and Ordinance No. XII of 1950.

(2) The application was made in the following circumstances. A suit had been filed by one Bhoordan for redemption of certain mortgaged property and Harlal was one of the defendants. The suit was decreed by the trial Court. Then there was an appeal to the Judicial Superintendent of Phalodi which was also dismissed. The matter went in second appeal to the High Court, of the former State of Jodhpur and the High Court set aside the decree of the two lower Courts and dismissed the suit holding that the plaintiff had failed to prove the mortgage set up. Thereupon, there was an appeal to the Ijlas-i-khas which was heard on the 18th of March 1948 and was accepted on the 26th of December, 1948 by His Highness the Maharaja of the former State of Jodhpur on the advice of the Members of the Ijlas-i-khas. Thereafter, the present application for review of judgment of the Ijlas-i-khas was made.

(2A) A preliminary objection has been raised on behalf of the opposite party to the effect that this Court cannot hear the review application and it should be dismissed. Learned counsel for the opposite parties relies on O. 47, R. 2 which is as follows:

"An application for review of a decree or order of a Court, not being a High Court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in R. 1 or the exercise of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the Judge who passed the decree or made the order sought to be reviewed; but any such application may, if the Judge who passed the decree or made the order has ordered notice to issue under

R. 4, sub-rule (2), proviso (a), be disposed of by his successor."

(3) The present application for review is said to be based on an error apparent on the face of the record and it is therefore, contended that O. 47, R 2 applies and as the Judge who had passed the decree or made the order had not ordered notice to issue, the application cannot be heard by this Court which is the successor to the Judge, who in this case was His Highness the Maharaja of the former State of Marwar.

(4) The first question that arises in this connection is whether O. 47, R. 2 applies to proceedings before the Ijlas-i-khas. This rule does not apply to High Court, nor does it apply to the Privy Council by virtue of S. 112 of the Code of Civil Procedure as it stood before the Adaptation of Laws Order, 1950. Though the Civil Procedure Code applied to the former State of Marwar, certain provisions had been omitted in its application to that State and one such provision was S. 112. In view of the omission of this Section, Order 47, Rule 2 applied to the Ijlas-i-khas. This is also clear from the Rules regarding Appeals and Petitions to His Highness the Maharaja Sahib Bahadur (Ijlas-i-khas) which were in force in the former State of Jodhpur since 8th of November, 1945. Rule 4 provided that subject to the provisions of these Rules, the procedure laid down in the Marwar Civil Procedure Code shall apply to all appeals and petitions other than criminal appeals and petitions. There was no rule in these rules of the Ijlas-i-khas which in any way modified O. 47, R. 2. Therefore, any application for review on grounds other than those mentioned in O. 47, R. 2 had to be made to the Judge concerned, who in this case was His Highness the Maharaja of Jodhpur. The present petition was filed on the 4th of April 1949. It was thus presented to the same Judge who had disposed of the appeal by his order dated 26th of December 1948, namely, His Highness the Maharaja Shri Hanwant Singh of the former State of Jodhpur. But notice under R. 4 (2) was not issued by His Highness the Maharaja but was issued by this Court on the 23rd of January 1951. It is, therefore, contended that as the notice was not issued by His Highness the Maharaja, who was the Judge who passed the decree, this Court which is the successor to the Ijlas-i-khas cannot dispose of this application for review in view of O. 47, R. 2. We are of opinion that this preliminary objection is correct and must prevail.

Learned counsel for applicant argued that the matter is now before the High Court and O. 47, R. 2 does not apply to a High Court and, therefore, this Court can dispose of the application. We cannot, however, accept this contention. The application was made to the Ijlas-i-khas of the former State of Jodhpur to which O. 47 R. 2 applied. It will, therefore, have to be disposed of subject to the provisions of O. 47, R. 2 and the fact that the successor Court is a High Court would not affect the application of O. 47, R. 2.

It may look strange that while O. 47, R. 2 did not apply to the High Court, it applied to the Ijlas-i-khas of the former State of Marwar. But it may be that His Highness the Maharaja of Jodhpur, who was the Ijlas-i-khas, might have thought it fit to apply O. 47, R. 2 to such petitions for review as he might have thought that such petitions as were not covered by the exception in R. 2 should be made to the particular Ruler who had passed the decree or made the order and not to his successor. In any case, the words of O. 47, R. 2 are quite clear and, therefore, this Court as the successor to Ijlas-i-khas cannot dispose of this application as notice was not issued by the Ijlas-i-khas.

(5) Learned counsel for applicant further drew our attention to R. 3 of the Ijlas-i-khas Rules. This rule provides that nothing in these Rules shall be deemed to bar the full and unqualified exercise of His Highness' pleasure in receiving appeals and petitions and in dealing with them in whatsoever manner he deems fit. This provision is somewhat similar to S. 112 (1) (a) of the Civil Procedure Code which, of course, was omitted from the Marwar Civil Procedure Code. It is urged on behalf of the applicant that we should exercise the power contained in R. 3. It is enough, however, to point out that S. 3 of Ordinance No. XL of 1949 abolished the jurisdiction of the Ruler of a Covenanting State to entertain appeals, revisions, references or petitions and this the Ijlas-i-khas of the former State of Marwar abolished. Section 4 made a provision for pending appeals etc. and it is under that provision read with Ordinance XII of 1950 that we are hearing this application. But though we are a successor Court to the Ijlas-i-khas, we are not the Ijlas-i-khas itself and, therefore, the power which was reserved by R. 3 of the Ijlas-i-khas Rules in His Highness the Maharaja of Jodhpur has not devolved on us and we are bound by the rules in the Civil Procedure Code when dealing with pending appeals etc. from the Ijlas-i-khas of any of the Covenanting States. Rule 3 of the Ijlas-i-khas really lays down the prerogative of the Ruler and that prerogative has not become vested in this Court when dealing with such pending matters. Rule 3, therefore, of the Ijlas-i-khas Rules cannot help the applicant.

(6) Lastly, it was urged on behalf of the applicant that there was error apparent on the face of the decree. The review application dated the 4th of April, 1949, however, makes out no such case. It is not possible for us to allow the applicant to make out a new case particularly when S. 3 of Ordinance No. XL of 1949 has abolished the Ijlas-i-khas of the former State of Marwar. If we allow the petition to be amended by adding this ground, it would mean that the applicant is now presenting an application for review on fresh ground when no such application can be presented in view of S. 3 mentioned above.

(7) We, therefore, accept the preliminary objection and hold that we cannot entertain the matter in view of O. 47 R. 2. The application is rejected but under the peculiar circumstances of this (case?) we pass no order as to costs of this application.

V.B.B. Application rejected.

A. I. R. 1952 Rajasthan 136
(JODHPUR BENCH)
BAPNA J.

Chandar Das, Petitioner v. Malla and others, Respondents.

Criminal Ref. No. 158 of 1951, D/- 10-12-1951.

Criminal P. C. (1898), S. 247 — Accused acquitted on default of complainant — High Court will not lightly interfere in reference or revision, in absence of appeal by Government — (Criminal P. C. (1898), Ss. 438, 439).

Under S. 247, which is found in the Chapter dealing with the trial of summons-cases, the Magistrate has been empowered to acquit the accused if on any date of hearing to which the case may be adjourned the complainant does not appear, unless for some reason he thinks proper to adjourn the hearing of the case to some other day. The general rule is to acquit the accused whereas an adjournment is an exception. While there is no doubt that the High Court in the exercise of its revisional powers can reverse such an order and direct a retrial of the accused, "except in the most serious cases and in the event of grave miscarriages of justice no High Court shall interfere in revision in such matters". The fact that the order of acquittal was not based on the merits makes no difference.

Where the Government does not choose to file an appeal but a reference is made for interference in an order of acquittal, the High Court will not interfere unless there be a radical and incurable irregularity or a complete disregard of the law and procedure or a manifest injustice has accrued which has got to be cured.

(Paras 3, 4)

Anno: Criminal P. C., S. 247 N. 12; S. 438 N. 2; S. 439 N. 12.

Kishtoormal, for Petitioner; Utsav Lal, for Respondent (Malla); Laxminarain, for the State.

REFERENCES: Courtwar/ Chronological/ Paras.

('21) AIR 1921 All 76: (22 Cri L J 597) (Pr 3)
('49) AIR 1949 All 264: (50 Cri L J 460) (Pr 3)
('40) AIR 1940 Nag 357: (41 Cri L J 919) (Pr 4)

ORDER: This is a reference by the learned District Magistrate, Nagaur.

(2) On 29th March, 1946 Chandar Dass, complainant, filed a complaint against Malla and four other persons for offences under Ss. 426 and 447, Indian Penal Code. The allegations were that the accused entered into his field and demolished a mud-wall, and thereby deprived the complainant of the benefit of the flow of the village water in his field during rains. The accused denied the charge. The case was tried as a summons case by the Third Class Magistrate, Didwana. Ultimately an order of acquittal was recorded on 26th October, 1950 on the complainant's absence on that day. The complainant made an application to the District Magistrate, Nagaur, on 8th December, 1950 for moving the Government to file an appeal against that order. The learned District Magistrate has made this reference on 30th April, 1951.

(3) He has mentioned that he took charge on the 22nd April, 1951 and the time left for an appeal was insufficient. According to the learned District Magistrate all the evidence for the parties had been recorded by 14th April, 1948 and thereafter several adjournments were granted as the Court wanted to examine the Havaldar of the village as a Court witness. This Havaldar had prepared a plan under instructions of the Magistrate. The witness attended the Court more than once but could not be examined. In the opinion of the learned District Magistrate, the complainant was not at all to blame for the delay in this case and his single absence from the Court on 26th October, 1950 should not have been made a ground for dismissal of the complaint and acquittal of the accused. While it is true that the complainant was not to blame for the delay in the disposal of the case in the trial Court, the fact remains that the trial Magistrate has passed an order which cannot be said to be illegal. Under S. 247, Criminal Procedure Code, which is found in the Chapter dealing with the trial of summons-cases, the Magistrate has been empowered to acquit the accused if on any date of hearing to which the case may be adjourned the complainant does not appear, unless for some reason he thinks proper to adjourn the hearing of the case to some other day. The general rule is to acquit the accused whereas an adjournment is an exception. While there is no doubt that the High Court in the exercise of its revisional powers can reverse such an order and direct a retrial of the accused it has been laid down in numerous cases that "except in the most serious cases and in the event of grave miscarriages of justice no High Court shall interfere in revision in such matters" 'PAHALWAN SINGH v. SAHIB SINGH', AIR 1921 All 76. In a recent case of the Allahabad High Court 'MANGLI PRASAD v. BUDH SEN', AIR 1949 All 264 the view taken by Stuart J. in the earlier case was upheld. It is not necessary to multiply cases.

(4) The fact that the order of acquittal was not based on the merits makes no difference. As observed by Puranik, J. in 'EMPEROR v. LAXMI PRASAD', AIR 1940 Nag 357, "the acquittal under S. 247, Criminal P. C. though not an acquittal on the merits has the force of a complete acquittal for all purposes". Where an accused is acquitted, a valuable and substantial privilege accrues in his favour and it is not proper for a Court to interfere with the acquittal simply because the complainant thinks that the accused has committed an offence and the offence will remain unpunished. Where the Government does not choose to file an appeal but a reference is made for interference in an order of acquittal, the High Court will not interfere unless there be a radical and incurable irregularity or a complete disregard of the law and procedure or a manifest injustice has occurred which has got to be cured.

(5) As observed above, the order is not illegal. It may be that the Magistrate should have decided the case on the merits when all evidence except that of a formal witness was on record, or it may be that steps should have been taken to procure the attendance of the formal witness and the case adjourned for that purpose. These are however not matters which would justify any interference in revision at this stage. The case is of a petty nature and while the complainant may not be liable to blame, the case has been dragged on for such

a long time owing to dilatory procedure adopted in this case that it would not be just to direct a further trial. The reference is, therefore, not accepted.

R.G.D Reference not accepted.

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(JODHPUR BENCH)

WANCHOO C. J. AND BAPNA J.

Jeewan Ram, Applicant v. United State of Rajasthan and another, Opposite Party.

Civil Misc. (Writ) Case No. 34 of 1951, D/- 3-12-1951.

(a) Houses and Rents—Rajasthan Premises (Requisition and Eviction) Ordinance XI (11) of 1949), S. 1 — Article 385 of Constitution has no application to Ordinance — Under Article 372 of Constitution Ordinance continues in force after 26-1-1950 — (Constitution of India, Arts. 372 and 385). (Para 4)

(b) Houses and Rents — Rajasthan Premises (Requisition and Eviction) Ordinance (XI (11) of 1949), S. 1 — Validity of Ordinance — Contravention of Art. 19 (1) (f) of Constitution — (Constitution of India, Art. 19(1)(f) and (5)).

The Ordinance is valid, because it only places reasonable restrictions on the right to acquire, hold or dispose of property in the interests of the general public. (Para 5)

(c) Houses and Rents — Rajasthan Premises (Requisition and Eviction) Ordinance (XI (11) of 1949), S. 1 — Validity of Ordinance — Provisions of Art. 31 (2) of Constitution have been fully complied with by Ordinance — Ordinance is not void—(Constitution of India, Art. 31(2)). (Para 6)

(d) Houses and Rents — Rajasthan Premises (Requisition and Eviction) Ordinance (XI (11) of 1949), S. 3 — Competent authority acts as quasi judicial tribunal. (Para 8)

(e) Constitution of India, Art. 226 — Powers of High Court — Extent.

The power of High Court under Art. 226 for enforcing fundamental rights is very wide, and is not restricted to the issuing of the well known writs under the Common Law. A fundamental right guaranteed by the Constitution may be put in jeopardy by the executive, and the Court has been empowered to issue to any person or authority and in an appropriate case even to the Government directions, orders or writs for the enforcement of rights conferred by Part III of the Constitution. (Para 8)

Anno: C. P. C., Appendix III, Constitution of India, Art. 226 N. 1.

(f) Houses and Rents — Rajasthan Premises (Requisition and Eviction) Ordinance (XI (11) of 1949), Sec. 3 (3) and (4) — Specification of exact purpose in notice — Necessity of.

In order to give the foundation for the jurisdiction of the competent authority it is necessary for the competent authority to specify the exact purpose for which the premises are required in the notice under Section 3(3), and if that is not done, there is no foundation for the jurisdiction of the competent authority, and all subsequent proceedings are null and void. It is not enough to say in the notice that the premises are required for Government servants or officers. If they are required for a Govt. servant, the name of the officer or official must be mentioned. If they are required for office, the name of the office should be given. It is only then that the landlord would be in a position to make a proper objection to the order of requisition, and it is only then that the foundation is laid for the further order that follows under Section 3(4). Even if the landlord did not make it a grievance before the Collector that he had not been informed of the exact purpose in the notice that would not confer jurisdiction on the Collector, if in law it could not arise. AIR 1951 Bom 404 and AIR 1951 Bom 440, Ref. (Paras 9, 10)

† (g) Constitution of India, Art. 226 (1) — Writ of prohibition — Issue of when alternative remedy is not availed of — (Houses and Rents — Rajasthan Premises (Requisition and Eviction) Ordinance (XI (11) of 1949), S. 5).

Where an authority or tribunal is acting without or in excess of its jurisdiction, the Court would issue a writ of prohibition even though there might have been an alternative remedy which might not have been availed of for the Court having come to know of want of or excess of jurisdiction would not allow the authority or tribunal to carry on further in the same manner. (1907) 1 K B 145 and (1914) 3 K B 429, Rel. on. (Para 16)

Where, therefore, the Collector has acted without jurisdiction, in that he has not laid the foundation of his jurisdiction by any valid notice under the Ordinance, and the order of requisitioning has not been carried out, even if the landlord has not appealed against the order, a writ of prohibition would be issued to the Collector not to proceed further on the notice. (Para 16)

Anno: C. P. C., Appendix III; Constitution of India, Art. 226 N. 12.

Lakshmi Narain and Bal Krishna, for Applicant; L. N. Chagani, for the State.

REFERENCES: Courtwar/ Chronological/ Paras.

('50) AIR 1950 S C 222: (1950 SCR 621) (Pr 8)

('51) 53 Bom L R 669: (AIR 1951 Bom 404) (Pr 11)

('51) 53 Bom L R 621: (AIR 1951 Bom 440) (Pr 12)

(1907) 1 K B 145: (76 LJKB 145) (Pr 14)

(1914) 3 K B 429: (83 LJKB 1439) (Prs 15, 16)

WANCHOO, C. J.: This is an application by Jeewan Ram under Art. 226 of the Constitution of India for the issue of a writ or order in the nature of 'mandamus' or prohibition or any other suitable writ against the State of Rajasthan and the Collector of Churu.

(2) The application has arisen out of an order by the Collector under the Rajasthan Premises (Requisition and Eviction) Ordinance, 1949 (No. XI (11) of 1949). The Collector has passed an order under S. 3, sub-section (4) of the Ordinance requisitioning the house of the applicant. The validity of the order has been

challenged on various grounds. In the first place, it is submitted that the Ordinance could not remain in force after the 26th of January, 1950, and, therefore, the Collector had no authority to act under it. In the second place, it is urged that the Ordinance is void, as it contravenes Art. 19 (1) (f) of the Constitution of India, and imposes unreasonable restrictions on the exercise by the applicant of his right to acquire, hold and dispose of property. In the third place, it is submitted that as the Ordinance has not received the sanction of the President under Art. 31 (6), it is void in view of the provisions of Art. 31 (2). Lastly, it is urged that the Collector had no jurisdiction to pass the order in question, because he did not lay the foundation for such jurisdiction.

(3) The application has been opposed on behalf of the State, and all the grounds urged by the applicant have been traversed.

(4) So far as the first contention of the applicant is concerned, we have not been able to understand how the coming into force of the Constitution of India on the 26th of January, 1950, has, by that very fact alone, brought the Ordinance to an end. It is true that under Art. 385 of the Constitution, the Raj Pramukh now promulgates laws by means of Acts; but this Ordinance was promulgated in August, 1949, and, therefore, Art. 385 has no application to it. Further, all the existing laws in force have been specifically continued in force under Art. 372 of the Constitution, and this Ordinance also, therefore, continues in force after the 26th of January, 1950, unless repealed as provided by law. There is no force, therefore, in this contention.

(5) We are further of opinion that there is no force in the second contention that the Ordinance is an unreasonable restriction on the right given to the applicant under Art. 19 (1) (f) of the Constitution. That Article guarantees the fundamental right of acquiring, holding and disposing of property. The restrictions which can be imposed on that right are mentioned in Art. 19 (5). Restrictions can be placed on this right, provided they are reasonable restrictions in the interests of the general public or for the protection of the interests of any Scheduled Tribe. Item 36 of List II (State List) of the Seventh Schedule specifically provides for requisitioning of property by a State for all purposes except for the purposes of the Union. Item 42 of List III (Concurrent List) also provides for legislation with respect to principles on which compensation for property requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined, and the form and the manner in which such compensation is to be given. It is, therefore, within the competence of the State Legislature to pass a law relating to requisitioning of property. The preamble to Ordinance No. XI (11) shows that the Ordinance has been passed by reason of the shortage of accommodation in Rajasthan, and power has been given to requisition any premises for any public purpose. It cannot, in our opinion, be said that such requisition is an unreasonable restriction on the right to acquire, hold or dispose of property.

It has been urged that the Ordinance is a permanent Ordinance, and, therefore, the State can requisition any premises for ever. The fact, however, that the Ordinance is a permanent law does not mean that the requisition would always be made permanent, as the preamble itself shows that the law has been passed because of the shortage of accommodation in Rajasthan, and as and when the shortage disappears, the law will, in all probability, be repealed. Further S. 9 of the Ordinance provides for release of property when it is no longer required. It follows, therefore, that requisition is only for such period as there is necessity for accommodation, and it cannot be said that it is acquisition of property by the State in the guise of requisition. We are, therefore, satisfied that Ordinance No. XI (11) of 1949 is valid, because it only places reasonable restrictions on the right to acquire, hold or dispose of property in the interests of the general public.

(6) The next point that is urged is that the Ordinance is invalid in view of the provision of Arts. 31 (2) and 31 (6) of the Constitution. We have not been able to understand what Art. 31 (6) has to do with this Ordinance. That Article merely provides for certification by the President in certain circumstances, and thereafter the law so certified is not open to question in any Court on the ground that it contravenes the provisions of Art. 31 (2). In the present case, the applicant is urging that the Ordinance is invalid in view of the provisions of Art. 31 (2), and he is not barred from urging that, and the Court will have to see whether the provision of Art. 31 (2) have been complied with, and if they have not been complied with, the Ordinance may have to be declared invalid. In this case, however, the provisions of Art. 31 (2) have, in our opinion, been fully complied with. This will be clear from a perusal of S. 7 of the Ordinance, which fixes the principles on which the compensation would be determined, and the manner in which it would be determined, and by what authority. There is therefore, no force in this contention also.

(7) We now turn to the last point, which is urged on behalf of the applicant, namely, that the Collector did not lay the foundation for his jurisdiction for action under the Ordinance, and, therefore, all the subsequent proceedings taken by him were without jurisdiction. This argument is met by the reply that the proceedings under the Ordinance are of an administrative nature, and, therefore, this Court has no jurisdiction to issue a writ or order of any kind. In the alternative it is said that the Collector had jurisdiction under the Ordinance, and, therefore, no writ or order should be issued.

(8) In order to decide whether the Collector acts merely as an administrative officer or as a quasi-judicial tribunal under the Ordinance, it is necessary to look at the scheme of the Ordinance. Section 3 confers power on competent authority (in this case the Collector) to requisition any premises which is needed or likely to be needed for any public purposes. Under sub-section (3) to S. 3, where the competent authority decides to requisition any premises, it has to call upon the landlord and the tenant or the person in possession by notice in writing to show cause within seven days why the premises should not be requisitioned. Under sub-section (4), after considering the cause, if any, shown by the landlord to the tenant

or the person in possession, the competent authority passes an order, if it is satisfied that it is necessary to requisition the premises. Thereafter, under sub-section (5), notice of the order is also served upon the landlord. Then comes S. 5, which provides for appeal within seven days of the communication of the order. The procedure, therefore, provided for requisition, and the provision of appeal that exists in S. 5, clearly, in our opinion, show that the competent authority acts as a quasi-judicial tribunal under the Ordinance.

Reliance in this connection has been placed on 'PROVINCE OF BOMBAY v. KHUSHALDAS S. ADVANI', AIR 1950 S C 222, where it was held that the order of requisition was an administrative act, and the decision of the Provincial Government about the existence of a public purpose was not regarded as a judicial or a quasi-judicial decision. That case was decided under the Bombay Ordinance which did not provide for the elaborate procedure, which is provided in the Ordinance. Section 3 of the Bombay Ordinance reads as follows:

> "If in the opinion of the Provincial Government it is necessary or expedient to do so, the Provincial Government may by order in writing requisition any land for any public purpose."

It was not necessary to hear the objection of the landlord or the tenant or the person in possession; nor was there any provision of appeal from the order of the Provincial Government. It was in those circumstances that the Supreme Court held that the order of the Provincial Government requisitioning any premises was an administrative order. Further the decision in 'KHUSALDAS'S CASE' was not under the present Constitution. The power of this Court under Art. 226 of the Constitution for enforcing fundamental rights is very wide, and is not restricted to the issuing of the well-known writs under the Common Law. A fundamental right guaranteed by the Constitution may be put in jeopardy by the executive, and the Court has been empowered to issue to any person or authority and in an appropriate case even to the Government, directions, orders or writs for the enforcement of rights conferred by Part III of the Constitution. Under these circumstances, the decision in 'KHUSALDAS'S CASE' has no application to the present case, particularly as we are definitely of the opinion that the competent authority under the Ordinance is a quasi-judicial tribunal.

(9) We now turn finally to the question whether the Collector in this case laid the foundation of his jurisdiction under the Ordinance. It goes without saying that the Collector having been appointed competent authority under S. 3 has jurisdiction under the Ordinance to requisition any premises. But that alone, in our opinion, does not dispose of the matter. We have already pointed out that the Collector acts as a quasi-judicial tribunal under the Ordinance, and there is a right of appeal provided against his order. The foundation of his jurisdiction is the notice which he issues under S. 3 (3) of the Ordinance. It is, in our opinion, necessary for the Collector to specify the particular purposes for which the premises are required in order to clothe him with jurisdiction to pass an order of requisitioning under sub-section (4) of Section 3. It is true that sub-section (3) has not prescribed the contents of the notice; nor is there any rule to our knowledge prescribing its contents. But where the person whose premises are being requisitioned, is given the right to object to the requisition, it is, in our opinion, the duty of the competent authority to tell him the exact purpose for which the requisition is being made. It is only then that the landlord or the tenant or the person in possession would be in a position to satisfy the Collector why his premises should not be requisitioned. If he does not know for what particular purpose the premises are being requisitioned, he will not be able to satisfy the Collector why the premises should not be requisitioned.

Further, even if he fails to satisfy the Collector why the requisition order should not be passed, he has a right of appeal, and he has to satisfy the appellate authority why the requisition order should not have been passed. But if he does not know the exact purpose for which the requisition is being made, he will not be able to satisfy the appellate authority why his premises should not be requisitioned. We are, therefore, of opinion that in order to give the foundation for the jurisdiction of the competent authority it is necessary for the competent authority to specify the exact purpose for which the premises are required in the notice under S. 3 (3), and if that is not done, there is no foundation for the jurisdiction of the competent authority, and all subsequent proceedings are null and void. It has been urged that the applicant did not make it a grievance before the Collector that he had not been informed of the exact purpose in the notice. Even if the applicant failed to do so, that would not confer jurisdiction on the Collector, if in law it could not arise.

(10) The notice in this case merely said that the house of the applicant was required for providing accommodation for Government servants or officers. Thus, it seems that upon the time the notice was given the Collector had not even decided whether the house would be required for some Government servant or some Government Office. In his application, the applicant said that the Collector wanted the house for himself, and when he did not agree to give the house to the Collector, action under the Ordinance was taken. The Collector, however, denies this allegation of the applicant, and we may accept that the Collector's action was not 'mala fide'. It is only in the order under S. 3 (4) that the Collector said that the house was required for the accommodation of the Collector and the District Magistrate. That, however, would not, in our opinion, cure the defect in the notice, and the competent authority having failed to lay the foundation for its jurisdiction could not proceed further in the matter.

That it is necessary to specify the particular purpose in order to give a chance to the landlord to object properly will be clear from an illustration. Suppose some competent authority requisitioned a house with, say, three living rooms and four bed rooms, and said in its notice that the house was required for, say, a Munsif drawing Rs. 250/- a month. The landlord might very well object that the house was too big for an officer of that status, and should not be requisitioned for him, and this objection, even if not upheld by the Collector may be up-

held by the appellate authority. On the other hand, if no mention is made of the exact purpose for which the premises are required in the notice, the landlord would not be in a position to make all objections which he should be allowed to make in view of the provisions of the law.

It may be pointed out that under S. 8, it is open to the Government once certain premises have been requisitioned, to use them for the purpose mentioned in the order of requisition, or for any other public purpose. Therefore, the landlord has only one chance of showing cause, when the notice is issued to him, and it seems to us only just and proper that he should be told the exact purpose for which the requisition is being made. If that exact purpose is not set out in the requisition, there is no foundation for the subsequent order under S. 3 (4), and the competent authority has no jurisdiction to deal further with the matter.

It is not enough to say in the notice, as has been done in this case, that the premises are required for Government servants or offices. If they are required for a Government servant, the name of the officer or official must be mentioned. If they are required for an office, the name of the office should be given. It is only then, in our opinion, that the landlord would be in a position to make a proper objection to the order of requisition, and it is only then that the foundation is laid for the further order that follows under S. 3 (4). As this has not been done in this case, we are of opinion that the Collector, though he may apparently have jurisdiction, had in reality no jurisdiction to pass an order of requisition for he has failed to lay the foundation for such jurisdiction.

(11) In this connection we may refer to two cases of the Bombay High Court. The first case is 'STATE OF BOMBAY v. MOHANLAL KAPUR', 53 Bom L R 669. That was a case under section 6 (4) (a) of the Bombay Land Requisition Act. Under that provision the Provincial Government could requisition premises for the purpose of the State or any other public purpose. The order that was issued merely mentioned the section under which it was issued and did not say anything else. Two contentions were raised in this case. The first was that as the order did not say in so many words that the requisition was for a public purpose, there was no jurisdiction to support it. That was met by the argument that as the section was mentioned, it should be presumed that the requisition was for a public purpose. The second contention was that even if such presumption could be made, this was not enough and the specific purpose for which the requisition was made should have been mentioned. Chagla C. J. put this question in these words:

> "Even if we were to accept this argument of Mr. Seervai, the next question that arises—and that is of considerable importance—is whether it is sufficient for the requisitioning authority merely to state that they are requisitioning a certain property for the purpose of the State or any other public purpose, or whether it is necessary for the requisitioning authority to indicate in the order the specific purpose of the State or any other public purpose."

The answer to the question was that the specific purpose must be stated, and the reasoning in support of it is in these words:

> "Once it is accepted that the State can only requisition a premises for purpose of the State or any other public purpose and that is the condition precedent for the exercise of its power to requisition, if requisition is done for a purpose other than that indicated in S. 6 (4) (a), then the order of requisitioning is bad. It will immediately be appreciated how necessary it is for the subject to know for what purpose the requisitioning powers of the Government are being exercised. The validity of the order must appear on the face of the order. The subject who is served with the order should be in a position to know that the order has been validly made. He should also be in a position to know that if the order is defective he has a right to challenge it and he has a right not to obey it. If the order merely states that the property is being requisitioned for the purposes of the State or any other public purpose, it would be impossible for the subject to determine whether in fact the specific purpose for which the order of requisition was passed was a purpose of the State or any other public purpose. The officer or authority exercising the power under S. 6 (4) may honestly and 'bona fide' come to the conclusion that a particular specific purpose which he or it had in mind was a purpose satisfying the conditions laid down in S. 6(4)(a), yet in law it may not be a purpose of the State or a public purpose. Whether that is so or not could only be tested provided the specific purpose was set out in the order."

It may be mentioned that in the Bombay Act, the order of the Provincial Government under S. 6 (4) (a) was final. There is no provision in it for any objection; nor is there any provision for appeal. The Ordinance with which we are dealing provides for objections and appeal, and, therefore, if it was necessary under the Bombay Act to set out the specific purpose, it is all the more necessary in the case of this Ordinance to do so. We are, therefore fortified in the view that we have taken by this case.

(12) The second case to which we may refer is 'ABDUL MAJID HAJI MOHOMMED v. P. R. NAYAK', 53 Bom L R 621. That was a case under the Administration of Evacuee Property Ordinance. That Ordinance provides for a notice under S. 7 (1), before the Custodian declares property to be evacuee property, and R. 5 (1), framed under the Ordinance, provides for the form and contents of the notice. It was held 'inter alia' that

> "inasmuch as the notice did not mention any grounds whatsoever on which the property of petitioner No. 1 was sought to be declared evacuee property, the notice was not in compliance with S. 7 (1) of the Ordinance and that the order was therefore without jurisdiction."

The principle of this case, in our opinion, applies to the present case, though in our Ordinance there is no prescribed form of the notice and no rules have been framed prescribing the form and contents of the notice. But as we have pointed out, a landlord, who has to object, cannot do so properly, unless he is told the exact purpose for which the pre-

mises is to be requisitioned, and the failure to mention that purpose in the notice, in our opinion, destroys the foundation of the jurisdiction of the competent authority. In so far as in this case the exact purpose was not mentioned in the notice, the Collector did not lay the foundation for his jurisdiction, and the subsequent proceedings taken by him must be set aside as without jurisdiction.

(13) It has, however, been urged on behalf of the State that there is a provision as to appeal, and the applicant should have appealed under S. 5. It is admitted that the applicant has not appealed and so it is urged that as he has not exhausted his remedy under the Ordinance, no writ should be issued in his favour.

(14) In this connection we may point out that a writ of prohibition stands on a different footing from other writs. Para. 1397 of Halsbury's Laws of England, Hailsham Second Edition, Vol. IX, dealing with this matter, says as follows at page 822:

> "The Court, in deciding whether or not to grant a writ of prohibition, will not be fettered by the fact that an alternative remedy exists to correct the absence or excess of jurisdiction, or an appeal lies against such absence or excess."

The law in England is settled that a writ of prohibition will issue, even though there may be a right of appeal, and the party had not gone in appeal. We may in this connection refer to 'CHANNEL COALING CO. v. ROSS', (1907) I K. B. 145. In that case, a writ of prohibition was issued against a County Court, even though the order against which the writ had been applied for could be set aside on an application to the County Judge himself, and there was thus an alternative remedy open to the applicant, which he had not availed of.

(15) The next case is 'THE KING v. KENSINGTON INCOME-TAX COMMISSIONER', (1914) 3 K. B. 429. In that case the question was whether a certain person could be assessed by Kensington Income-Tax Commissioners. It appeared that he had been assessed for a number of years by the Kensington commissioners, though he had not paid the income-tax except for the first year. He applied for a writ of prohibition forbidding the Kensington Income-Tax Commissioners from realising income-tax from him. The writ was issued in spite of the fact that there was a right of appeal from the order of the Commissioners and the applicant had not appealed.

(16) The basis of these decisions is that where an authority or tribunal is acting without or in excess of its jurisdiction, the Court would issue a writ of prohibition, even though there might have been an alternative remedy which might not have been availed of, for the Court having come to know of want or excess of jurisdiction would not allow the authority or tribunal to carry on further in the same manner. Therefore, the fact that the applicant had not appealed in the present case would not matter, if we are satisfied that the Collector has acted without jurisdiction or in excess of it. The order of requisitioning has not yet been carried out, and the Collector has not yet taken possession of the property. Under these circumstances, as we are satisfied that the Collector is acting without jurisdiction, as he had not laid the foundation of his jurisdiction by any valid notice, and as possession has still to be taken, we are of opinion that we should prohibit the Collector from taking possession under the order which is without jurisdiction. We may point out that in 'THE KING v. KENSINGTON INCOME-TAX COMMRS', (1914) 3 K. B. 429, the assessment had been made, but money had not been paid for other years except the first year, and a writ of prohibition was, therefore, issued with respect to other years. In the present case also, possession has not yet been taken, and, therefore, it is a fit case for issue of a writ of prohibition to the opposite parties not to proceed further on the notice that was issued against the applicant in March, 1951, and the order that was passed on the basis of that notice.

(17) We, therefore, allow the application, and prohibit the opposite parties from proceeding further with the dispossession of the applicant on the basis of proceedings taken against him on the notice issued on the 12th of March, 1951. We pass no order as to costs.

V.R.B. Application allowed.

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(JODHPUR BENCH)

BAPNA J.

Ratanlal, Appellant v. Kishanlal and others, Respondents.

Second Appeal No. 136 of 1951, D/- 17-12-51.

T. P. Act (1882), S. 53A — Agreement to sell—Transferee already in possession as mortgagee — Held that there was part performance of agreement.

Section 53A does not lay down that the contract must contain a direct covenant regarding transfer of possession. It only requires that the possession should have been taken in part performance of the contract for transfer, and some act should have been done by the transferee in furtherance of it. Where the transferee was already in possession as mortgagee and nothing further was required to convey an absolute title except the execution of the deed of sale and the receipt of consideration, something had been done by the transferees by paying some amount towards the consideration to the transferor and the transferor had mentioned in the deed that he was making the sale by executing that agreement of sale:

Held that there was a part performance of the contract for sale and the possession of the mortgagee was in pursuance of the contract and that the mortgagor's suit for redemption was not therefore maintainable. AIR 1944 Oudh 212, Rel. on; AIR 1950 FC 1, Distinguished. (Para 2)

Anno: T. P. Act, S. 53A N. 10.

U. M. Trivedi, for Appellant; Hemchand Sogani and Prakash Chandra, for Respondents No. 1 to 3.

Cases referred to:

('50) AIR 1950 F C 1: (1949 FCR 484) (Pr 2)

('44) AIR 1944 Oudh 212: (19 Luck 565) (Pr 2)

JUDGMENT: This is a second appeal by the plaintiffs in a suit for redemption. The appellant sued the respondents on 11th March, 1947, for redemption of certain property situated in the town of Partapgarh, and described in the plaint, on the allegations that their father Pannalal mortgaged the property with the respondents on 11th June 1920 for securing a loan of Rs. 151/- but that the defendants had declined to redeem the mortgage. The respondents pleaded that a further charge was created by Pannalal on 14th December 1922 for a sum of Rs. 95/- and thereafter on 26th December 1923, Pannalal agreed to sell the house to the mortgagees for a sum of Rs. 455/-, & that after adjusting the loan and the interest thereon he took some cash and agreed to take the balance on executing a registered deed of sale four days later. It was further pleaded that after the death of Pannalal, a deed was executed by one Punamchand as guardian of the plaintiffs, who were then minors, on 11th January 1924.

The trial Court held that the sale-deed of 11th January was by a person who was not competent to execute the deed of transfer. The Court did not rely on the agreement of sale dated 26th December 1923 and decreed the suit in favour of the plaintiffs subject to payment of Rs 276/-. On appeal by the defendants, the learned District Judge held that the agreement of 26th December 1923, allowed the defendants the benefit of the doctrine of part-performance, and dismissed the suit.

(2) In this second appeal, it was argued that it was necessary under the terms of S. 53A of the Transfer of Property Act that possession should have been delivered to the mortgagees under the deed, and reliance was placed on the following words occurring in the section.

> "and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession continues in possession in part performance of the contract and has done some act in furtherance of the contract."

It was contended that the mortgagees though already in possession have not been shown to have continued in possession in part performance of the contract as no words in the contract to show that possession after that date would be in pursuance of the agreement of sale. According to the terms of the agreement of sale, the mortgagor Pannalal calculated the principal and interest on the mortgage and the charge to amount to Rs. 262/14/6 and it was mentioned that the sale was being effected for Rs. 455/- and that out of the unpaid amount of Rs. 192/1/6, he was receiving Rs. 30/- in cash and the balance would be taken by him on execution of the sale deed. As the mortgagees were already in possession of the property nothing was required further in the present case than to execute a deed of sale. In the document, there are words to indicate that the parties only considered the execution of the deed and its registration as a formal matter and were it not for the Law of Stamps and Registration, the parties, so far as they were concerned, were quite prepared to take this agreement as a complete sale. The words which occur soon after the mention of the fact that the mortgagor had agreed to transfer the property for Rs. 455/- are:

> "Now I have sold this house, which is under mortgage with you, for Rs. 455/- and a formal deed of sale will be executed in four days."

There is also mention that the transferor had received Rs. 30/- out of the balance of the consideration of Rs. 192/1/6. Learned counsel for the appellant relied on 'SUBBRAO v. MATTAPALLI', AIR 1950 FC 1 in support of his contention that the mortgagor should appear to have transferred possession under the agreement of sale. That case is easily distinguishable because it was admitted by the parties in that case that the mortgagees had never been in possession. It has been held in 'EWAZ ALI v. MT. FIRDOUS JEHAN', AIR 1944 Oudh 212 that S. 53A does not lay down that the contract must contain a direct covenant regarding transfer of possession. It only requires that the possession should have been taken in part performance of the contract for transfer, and some act should have been done by the transferee in furtherance of it. In the present case, the transferees were already in possession as mortgagees and, as stated above, nothing further was required to convey an absolute title except the execution of the deed of sale and the receipt of consideration. Something had been done by the transferees in this case by paying Rs. 30/- to the transferor and the transferor had mentioned in the deed that he was making the sale by executing that agreement of sale.

(3) The lower Court has taken a correct view of the case. Therefore, this appeal fails and is hereby dismissed with costs.

R.G.D. Appeal dismissed.

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(JODHPUR BENCH)

WANCHOO C. J.

State v. Bala Prasad, Non-Petitioner.

Criminal Ref. No. 331 of 1951, D/- 22-1-52.

(a) Penal Code (1860), Ss. 182 and 211 — Complaint under Section 182 — Facts disclosing offence under S. 211 as well as under Section 182 — Accused not to be acquitted on ground that prosecution should have been under S. 211.

If a case comes both under Ss. 211 and 182 of the Indian Penal Code, it is open to the authority concerned to proceed either under one section or the other. But if in such a case the authority concerned has thought fit to file a complaint under S. 182, Penal Code the Magistrate is not justified in acquitting the accused on the sole ground that he should have been prosecuted under Section 211, Penal Code. 32 Cal 180; 7 Mad H C R (App) 5 and 15 All 336, Foll.; 14 Cri L J 491 (Bom), Not Foll. (Para 6)

Anno : Penal Code, S. 182 N. 6.

(b) Criminal P. C. (1898), S. 195 (a) — Complaint under Section 182, Penal Code — Who can make.

A complaint under Section 182 of the Penal Code has to be made either by the public servant to whom information has been

given, or by some other public servant to whom he is subordinate. The public servant concerned under Sec. 195 (1) (a) of the Code of Criminal Procedure is the public servant to whom the information is given. Hence where the false information was given to the Deputy Inspector General of Police, he would be the 'public servant concerned' within the meaning of Section 195 (1) (a) and should file the complaint under Section 182, Penal Code. The fact that he sent the application to the Station Officer of a particular Police station for investigation would not make the Station Officer the public servant concerned to whom information was given. AIR 1941 Mad 764; AIR 1937 Lah 624; AIR 1936 Pat 56; AIR 1947 Pat 64, Ref. (Paras 8, 12)

Anno : Cr. P. C., S. 195 N. 6.

Laxmi Narain, Dy. A. G., for the State.

Cases referred to :

('93) 15 All 336 (Pr 5)
('13) 14 Cri L J 491: (20 Ind Cas 747 (Bom)) (Pr 4)
('05) 32 Cal 180: (2 Cri L J 171) (Pr 5)
('37) AIR 1937 Lah 624: (38 Cri L J 1070) (Pr 9)
('72) 7 Mad H C R (App) 5 (Pr 5)
('41) AIR 1941 Mad 764: (1941 Mad W N 523) (Pr 9)
('36) AIR 1936 Pat 56: (37 Cri L J 324) (Pr 9)
('47) AIR 1947 Pat 64: (48 Cri L J 264) (Pr 10)

ORDER: This is a reference by the District Magistrate of Bikaner in a case in which one Bala Prasad was prosecuted under S. 182 of the Indian Penal Code.

(2) The facts of the case may be briefly narrated. Bala Prasad sent an application to the Deputy Inspector General of Police. Bikaner, in April 1950, in which he said that certain persons had murdered an old woman for her money and had thrown her body in a tank and had spread a false rumour that she had left the village. He also said that the body had come afloat on the tank after three days and was quickly cremated and no information was given to the Police about it. The Dy. Inspector General of Police forwarded this application to the Sub-Inspector of Police, Gersar, who investigated the matter and came to the conclusion that the information given by Bala Prasad was false and was given with the intention of putting the persons named in the application to harassment. Thereupon, a complaint under S. 182, Indian Penal Code was filed against Bala Prasad in the Court of Sub-Divisional Magistrate (North) Bikaner. That Magistrate acquitted the accused and thereupon there was a revision before the District Magistrate who has made this reference with the recommendation that the order of acquittal should be set aside.

(3) The Magistrate had acquitted the accused on two grounds. The first was that the facts disclosed a case under S. 211 of the Indian Penal Code and not under S. 182. The second was that the complaint should have been made by the Dy. Inspector General of Police and not by the Superintendent of Police. The District Magistrate has disagreed with the conclusion of the Magistrate concerned on both these points. I propose to examine these two points one by one.

(4) The question whether an information of this nature falls under S. 211 or under S. 182. Indian Penal Code has been the subject of debate in various High Courts and the view is not unanimous. The Bombay High Court had held that criminal law makes a clear distinction between a false charge which comes under S. 211 and false information given to the police, which comes under S. 182. The distinction has been drawn in this manner:

> "If the information conveyed to the police amounts to the false institution of criminal proceedings against a defined person or amount to the falsely charging of a defined person with an offence, then the person giving such information is guilty of an offence under Section 211. In such a case S. 182 is not the appropriate section under which to frame a charge. Section 182, when read with S. 211, must be understood as referring to cases where the information given to the public servant falls short of amounting to an institution of criminal proceedings against a defined person and falls short of amounting to the falsely charging of defined person with an offence."

Reference may be made to the case of 'APAYA TATOBA v. EMPEROR', 14 Cri L J 491 (Bom) in support of this view.

(5) But the Allahabad, Calcutta and Madras High Courts have taken a different view. The Calcutta High Court has held that a prosecution for a false charge may lie under S. 182 or S. 211, but if the false charge is a serious one, the graver S. 211 should be applied vide 'EMPEROR v. SARODA PROSAD', 32 Cal 180. The Madras High Court has also held that there is no error in a conviction under S. 182, when the false charge made before the police is punishable under S. 211 vide 'HIGH COURT PROCEEDINGS', 23rd April, 1872; 7 Mad HCR App 5. The view of the Allahabad High Court was expressed by Edge, C. J. in 'QUEEN EMPRESS v. RAGHU TIWARI', 15 All 336 in the following words:

> "Although it is difficult to see what case could arise under S. 211 to which S. 182 could not be applied yet S. 182 would apply to a case which might not fall under S. 211. The offence under S. 182 is complete when false information is given to a public servant by a person who believes it to be false, but who intends thereby to cause such public servant to institute criminal proceedings against a third person. The offence is complete although the public servant takes no step towards the institution of such criminal proceedings...it is in such a case not at all necessary that the public servant should take any step whatever, on the false information before instituting and prosecuting to a conclusion a charge under S. 182 against the person who had given such false information.....In cases to which S. 211 especially applies and in which a criminal proceeding has been instituted, a Court should.....as a rule proceed to determine such criminal proceeding instituted in it and should give the person instituting such proceeding, a reasonable opportunity of supporting his case before proceeding against him for an offence under S. 211..... It appears to us that it has

been left to the discretion of the Court to determine when and under what circumstances prosecutions should be proceeded with under Ss. 182 and 211."

(6) I am of opinion that the view taken by the Allahabad, Calcutta and Madras High Courts is if I may say so with all respect, sound, — and there is no reason why, if a case comes both under Ss. 211 and 182 of the Indian Penal Code, it may not be open to the authority concerned to proceed either under one section or the other. The view, therefore, of the Magistrate, that the facts of this case make out a case under S. 211 and, therefore, there could have been no prosecution under S. 182, is not correct. It may be that on the facts, a case of falsely charging the persons named in the application for murder might be made out and Bala Prasad might have been prosecuted under S. 211 of the Indian Penal Code. But these very facts also make out a case of giving false information to a public servant with intent to use the lawful power of such person to the injury or annoyance of any person. The Magistrate was, therefore, not right in acquitting Bala Prasad on the ground that he should have been prosecuted under S. 211, and not under S. 182 of the Indian Penal Code.

(7) Then I come to the second point, namely, whether the complaint in this case should have been made by the Dy. Inspector General of Police, or whether it was enough that the Sub-Inspector of Police, who had investigated the case on receiving the application from the Dy. I.G.P., should have made the complaint. This depends upon the interpretation of S. 195 (1) (a) of the Code of Criminal Procedure, which reads as follows:

"No Court shall take cognizance of any offence punishable under Ss. 172 to 188 of the Indian Penal Code, except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate."

(8) The main question in such cases is as to who is the public servant concerned. The prosecution under S. 182 of the Indian Penal Code is for giving false information to a public servant with particular intent. Therefore, the 'public servant concerned' meant in S. 195 (1) (a), Criminal P. C. can only be the public servant to whom the false information is given. In the present case, false information was given to the Dy. Inspector General of Police, and he is, therefore, the 'public servant concerned' within the meaning of S. 195 (1) (a) of the Code of Criminal Procedure. The fact that he sent the application to the Station Officer of a particular Police station for investigation would not make the station Officer the public servant concerned to whom information was given. The complaint therefore, had to be filed either by the Dy. Inspector General of Police, Bikaner, or by some other public servant to whom the Dy. Inspector General of Police is subordinate. I cannot, therefore, agree with the District Magistrate that the complaint in this case could have been filed by the Station Officer of Police Station, Gersar, to whom the application had been sent by the Dy. Inspector General of Police for enquiry.

(9) I may refer to certain cases in support of the view that I have taken. It has been held that a complaint under S. 182 has to be filed by the public servant to whom the false information was given, vide 'OYYAPPA KONE v. CHIDAMBARAM CHETTIAR', AIR 1941 Mad 764 & 'RAM RAKHA v. EMPEROR', AIR 1937 Lah 624. Another case to which reference may be made is 'BACHALAL v. EMPEROR', AIR 1936 Pat 56. In that case, a complaint had been made before a Magistrate who sent it for enquiry to a Sub-Inspector of Police. The complaint was found to be false on enquiry by the Police and thereupon the Magistrate directed the Sub-Inspector to make a complaint under S. 182 and S. 211 of the Indian Penal Code. It was held that the proper authority to file a complaint under S. 182 was the Magistrate himself to whom the alleged false complaint had been made.

(10) In 'SUDARSAN BARHAMBHAT v. EMPEROR', AIR 1947 Pat 64, a first information report of robbery was lodged by the accused a railway employee, before a Sub-Inspector of Railway Police, who, after recording the statement, sent the report for investigation to the proper Police-station. The investigation was made by the Assistant Sub-Inspector of Police, who as a result of that investigation, applied for prosecution of the accused under S. 182 and S. 211 of the Indian Penal Code. It was then held by the High Court that if the report of the Assistant Sub-Inspector was regarded as a complaint, it was the complaint of somebody who was neither the person to whom the information was given nor of the person to whom he was subordinate.

(12) It is thus obvious that a complaint under S. 182 of the Penal Code has to be made either by the public servant to whom information has been given, or by some other public servant to whom he is subordinate. The public servant concerned under S. 195 (1) (a) of the Criminal P. C. is the public servant to whom the information is given. In this case, it was the Deputy Inspector General of Police and, therefore, the complaint should have been made by the Dy. I.G.P., Bikaner, or some officer to whom he was subordinate.

(13) In this view of the matter, the reference must be rejected. It will, however, be open to the Dy. Inspector General of Police, if he considers that the case is of sufficient importance to warrant a trial, to make a complaint, if he so desires. With these remarks, I reject the reference and order the return of the record.

K.S. Reference rejected.

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(JODHPUR BENCH)

WANCHOO C. J. AND BAPNA J.

Rangraj and others, Applicants v. Gram Panchayat, Khinwel, Respondent.

Civil Misc. Case No. 11 of 1950, D/- 7-4-1952.

(a) Marwar Village Panchayats Act (1945), S. 4 — Absence of notification — Effect.

A notification under S. 4 is the foundation for the coming into existence of a 'panchayat' in a village and where no such notification has been made no 'panchayat' under the Act can function in any village. If no such notification was ever made, the body which calls itself the 'panchayat' of

a village has no legal existence and cannot impose any taxes or perform any functions conferred on a 'panchayat' by the Act. (Para 3)

(b) Marwar Village Panchayats Act (1945), S. 67 — Applicability.

Where the case of the applicants is that the 'panchayat' is not legally constituted at all S. 67 has no application, for it applies to cases of orders passed by a legally constituted 'panchayat'. (Para 6)

(c) Constitution of India, Art. 226 — Alternative remedy — Issue of writ of prohibition — (Marwar Village Panchayats Act (1945) S. 60.)

It cannot be said that the Court cannot issue an order if there is another remedy available. The power of the Court is there, though it may not be exercised in case where an adequate, specific and convenient remedy is otherwise available. There is no inflexible rule that such writs could not be issued where the Court thought it just and convenient to do so. The fact that it ordinarily did not do so is a question not of want of jurisdiction but of expediency. Even if another remedy is available, it is open to the High Court, where the order is in the nature of prohibition, to issue such order in a proper case.

Section 60 of the Marwar Village Panchayats Act, 1945, does not confer any right on any party. It only gives power to the Minister-in-Charge. Of course, it is possible for an aggrieved person to go to the Minister-in-Charge and ask him to suspend or abolish the 'panchayat' for reasons mentioned in that section. But the exercise of powers under S. 60, however, presupposes the existence of a valid Panchayat and the necessity for its suspension or abolition arises by the improper conduct of the said Panchayat. Where the very constitution of the Panchayat is illegal and where the lack of jurisdiction is patent, a writ of prohibition is the proper remedy. 'Case law discussed'. (Paras 7, 8, 9, 10, 11)

Hukam Chand, for Applicants; B.B. Desai, for the State of Rajasthan; Dashrath Mal, for Respondent (Gram Panchayat).

REFERENCES: Courtwar/Chronological/ Paras.

('51) AIR 1951 Cal 420: (55 Cal W N 326) 8
('51) AIR 1951 Cal 430: (87 Cal L J 109) 8
('52) AIR 1952 Cal 171 9
('51) AIR 1951 Mad 204: (ILR (1951) Mad 815) 8
('51) 1951 RLW 56: AIR 1951 Raj 94 (2) 7

WANCHOO, C. J.: This is an application by Rangraj and seven others under Art. 226 of the Constitution of India for a writ of mandamus and prohibition against the Gram Panchayat, Khinwel through its Sarpanch Chunnilal. The State of Rajasthan has also been made a party to the application.

(2) It is unnecessary to give in detail all the points raised in the application and we propose to confine ourselves to the main argument on behalf of the applicants based on S. 4 of the Marwar Village Panchayats Act, 1945. That argument is that the Panchayat which is functioning in village Khinwel and has imposed certain taxes since January 1950 is not a properly constituted body, as no notification under S. 4 of the Act was ever issued establishing a Panchayat in that village. The Marwar Village Panchayats Act, 1945 came into force on the 1st January 1946. Section 4 of that Act reads as follows:

"The Minister in Charge may, by notification in the Jodhpur Government Gazette, establish a panchayat in any village or any group of villages not included within the limits of a Municipality."

(3) The case of the applicants is that no notification under S. 4 has ever been issued establisning a 'panchayat' in village Khinwel and therefore, the body which is acting as a 'panchayat' in that village has no legal sanction and cannot function as such. It has been admitted by the opposite parties that no such notification as required under Section 4 of the Act was ever issued by the Minister in Charge; nor has any such notification been brought to our notice by the opposite parties. After this admission, it is clear that no body of persons can set themselves up as a village 'panchayat' in village Khinwel and arrogate to themselves the powers which are conferred on a village 'panchayat' by this Act.

A notification under S. 4 is, in our opinion, the foundation for the coming into existence of a 'panchayat' in a village and where no such notification has been made, no 'panchayat' under the Act can function in any village. In the present case, as no such notification was ever made, the body which calls itself the 'panchayat' of village Khinwel has no legal existence and cannot impose any taxes or perform any functions conferred on a 'panchayat' by this Act. In this view of the matter the applicants are entitled to an order prohibiting this body which calls itself as the 'panchayat' of Khinwel from imposing any taxes or exercising any powers under the Marwar Village Panchayats Act, 1945.

(4) Learned counsel for the State, however, urges that this Court should not issue an order or direction under Art. 226 of the Constitution because there are other remedies available to the applicants. Our attention was drawn in this connection to Ss. 59, 60 and 67 of the Act. Under S. 59 the Collector can by written order suspend the execution of any resolution or order of a 'panchayat' other than an order passed in judicial proceedings or prohibit the doing of any act which is about to be done or is being done under the cover of the Act. Learned counsel for the State urges that the applicants should have proceeded under this section. It appears that the applicants did approach the Collector against the order imposing certain taxes on them and ordering them to pay the amount of the taxes. It further appears that the Sub-divisional Officer and the Collector refused to act under S. 59 and the order of the panchayat imposing the tax on the applicants still stands.

(5) As to S. 60, it provides that the Minister-in-Charge may suspend or abolish the 'panchayat' if in his opinion it is incompetent to perform or persistently makes default in the performance of the duties imposed on it, or exceeds or abuses its powers, or should there be any reason which in the opinion of the Minister-in-charge necessitates the suspension or abolition of a panchayat. The applicants have not approached the Minister-in-charge with a prayer for the abolition of the 'panchayat' on the ground that no notification under S. 4 of the Act has been issued. It is, therefore, contended that this Court should refuse to issue any order or direction under Art. 226 of the Constitution as the applicants have not availed of the

remedy under S. 60 of the Marwar Village Panchayats Act, 1945.

(6) Section 67 provides revisional powers in the Minister-in-charge and he has the authority of calling for and examining the record of proceedings of any panchayat for the purpose of satisfying himself as to the legality or propriety of any executive order passed by it under cover of this Act and to revise or modify such order as he may deem fit. The applicants have not approached the Minister-in-Charge under this section. But considering that their case is that the 'panchayat' is not legally constituted at all, this section has no application, for it applies to cases of orders passed by a legally constituted 'panchayat'.

(7) The question then arises is whether in view of the failure of the applicants to apply to the Minister-in-charge under S. 60, this Court should refuse to issue an order or direction under Art. 226 of the Constitution. The direction which will be issued by this Court in this case will be in the nature of prohibition. It has been held in 'MADAN GOPAL v. THE UNION OF INDIA', 1951 RLW 56, that even if another remedy is available, it is open to this Court, where the order is in the nature of prohibition, to issue such order in a proper case. Learned counsel for the State relies on certain cases in support of his submission that no order should be issued.

(8) An examination of these cases, however, shows that they do not lay down that the Court cannot issue an order if there is another remedy available. The power of the Court is there, though it may not be exercised in case where an adequate, specific and convenient remedy is otherwise available. In 'SHYAMAPADA v. ABANI MOHAN', AIR 1951 Cal 420, which related to the issue of writ of mandamus or Quo Warranto, it was held that recourse ought not to be allowed to an extraordinary remedy when it is not really needed, and a mandamus will never be granted to enforce the general law of the land which may be enforced by action. It was further observed that writs of Quo Warranto are not issued as a matter of course where there is an alternative remedy which is equally appropriate and effective. But the Court went on to observe that the power of the Court was discretionary and proceedings under Art. 226 being of a summary and coercive nature, the wide powers under the Article should be sparingly used and only in those clear cases where the rights of a person had been seriously infringed and he had no other adequate and specific remedy available to him.

It may be noted that this was not a case of an order or direction in the nature of prohibition. The next is 'ELBRIDGE WATSON v. R. K. DAS', AIR 1951 Cal 430. That was a case under the Income-tax Act and it was held that if there was an adequate legal remedy provided in the statute itself, then the High Court should not interfere under Art. 226. But the remedy in question must be a specific remedy at law which is not less convenient, beneficial and effective. In that case, the Court did issue a direction to the Income-tax Officer. The next case referred to was 'MUTHIAH CHETTIAR v. COMMR. OF INCOME-TAX, MADRAS', AIR 1951 Mad 204. That was also a case under the Income-tax Act and it was held that where an assessee failed to ask for a relief which he would have been entitled to obtain under any of the provisions of the Income-tax Act, then certainly the High Court would not exercise its power to issue prerogative writs to give such relief to the assessee.

(9) The last case is 'RAKHALDAS MUKHERJEE S. P. GHOSE', AIR 1952 Cal 171. That was a case in connection with the West Bengal Premises Rent Control Rules and it was held that writs of mandamus, certiorari and prohibition, and for the matter of that, all high prerogative writs, were ordinarily not issued where there existed an alternative remedy equally efficient and adequate; but there was no inflexible rule that such writs could not be issued where the Court thought it just and convenient to do so. The fact that it ordinarily did not do so is a question not of want of jurisdiction but of expediency.

(10) It may be pointed out that in the present case S. 60 of the Marwar Village Panchayats Act, 1945 does not confer any right on any party. It only gives power to the Minister-in-Charge. Of course, it is possible for an aggrieved person to go to the Minister-in-Charge and ask him to suspend or abolish the 'panchayat' for reasons mentioned in that section. But the exercise of powers under S. 60, however, presupposes the existence of a valid Panchayat and the necessity for its suspension or abolition arises by the improper conduct of the said 'Panchayat'. This conduct has been classified under various heads such as incompetence, negligence or exceeding its powers or misusing them. Any other reason which in the opinion of the Minister-in-Charge necessitates suspension or abolition would obviously be analogous to the reasons mentioned earlier in the section.

(11) In the present case, the very constitution of the Panchayat is illegal and where the lack of jurisdiction is patent, a writ of prohibition is the proper remedy. We are, therefore, of opinion that an order in the nature of prohibition should issue in this case.

(12) We therefore, allow the application and order that the body which is functioning as a 'Gram Panchayat' through its Sarpanch Chunnilal be prohibited from functioning as such and from imposing any taxes or performing any duties under the Marwar Village Panchayats Act, 1945. The applicants will get their cost from the opposite parties which we assess at Rs. 50/- per day of hearing.

D.H. Application allowed.

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(JAIPUR BENCH)

WANCHOO C. J. AND RANAWAT J.

Kaboolchand, Applicant v. Deputy Custodian, Alwar, Opposite Party.

Writ Appln. No. 16 of 1951, D/- 21-12-51.

Constitution of India, Art. 226 — Suppression of true facts — Effect.

Parties who come to the High Court and ask it to exercise its extraordinary jurisdiction under Art. 226 should place full and true facts before it and should not word the application or affidavit in such a way as to create a completely misleading picture of the facts leading to the making of the application in order to deceive the Court in passing interim orders in their favour. If the applicant deliberately suppresses material and relevant facts from the Court, the applicant disentitles himself from getting any writ, order, or direction in his favour and the Court will refuse to look into the merits of the case and dismiss the application. (1917) 1 KB 486; AIR 1951 Nag 16; AIR 1951 All 746 (FB), Rel. on. (Paras 9, 10)

J. P. Jain, for Applicant; Vishnu Chandra, for Deputy Custodian.

REFERENCES: Courtwar/Chronological/ Paras
('51) AIR 1951 All 746: (1951 All LJ 576 FB) 8
('51) AIR 1951 Nag 16: (ILR (1951) Nag 64) 7
(1917) 1 KB 486: (86 LJKB 257) 6

WANCHOO, C. J.: This is an application by Shri Kabool Chand under Art. 226 of the Constitution of India for a writ, direction or order to the Deputy Custodian, Alwar District, and the Superintendent of Police, Alwar, directing them not to evict the applicant from a certain house in the city of Alwar. The case put forward by the applicant in his petition was briefly this. The petitioner had been occupying house No. 10 in Ward No. 2, Mohalla Shikari Para, Alwar. This was evacuee property and the applicant was the lessee of the Custodian of Evacuee Property. The applicant had been paying the rent of the house regularly and had paid up to January 1951 and had also deposited one month's rent in advance when the house was first given to him. The lease in question had not been determined by the Deputy Custodian and the petitioner had not received any notice to that effect. The Deputy Custodian, however, passed a warrant of ejectment and sent it to the Superintendent of Police for compliance and that officer was taking steps to turn the family of the applicant out of the house.

The applicant had not been provided with any alternative accommodation. He had also not been allotted a house in Jaipur, where he had been transferred in connection with his service. The petitioner personally requested the Deputy Custodian to cancel his orders but he was bent upon enforcing his orders. It was with great difficulty that the petitioner had obtained a copy of the order. The date of the order was the 17th of January 1951 and the petitioner was being ejected from the house and this was an encroachment of the applicant's legal and fundamental rights.

(2) An application was also made praying for an interim order on the ground that the applicant was in imminent danger of being evicted from the house without any authority of law. Thereupon, this Court passed an interim order by which the Deputy Custodian was ordered not to enforce the order regarding the ejectment of the house in question till the disposal of the application. That interim order continues up to today.

(3) The application has been opposed on behalf of the Deputy Custodian and the reply of the Deputy Custodian reveals the true facts which are these. The applicant was allotted this house which was evacuee property. He was served with a notice in March 1950 that as the house was required for the rehabilitation of a displaced person he should vacate the house by the 15th of April 1950. This notice was served on him through the Accountant General, Jaipur, under whom he was serving. Thereafter he made an application on the 18th of April in which he said that he was on sick leave and was unable to vacate the house. He also said that he had been transferred to Jaipur and had not been able to get a house there. He further said that one Jhumman who was in need of the house in Alwar had already got a house and therefore he might be given some time so that he might get another house before he vacated this house. He was then allowed time to vacate the house. When this time expired he was again given notice under S. 9 of the Administration of Evacuee Property Ordinance to vacate the house by a date in August 1950.

Then on the 2nd of September 1950 the applicant made an application to the Accountant General, Rajasthan in which he said that he had no objection to vacate the house but that it would be very difficult to do so during the rainy season. He also said that it was not the custom among the Hindus to shift from one house to another during those days and requested that the Deputy Custodian might be moved not to eject the members of his family from the house. This request was forwarded to the Deputy Custodian who was however unable to do anything for the applicant. Eventually, on the intervention of the Government of Rajasthan the applicant was allowed to keep possession of the house up to the end of November 1950. It seems that when the applicant did not give up possession of the house even after November 1950 proceedings were taken to have the house vacated in January 1951 and it was thereafter that the present application was made.

(4) We may also mention that in his earliest application to the Custodian Alwar, which the applicant sent through the Accountant-General on the 18th of February 1950, he said that his sons were reading in schools and the whole family had to come to Jaipur in the month of April 1950 and as such he might be allowed to stay on in the house till then.

(5) A comparison of the facts narrated above from the original file which has been placed before us on behalf of the Deputy Custodian with the application and affidavit of the applicant shows that the applicant suppressed relevant and material facts from this Court when he made the application in February 1951. A perusal of the application that he made gives one the impression that the applicant was being dealt with harshly by the Deputy Custodian and that one fine morning in January 1951 the order of the Custodian was received by the applicant as a bolt from the blue demanding vacation of the house on pain of his being forcibly ejected through the police. It was on such an application that the applicant obtained an interim order.

He had no business to suppress all the facts which we have set out above and which go to show that he was being asked by the Deputy Custodian since January 1950 to vacate this house and had been granted time again and again on his request and eventually on the intervention of the Government of Rajasthan to vacate the house which he had agreed to vacate after the time granted to him. There is no knowing whether any interim order would have been passed in his favour if the full facts had been disclosed by the applicant in his application. As it is, he has managed to stay in the house for ten months with the help of the interim order after deceiving the Court as to the true state of affairs.

(6) It has been held in a number of English and Indian cases that a party applying for a writ has to come to the Court with clean hands and to state the true facts fully before this Court. We may in this connection refer to the case of 'REX v. KENSINGTON I. T. COMMRS; DE POLIGNAC (PRINCESS), EX PARTE', (1917) 1 K B 486. That was a case where the Princess stated in her affidavit that she was a French subject and resident in France and was not and had not been a subject of the United Kingdom nor a resident in the United Kingdom. On examination of the facts it was found that a lease-hold house had been taken in the name of her brother as far back as 1909 and the purchase money for the lease of the house and the furniture had been paid for by the Princess. It was also found that the household expenses were paid by the brother and subsequently adjusted between him and the Princess. It was therefore held that there was a suppression

of material facts and the party was not entitled to the writ on that ground alone.

We may quote the words of Viscount Reading, C. J. at p. 495, as below:

"Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit."

(7) Similar view has been taken in 'ZIKAR v THE GOVERNMENT OF MADHYA PRADESH', AIR 1951 Nag 16. That was a case where Zikar made an application for a writ on the ground that he was an Indian subject and had never migrated to Pakistan and had no domicile there and had not acquired any property in Pakistan. As the applicant was being treated as a Pakistani, it was prayed that this action was wrongful and should be the subject of a writ or order. It was found at the hearing that Zikar had made applications in Pakistan in which he had given his domicile as Pakistan and which showed that he had lived in Pakistan for some time in various places. On these facts being brought to the knowledge of the Court it was observed at p. 21 as follows:

"Where, as here, the Court has reason to be satisfied that there has been a deliberate concealment of facts so as to deceive it, the Court will decline to consider the merits and reject the application. The rule stated by Viscount Reading C. J., is very salutary."

(8) A similar view was taken by a Full Bench of the Allahabad High Court in 'ASIATIC ENGINEERING CO. v. ACHHRURAM', AIR 1951 All 746 (FB). In that case the applicant Company attempted to conceal the fact that the Company had its office in Pakistan in order to meet a possible argument that the Company had obtained a right to or interest in or benefit from property which was being treated as evacuee or abandoned property in Pakistan. Misleading statements were made and inaccurate information was given about the residence of the share-holders and the directors of the Company. Allegations of personal interest and mala fides against the Deputy Custodian were also made without any foundation.

After stating these facts the law was laid down at p. 767 as below:

"A person obtaining an ex parte order or a rule nisi by means of a petition for exercise of the extraordinary powers under Art. 226 of the Constitution must come with clean hands, must not suppress any relevant facts from the Court, must refrain from making misleading statements and from giving incorrect information to the Court. Courts, for their own protection, should insist that persons invoking these extraordinary powers should not attempt, in any manner, to misuse this valuable right by obtaining ex parte orders by supression, misrepresentation, or misstatement of facts."

(9) We are of opinion that the principles laid down in these three cases are very salutary and it is necessary that parties who come to this Court and ask it to exercise its extraordinary jurisdiction under Article 226 of the Constitution of India should place full and true facts before it and should not word the application or affidavit in such a way as to create a completely misleading picture of the facts leading to the making of the application in order to deceive the Court in passing interim orders in their favour. We have already set out the main contents of the affidavit of the applicant and the true facts as they appear from the record of the Deputy Custodian which has been placed before us.

It is obvious from a comparison of these two matters that the applicant deliberately suppressed material and relevant facts from the Court, and tried to make out as if the Custodian suddenly without any rhyme or reason ordered him to vacate the house, in which he had been living since 1947 as a lessee. This was obviously done in order that an interim order may be easily available, for, if this Court knew that the applicant had been given notice after notice from January 1950 and had been taking time again and again to vacate the house for the last one year before he made the application in this Court he might not have got the interim order at all. We are therefore of opinion that the applicant in this case has disentitled himself from getting any writ, order, or direction in his favour and the salutary rule laid down by Viscount Reading, C. J., should be applied to this case.

(10) We therefore refuse to look into the merits of the case and dismiss the application for reasons which we have already set out. The Deputy Custodian will get his costs from the applicant. We fix Rs. 50/- as counsel's fee.

Application dismissed.

D.H.

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SHARMA J.

Har Deo, Applicant v. State.

Criminal Ref. No. 232 of 1951, D/- 20-9-51.

† Criminal P. C. (1898), S. 523 — Dismissal of claimant's application for default.

Section 523 is self-contained and the Magistrate has no power to make any order which does not come within one or the other provisions of the said Section. The Magistrate has not been given any power to dismiss an application of the claimant for default. (Para 2)

Anno: Cr. P. C., S. 523 N. 5.

Applicant in person; R. K. Rastogi, Government Advocate, for the State.

ORDER.: The applicant Har Deo claimed an amount of Rs. 575/4/- which were recovered from the possession of his son Bhadur. The proceedings were taken under Section 523 of the Code of Criminal Procedure by the Railway Magistrate, Jaipur but as after the examination of some of the witnesses, the applicant did not appear in Court on a date to which the case had been adjourned, the Learned Magistrate dismissed Hardeo's application for default, Hardeo went in appeal to the Court of Sessions, Jaipur and the Learned Additional Sessions Judge, Jaipur holding that no appeal lay, but the matter was such in which inter-

ference was necessary, treated the appeal as an application for revision and has made a reference to this Court recommending that the order of the Learned Magistrate dated the 18th April 1951 dismissing Har Deo's application for default, be set aside and the Magistrate be asked to pass appropriate orders under Section 523 of the Code of Criminal Procedure, allowing the applicant one more chance to adduce evidence.

(2) The applicant has appeared before me. On the other side Government Advocate has appeared. He concedes that the reference is perfectly justified and the order of the Magistrate should be set aside. There can be no doubt that the order of the Magistrate dismissing the application for default cannot be maintained. Under Section 523, the Magistrate is required to make such order as he thinks fit respecting the disposal of the property in question or the delivery of such property to the person entitled to the possession thereof or if such person cannot be ascertained respecting the custody and production of such property.

Under Sub-section 2, if the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit. If such person is unknown the Magistrate may detain the property and shall, in such a case, issue a proclamation specifying the articles of which such property consists, and requiring any person, who may have a claim thereto to appear before him and establish his claim within six months from the date of such proclamation. It would thus, appear that Section 523 is self-contained and the Magistrate has no power to make any order which does not come within one or the other provisions of the said Section. The Magistrate has not been given any power to dismiss an application of the claimant for default. The order, was, therefore, not legally justified.

(3) The reference is accepted, the order of the Learned Magistrate, dated the 18th April 1951, dismissing the applicant's application for default is set aside and the Magistrate is directed to make a proper order under Section 523 of the Code of Criminal Procedure after giving the applicant one more chance to adduce evidence.

D.H. Reference accepted.

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(JAIPUR BENCH)

RANAWAT J.

Newad Ram, Applicant v. Kishan and others, Opposite Party.

Criminal Revn. No. 311 of 1951, D/- 28-9-1951.

(a) Criminal P. C. (1898), S. 497(1) — Sessions Judge is not bound by committing Magistrate's opinion.

In the matter of granting bail to the accused charged under S. 302, Penal Code, a Sessions Judge is not bound by the opinion of the committing Magistrate that there was a 'prima facie' case against the accused under Sec. 302. It is open to the Court of Sessions to examine the evidence on record and to come to its own conclusion regarding the fact whether there was or was not reasonable ground to believe that the accused had committed an offence punishable with death or transportation for life. AIR 1935 Pesh 101, Rel. on. (Para 4)

Anno: Cr. P. C., S. 497 N. 5 Pt. 10.

(b) Evidence Act (1872), S. 114 — Presumption in favour of propriety of orders of Court.

There is a presumption in favour of the propriety of the orders of a Court of law and it is to be presumed that an order made by a Court of law was made after considering all the material on the record of the case and after hearing both the parties. Such a presumption is rebuttable. (Para 4)

Anno: Evidence Act, S. 114 N. 29.

H. M. Mukerjee, for Applicant; Ram Avtar Gupta, Government Advocate; D. M. Bhandari and B. B. Sharma, for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras ('35) AIR 1935 Pesh 101: (36 Cri LJ 1141) 3

ORDER.: This is a revision application filed by the complainant Newadram against an order of the Sessions Judge, Bharatpur, dated the 5th July 1951, by which the four accused persons who had been committed to his Court by the City Magistrate, Bharatpur, to stand their trial under Section 302, I.P.C., were allowed to remain on bail. The Government Advocate has supported the application of the complainant. A notice was issued to the opposite parties.

(2) The argument of the learned counsel of the applicant is that the accused persons have been committed to Sessions under Section 302, I.P.C., which is an offence punishable with death or transportation for life and under Section 497, Criminal P.C., it was not open to the Magistrate to have allowed the accused persons to remain on bail. The learned Sessions Judge, it is said on behalf of the complainant, did not apply his mind to the facts of the case in making an order in favour of the accused. 'Prima facie' it is argued there was evidence against the accused for committing them to the Court of Session to stand their trial under Section 302, I.P.C., and on this account the City Magistrate made a commitment order; that Court could not therefore be supposed to have held that there were no reasonable grounds to believe that the accused had committed an offence punishable with death or transportation for life and when the case had been committed under Section 302 the learned Sessions Judge should have held that there was a case under Section 302 against the accused and under Section 497, Criminal P.C., bail was improperly granted to the accused by the Court of the City Magistrate.

(2) On merits it is contended, the learned Sessions Judge also could not have come to a contrary conclusion that there were no reasonable grounds for believing that the accused had committed an offence punishable with death or transportation for life when the accused had already been committed to his Court by the committing Magistrate under the charge of murder. The counsel on the opposite side has replied that the learned Sessions Judge did hear the arguments of both the sides and after giving due weight to the evidence he made an order under Section 498, Criminal P.C., releasing the accused on bail. The provisions of Section 498, are not limited by the provisions of Section 497, Criminal P.C.

(3) It may be observed that when the learned City Magistrate committed the accused persons under a charge of murder it cannot be said that the same Court could have come to the conclusion that there were no reasonable grounds to hold that the accused had committed an offence punishable with death or transportation for life. A case is committed to Sessions only when there are grounds to believe that at least there is a 'prima facie'

case against the accused. In this view of the matter, the order of the City Magistrate granting bail to the accused appears to be contrary to the provisions of Section 497, Criminal P.C. The exceptions given in the Section do not apply to this case and obviously when the case was committed under Section 302, I.P.C., the Magistrate ought to have taken the accused persons in custody.

However, that stage of the case is now over and it is not necessary to go back to that position of the case. The case has been committed to the Court of Session and on an application made on behalf of the accused the learned Sessions Judge has made an order in this behalf which is being impugned in this revision. Even though it can be said that the Court of the committing Magistrate could not commit the case under Section 302 and at the same time hold that there were no reasonable grounds to believe that the accused had committed an offence punishable with death or transportation for life, yet the same cannot be said against the learned Sessions Judge, because it is not necessary for the Sessions Judge to concur with the opinion of the committing Magistrate as regards the point regarding the existence of the reasonable grounds to believe that the accused had committed an offence punishable with death or transportation for life.

In spite of the fact that the case had been committed to the Court of the Sessions Judge under Section 302, I.P.C., the Sessions Judge may hold the opinion if he is satisfied after examining the record of the case that there is no reasonable ground to believe that the accused had committed an offence punishable with death or transportation for life. In a case reported in 'NISAR ALI v. ABDUL HAMID', AIR 1935 Pesh 101, a similar point was raised and it was held by a Division Bench of that Court as follows:

"We cannot support the view that because the factum of commitment implies that the City Magistrate had sufficient grounds for committing the accused, it necessarily gave the third Additional Sessions Judge reasonable grounds for believing that he has been guilty of the offence charged. It frequently happens in cases of violence that persons upon opposite sides are prosecuted for offences triable by a Court of Session and that the two prosecution stories are mutually destructive of each other, yet in such cases if the unrebutted evidence in each case be sufficient to afford 'prima facie' proof of the allegations made, it may be the duty of the Magistrate carrying out the judicial enquiry to commit both sets of accused for trial. In such cases he cannot possibly believe both stories and it is difficult to affirm that there are reasonable grounds for believing both stories. Again, there is no doubt that when a person is convicted of an offence punishable with death or transportation for life and appeals the appellate Court is empowered to admit him to bail pending decision of the appeal, and therefore if Section 497, Criminal P.C., does apply to the appellate Court in such a case, we must come to the conclusion that the conviction by a lower Court does not necessarily in itself give the appellate Court reasonable grounds for believing that the accused appellant is guilty."

(4) It cannot therefore be said that the learned Sessions Judge was bound by the opinion of the committing Magistrate that there was a 'prima facie' case against the accused under Section 302, I.P.C. It was open to the Court of Session to examine the evidence on record and to come to its own conclusion regarding the fact whether there was or was not reasonable ground to believe that the accused had committed an offence punishable with death or transportation for life. The learned Sessions Judge has not discussed the evidence on record but he has simply said in his order that it was proper to make an order releasing the accused on bail.

It may be that at that stage expression of opinion by the learned Sessions Judge was uncalled for and in order to obviate further complications he may not have considered proper to express it in so many words that there were no reasonable grounds to believe that the accused had committed an offence punishable with death or transportation for life. There is a presumption in favour of the propriety of the orders of a Court of law and it is to be presumed that an order made by a Court of law was made after considering all the material on the record of the case and after hearing both the parties. Such a presumption is rebuttable, but in the present case the parties have not filed any affidavits in order to show that this was not so done. It would not be proper for this Court at this stage to examine the evidence on the record and to express any opinion as regards the merits of the case, because it may prejudice the case of the parties in the trial Court.

The scope of Section 498, Criminal P.C., is much wider than that of Section 497, Criminal P.C., and the order of the learned Sessions Judge is not contested by the parties in this case for want of jurisdiction. However, in concluding his order the learned Sessions Judge has made certain observations regarding the propriety of the order of the Magistrate but as has already been discussed above, it is not free from doubt that the order of the Magistrate on the subject was in accordance with the provisions of law. Moreover, the discretion of the learned Sessions Judge was not in any way hampered by the order of the committing Magistrate in this behalf and the propriety or otherwise of the order of the committing Magistrate cannot in any way be taken into account to judge the legality of the order of the learned Sessions Judge.

Similarly, a passing reference has also been made by the learned Sessions Judge to an order made by this Court at an earlier stage of the case. It may be pointed out that that order was made at a prior stage on the strength of the circumstances then existing on the record of the case and after the conclusion of the enquiry in the Court of the committing Magistrate and after the commitment that order had no application to the facts of the case at the time the bail application was decided by the learned Sessions Judge. The discretion of the learned Sessions Judge was in no way affected by the existence of that order of this Court.

The learned Government Advocate has stressed that the learned Sessions Judge was misled firstly by the order of the committing Magistrate and secondly on account of a misconception regarding the applicability of the order of this Court in the changed circumstances of the case. It may be pointed out that even though a passing reference has been made to the order of the committing magistrate and the order of this Court in the order of the learned Sessions Judge, which has been impugned in this revision, it does not appear that the learned Sessions Judge was in any way influenced by the existence of those orders. He had expressed himself in unequivocal terms at the very outset that under the circumstances of the case he considered it proper to release the accused persons on bail. The argument of the learned Govern-

ment Advocate on this point, therefore, has little force.

The trial Court has exercised its judicial discretion in the matter and it appears that all the circumstances of the case were taken note of by that Court while it made an order granting bail to the accused and it does not appear necessary for this Court to interfere in the exercise of discretion by the lower Court. The trial of the case has been unnecessarily prolonged on account of this revision application, as the trial Court had to postpone the trial of the case, because the record of the case had come in this Court in connection with the revision application. It is in the interest of justice that criminal cases and specially cases of serious offences should be tried and disposed of expeditiously without any delay.

(5) This application is rejected and it is ordered that the record of the case may be returned to the trial Court so that the proceedings in that Court may not be delayed any more.

V.R.B. Application rejected.

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(JODHPUR BENCH)

WANCHOO C. J. AND BAPNA J.

Budh Mal, Applicant v. Gulab Singh and others, Opposite Party.

Civil Misc. (Writ) Appln. No. 12 of 1951, D/- 19-11-1951.

Constitution of India, Art. 226 — Other remedy open.

Where the contract was concluded between the State and the applicant, and later the State went back on that contract and decided to call for fresh tenders, the High Court should not exercise its extraordinary jurisdiction under Art. 226 as even if there has been a breach of the contract, a specific, adequate and convenient remedy is available by a suit for damages for breach of contract. As the damage done can be compensated for by a decree for damages, the fact that the applicant would have had to give notice under Section 80 of the Code of Civil Procedure and could not file the suit for two months does not mean that there was not an adequate remedy available to him. AIR 1947 Cal 307, Rel. on. (Paras 4, 6)

B. B. Desai for Applicant; Mansha Ram, for the State.

REFERENCES: Courtwar/Chronological/ Paras.
('47) AIR 1947 Cal 307 (Pr 4)

WANCHOO, C. J.: This is an application by Budhmal Radhakishan Parmar under Article 226 of the Constitution of India for issue of a writ, order or direction against the State of Rajasthan, and the Commissioner, Civil Supplies, Jaipur, and the Deputy Commissioner, Civil Supplies, Jodhpur, prohibiting them from proceeding with certain contracts with respect to grain.

(2) The facts alleged by the applicant are that tenders were called for a contract of handling work in connection with the Grain Stores of Jodhpur Division for the year 1951. In that connection, the applicant made a tender, and complied with the necessary directions in that behalf. All the tenders received were opened, and the applicant was verbally informed that he would be appointed contractor for the said work for the year 1951. Thereafter, the deposits of the other tenderers were returned, while the deposit of the applicant was retained. Later, however, the Civil Supplies Commissioner and Deputy Commissioner cancelled the contract in favour of the applicant, and called for fresh tenders. In the meantime, the work was carried on by the old contractor, who was given extensions from time to time. It was contended that it was the duty of the officer concerned in their public character to perform specifically the contract with the petitioner, and to refrain from committing a breach thereof, and the petitioner was, therefore, entitled to a writ ordering the officers concerned and the State of Rajasthan for specific performance of the contract.

(3) The application has been opposed on behalf of the State of Rajasthan and the officers concerned. The fact alleged by the applicant, namely, that he had been granted the contract, has not been admitted. It has also been urged that in any case, the applicant is not entitled to any writ at all, as there was no duty laid on the State or the officers to perform specifically the alleged contract.

(4) We do not think it necessary for the purposes of this case to decide the question whether the contract for the work was in fact granted to the applicant. That is a matter which may have to be decided if and when the applicant decides to bring a suit for damages for breach of contract against the State, and we would not like to prejudice the decision of that issue by any remarks on that point at this stage. For the purposes of the present application, we shall assume that the contract was concluded between the State and the applicant, and that later the State went back on that contract, and decided to call for fresh tenders. The question that arises then is whether the applicant is entitled to any relief under Article 226 of the Constitution of India in these assumed circumstances. We are of opinion that this Court should not exercise its extraordinary jurisdiction under Article 226 of the Constitution in a case like the present, where, even if there has been a breach of the contract, a specific, adequate and convenient remedy is available by a suit for damages for breach of contract. In this connection we may refer to the case of 'P. K. BANERJEE v. L. J. SIMONDS', AIR 1947 Cal 307. There also an application for a writ was made under Section 45 of the Specific Relief Act in a case based on contract. It was held that as there was other specific and adequate remedy available by way of suit, no relief could be granted under Section 45 of the Specific Relief Act.

(5) Learned counsel for the applicant wants to distinguish this case on the ground that Section 45 of the Specific Relief Act in so many words provides in Clause (g) that the High Court will not make any order on any other servant of the Crown, as such, merely to enforce the satisfaction of a claim upon the Crown. He urges that there is no such prohibition under Article 226 of the Constitution. We may, however, point out that this was an additional ground on which the learned Judges of the Calcutta High Court dismissed that application. Further, though it is true that Article 226 of the Constitution of India is very general in terms, and gives very wide powers to this Court, it would not use those extraordinary powers in cases arising out of contractual relationship, where there is specific remedy available otherwise, and where the harm done can be compensated for by a suit for damages for breach of contract.

(6) Learned counsel also urges that before bringing a suit, the applicant would have had to give

notice under Section 80 of the Code of Civil Procedure, and thus would not have been able to get an injunction in time. But where, as in this case, the damages done to him can be compensated for by a decree for damages, the fact that he could not file the suit for two months does not mean that there was not an adequate remedy available to him.

(7) We are, therefore, of opinion that there is no cause for the issue of a writ in this case. The application is hereby dismissed with costs to the State. We fix Rs. 80/- as the fees of the learned Government Advocate.

D.H. *Application dismissed.*

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(JODHPUR BENCH)

BAPNA J.

Anwar Khan, Petitioner v. Bhoor Singh and others, Respondents.

Criminal Revn. No. 76 and 114 of 1951, D/- 25-3-52.

(a) Criminal P. C. (1898), S. 253 — Order discharging some of the accused — Revision.

If there are more accused than one, and the Magistrate decides to discharge only some of them, it cannot be said that it is competent for the Magistrate to give reasons in the final order of acquittal or conviction of the remaining accused. It would be reasonable to expect that some reasons are given in support of order of discharge so that the superior Court may be in a position to find that the Magistrate has exercised his mind in respect of the evidence before him. As regards the final order of acquittal or conviction, as the opening words of S. 366 indicate, the judgment refers to a trial which stage arises after a charge has been framed. If the judgment is to be in respect of persons who have also been discharged, subsection (2) of Section 366 cannot be complied with as the persons who are discharged, no longer remain before the Court. Section 367 does not make any reference in respect of persons who have been discharged or in respect of offences as regards which the accused have already been discharged. Therefore revision lies against such an order. AIR 1949 Mad 66, Dissent. (Para 4)

Anno: Cr. P. C., S. 253 N. 7, 9.

(b) Evidence Act (1872), S. 114 — Official orders — Presumption.

'Prima facie' there is a presumption that Official orders have been issued in exercise of powers vested in the Government Officer. (Para 5)

Anno: Evi. Act, S. 114 N 29.

Thanchand, for Petitioner; Sumer Dan, for the State; Laxmi Narain Chagani, for Respondents Nos. 2, 3, 4 and 6.

REFERENCES: Courtwar/Chronological/ Paras.
('49) AIR 1949 Mad 66: (49 Cri LJ 597) 4

ORDER.: This is a revision against an order of discharge of some of the accused in a case pending before the Sub-Divisional Magistrate of Jetaran.

(2) Certain dispute arose as to the apportionment of rents of the 'Rabi' crop of Smt. 2004 between the 'Thakur of Nimbera and Bhoor Singh and others, and on an application on behalf of the Thakur, and 'Amin' Hardeosingh and a Kanwaria Anwarkhan was appointed by the Executive Hakim of Jetaran by an order dated 30th March 1948. The instructions were that they were to have the grain of 'bera' Khera thrashed out and rents apportioned according to previous practice in the presence of the parties. He also issued notice to the opposite party in this respect.

Anwar Khan Kanwaria made a report to the Hakim on 20th May 1948 that he was on duty at 'Bera' khera and got the grain thrashed out by 19th May 1948 and had put a seal on it and was guarding the grain for the purpose of apportionment, but on the night between the 19th and 20th May, Ram Singh and Takhat Singh, who were sleeping close by and were also keeping watch on the grain along with Bhoor Singh, Ganpat Singh, Mod Singh, Heer Singh and others, came to the spot, Ram Singh put a 'rali' on him and the others tied him with a rope and when he protested, Bhoor Singh threatened to kill him and thereafter the aforesaid persons took away the entire grain. Ganpat Singh untied him in the morning. The Hakim forwarded the original report to the Sub-Inspector of Police Jetaran with directions to reach on the spot and proceed further according to law.

The Sub-Inspector after investigation put up a challan against six accused, namely, Bhoor Singh, Ganpat Singh, Takhat Singh, Fateh Singh, Ram Singh and Mod Singh for offences under Sections 147, 342 and 424, I.P.C. The learned Sub-Divisional Magistrate, Jetaran, who enquired into the case, after recording the evidence for the prosecution and examining the Thakur of Nimbera as Court-witness, framed a charge against Bhoor Singh for an offence under Section 342, I.P.C., on 8th September 1950. He discharged the other accused. Anwar Khan filed a revision in the Court of Sessions Judge against the discharge of the five accused and for framing a charge under Sections 147; 424 and 342, I.P.C., against all the accused. That revision was rejected.

(3) Anwar Khan has filed a revision to this Court, which is Revision No. 76 of 1951. The State has also filed a revision against the order of the Sub-Divisional Magistrate dated 8th September 1950 praying that a charge under Section 424, I.P.C., should be framed against all the accused. This is Revision No. 114 of 1951.

(4) It was contended by learned counsel for the accused that the order of discharge of the five accused should not be interfered at this stage, and he has relied upon 'In re: JAYARAMAN', AIR 1949 Mad 66, in which it was observed that the Magistrate was not bound to give reasons for the discharge and it was competent for him to give reasons in the final order of acquittal or conviction of the remaining accused; and therefore in cases where charges have been framed against some of the accused alone, or against all the accused under some sections alone, it would be better if the applications in revision for setting aside the orders of discharge, were made only after the Court finally disposes of the matter. With great respect I am unable to agree with this opinion.

In most cases such a procedure would lead to great inconvenience and delay in disposal of cases and may involve re-trial and great embarrassment to all parties concerned. While under Section 253 Criminal P.C., it is not provided that a Magistrate should give reasons for an order of discharge, but

in cases where there is only one accused it is obvious that if the Magistrate discharges the accused, reasons have to be given in support of that order. Similarly, if there are more accused than one, and the Magistrate decides to discharge only some of them, it would be reasonable to expect that some reasons are given in support of that order so that the superior Court may be in a position to find that the Magistrate has exercised his mind in respect of the evidence before him.

As regards the final order of acquittal or conviction, the matter is provided in Section 367 of the Criminal Procedure Code. As the opening words of Section 366 indicate, the judgment refers to a trial which stage arises after a charge has been framed. If the judgment is to be in respect of persons who have also been discharged, Subsection (2) of Section 366 cannot be complied with as the persons who are discharged, no longer remain before the Court. Under Section 367, Criminal P.C., the Court has to give certain particulars in case of conviction or in case of acquittal, but it does not make any reference in respect of persons who have been discharged or in respect of offences as regards which the accused have already been discharged.

(5) Learned counsel for the petitioner Anwar Khan has placed before me the order of the learned Sessions Judge, and the reasons given by the learned Sessions Judge have been commented upon at some length. The learned Sessions Judge considered that no case under Section 424, I.P.C., had been made out as the accused did not have any dishonest intention in removing the grain. To this learned counsel for the accused has added another reason that it has not been shown by the prosecution that the order of appointment of the 'Amin' and the 'Kanwaria' was in pursuance of any law prevailing in the State. At one stage, it was argued that the order of appointment of the 'Amin' and the 'Kanwaria' was also not on record. The last point has, however, no force as a certified copy of the order is on the record.

As regards the provision of law, learned counsel for the petitioner Anwar Khan has referred me to Order No. 2502/C.B., dated 9th April 1945 published in the Government Gazette of 14th April 1945, of the former covenanting State of Jodhpur, which authorized the Executive Hakim to appoint an 'Ameen' and a 'Kanwaria' for smooth division of the crops between the Jagirdar and the cultivator. I find that the officer Mr. Abdul Jalil Kazi P.W. 8, who made the appointment of 'Ameen' and 'Kanwaria', was not cross-examined as regards the power under which he issued the order. It appears that he was only questioned by the prosecution with respect to the complaint by Anwar Khan, but nevertheless he could be cross-examined as to his powers to appoint an 'Amin' and 'Kanwaria' as the certified copy of the order was on the record.

'Prima facie' there is a presumption that official orders have been issued in exercise of powers vested in the Government Officer and if the accused wanted to agitate this matter, which he had no doubt a right to do, he should have cross-examined the officer when he came into the witness-box. This is, however, a matter which will be gone into again when the case proceeds further.

(6) The alleged removal of grain stealthily at night after disabling the complainant Anwar Khan makes out a prima facie case against the accused under S. 424 of the Penal Code. In their statements, four of the accused admit having taken the grain at night. The charge of disabling Anwar Khan has already been framed against Bhoor Singh under S. 342, I. P. C. Now, whether there were more than five accused and a charge under S. 147 will be proper, or whether there were less than five and a charge under S. 34, Penal Code, will be proper, or the individuals who committed the offence will have to be charged individually, is a matter for the lower Court to consider. There is in any case no ground for the discharge at this stage.

(7) Learned counsel for the accused has urged that taking the evidence at its best, it is not proved that more than four persons have taken part in this incident. Learned counsel for the complainant has drawn attention to the statements of Anwar Khan and Gazi and urged that a 'prima facie' case has been made out against all the accused. Since the trial Court does not give any reasons how far these two witnesses could or could not be believed, it will be open to the trial Court to apply its mind on the evidence before it and frame charges against such of the accused as may appear 'prima facie' to have committed the offence. It would be for the Magistrate to come to a conclusion whether in this case a charge under S. 147, Penal Code, if there are more than five accused, or under S. 34, Penal Code if there are less than five, or for offences against individual persons has to be framed.

(8) The revision is, therefore, allowed, and the order of discharge in respect of the five accused, namely, Ganpat Singh, Takhat Singh, Fateh Singh, Ram Singh and Mod Singh is set aside. The discharge of Bhoor Singh in respect of offences under Ss. 147 and 424, Penal Code, is also set aside. The case will go back to learned Sub-Divisional Magistrate, Jetaran, for further enquiry according to law.

D.H. Revision allowed.

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(JAIPUR BENCH)

SHARMA J.

Jagannath, Appellant v. State.

Criminal Appeal No. 1 of 1951, D/- 23-11-1951.

(a) Evidence Act (1872), S. 118 — Child witness.

Children witnesses are risky as they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others & are greatly influenced by fear of punishment, by hope of reward and by desire of notoriety. It is necessary for a Court before examining a child of tender years as witness to satisfy itself that the child is sufficiently intellectually developed to comprehend what he has seen and to give an intelligent account of it to the Court. If the Court is of the opinion that by reason of tender years or defective or immature understanding, the child could not have perceived the particular incident to prove which he is produced as a witness, the Court should not only refrain from administering the oath to him but should also decline to examine him as a witness. (Para 5)

Anno: Evidence Act S. 118 N. 2, 4.

(b) Penal Code (1860), S. 376 — Evidence and proof.

The simple fact that the doctor found some spots of semen by the medical exa-

mination on the dhoti of the accused or they were found on the petti coat of the girl or there were three slight bruises over the private parts of the girl is not enough to prove that it was the accused who committed rape upon the girl. Some suspicion may be attached to him but suspicion cannot take place of legal evidence & the criminal Court is open to do its duty of giving the benefit of doubt to the accused, howsoever it may suspect that it might have been the accused who committed the guilt. Whatever may be the medical evidence, it cannot be acted upon in the face of the girl's clear admission in the committing Magistrate's Court that penetration did not at all take place. (Para 5)

Anno: Penal Code, S. 376 N. 4.

J. K. Mathur, for Appellant; R. A. Gupta, Government Advocate, for the State.

JUDGMENT : Jagannath has been convicted by the Additional Sessions Judge, Bara under Ss. 376 and 451, Penal Code and sentenced to 2½ years rigorous imprisonment and a fine of Rs. 51/- in default to undergo further rigorous impisonment for four months. It was alleged by the prosecution that on the 5th February, 1950 when Mt. Pana a girl of about eight years was engaged in sweeping the grains at the platform near her house in village Bhanwara some time in the afternoon the accused Jagannath came to her and took her away inside the house and in the IKDARA committed rape upon her. At that time there were only some children at the place; two of whom were a girl Mt. Kessar and a boy Krishna both about seven years old. When her father returned to the house she told him about the act of the accused.

The girl's father Madna went to the Police Station to lodge a report but it was not recorded. He therefore, made an application before the Sub-Divisional Magistrate, Chabra who directed the police to record a report and investigate the case. The first information report was, therefore, recorded on the 7th February 1950 at about 6 in the evening. The girl and Jagannath accused were medically examined and after necessary investigation the case was challaned under S. 451 as well as 376 in the Court of Sub-Divisional Magistrate, Chabra who committed the accused to take his trial under both the sections to the Additional Sessions Judge's Court at Baran.

(2) The accused denied the charge and pleaded that the case was an outcome of enmity. The learned Additional Sessions Judge, however, was satisfied that offence under both the sections was proved against the accused and consequently convicted and sentenced him as above. The accused Jagannath has filed this appeal.

(3) I have been taken through the evidence by the learned counsel for the appellant Mr. Jugal Kishore Mathur who appears for him. He referred to the statement of Mt. Pana, the victim of the alleged offence who had to admit in cross-examination that she had stated in committing Magistrate's Court that whatever she had stated was at the instance of her father and that she did not understand many things which she had mentioned in her examination. Mt. Pana was confronted with this statement in the Sessions Court and the statement was put on record as Ex. P. W. 3.

The learned counsel argued that in the first instance the girl was of tender years and her statement carried not much weight, and looking to the fact that she who was the victim herself had to admit that whatever she had stated, she had done at the instance of her father the evidence was simply a scrap of waste paper. All other evidence was in corroboration of the evidence of Mt. Pana and when her evidence itself had to be totally discarded, the question of acting upon the corroborative evidence does not arise. He has also argued that in her statement before the committing Magistrate with which she was confronted in the trial Court, there are admitted facts which showed that there was no penetration at all. In the circumstances of the case the offence of rape was not at all made out.

(4) The learned Government Advocate had to concede that so far as the offence of rape is concerned term (sic) made out on the record is from the evidence of the girl. It was not established that any penetration took place. He further argued that there is sufficient evidence to prove that the the case under S. 451 and S. 354 at the least was made out. To this the reply of the learned counsel for the appellant is that even if offence under Ss. 451 and 354 has been committed, there was no evidence which can be relied upon. The only evidence about the entry of the accused inside the house of Mt. Pana at the time of alleged incident is that of Mt. Pana and two other child witnesses Krishna and Mt. Kesar. Each of them admitted that whatever has been stated by them was on the basis of the knowledge derived from the other and that neither the one witness nor the other had any personal knowledge.

(5) The case gives rise to another great difficulty. On the one side there is the evidence to show that marks of semen were found on the DHOTI of the accused and also on the petti coat of the girl. There is also medical evidence to show that private part of the girl was slightly injured although her hymen was not ruptured. However whatever be the medical evidence it cannot be acted upon in the evidence (sic) of the girl's clear admission in the committing Magistrate's Court that penetration did not at all take place. It is on the basis of this that the learned Government Advocate himself had to concede that the offence under S. 376 was not made out. The question, however, is whether the evidence which has been produced by the prosecution is sufficient even for the offence under S. 451 or 354 or for any other offence for which the accused can be convicted by the appellate Court although he was not charged with it.

The evidence for house trespass is that of Mt. Pana and the two other child witnesses Krishna & Mt. Kesar. Children's witness is risky as they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others and are greatly influenced by fear of punishment, by hope of reward and by desire of notoriety. It is necessary for a Court before examining a child of tender years as witness to satisfy itself that the child is sufficiently intellectually developed to comprehend what he has seen and to give an intelligent account of it to the Court. If the Court is of the opinion that by reason of tender years and defective or immature understanding, the child could not have perceived the particular incident to prove which he is produced as a witness, the Court should not only refrain from administering the oath to him but should also decline to examine him as a witness. In the present case all the three children were about seven or eight years old and no attempt was made by the Court to find out if they were intellectually developed, could understand questions and give rational answers. As appears from their statements themselves, none of the

three witnesses understood as to what they were deposing.

Mt. Pana in the examination-in-chief related to the incident as if she was stating from her knowledge. In the committing Magistrate's Court however, she had to admit that whatever she was stating she was doing at the instance of her father. She was confronted with this portion of the statement which was placed on the record. If this statement is true it clearly shows that she was tutored and whatever she has stated was on account of tutoring. It is clear that she did not understand the implication of whatever she was stating. For this reason the statement of Mt. Pana cannot be relied upon. Similar is the case with the evidence of Krishna and Mt. Kessar. In their examination-in-chief they made statements as if they were making from their own knowledge. In cross-examination, however, Mt. Kessar has stated that whatever she had stated about the accused was on information received from Krishna & Krishna has stated that his statement was based upon what Mt. Kessar had told him. It is curious that the lower Courts administered oath to such witnesses.

The learned committing Magistrate as well as the learned Sessions Judge failed in their duty before recording the statements of these three witnesses that they understood questions put to them and were capable of giving rational answers. They also failed to put some introductory questions in order to find out whether these three witnesses were intellectually developed and whatever they would state would be worth relying upon. It is only the evidence of these three witnesses which shows that Jagannath entered the house of Mt. Pana's father and took her inside. If the statements of these three witnesses cannot be acted upon, there remains no question to act upon their evidence. The simple fact that the doctor found some spots of semen by the medical examination on the DHOTI of the accused or they were found on the petti coat of the girl or there were three slight bruises over the private parts of the girl is not only to prove that it was the accused who committed rape upon the girl.

Of course the offence with which the accused was charged was very serious and some suspicion may be attached to him but suspicion cannot take place of legal evidence and the criminal Court is open to do its duty of giving the benefit of doubt to the accused howsoever it may suspect that it might have been the accused who committed the guilt. I regret to say that the case was very mismanaged in the lower Courts on behalf of the prosecution and the lower Courts do not fully realise that they have to decide the case on the evidence of child witnesses and therefore, they were bound to take all precautions to satisfy themselves that whatever would be stated by these witnesses would be truth and nothing but the truth. The statement of three witnesses was garble and it is very difficult to separate the children (sic) from the Court and I am constrained to give the accused the benefit of doubt. The appeal is allowed, the conviction and sentence is set aside and the accused is acquitted. He shall at once be released unless required with some other case.

D.H. Appeal allowed.

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(JODHPUR BENCH)

WANCHOO C. J. AND BAPNA J.

Lumba and another, Appellant v. State.

Criminal Appeal (Jail) No. 80 of 1951, D/- 4-4-1952.

Evidence Act (1872), S. 32 — Dying declaration — Corroboration — Necessity.

There is nothing in law to prevent a Court from convicting the accused on the uncorroborated dying declaration of the deceased provided the Court is of opinion that that dying declaration is true. AIR 1940 Mad 196; AIR 1945 Nag 153, Rel. on. (Para 5)

Anno: Evidence Act S. 32 N. 9.

Appellants present under custody; Sumer Dan, Public Prosecutor, for the State.

REFERENCES: Courtwar/Chronological/ Paras
('40) AIR 1940 Mad 196: (41 Cri L J 437 F B) 5
('45) AIR 1945 Nag 153 : (47 Cri L J 92) 5

WANCHOO, C. J.: This is an appeal by Lumba and Dunga who have been convicted under S. 325, of the Indian Penal Code by the Additional District and Sessions Judge of Udaipur.

(2) The prosecution story was briefly this. The deceased Bhera is a cousin of the accused Lumba. It appears that there had been bad blood between them for some time on account of some dispute about land. On the morning of the 9th of June 1950 Khaju Khan P. W. was returning from village Bhuriya Kheda. On his way back, he found Bhera deceased lying injured in Dharam Talai near the boundary of Saroth. When Bhera saw Khaju passing that way, he shouted to Khaju to come to his help. Khaju went and asked Bhera what had happened. Bhera then told him that he had been beaten by Lumba and Dunga. Khaju found that Bhera's hands and feet had been fractured and he was not fit to walk. Bhera asked Khaju to take him home and thereupon Khaju removed him from that place and took him to the roadside.

Then Khaju raised an alarm which brought a number of people to the scene. Among these were Teja, Hamira, Uda and Panna — prosecution witnesses. Uda is the son of the deceased, while the others belong to different castes and live in neighbourhood. These people on arrival asked Bhera as to who had caused him injuries & Bhera told them also that he had been attacked by Lumba and Dunga accused. Thereafter some of these persons went to a place about half a mile away, where famine relief work was going on. They found Dunga accused working there. They also found Lumba coming that way. They enquired of these persons whether they had attacked Bhera. These two persons, however, denied this.

The villagers did not accept their denial and caught hold of them and took them to the place where Bhera was lying. By the time, however, they returned with the two accused Bhera was dead. Information was then sent to the police outpost and though the report that was sent by the constable on 'gust' does not mention the names of the accused, it shows that the accused had already been caught.

(3) Both the accused denied their guilt and said that they had been implicated on account of enmity. One witness was produced on behalf of each of them to prove alibi.

(4) The prosecution has produced Khaju and the other four witnesses whose names we have given above. The medical report shows that there were injuries only on the hands and feet of Bhera and none on his head. Therefore, it is clear that Bhera could have been in his senses and could have stated on enquiry as to who had caused him injuries. The only evidence in this case consists of the dying declaration made by Bhera. There are five witnesses

who have deposed to this dying declaration having been made by Bhera when people who arrived on the scene made enquiries from him. Of these, Uda is the son of the deceased while Hamira is said to have been annoyed with the accused, but the other three witnesses, namely, Khaju, Teja and Panna are, in our opinion, perfectly independent and there is no reason for us to disbelieve their statements.

Their evidence clearly establishes that Bhera was in his senses at the time and definitely stated that Lumba and his son Dunga had caused him the injuries. There is also evidence of Panna and Bhera's son Uda to the effect that there had been bad blood between Bhera and Lumba for some time before the incident on account of some dispute over land. Under these circumstances, it is quite probable that Bhera was attacked by the two accused. There is the statement of Ghisulal P. W. 6 to the effect that Lumba had come to him some time before the incident and told him that he would beat up Bhera if the trouble between him and Bhera was not justly decided. We have, therefore, no hesitation in accepting the dying declaration of Bhera as true.

The two defence witnesses who have been produced by the accused are about their alibi. We have gone through their evidence and are satisfied that they do not prove the alibi of the accused. Dunga is said to have been working at the famine relief works. The evidence is that attendance is taken at the works at 9.30 A.M., while the attack on Bhera took place much before 8. A.M. It was, therefore, possible for Dunga to take part in the attack and then reach the works. As for Lumba, the statement of the defence witness is that he was working at the witness' well; but on that day he merely came to take his wages and then went away. The place where this well was being constructed was only two miles away and, therefore, this evidence is not enough to prove the alibi of Lumba. We are, therefore, satisfied that the dying declaration made by Bhera is correct and he was attacked by the two accused.

(5) There is undoubtedly no corroboration of this dying declaration, but there is nothing in law to prevent a Court from convicting the accused on the uncorroborated dying declaration of the deceased provided the Court is of opinion that that dying declaration is true. We may in this connection refer to two cases, viz., In re 'GURUSWAMI TEVAR', AIR 1940 Mad 196, and 'GULABRAO KRISHNAJEE v. EMPEROR', AIR 1945 Nag 153. The accused have, therefore, been rightly convicted under S. 325 of the Indian Penal Code.

(6) We now come to the question of sentence. Lumba has been sentenced to five years rigorous imprisonment and we see no reason to reduce the sentence. But Dunga is a young boy of about 16 or 18 years of age and must have acted under the influence of his father. He has already been in jail for over nine months after his conviction. In his case, therefore, we think that the sentence of imprisonment that he has undergone would be sufficient.

(7) We, therefore, dismiss the appeal of Lumba. We also dismiss the appeal of Dunga but we modify the sentence and reduce it to the period already undergone.

D.H. Order accordingly.

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(JODHPUR BENCH)

BAPNA J.

State v. Nathmal, Respondent.

Criminal Ref. No. 108 of 1951, D/- 30-11-51.

† Criminal P. C. (1898), S. 497 — "Appears or is brought before a Court."

Where a person has been accused of a non-bailable offence and has appeared before the Court the Court has power to release him on bail even before he has been arrested and when no warrant has been issued for his arrest. AIR 1950 East Punj 53 (FB). Disting. (Para 4)

Anno: Cri P. C., S. 497 N. 3.

Laxmi Narain, Dy. Government Advocate, for the State; Chaitan Dass and Ugam Raj, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras ('50) AIR 1950 EP 53: (51 Cri LJ 480 FB) 3

ORDER: This is a reference by the learned District Magistrate, Bikaner.

(2) On the 4th November 1950, the Sub-Inspector Deshnok detected two bags of rice with one Nathmal while he was travelling in a bus running from Bikaner to Nokha. On the 17th December 1950, an offence was registered against Nathmal for contravening the provisions of Notification No. 51 of 23rd December 1949 and thereby committing an offence under S. 7 of the Essential Supplies (Temporary Powers) Act, 1946. The intimation of the registration of the offence reached the Court of the Sub-Divisional Magistrate on 20th December 1950. On 26th December, the said Nathmal appeared before the Sub-divisional Magistrate Bikaner North and made an application that although the police had registered the case against him, he had under the law not committed an offence as the law relied upon by the Police had since been repealed. He prayed that he may be allowed to remain on bail as he was prepared to stand the trial but the Police was bent upon disgracing him by effecting his arrest and harassing him in other ways. The learned Sub-divisional Magistrate allowed Nathmal to remain on bail on executing a personal bond of Rs. 5,000/- and producing a surety for the like amount. On behalf of the Police a revision was filed in the Court of the District Magistrate challenging the validity of the order releasing Nathmal on bail before his arrest. The learned District Magistrate has made a reference that the order of bail passed by the Sub-Divisional Magistrate be cancelled on the ground that he had no jurisdiction to direct the release of an accused on bail before he had been arrested and when no warrant had also been issued for his arrest.

(3) Learned Deputy Government Advocate, who appears in support of the reference, relies on 'AMIRCHAND v. THE CROWN', AIR 1950 EP 53 FB. The conclusions arrived at by the Full Bench in that case are mentioned in para (26) of the judgment and are as follows:

"It follows, therefore, that bail can only be allowed to a person who has been arrested or detained without warrant or appears or is brought before a Court. Such person must be liable to arrest and must surrender himself before the question of bail can be considered. In the case of a person who is not under arrest but for whose arrest warrants have been issued, bail can be allowed if he appears in Court and surrenders himself."

According to the facts of that case, a report alleging offences punishable under Ss. 7 and 10 of the

Essential Supplies (Temporary Powers) Act had been made to the Police and before the report was recorded, the Police had been making enquiries but no warrants for the arrest of the petitioner had been taken out nor had the Police taken any steps to apprehend him. 'AMIRCHAND'S CASE', is, therefore, distinguishable in so far as no offence had been registered against Amirchand in that case.

(4) The relevant portion of S. 497, Criminal P. C. is as follows:

"'Section 497 (1)' "When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life. Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail"

(5) Here Nathmal had been an accused of a non-bailable offence and he had appeared before a Court. The Court had, therefore, the power to release him on bail. The reference is not correct and is not accepted."

D.H. Reference rejected

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(JAIPUR BENCH)

SHARMA J.

Ram Balabh, Applicant v. Gopi Ram, Respondent.

Civil Revision No. 196 of 1951, D/- 18-12-51.

Civil P. C. (1908), Ss. 115 and 151 — Striking out defence.

Where the defendant was ordered to do a certain thing which he failed to do, the Courts might be justified in striking out the defence under the inherent powers given by Section 151 but where the defendant was not ordered to appear in his capacity as a defendant but was summoned as a witness for the plaintiff, if he did not appear the Court could have taken action which could be taken against a witness. The Court was, however, not authorised to strike out the defence under its inherent powers. Even if the Court thought that it had such powers it was its duty at least to ask the defendant to show cause why his defence should not be struck out. Even if it may not be said that the Court acted without jurisdiction the Court at least committed a material irregularity in the exercise of its jurisdiction. AIR 1928 Oudh 262; AIR 1932 Mad 263 and AIR 1925 All 280, Disting.

(Para 2)

Anno: C. P. C., S. 115 N. 12; S. 151 N. 1.

B. K. Bhargava, for Applicant; P. N. Dutt, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras
('25) AIR 1925 All 280: (47 All 538) 2
('32) AIR 1932 Mad 263: (136 Ind Cas 42) 2
('28) AIR 1928 Oudh 262: (111 Ind Cas 473) 2

ORDER: This is an application by the defendant to revise the order of the Munsif at Jhunjhun for striking out their defence. The facts are that sometime before the 1st May, 1951 the defendant Shubh Karan was asked to copy out the Hundi which is the basis of the suit. The defendant Subh Karan was summoned on the 1st May, 1951 for making out another copy of the document as there was some difference about the manner in which the copy was made. On the 1st May, 1951 Subh Karan was present with his counsel but there was some difference between the parties as to the manner in which the copy was to be made. The Court decided the case on the 3rd May, 1951 without making any order that the defendant Subhakaran should be present on the 3rd May, 1951. On the 3rd May, 1951 Subh Karan was not present and his counsel was not prepared to take the responsibility of producing him on the next date. The Court therefore, made an order to the plaintiff to file process fee within three days to summon Shubh Karan. Subh Karan was summoned as a witness for the plaintiff for the 24th May, 1951. On that date Subh Karan did not appear in Court and the learned Munsif made an order striking out the defence.

Against this order the defendant has come in revision to this Court. It has been argued by the learned counsel for the defendant that there was no power in the lower Court to strike out the defence when Shubh Karan did not appear on the summons of the plaintiff as a witness. The order of the lower Court was therefore, without jurisdiction or at least it committed illegality or material irregularity in the exercise of its jurisdiction. It was also argued that even if the lower Court had a mind to strike out the defence as a consequence of non-appearance of Subh Karan on the 24th May, 1951 he ought not to have made an order without giving Subh Karan an opportunity to show cause.

(2) On behalf of the opposite party it has been argued by Mr. Dutta that the order of the lower Court was made under the inherent powers given by S. 151 of the Code of Civil Procedure. Rulings reported in 'SHEO PRATAB SINGH v. GHIRRAO SINGH', AIR 1928 Oudh 262; 'VENKATACHARYULU v. MANCHULA YESOB', AIR 1932 Mad 263 and 'EAST INDIAN RLY. CO. v. JIT MAL KALLO MAL', AIR 1925 All 280, have been relied upon. The learned counsel was not able to show any specific provision in Civil Procedure Code apart from S. 151 to justify the action of the lower Court. Even the rulings which have been cited do not apply to the facts of the present case. In AIR 1928 Oudh 262, the defendant was ordered to appear before the trial Court and the Court made attempts from time to time to persuade the defendant to attend the Court, but he persistently failed to comply with the order and under these circumstances, the Court exercising its power under S. 151 struck out the defence.

In AIR 1932 Mad 263, the defendant was ordered to furnish security and the Court ordered him to pay the Batta for the issue of process to the Court amin who was to look into the adequacy of the bond. The defendant did not deposit the amount in the Court although he was warned that on failure to do so his defence would be struck out. The defendant failing to make the deposit the defence was struck out. In AIR 1925 All 280, payment of costs was made a condition precedent of adjournment granted to the defendant, but the defendant could not deposit the costs and the defence was consequently struck out and the case proceeded ex parte.

It would appear that in all these cases as the defendant was ordered to do a certain thing which he failed to do, the Courts might have been justified in these cases in striking out the defence

under the inherent powers given by S. 151. In the present case, Subh Karan, was not ordered to appear in his capacity as a defendant but was summoned as a witness for the plaintiff. If he did not appear the Court could have taken action which could be taken against a witness. The Court was however not authorised to strike out the defence under its inherent powers. Even if the Court thought that it had such powers it was its duty at least to ask Subh Karan to show cause why his defence should not be struck out as was done in Madras case referred to by the learned counsel for the applicant. In my opinion even if it may not be said that the Court acted without jurisdiction the Court at least committed a material irregularity in the exercise of its jurisdiction.

(3) The application is allowed. The order of the lower Court striking out the defence is set aside. The costs of this revision shall abide the result of the suit.

D.H. Application allowed.

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(JAIPUR BENCH)

WANCHOO C. J. AND SHARMA J.

Pheli (Accused) v. State.

Criminal Appeal No. 51 of 1951, D/- 12-11-1951.

Penal Code (1860), Ss. 97, 99, 100 and 102 — Right of private defence — Extent of.

The cattle of deceased had trespassed into the field of the accused and thereupon there was an exchange of abuses between them. While the exchange of abuses was going on deceased gave a lathi blow on the person of the accused. The accused happened to have a sword with him and struck the deceased with the sword in return. The first blow was stopped by the deceased on his lathi and then the accused gave a second blow on the left leg of the deceased with the result that the deceased fell down injured. Thereafter the accused did not give any other blow to the deceased and went away. The latter died in the hospital on the next day:

Held that obviously when the deceased hit at the accused with a lathi right of private defence of person arose in favour of the latter. The assault was of such a nature that the accused could have an apprehension that at least grievous hurt would be the consequence of such assault if he did not defend himself. He was, therefore, entitled to hit back in defence of his own person and even to cause the death of the assailant. It could not be said that there was time to have recourse to the protection of the public authorities or that the right of private defence was exceeded and more harm than was necessary was caused to the deceased. The place of attack clearly showed that the intention of the accused was to disable the deceased who was still armed with the lathi. The apprehension that had arisen in the mind of the accused must still have continued, for the deceased was still in the possession of the lathi. So long therefore as the deceased had a lathi in his hand, the accused could repeat the attack which he had already made on the accused. Under the circumstances the second blow given by the accused was also justified.

(Paras 5, 6)

Anno: Penal Code, S. 97 N. 1, 2; S. 99 N. 5, 6; S. 100 N. 1; S. 102 N. 1.

R. K. Rastogi, Govt. Advocate.

WANCHOO C. J.: This is an appeal by Pheli against his conviction under S. 304 of the Indian Penal Code by the Additional Sessions Judge, Gangapur city.

(2) The facts which have been found by the Court below and which in our opinion have been proved by the evidence of the prosecution witnesses are these:

(3) The appellant Pheli had taken some land from Amolakh P. W. 4. On the 5th of May 1950 the appellant was at his field which is near the well of Amolakh. The deseased Hukma was also there. The cattle of Hukma had trespassed into the field of Pheli and thereupon there was an exchange of abuses between them. This took place at the well of Amolakh and while the exchange of abuses was going on Hukma gave a lathi blow on the person of Pheli. Pheli happened to have a sword with him and struck Hukma with the sword in return. The first blow was stopped by Hukma on his lathi and then Pheli gave a second blow on the left leg of Hukma with the result that Hukma fell down injured. Thereafter Pheli did not give any other blow to Hukma and went away. Hukma died in the hospital on the 6th of May, 1950 and it is said that this was the result of the injury which had been caused by Pheli on his left leg on the previous day.

(4) The appellant's story was that he had not caused the injury at all and that it was Amolakh who had done so and had passed on the blame to him. This story has not been believed and we are of opinion that there is no force in this contention of the appellant and that the learned Sessions Judge was right in believing the version of the prosecution, as we have already said above.

(5) The main question, however, which arises on the version, which was believed by the learned Sessions Judge is whether the appellant had a right of private defence of person This aspect of the matter was however completely ignored by the learned Sessions Judge, for we find no mention of it in his judgment. It is admitted by the prosecution witnesses that after the appellant and Hukma had been exchanging abuses for some time, it was Hukma who gave the first blow to the appellant with the lathi, and the appellant hit back with the sword, which he happened to have in his hand, only in return. Under S. 97 of the Indian Penal Code every person has a right, subject to the restrictions contained in S. 99 to defend his own body against any offence affecting the human body. Obviously when Hukma hit at the appellant with a lathi right of private defence of person arose in favour of the appellant. The extent of this right is defined in S. 100, I. P. C. It extends even to the voluntary causing of death or of any other harm to the assailant if the offence which occasions the exercise of the right be of any one of the descriptions mentioned in that section. The second clause of S. 100 is as follows:

"Secondly — such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault."

(6) In this case, Hukma had hit at the appellant with a lathi and we are of opinion that the

assault was of such a nature that the appellant could have an apprehension that at least grievous hurt would be the consequence of such assault if he did not defend himself. He was, therefore, entitled to hit back in defence of his own person and even to cause the death of the assailant namely, Hukma. It cannot be said in this case that there was time to have recourse to the protection of the public authorities or that the right of private defence was exceeded and more harm than was necessary was caused to Hukma. These are the only two restrictions which would apply to the present case under the third and fourth para of S. 99, I. P. C. and neither of these restrictions can be said to apply in the present case.

The evidence is that after the appellant had been hit, he hit back at Hukma and the first blow was stopped by Hukma on his lathi. The appellant then hit back again this time on the leg of Hukma. The place of attack clearly shows that the intention of the appellant was to disable Hukma, who was still armed with the lathi. The apprehension that had arisen in the mind of the appellant must still have continued, for, Hukma, was still in possession of the lathi. Under S. 102, I. P. C. the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed and it continues as long as such apprehension of danger to the body continues. So long therefore as Hukma had a lathi in his hand, he could repeat the attack which he had already made on the appellant. Under these circumstances, the second blow which was given by the appellant was also justified. We have already said that the place of the blow shows that the appellant had no intention of killing Hukma. His whole intention appears to have been to disable Hukma from repeating the attack which Hukma had already made upon him once. We are therefore of opinion that on the facts which have been accepted by the learned Sessions Judge and have been proved from the evidence of the prosecution witnesses this is a clear case in which the appellant is entitled to the benefit of private defence of his own person.

(7) We therefore allow the appeal, set aside the conviction and sentence, and acquit the accused. He will be set at liberty at once. The fine, if paid, will be refunded.

D.H. Appeal allowed.

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(JODHPUR BENCH)

WANCHOO C. J. AND BAPNA J.

Gheesa Lal, Appellant v. Molia and another, Respondents.

First Appeal No. 11 of 1950, D/- 9-4-1952.

(a) Debt Laws — Marwar Relief of Indebtedness Act (1941), S. 5 — Excessive interest — Court if bound to allow maximum rate allowed.

Under S. 5 (2) (c), Marwar Relief of Indebtedness Act, it is only when the interest is more than eighteen and three quarter per cent, per annum that the Court is bound to presume from that fact alone that the interest is excessive. But this does not mean that the Court is bound to allow the maximum interest of eighteen and three quarter per cent. per annum in every case. It is open to the Court after considering the circumstances mentioned in S. 5 (2) (a), (b), (c) and (d) to decide for itself what would be the reasonable rate of interest in a particular case, and that reasonable rate can be less than eighteen and three quarter per cent. per annum. AIR 1941 Lah 212, Rel. on. (Para 4)

(b) Civil P. C. (1908), Ss. 34, 107 — Pendente lite and future interest — Decree silent as to — Power of appellate Court to allow such interest.

A creditor is entitled to pendente lite and future interest unless there are reasons why he should be deprived of it.

Where the decree is silent as to pendente lite and future interest and the Court has by implication refused to allow such interest, the appellate Court will allow such interest if reasons for refusal of the same are not present. (Para 6)

Anno: C. P. C., S. 34 N. 4, 5, 17; S. 107 N. 9.

Sardarnath, for Appellant; Vishin Lal, for Respondents.

REFERENCES: Courtwar/ Chronological/ Paras.
('41) AIR 1941 Lah 212: (195 Ind Cas 157) 4

WANCHOO C. J.: This is an appeal by Gheesa Lal against the decree of the District Judge of Nagaur. The appeal is only with respect to interest and the appellant has raised four points.

(2) The Khata on the basis of which the suit was filed carried interest at 24 per cent per annum. The Court has however, decreed interest at the rate of 12 per cent per annum and the first contention of the appellant is that he should be allowed interest at the contractual rate. Secondly, it is being urged that the Court has miscalculated the amount of interest even treating the rate as 12 per cent, and that this should be corrected. Thirdly it is said that the Court has given no reason for not allowing pendente lite interest and this Court should, therefore, grant pendente lite interest. Lastly, it is contended that future interest should also be allowed as the Court below disallowad future interest by not saying anything about it.

(3) The main question in this appeal is whether the Court below was justified in reducing the rate of interest from 24 per cent. per annum to 12 per cent. per annum. In this connection the law applicable is contained in S. 5 of the Marwar Relief of Indebtedness Act 1941. That section authorises the Court, if it has reason to believe that the interest is excessive or that the transaction was as between the parties substantially unfair, to re-open the transaction and relieve the debtor of all liability in respect of it. Section 5(2) (a) lays down what 'excess' means and S. 5(2)(b), (c) and (d) give the principles on the basis of which the Court has to consider whether the interest is excessive or the transaction was unfair. Then comes S. 5(2)(e) which lays down that the Court shall deem interest to be excessive if on secured loans it exceeds twelve per cent. per annum simple interest.....and if on unsecured loans it exceeds eighteen and three quarter per cent. per annum simple interest.....

(4) Learned counsel has, in view of this provision, given up his case that he should be allowed interest at 24 per cent. per annum but he contends that he is entitled to interest at eighteen and three quarter per cent. per annum as that is allowed under the law. It is true that it is open to a Court to allow interest upto eighteen and three quarter per cent. per annum and it is only when the interest is more than eighteen and three quarter per cent. per annum that the Court is bound

to presume from that fact alone that the interest is excessive. But this does not mean that the Court is bound to allow the maximum interest of eighteen & three quarter per cent. per annum in every case. It is open to the Court after considering the circumstances mentioned in S. 5(2) (a), (b) (c) & (d) to decide for itself what would be the reasonable rate of interest in a particular case, and that reasonable rate can be less than eighteen and three quarter per cent. per annum. In this connection, we may refer to 'JIWAN DASS v. RAKHMAT DIN', AIR 1941 Lah 212 where a similar provision in the Punjab Relief of Indebtedness Act which provided that the Court was bound to hold interest to be excessive if it exceeded twelve per cent per annum in case of secured debts, was interpreted and it was held that the provision did not necessarily mean that the Court had no power to reduce interest below twelve per cent. per annum if the circumstances of the case justified a lower rate being allowed. In the present case, the Court after considering the circumstances came to the conclusion that the rate was excessive and reduced it to twelve per cent. per annum. We are not prepared to allow the appellant anything more than that.

(5) Next we come to the question of wrong calculation of interest. Learned counsel for the appellant contends that the Court below has made a mistake in calculating the interest at Rs. 1000/-. Actually, it comes to Rs. 1453/10/6 and the decree of the Court below will have to be increased by Rs. 444/14/6. Learned counsel for the respondents admits the correctness of this figure which has been given to us by the learned counsel for the appellant.

(6) Then we come to the question of pendente lite and future interest. The Court below has said nothing about this and has by implication refused to allow pendente lite and future interest. We are of opinion that a creditor is entitled to pendente lite and future interest unless there are reasons why he should be deprived of it. In this case, no such reasons are in our opinion present. The appellant is, therefore, entitled to pendente lite and future interest. We allow him this interest at 6 per cent. per annum from the date of the suit to the date of the decree and from the date of decree to the date of realisation.

(7) We, therefore, allow the appeal and modify the decree of the Court below as indicated above. The appellant will get proportionate costs of this appeal from the respondents. He will also get proportionate costs of the lower Court according to the amount decreed by us.

Decree modified.

K.S.

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(JODHPUR BENCH)

WANCHOO, C. J. AND BAPNA J.

Mukania and another, Petitioners v. Achalia and others, Opposite Party.

Criminal Ref. No. 203 of 1951, D/- 19-2-1952.

Criminal P. C. (1898), S. 190(1) and S. 239 — Clauses in S. 190(1) are not mutually exclusive — Police report and complaint about same offence — Cognizance by Magistrate — Joint trial of accused named in police report and in complaint — Legality.

Under S. 190(1), it is open to a Magistrate to act on any one of the three grounds mentioned in the Clauses in S. 190(1) but these three grounds are not mutually exclusive and it is possible for a Magistrate to take cognizance of any offence upon two or more of such grounds e. g. both upon receiving a complaint and on a police report. AIR 1929 Pat 473 (FB), Foll. (Para 4)

If there are no circumstances which make a joint trial in particular cases improper, a Magistrate has the jurisdiction to amalgamate the two cases and hold a joint trial of the accused mentioned in the police report and in the complaint provided he can do so under S. 239, and his action in doing so is not illegal. AIR 1933 Rang 271, Rel. on; 1950 R L W 281: AIR 1951 Raj 16, OVERRULED. (Para 5)

Anno: Cri. P. C., S. 190 N. 24; S. 239 N. 4.

Mansha Ram, Government Advocate.

REFERENCES: Courtwar/Chronological/ Paras.

('29) AIR 1929 Pat 473: (30 Cri L J 1056 F B) 4

('50) 1950 R L W 281: (AIR 1951 Rajas 16) 2, 3, 5, 6

('33) AIR 1933 Rang 271: (34 Cri LJ 1185) 5

WANCHOO C. J.: This is a reference by the Additional Sessions Judge of Balotra and has arisen in the following circumstances:

(2) Two goats belonging to Rawal Khanger Singh were stolen on the night between 8th and 9th October, 1948. In that connection Sardara and Mukania went to the 'Dhani' of Achalia and others and made enquiries. It is said that there was an altercation between Sardara and Mukania on the one side and Achalia and others on the other, with the result that Sardara and Mukania were attacked by Achalia and others. The police investigated the matter and prosecuted three persons namely, Achalia, Nagia and Nawia under S. 326 of the Indian Penal Code. Mukania, however was not satisfied with that prosecution and filed a complaint against nine persons. These included Achalia, Nagia and Nawia who were prosecuted by the police, two other men Mohabatia and Kirtia and four women. Both the police case as well as the complaint case were before the same Magistrate. The Magistrate did not summon the four women but summoned Mohabatia and Kirtia also to stand their trial. He held a joint trial of the five accused, three of whom were mentioned in the police challan also, and the remaining two only in the complaint of Mukania. Eventually, the Magistrate framed a charge against Achalia only under S. 326 of the Indian Penal Code. Thereupon, there was a revision before the Sessions Judge by Mukania.

This revision was directed against the discharge of Nawia, Nagia, Mohabatia and Kirtia and there was also a prayer that all of them should be charged under Ss. 148 and 307 read with S. 149 of the Indian Penal Code. When the matter came up before the learned Additional Sessions Judge he did not go into the question whether the discharge was correct. He relied on 'SITA RAM v. THE STATE', 1950 RLW 281 and held that the joint trial of all the five accused was illegal, as only three of them were named in the police challan while the other two were mentioned only in the complaint of Mukania. This reference came before a learned single Judge of this Court, who felt that the decision in 'SITA RAM'S CASE' was not correct, and, therefore, made a reference to a larger bench, the decision in 'SITA RAM'S CASE', being

by a single Judge. That is how the matter has come before us.

(3) There is no doubt that 'SITA RAM'S CASE', 1950 RLW 281 supports the view taken by the learned Additional Sessions Judge. In that case the police had sent up a challan against Sita Ram only while the complainant had filed a complaint against Sita Ram as well as Sankardan. The learned Judge observed that since only one accused was implicated in the challan, it was obvious that the complaint which implicated both Sita Ram and Sankerdan could not be linked with it. No case has, however, been cited in support of this view. We are of opinion that the law, as stated there, goes too far.

(4) Section 190 of the Code of Criminal Procedure gives jurisdiction to a Magistrate to take cognizance of any offence under three circumstances:

(a) unon receiving a complaint of facts which constitute such offence;
(b) upon a report in writing of such facts made by any police-officer; and
(c) upon information received from any person other than a police-officer, or upon his own knowledge or suspicion, that such offence has been committed.

It is open to a Magistrate to act on any one of these three grounds but these three grounds are not, in our opinion, mutually exclusive and it is possible for a Magistrate to take cognizance of any offence upon two or more of such grounds e.g. both upon receiving a complaint and on a police report. We may, in this connection, refer to 'BHARAT KISHORE v. JUDHISTIR MODAK', AIR 1929 Pat 473 which is a Full Bench decision. In that case it was held that the alternatives upon which a Magistrate might take proceedings could not be treated as mutually exclusive and it was not correct to say that a Magistrate while taking cognizance of an offence should have done it under some one of the alternatives to the exclusion of the other. It follows, therefore, that if a Magistrate has both a complaint and a police report before him about the same offence, he can take cognizance of that offence on the basis of both. The further question whether after taking cognizance on the basis of both, he can amalgamate them and hold a joint trial of the accused named in the police report as well as in the complaint depends upon S. 239 of the Criminal P. C. and the discretion of the Magistrate, which has to be exercised according to the circumstances of each case.

(5) Section 239 permits a Magistrate to hold a joint trial of various persons under the conditions mentioned therein. If, therefore, it is permissiable under that Section for the Magistrate to hold a joint trial of the accused named in the police report and the accused named in the complaint, there is, in our opinion, nothing illegal in the Magistrate amalgamating the two casas and holding a joint trial even though the accused in the police report may not all be the same as those in the complaint. The Magistrate is of course not bound to hold a joint trial for there may be circumstances in a particular case where it may not be proper to hold a joint trial e.g., though the offence may be one, the persons prosecuted by the police may be totally different from the persons named in the complaint. In such a case, it will obviously be improper to amalgamate the two cases and hold a joint trial. But if there are no circumstances which make a joint trial in particular cases improper, a Magistrate has, in our opinion, the jurisdiction to amalgamate the two cases and hold a joint trial of the accused mentioned in the police report and in the complaint provided he can do so under S. 239.

We may in this connection refer to U PO YONE v. EMPEROR', AIR 1933 Rang 271. In that case, the police prosecuted only three persons while the complainant named these three and three others. Both cases were before the same Court and a question arose whether all the six could be tried together. The learned Judge was of the opinion that on the allegations made by the complainant, all the six could be tried together in view of S. 239 though whether in any particular case it would be proper to hold a joint trial, would depend upon the facts of that case. We are, therefore, of opinion that the Magistrate had the power to try the three persons named in the police report and the further two persons named in the complaint jointly and his action in doing so was not illegal. To that extent, the decision in 'SITA RAM'S CASE', 1950 RLW 281, is overruled.

(6) Then we come to the further question whether in the circumstances of this case, it was proper that the complaint case and the police case should have been amalgamated and all the five persons tried jointly. We see no impropriety in trying the five accused together in this particular case. We take it that the Magistrate took the precaution of recording all the evidence that the police and the complainant desired to produce. The reference which was based on 'SITA RAM'S CASE', 1950 RLW 281 must, therefore, be rejected and the Sessions Judge should be directed to hear the revision of Mukania on the merits.

(7) We, therefore, reject the reference and direct the Sessions Judge concerned to hear the revision of Mukania on the merits.

A/V.B.B. Reference rejected.

A. I. R. 1952 RAJASTHAN 161

(JODHPUR BENCH)

WANCHOO, C. J. AND BAPNA J.

Udaimal, Appellant v. Hastimal and others, Respondents.

Ijlas-i-khas A. No. 7 of 1950, D/- 7-4-1952.

(a) Civil P. C. (1908), Ss. 109 and 110 — Marwar State Ijlas-i-khas Rules — Rr. 18 (c) and 19 — Decree involving claim to or respecting property of the value of Rs. 4000.

Where the suit was for arrears of rent and ejectment and the defendants admitted the tenancy and also their liability for rent and they only challenged their liability to ejectment, even if the house was valued at Rs. 30,000/- the decree did not involve directly or indirectly some claim to, or some question respecting, property of the value of Rs. 4000/- or more the valuation in this case being only Rs. 120/-. Where the High Court Judge who dealt with the matter specifically mentioned that he granted leave under R. 19, this cannot be taken to be a certificate under R. 18(c), though the High Court could only grant a certificate for leave to appeal under R. 18(c).

(Paras 3, 4)

Anno: C. P. C., S. 110 N. 11; S. 109 N. 2.

(b) Civil P. C. (1908), S. 109 — Leave wrongly granted — Hearing on merits — Marwar Ijlas-i-khas Rules — R. 18 (a), (b).

If leave has been wrongly granted under S. 109 (a) and (b) which correspond to Rule 18 (a) and (b) of Marwar Rules, the Privy Council will not hear the appeal on merits. (Para 5)

Anno: C. P. C., S. 109 N. 2.

Than Chand, for Appellant; Chandmal, for Respondents.

WANCHOO, C. J.: This is an Ijlas-i-Khas appeal by Udaimal and has come up before us in view of the provisions of Ordinances XL of 1949 and XII of 1950.

(2) The case out of which this appeal has arisen was a simple suit for arrears of rent and ejectment. A second appeal came to the High Court of the former State of Jodhpur and was decided in favour of the defendants. Thereupon, there was an application to that Court for leave to appeal to the Ijlas-i-Khas, which came up before another learned Judge and that learned Judge granted a certificate for leave to appeal under R. 19 of the Ijlas-i-Khas Rules of the former State of Marwar. Rule 19 provides for appeals in cases in which the amount or value of the subject-matter of the suit in the Court of first instance was Rs. 4000/- or more, and the amount or value of the subject-matter in dispute on appeal to His Highness was also Rs. 4000/- or more, or the decree involved directly or indirectly some claim to, or some question respecting property of like amount or value.

(3) The learned Judge who gave leave was of opinion that the suit related to property the value of which was Rs. 30,000/- or so and, therefore, the applicant before him was entitled to leave. We are of opinion that this view of the learned Judge is wrong. The suit was for arrears of rent and ejectment and the defendants admitted the tenancy and also their liability for rent. They only challenged their liability to ejectment. Therefore even if the house was valued at Rs. 30,000/- the decree did not involve directly or indirectly some claim to, or some question respecting, property of the value of Rs. 4000/- or more. The learned Judge was, therefore, wrong in giving a certificate under R. 19 of the Ijlas-i-Khas Rules, the valuation in this case being only Rs. 120/-.

(4) Learned counsel for the appellant urges that though the learned Judge who gave leave specifically said that the applicant was entitled to leave under R. 19, this Court should consider it as granted under R. 18(c) of the Rules, because in a case of this kind that was the only provision under which certificate for leave to appeal could be granted. It is true that in this case the High Court could only grant a certificate for leave to appeal under R. 18(c) but the learned Judge who dealt with the matter specifically mentioned that he granted leave under R. 19. We are not prepared to hold that this must be taken to be a certificate under R. 18(c). There is nothing indeed in the order of the learned Judge to show that it was even urged before him that it was a fit case for appeal. Further, there is nothing to show that he applied his mind to the circumstances which should be present before he granted leave under R. 18(c).

(5) The last point that is urged is that the leave having been granted by the High Court, the appeal should be heard on merits. So far as that is concerned, it is enough to say that there is ample authority of the Privy Council to the effect that if leave has been wrongly granted under S. 109(a) and (b) of the Code of Civil Procedure which correspond to R. 18(a) and (b) of Marwar Rules, the Privy Council will not hear the appeal on merits. It may be mentioned that R. 19 refers to leave granted under R. 18(a) and (b).

(6) We are, therefore, of opinion that leave should not have been granted in this case and no appeal, therefore lies to the Ijlas-i-Khas. The appeal is hereby dismissed with costs.

B/D.H. Appeal dismissed.

A. I. R. 1952 RAJASTHAN 162

(JAIPUR BENCH)

WANCHOO C. J. AND SHARMA J.

Hafiz Abdul Rahim, Applicant v. Deputy Custodian, Opposite Party.

Constitutional Writ Appln. No. 12 of 1951, D/- 16-11-1951.

(a) Constitution of India, Art. 226 — Jurisdiction under — Nature of.

The jurisdiction of the High Court to issue a writ of certiorari is a limited jurisdiction. The Court is not a Court of appeal nor is it a Court of revision. It has no power to correct either findings of fact or even errors of law. Its sole function is to correct persons or tribunals exercising judicial or quasi-judicial functions when they do not possess or when in the exercise of their jurisdiction, they violate principles of natural justice. But when the Court has been empowered to determine certain questions and jurisdiction has been conferred upon it to determine those questions, then the determination by the Court of those questions, however erroneous in fact or law, cannot call into question the jurisdiction of the High Court under its high prerogative of issuing a writ of certiorari. There are two well-recognised exceptions to the above limits. The superior Court will interfere (1) when an error of law is patent on the face of record, and (2) when the determination is arrived at mala fide in which case it will not be a determination at all. Fraud or mala fides will vitiate any decision, however arrived at. AIR 1951 Bom 303, Rel. on. (Paras 5, 6)

† (b) Administration of Evacuee Property Ordinance (XXVII (27) of 1949), S. 7 — Duty of custodian to give notice under S. 7 before proceeding under Ordinance — Notice lays foundation of jurisdiction — Defective notice — Subsequent proceedings are without jurisdiction and are liable to be set aside — All remedies under Ordinance exhausted — Aggrieved person can approach High Court under Art. 226 — (Constitution of India, Art. 226) — (Administration of Evacuee Property Act (XXXI (31) of 1950), S. 7).

Before declaring any property to be evacuee property, it is the duty of the Custodian (in which term is included the Assistant Custodian or Deputy Custodian) when he issues a notice under S. 7 of the Ordinance (now replaced by S. 7 of the Administration of Evacuee Property Act, No. XXXI (31) of 1950) to comply with the Rules framed thereunder for issue of notice and to see that the notice, which is issued in Form No. 1 under R. 5 of the Rules under the Ordinance (which is now being issued under Rule 6 Form No. 1 of the Act), is in conformity with that form and supplies the necessary informa-

tion to the person concerned. Before any property can be declared evacuee property the Custodian has to come to the conclusion that an evacuee owns it or has interest in it. The intention of the law is that the person, to whom notice is given under S. 7. should be told under what provision of the law he is going to be declared an evacuee. This has been provided in order that the person concerned may be able to raise objections before the Custodian and meet the case against him. If no such information is given to the person to whom notice is issued, he may not be able to explain to the Custodian why his property should not be considered evacuee property. Where the notice is not in accordance with Form No. 1, in that it does not show under what clause of S. 2 (e) the Custodian considers that the person is an evacuee and it also does not give any grounds why the Custodian considers that the property should be declared evacuee property, the Custodian cannot be said to have laid the foundation of the jurisdiction to proceed with the matter, and all the subsequent proceedings are without jurisdiction, and are liable to be set aside.

Where the person aggrieved has exhausted all his remedies under the Ordinance he can approach the High Court under Art. 226 of the Constitution. (Paras 10, 12, 13, 15, 19)

(c) Constitution of India, Art. 226 — Applicant who has been negligent in pursuing his remedies under provision of the Statute under which the proceedings were laid, cannot get relief under Art. 226 — Non-appearance of applicant to contest defective notice under S. 7 of the Administration of Evacuee Property Ordinance (27 of 1949) — Non-appearance due to some bona fide misunderstanding of procedure on part of applicant — Applicant would suffer consequences of non-appearance but this cannot be called negligence as to disentitle him to an order under Art. 226 — (Administration of Evacuee Property Ordinance (27 of 1949), S. 7). (Para 17)

(d) Constitution of India, Art. 226 — Negligence — Delay in filing appeal under ordinary law entirely due to action of Court itself — This is no negligence as to disentitle applicant to relief under Art. 226. (Para 18)

(e) Constitution of India, Art. 226 — Negligence — Applicant's appeal under ordinary law dismissed for default — No further steps taken for restoration — It is negligence and applicant cannot approach High Court and ask it to exercise its extra-ordinary powers under Art. 226 — But it is no negligence if the default is due entirely to his counsel, who failed to appear on account of his illness, which fact had been communicated to the Court — In such case High Court will exercise its powers under Art. 226. AIR 1947 Bom 46, Distinguished. (Para 18)

P. N. Dutt, for Applicant; R. K. Rastogi, Government Advocate, for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras.

('47) AIR 1947 Bom 46: (ILR (1946) Bom 940) 18

('51) AIR 1951 Bom 303: (ILR (1951) Bom 701) 5

('51) 53 Bom LR 621: (AIR 1951 Bom 440) 14

(1902) 2 Ch 498: (71 LJCh 883) 7

WANCHOO, C.J.: This is an application by Abdul Rahim under Article 226 of the Constitution of India for a writ of certiorari or any other writ praying that certain proceedings taken by the Deputy Custodian of Evacuee Property, Jaipur, were without jurisdiction and should be quashed along with all proceedings consequent on the proceeding of the Assistant Custodian or any other order or direction which the Court considers proper in the circumstances of the case.

(2) The application has been made in the following circumstances:

There is a house No. 767 situate in Mohalla Bisatiyan Chaukri Ghat Darwaza, Jaipur City. A report was made to the Assistant Custodian, Jaipur, in April 1950 that this house belonged to one Aja Khan, who had left for Pakistan and had been taken in possession by certain Muslims from Agra without authority. The Assistant Custodian called for a report from the Field Inspector and after perusing that report notice was issued under Rule of the Administration of Evacuee Property Central Rules, 1949 hereinafter called the Rules. Thereafter on the 15th of April 1950, the Assistant Custodian passed an order under Section 7 (1) of the Administration of Evacuee Property Ordinance No. 27 of 1949 hereinafter called the Ordinance. Thereafter on the 24th of April 1950, the applicant filed a written statement before the Assistant Custodian objecting to the declaration that had been made under Section 7. This objection was considered by the Assistant Custodian. On the 12th of July 1950 the Assistant Custodian, who had by now become the Deputy Custodian, dismissed the objections holding that he had no power to review his order. Thereupon the applicant filed an appeal before the Custodian soon after. This appeal was dismissed for default of appearance on the 28th of October 1950. Thereupon there was an application for restoration which was dismissed on the 28th November 1950. In the meantime, it appears that the applicant had gone in revision to the Custodian General also. That revision was dismissed on the 30th of December 1950. The present application was then made on the 29th of January 1951 in this Court.

(3) The contention on behalf of the applicant is that there was no foundation for the jurisdiction of the Assistant Custodian who dealt with this matter and passed the first order on the 15th of April 1950. (It may be mentioned that in the application the applicant calls the order as that of the 17th of April 1950, but the correct date seems to us to be the 15th of April 1950). As such it is urged that all the subsequent proceedings should be quashed.

(4) The application has been opposed on behalf of the State on two main grounds. In the first place it is urged that the Assistant Custodian had jurisdiction to decide the matter and any irregularity in his procedure would not give jurisdiction to this Court to interfere by a writ of certiorari or by any other writ. In the second place, it is urged that even if this Court has the jurisdiction to interfere by a writ of certiorari it should not exercise that extraordinary power in favour of the applicant who has been guilty of negligence in prosecuting his remedies under the Ordinance.

(5) We shall first consider whether this Court can interfere in these proceedings. There is no doubt that the jurisdiction of this Court to issue a writ of certiorari is a limited jurisdiction. The limits of that jurisdiction were considered in a case of the Bombay High Court in 'MOHASINALI MOHAMEDALI v. STATE OF BOMBAY', AIR 1951 Bom 303, and if we may say so with great respect

we agree with the observations in that case. These observations which appeared at p. 305 are as follows:

"Now it is unnecessary to repeat that the jurisdiction that the High Court exercises when it issues the high prerogative writ of certiorari is a limited jurisdiction. The Court is not a Court of appeal nor is it a Court of revision. It has no power to correct either findings of fact or even errors of law. Its sole function is to correct persons or tribunals exercising judicial or quasi judicial functions when they do not possess or when they refuse to exercise jurisdiction which is vested in them by law, or when in the exercise of their jurisdiction, they violate principles of natural justice.....But when the Court has been empowered to determine certain questions and jurisdiction has been conferred upon it to determine those questions, then the determination by the Court of those questions, however erroneous in fact or in law, cannot call into question the jurisdiction of the High Court under its high prerogative of issuing a writ of certiorari."

(6) It is further observed that there are two well recognised exceptions to the above limits, and the superior Court will interfere (1) when an error of law is patent on the face of record, and (2) when the determination is arrived at mala fide in which case it will not be a determination at all and fraud or mala fides will vitiate any decision however arrived at.

(7) Reference may also be made to an English case, viz., 'CARATAL (NEW) MINES LTD.' In re: (1902) 2 Ch 498. That was a case where there was an error on the face of the record and in such a case it was held that the Court will correct an error of law patent on the face of the record by a writ of certiorari.

(8) Reference may further be made to Halsbury's Laws of England, Vol. 9, at p. 887 where the following passage occurs:

"Where upon the face of the proceedings themselves it appears that the determination of the inferior Court is wrong in law, certiorari to quash will be granted."

(9) We have, therefore, to see whether on the facts of this case we have the power to issue a writ of certiorari. The facts show that the proceedings were started under Section 7 of the Ordinance. Under that section the Custodian (which term of course includes the Deputy Custodian and the Assistant Custodian) has to give notice before declaring any property to be evacuee property. The manner in which the notice has to be given is prescribed in the Rules under the Ordinance. The rule with which we are concerned is Rule 5, which says that after a survey of any property is made and the Custodian is satisfied that his information discloses that the property or any interest therein is evacuee property, he shall cause a notice to be served in Form No. 1 on the person claiming title to such property or interest therein and on any other person or persons whom he considers to be interested in the property. It is further prescribed that the notice shall as far as practicable mention the grounds on which the property is sought to be declared evacuee property and shall specify the provision of the Ordinance under which the person claiming any right to, or interest in, such property is alleged to be an evacuee.

After the notice has been given the person to whom the notice is given has the right to show cause to the Custodian in the inquiry which that section enjoins him to hold. Further under Section 24 of the Ordinance an appeal is provided against certain orders passed under Section 7 and under Section 25 against other orders passed under the same section. A perusal, therefore, of these provisions clearly shows that the foundation of the jurisdiction of the Custodian is the notice which is issued in Form No. 1. That Form is provided in the Rules and is as follows:

"WHEREAS, there is credible information in possession of the Custodian that you are an evacuee under Clause (iii) of Section 2 (d) of the Administration of Evacuee Property Ordinance on account of the grounds mentioned below;

AND WHEREAS, it is desirable to hear you in person;

NOW, THEREFORE, you are hereby called upon to show cause (with all material evidence on which you wish to rely) why orders should not be passed declaring you an evacuee & all your property as evacuee property under the provisions of the said Ordinance.

The hearing of your case is fixed before the undersigned on ————at————.

Grounds: (Here give the grounds as far as practicable)."

(10) An analysis of this form shows that it is the duty of the Custodian who gives notice under Section 7 of the Ordinance to inform the person, to whom the notice is given, that his property is to be declared as evacuee property, because his case comes under certain provisions of the Ordinance. Section 2 (e) of the Ordinance defines an "evacuee" and Section 2 (f) "evacuee property." The definition of "evacuee property" is that it must be property of an evacuee or an evacuee must have an interest in it. Therefore, before any property can be declared evacuee property the Custodian has to come to the conclusion that an evacuee owns it or has interest in it. The definition of an "evacuee" in Section 2 (e) contains three clauses and the intention of the law is that the person, to whom notice is given under Section 7, should be told under what provision of the law he is going to be declared an evacuee. This has been provided in order that the person concerned may be able to raise objections before the Custodian and meet the case against him. If no such information is given to the person to whom notice is issued, he may not be able to explain to the Custodian why his property should not be considered evacuee property.

(11) It has been urged on behalf of the State that a notice under Section 7 was given in this case. That is no doubt so but the notice is, in our opinion, very defective and does not comply with the provisions of Rule 5, and is not according to Form No. 1. The notice that was given to the applicant was simply this:

NOTICE UNDER SECTION 7 (1).

"BECAUSE it has been made to appear to me that the following property which is in your possession is evacuee property, so you are hereby given notice to appear before me on the 15th of April 1950, and show cause why the property should not be declared evacuee property. You should bring all documents with you on which you wish to rely."

(12) This notice, as is quite clear, is not in accordance with Form No. 1. It does not show under what clause of Section 2 (e) the Custodian considers that the person is an evacuee. It also does not give any grounds why the Custodian considers that the property should be declared evacuee property.

(13) The question then arises whether on a notice of the kind which has been issued in this case, the Assistant Custodian can be said to have

jurisdiction to proceed with the matter. There is no doubt that the Custodian had jurisdiction in the ordinary sense to deal with a matter relating to evacuee property in Jaipur. It is, therefore, urged that the mere fact the notice that was given was defective was not sufficient to take away his jurisdiction and, therefore, this Court should not interfere by a writ of certiorari. It seems to us that even though there was jurisdiction in the Assistant Custodian to take proceedings under the Ordinance, he did not lay the foundation of his jurisdiction by giving a notice as required by the law and rules. The person whose interests are affected has no further remedy if once an order under Section 7 is passed against him and is upheld by the authorities provided in the Ordinance. It is, therefore, necessary that the person concerned should be supplied with particulars which the Rules in this case make incumbent on the Custodian to supply to him and which are to be found in Rule 5, Form No. 1. Where such particulars are not supplied and the person concerned is not put in a position to prefer his objection, there is, in our opinion, no foundation for the jurisdiction of the Custodian to deal with the particular case.

(14) We may in this connection refer to 'ABDUL MAJID HAJI MAHOMED v. P. R. NAYAK', 53 Bom L R 621. That was also a case under the Administration of Evacuee Property Ordinance, and the question as to the effect of non-compliance with the provisions of Section 7 (1) and Rule 5 was specifically considered. It was held:

"(1) that the two conditions laid down by S. 7 (1) of the Ordinance, which were not merely procedural in character but substantive in nature, not having been complied with, the notice was not validly issued;

(2) that bearing in mind the object of serving the notice viz., to give an intimation to the person concerned that he was going to be held to be an evacuee and that all his property was to vest in the Custodian, the notice should specify with sufficient clarity and particularity what were the grounds which had led the Custodian to come to the conclusion that the person against whom action was going to be taken was an evacuee.

(3) that inasmuch as the notice did not mention any grounds whatsoever on which the property of petitioner No. 1 was sought to be declared evacuee property, the notice was not in compliance with S. 7 (1) of the Ordinance and that the order was therefore without jurisdiction."

(15) We respectfully agree with the view that has been taken in this case, and are of opinion that in view of the invalid notice issued in this case, the Assistant Custodian did not lay the foundation of his jurisdiction as was required under the law, and, therefore, all subsequent proceedings were without jurisdiction, and are liable to be set aside.

(16) It was next urged that the applicant had his remedies under the Ordinance and he could not, therefore, come to this Court under Article 226 of the Constitution of India. So far that is concerned the applicant has exhausted all his remedies under the Ordinance and he can get no relief anywhere except under Article 226 of the Constitution of India. Whether he should get any relief under that Article is a matter which we should consider just now.

(17) We have already held that this Court has jurisdiction to issue a writ of certiorari in the special circumstances of this case; but before we do so we have to examine the second argument on behalf of the State, viz., that this Court should not help a person who has been negligent. The negligence that has been pointed out is this. It is said that the applicant did not appear to contest the notice issued under Section 7. We have already pointed out that notice was gravely defective. It may also be mentioned that the Central Ordinance, had only come into force recently and the Rajasthan Ordinance (No. XIV of 1949) was different and it was not necessary under that Ordinance to appear and object till a notification was made in the Gazette.

In any case, if the applicant did not appear to contest the notice under Section 7, he would have to suffer the consequences of that non-appearance. That cannot however be called such negligence as to dis-entitle him to an order from us. It is further said that the applicant did not immediately appeal after the order of the 15th of April 1950 and allowed the time to expire and appealed some time in July 1950. That is no doubt so, but here again we may point out that the law in the Rajasthan Ordinance was different and it seems that the impression in the mind of the Assistant Custodian also was that he couid hear the objections of the applicant after the order of the 15th of April 1950. If this was not so, there is no reason why the Custodian did not dismiss the objections which the applicant filed on the 24th of April 1950 then and there and told him to go in appeal which he actually did almost three months later i.e., on the 12th of July 1950. If the Custodian had dismissed the applicant's objections on the 24th of April 1950 at once, the applicant could have gone in appeal and he would have had ample time to prefer the appeal within limitation. The delay in filing the appeal was due to the fact that the Assistant Custodian kept his objections pending for about three months and then dismissed them on the 12th of July 1950. The delay therefore occasioned in this manner cannot really be called negligence on the part of the applicant, for he was apparently pursuing some remedy which might have been proper under the Rajasthan Ordinance but which was not the proper remedy under the Central Ordinance which had come into force.

(18) Lastly, it has been urged that the applicant was negligent in allowing his appeal to be dismissed in default on the 28th of October 1950. This charge, if correct, is certainly serious and a person who allows an appeal to be dismissed for default and takes no further steps thereafter cannot come to this Court and ask it to exercise its extraordinary powers in his favour.

Reference in this connection was made to 'KHURSHED MODY v. RENT CONTROLLER, BOMBAY', AIR 1947 Bom 46. In that case the applicant had a right of appeal and did not file any. He then came to the High Court under Section 45 of the Specific Relief Act and wanted issue of a writ of certiorari. It was held that where a party has a remedy given to him by law and does not avail himself of that opportunity owing to his own default the High Court would not interfere by means of a high prerogative writ. With due respect, we agree with this view where the prayer as in that case, is for a writ of certiorari.

What we have, however, to see is whether the applicant did not avail of the remedy that was open to him on account of his own default. The reason why the appeal was dismissed on the 28th of October 1950 is that the applicant's counsel did not appear before the Custodian. The applicant's counsel who was engaged to appear before the Custodian has filed an affidavit to the effect that he had been engaged by the applicant and had been paid his full fees and expenses and was to

go alone to Jodhpur to argue the case before the Custodian. He however fell ill on the afternoon of the 27th of October 1950 and could not proceed to Jodhpur by the evening train. He therefore sent a telegram to the Custodian saying that he was ill and praying for adjournment. He could not inform the applicant of his illness and his inability to go to Jodhpur. The result of this however was that the applicant made no other arrangement to look after the case in Jodhpur and the appeal was dismissed for default. We accept this affidavit, for, it is not being controverted by the other side. It is true that in the Custodian's order it is said that the reason for the postponement was not mentioned in the telegram which was admittedly received; but as the original telegram is not forthcoming we must accept the affidavit of the counsel and it is possible that the recital in the order might be a mistake. Thus it appears that it was no fault of the applicant that the appeal happened to be dismissed for default on the 28th of October 1950. His conduct after that date also shows that he has been vigilant throughout. He immediately filed an application for restoration which was however dismissed on the 28th of November 1950. He also applied in revision to the Custodian-General at the same time. This revision was dismissed on the 30th of December 1950. It is only when he had exhausted all other remedies that he made an application to this Court. Taking a comprehensive view of the applicant's action throughout, we do not think that it can be said that he had been negligent in this case. Under these circumstances, the principle of 'KHURSHED MODY'S CASE', AIR 1947 Bom 46, does not apply in this case and we will not be helping a negligent litigant if we exercise our jurisdiction under Article 226 of the Constitution of India in his favour.

(19) We are of opinion that it is the duty of the Custodian (in which term we include the Assistant Custodian or Deputy Custodian) when he issues a notice under Section 7 of the Ordinance now replaced by Section 7 of the Administration of Evacuee Property Act No. XXXI of 1950 to comply with the Rules framed thereunder for issue of notice and to see that the notice, which is issued in Form No. 1 under Rule 5 of the Rules under the Ordinance and which is now being issued under Rule 6 Form No. 1 of the Act, is in conformity with that form and supplies the necessary information to the person concerned. If he does not do so, no foundation is laid for the jurisdiction of the Custodian and the proceedings taken by him are liable to be set aside.

(20) We, therefore, allow this application and issue a wit of certiorari quashing the order of the Assistant Custodian dated the 15th April 1950, and all proceedings consequent to that order. We may point out that, in accordance with the law, the Custodian can take fresh proceedings after laying the foundation of his jurisdiction. In view of all the circumstances of the case, we pass no order as to costs.

A/R.G.D. Application allowed.

A. I. R. 1952 RAJASTHAN 166

(JODHPUR BENCH)

TRILOCHAN DUTT J.

Kishen Singh, Applicant v. Dungaria and Karinga, Opposite Party.

Civil Revn. No. 100 of 1950, D/- 14-10-1950.

Rajasthan Ordinance (9 of 1949), S. 4 — Suit for ejectment of person taking forcible possession — No relationship of landlord and tenant — Ordinance does not apply.

From the perusal of Ss. 4, 5 and 6 of the Ordinance No. 9 of 1949, it appears, that they apply only to cases where relation of landlord and tenant exists or is so alleged to exist between the parties. Where the ejectment of a person from an agricultural land is sought on the allegation that he has taken forcible possession of the land and there is no issue as to relationship of landlord and tenant between the parties, the Ordinance does not apply. (Para 4)

Karinga, Opposite Party No. 2, in person.

ORDER.: This is an application for revising the order of the learned District Judge, Rajsamand, dated 21st of July 1949.

(2) A suit for the possession of some agricultural land was brought by the applicant Kishen Singh against the non-applicants Dungaria and Karinga, in the Court of the Munsiff Nathdwara, and a decree for possession of said land was passed in favour of the plaintiff. The defendants, who are non-applicants in the present revision, filed an appeal against the judgment and decree of the Munsiff, in the Court of the District Judge, Rajsamand, which Court is defunct now. On the 21st of July 1949, this appeal came up for hearing before the learned District Judge. During the course of the arguments, a point was raised by the learned counsel for the appellants, that the appeal cannot proceed further under Section 5 of the Rajasthan Ordinance No. 9 of 1949. The learned District Judge passed stay order in the appeal and consigned the file of the appeal to record room.

(3) Ordinance No. 9 of 1949 provides for the protection of tenants from ejectment from their holdings by their landlords. The relevant portions of Ss. 4, 5 and 6 of the Ordinance run as follows:

'Section 4.' Tenants not liable to ejectment:

"(1) So long as this Ordinance is in force in any area of Rajasthan, no tenant shall be liable to ejectment or dispossession from the whole or a part of his holding in such area on any ground whatsoever."

'Section 5.' Provisions as to pending suits etc.:

"All suits, appeals, revisions, references, applications and proceedings, for the ejectment of tenants, pending on the date of the commencement of this Ordinance, shall be temporarily consigned to records."

'Section 6.' Decrees and orders for ejectment to be stayed:

"(1) All decrees or orders for ejectment, which, at the date of the commencement of this Ordinance, have not been fully executed, shall remain in abeyance and their execution shall be stayed so long as this Ordinance remains in force."

(4) From the perusal of Ss. 4, 5 and 6 of the Ordinance No. 9 of 1949, it appears, that they apply only to cases where relation of landlord and tenant exists or is so alleged to exist between the parties. Where the ejectment of a person from any agricultural land is sought on the allegation that he has taken forcible possession of the land, Ordinance No. 9 of 1949 does not apply.

(5) In the present case, the plaintiff brought the suit on the allegation that the land in suit was under his cultivating possession as a proprietor and the defendants took forcible possession of it only a few months before the suit. The plaintiff nowhere alleged in his plaint that the defendants were his tenants. The defendants also did not allege in their written statement that they were

the tenants of the plaintiff, but what was alleged by them was that they were the full proprietors of the land in suit, and were in possession of it since generations. They further alleged that the debt of the plaintiff was discharged since long and therefore, the plaintiff cannot eject them. There was no issue in this case with regard to the existence of the relationship of landlord and tenant between the parties. The only issue, that was framed in the case by the trial Court, was whether the defendants took forcible possession of the land in suit in 'Asadh' last? This issue was decided by the trial Court in favour of the plaintiff and a decree was passed. The present case was not a case for the ejectment of a tenant by a landlord and hence Ordinance No. 9 of 1949 had no application, and therefore, the order of the learned District Judge, Rajsamand dated 21st of July 1949, is liable to be set aside and is hereby set aside with the direction that the appeal be taken on the list and be disposed of according to law.

D/R.G.D. Order accordingly.

A. I. R. 1952 RAJASTHAN 167

(JODHPUR BENCH)

WANCHOO C. J. AND BAPNA J.

Shiv Lal, Appellant v. Jootha, Respondent.

Misc. First Appeal No. 6 of 1951, D/- 17-3-52.

(a) Evidence Act (1872), Ss. 32 and 50 — Relationship — Evidence of general reputation.

The Evidence Act does not contain any express provision making evidence of general reputation admissible as proof of relationship. It is necessary to put forward evidence of the kind described in S. 32, Clauses (5), (6) and (7) and S. 50 to prove the existence of relationship between persons deceased whenever the question is in issue. AIR 1937 PC 201, Foll. (Para 5)

Anno: Evidence Act, S. 32 N. 24 to 27, 30.

(b) Evidence Act (1872), S. 32(6) — Statement of relationship in deed — Admissibility.

A pedigree would become admissible under Sec. 32 (6) even though the writer or the person who dictated it is not known, if it has been adopted by a person who had special means of knowledge. Where however it is not shown as to who had written the disputed entries or at whose instance they were written or even whether they had been adopted by any person having special means of knowledge who was dead, the document and the statement based thereon are valueless. AIR 1915 All 334; AIR 1931 PC 45, Ref. (Para 9)

Anno: Evi. Act, S. 32 N. 30.

(c) Succession Act (1925), S. 370 — Locus standi — Person claiming under will of heir.

An assignee from an heir is entitled to claim the grant of succession certificate. A person claiming under a will by an heir is in the same position and he can, therefore, object to the grant of certificate to a stranger. AIR 1920 All 185; AIR 1921 Mad 168 (FB), Rel. on; AIR 1935 Pat 478, Disting. (Para 10)

Anno: Succession Act, S. 370 N. 1.

(d) Succession Act (1925), S. 370 — Locus standi to contest proceedings.

Where the party did not set up any will by the deceased and he had already obtained the Letters of Administration with a will annexed, from the Court of the District Judge in respect of will of the heir of the deceased under whom he claimed during the course of the proceedings it cannot be held that the legatee from the heir had no 'locus standi' to contest the proceedings for Succession Certificate by another person. (Para 10)

Anno: Succession Act, S. 370 N. 1.

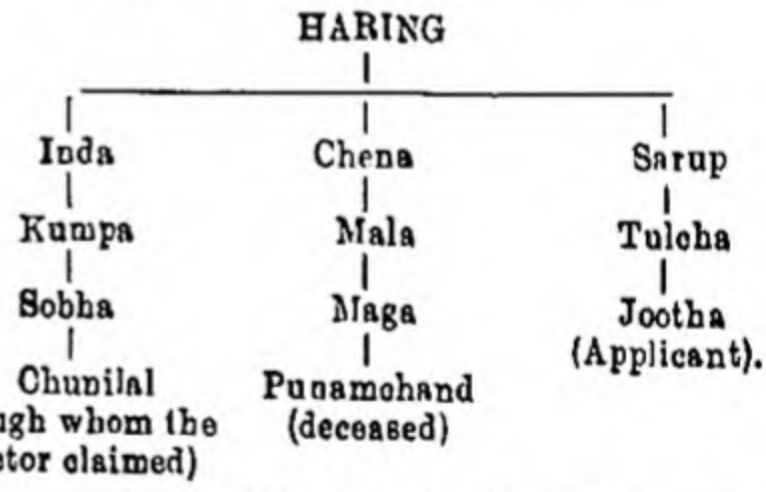
Amrit Raj, for Appellant; Hastimal, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('31) AIR 1931 PC 45: (12 Lah 336) 9
('37) AIR 1937 PC 201: (168 Ind Cas 881) 5
('15) 37 All 600: (AIR 1915 All 334) 9
('20) 42 All 549: (AIR 1920 All 185) 10
('21) 44 Mad 499: (AIR 1921 Mad 168 FB) 10
('35) AIR 1935 Pat 478: (159 Ind Cas 1119) 10

BAPNA, J.: This is an appeal under S. 384 of the Indian Succession Act (No. 39 of 1925).

(2) The respondent Jootha applied for grant of succession certificate in respect of the estate of the deceased Punamchand who died on Second Srawan Sudi 15, Smt. 2004 (31st of Aug. 1947). The respondent claimed to be the nearest heir of the deceased and alleged that one Chunilal, who had made a separate application for grant of such certificate was not the nearest heir. The appellant Shivlal objected to the grant of certificate to Jootha alleging that the nearest heir of the deceased Punamchand was Chunilal, who later on died bequeathing all the property to the objector. It was mentioned that Chunilal had filed a petition for grant of succession certificate in respect of the estate of Punamchand but that petition became infructuous owing to Chunilal's death. The relevant portion of the pedigree relied upon by the respondent is as under:



The appellant did not admit that Sarup was the son of Haring, but it was alleged on his behalf that Sarup was the son of Ranchor, a brother of Haring. The learned District Judge held that Sarup was the son of Haring and consequently Jootha was nearer in degree to the deceased Punamchand than Chunilal. He also observed that the proceedings for grant of succession certificate being of a summary nature, a legatee from an alleged heir had no 'locus standi' to contest the proceedings. He further observed that the objector was not entitled to a certificate since he claimed under a will for which he could obtain Letters of Administration or Probate. The learned District Judge accordingly directed that a succession certificate be issued to Jootha respondent in respect of the assets of the deceased Punamchand mentioned in the schedule accompanying the petition.

(3) It is urged on behalf of the appellant that the lower Court has grossly erred in relying on the evidence of the witnesses for the respondent, and that the observations of the learned Judge, that the witnesses were residents of the village of the deceased and withstood the test of cross-examination, are not correct.

(4) We have gone through the evidence and are of opinion that the evidence led by the respondent is wholly unreliable and entirely insufficient for a finding that Sarup, the grandfather of the respondent, was the son of Haring. The entire evidence led by the respondent consists of four witnesses, viz., Jhutmal s/o Peera, Chunilal, Ranmal, and the respondent Jhoota himself. The first three witnesses did not belong to the family to which the deceased Punamchand belonged, and they did not state their source of knowledge as regards the pedigree of the family of the deceased. Their parrot-like statements to prove the pedigree relied upon by the respondent, are inadmissible in evidence. Jhutmal s/o Peera admitted that he did not belong to the family of Punamchand and was unable to state the pedigree of his own maternal uncle. Chunilal, the second witness, also did not state how he was connected with Punamchand and what was the source of his knowledge. Ranmal also admitted that he did not belong to the family of the deceased and was not related to him in any way.

(5) As pointed out by their Lordships of the Privy Council in 'LAXMI REDDI v. VENKATA REDDI'. AIR 1937 PC 201, the Indian Evidence Act does not contain any express provision making evidence of general reputation admissible as proof of relationship. Their Lordships further pointed out the necessity of putting forward evidence of the kind described in S. 32, Cls. (5), (6) and (7), and S. 50, Evidence Act, to prove the existence of relationship between persons deceased whenever the question is in issue. In the case before their Lordships a number of witnesses were allowed simply to enunciate from the witness box the proposition which they desired to prove without stating the basis which could give that evidence the value or admissibility and their Lordships observed that

> "time, trouble and expense would have been saved had Cl. 5, S. 32, Evidence Act, been properly applied and witnesses required to prove the statements relied upon with proper particularity and with due attention to the requirement that the person making the evidence had special means of knowledge."

Their Lordships further observed that

> "this matter could not rightly be left to time or chance or cross-examination to disclose whether a statement had any basis which could give it value or admissibility."

(6) The respondent Jootha started by saying that he did not know his family pedigree but later on gave the pedigree relied upon by him, but in the very first question in cross-examination stated that the pedigree table had been given to him by his Kul-Guru Rajmal. This then was the source of his knowledge. He however did not produce that pedigree and, as would be mentioned later on, Rajmal as witness for the appellant supported the appellant's version that Sarup was the son of Ranchor, a brother of Haring. A perusal of the statement of the respondent shows that he was unable to state anything beyond the direct ascendant of Chunilal, Punamchand and Jootha. He was unable to state, for instance, how many sons had Inda or Kumpa, or who were the brothers of Haring.

(7) It may be pointed out that the observation of the learned District Judge that all the witnesses were residents of the village of the deceased was conceded by learned counsel for the respondent to be an error. They were, as a matter of fact, all residents of Bhaloron Ka Bara, Paragna Siwana while the deceased was a resident of the village Bala, Paragna Jalore.

(8) The evidence led by the respondent is thus entirely insufficient for a finding that the respondent's father Sarup was the son of Haring.

(9) On behalf of the appellant, five witnesses were produced including the appellant himself, but except Rajmal, the rest of the witnesses have suffered from the same defect as witnesses for the respondent. As regards Rajmal, he was admitted to be the Kul-Guru of Punamchand, and he produced a pedigree Ex. P/A from a book of pedigrees kept by him. This table supported the appellant. Learned counsel for the respondent, however, challenges the admissibility and authenticity of this table on several grounds. In the first place, he contended that the record kept by the Kul-Guru was not a bound book, but was in loose sheets, and that there were blank spaces on those sheets and manipulation could easily be made. It was next contended that the witness was unable to say in whose handwriting the record kept by him existed, and that there being no signatures appended to the contents in the record it could not be said whose statements they were, which were being sought to be admitted. The witness gave some explanation as to loose leaves by saying that the book having become old, some papers had got out. He was, however, unable to say in whose handwriting were the entries from which the pedigree was made out.

Learned counsel for the appellant relied upon 'JAHANGIR v. SHEORAJ SINGH', 37 All 600 for the proposition that it was not necessary to show who had made the statements contained in the pedigree. In the case relied upon, the pedigree was produced by a member of the family as having been handed over to the witness by his grand father as the family pedigree and the Court held it to be genuine. It was contended for the opposite party that it was necessary to show who was the author of the statements on the basis whereof the pedigree came to be prepared and their Lordships repelled that contention. In that case the pedigree was held to be admissible in evidence on the presumption that the grandfather of the witness had adopted it and it became his statement even though the writer or the person who dictated it remained unknown.

All that this case therefore lays down is that a pedigree would become admissible under S. 32(6) of the Indian Evidence Act, even though the writer or the person who dictated it is not known, if it has been adopted by a person who had special means of knowledge. The same view has been taken in 'ABDUL GHAFUR v. MT. HUSSAIN BIBI', AIR 1931 P. C. 45. In the present case Rajmal was however unable to show who had written the disputed entries or at whose instance they were written or even whether they had been adopted by any person having special means of knowledge who was dead. The document and the statement of Rajmal based thereon are, therefore, in our opinion, valueless. But even on the finding that the objector failed to prove that Sarup was the son of Ranchor, the respondent is not benefited. Unless it was proved that the respondent was in the line of Haring, the Objector would succeed as Chunilal was admittedly in the line of Haring a common ancestor of Chunilal and Punamchand.

(10) The learned Judge's observation, that the objector had no 'locus standi' in view of his claim

being based on a will by Chunilal, is not correct. It has been held in 'GULSHAN ALI v. ZABIR ALI', 42 All 549 and 'VIRAVAN v. SRINIVASA CHARIAR', 44 Mad 499 that an assignee from an heir is entitled to claim the grant of succession certificate. A person claiming under a will by an heir is in the same position and he can, therefore object to the grant of certificate to a stranger. The ruling relied upon by the lower Court, MT. KABO v. DAMRI LAL', AIR 1935 Pat 478 is entirely irrelevant. In that case, the question related to the ownership of the property. The several contesting parties alleged three different persons to be the owners of the prepared (sic) and what the Court decided was that the owner was the person in whose name property stood, and accordingly granted a certificate to the person who was admittedly his heir. The observation of the learned District Judge that the appellant had no 'locus standi' before obtaining the Letters of Administration or Probate in respect of the estate of Punam Chand is also incorrect, since the appellant did not set up any will by Punam Chand and the appellant had already obtained the Letters of Administration with a will annexed, from the Court of the District Judge in respect of Chunilal's will during the course of the proceedings.

(11) The appeal is, therefore, accepted, the direction as to grant of succession certificate to the respondent is set aside, and the petition is dismissed. The non-petitioner having not made any application for the grant of a succession certificate, no grant of certificate can be made to him at this stage.

B/D.H. Appeal allowed.

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(JODHPUR BENCH)

BAPNA J.

Uda, Petitioner v. Balu Lal and others, Respondents.

Civil Revns. Nos. 62 and 63 of 1951, D/- 26-10-1951.

(a) Civil P. C. (1908), O. 21, Rr. 84, 92 — Officer conducting sale can declare highest bidder to be purchaser — Discretion of Court to refuse to accept, not exercised — Re-sale ordered without any application under either Rule 89, R. 90 or R. 91 — Order is not under Rule 92 — Order is appealable.

The declaration as to who is purchaser can be made by officer conducting the sale. The language of Rule 84 of Order 21 does not require that the permission of the Court is to be obtained before a certain person can be declared to be a purchaser. Both the Court and the officer have discretion to act in the matter so that either of the two officers can adjourn the sale if the price offered by the highest bidder appears so clearly inadequate as to make it advisable to do so. The Court can however, notwithstanding a declaration that the highest bidder was the purchaser made by the officer conducting the sale, decline to accept the bid if in its opinion, the price offered appeared to be clearly inadequate in the circumstances of the case. This would further lead to the proposition that once the Court had omitted to exercise the discretion, it cannot thereafter re-open its own order under this clause and if it purported to do so, it would not be an order under O. 21, R. 84 of the Code. Where the Court orders resale without any application before it in that respect under either Rule 89 or Rule 90 or Rule 91, the setting aside the sale cannot be considered to be one under Rule 92 and on this reason the person who was declared to be the purchaser can file an appeal, on the ground that the Court had no authority to set aside sale except under R. 92. AIR 1925 Mad 318; AIR 1923 Pat 525, Explained and not followed. AIR 1936 Lah 555; AIR 1939 Nag 269; AIR 1929 Rang 311, Ref. (Para 4)

Anno Civil P. C., O. 21, R. 84 N. 1; R. 92, N. 2, 13.

(b) Civil P. C. (1908), O. 21, R. 84 — Mortgagee decree-holder purchasing property in execution of his mortgage decree — Deposit of 25 per cent. of balance of purchase money after deducting amount of incumbrance held proper. (Para 6)

Anno: Civil P. C., O. 21, R. 84 N. 3.

Udharam, for Petitioner; Sumerchand, for Respondent No. 1.

REFERENCES: Courtwar/Chronological/ Paras.

('23) AIR 1923 Cal 316(1): (68 Ind Cas 305) 4
('36) AIR 1936 Lah 555: (166 Ind Cas 603) 4
('25) AIR 1925 Mad 318: (82 Ind Cas 793) 4
('39) AIR 1939 Nag 269: (186 Ind Cas 872) 4
('23) AIR 1923 Pat 525: (2 Pat 548) 4
('29) AIR 1929 Rang 311: (7 Rang 425) 4

ORDER: These two revisions arise out of a single order passed by the Additional District Judge, Udaipur, on 9th of March, 1951, in two connected appeals.

(2) In execution of a decree obtained by Kashi Ram against Khushal, the judgment-debtor's property was put up for sale and on the 12th of January, 1951, the Nazir accepted the last bid of Balu Lal amounting to Rs. 6310/-. Balu Lal was also a mortgagee of this property for a sum of Rs. 5200/-. Balu Lal paid one-fourth of the amount of the purchase money after adjusting his mortgage amount to the Nazir and the Nazir made a report to the Munsiff of Rajsamand in whose Court the execution proceedings were being carried on stating the above facts. The Court ordered that the amount of Rs. 277/8/- paid by Balu Lal be deposited in the Court. Some time later on the same day, a petition was presented by Chhagan Lal that he had been making bids at the sale of the property and had just absented himself for about 10 minutes after making a bid for Rs. 6305/- intimating to the Nazir to wait for his return but when he returned he found that the Nazir had knocked down the sale in favour of Balu Lal for Rs. 6310/-. He intimated that he was willing to pay Rs. 6400/- for the property and even higher if the property be sold to him. The Court asked the Nazir to report whereupon the latter stated that Chhagan Lal had made a bid of Rs. 6205/- and thereafter he went away and did not return. He closed the sale at 6 P.M. when the last bid of Rs. 6310/- was made by Balu Lal, and nobody at that time was willing to make a higher bid. The Court recorded an order that the sale of the property be again conducted on the 13th and 14th of January, 1951. The Nazir complied and made a report on the 15th of January, 1951, that he started sale taking the bid

of Rs. 6400/- of Chhagan Lal and no one gave a higher bid and he therefore accepted it. On the same day, that is, 15th of January, 1951, Balu Lal made a petition that he had been lawfully declared to be the purchaser on the 13th of January and that he was ready to deposit the balance of amount of the purchase money after adjustment of his mortgage, which should be accepted, and a certificate of sale be issued in his favour. Khushal, judgment-debtor, had in the meanwhile presented one petition to the Nazir while he was conducting the sale that the sale be stopped as he was prepared to pay the decretal amount on which the Nazir directed him to deposit the amount in Court. Another petition was presented by Chhagan Lal on the 20th of January, 1951, that he was only a 'Benamidar' for Uda who may be considered as the purchaser. The learned Munsiff passed an order on the 25th of January, 1951, upholding the correctness of his order directing re-sale of the property and accepted Uda as the purchaser of the second sale. The judgment-debtor's objection was rejected as he had not paid the decretal amount and only wanted time. Against this order, Balu Lal, and Khushal filed separate appeals. The learned Additional District Judge, Udaipur, by his order dated 9th of March, 1951, held that the lower Court was not right in setting aside the first sale made in favour of Balu Lal and he, therefore, quashed the subsequent proceedings. Uda has filed two revisions as there were two appeals pending before the lower Courts.

(3) It is argued that the order of the Executing Court, dated the 25th of January 1951, was not open to appeal, inasmuch as, at best it was an order under O. 21 R. 84 when the Court refused to declare Balu Lal to be the purchaser of the property. It was urged that a sale made by the Nazir was not complete until the bid had been accepted by the Court. It was also argued that the appeal was preferred against the order of the Munsiff dated the 25th of January 1951, while no appeal had been preferred against his order of the 13th of January 1951, and, therefore, if the order of the 13th January stood, the appeal against the second order was incompetent. Learned counsel for the opposite party urged that the sale was complete as soon as the Nazir had knocked down the sale in favour of Balu Lal and, as a matter of fact, the Court also accepted him as the purchaser by accepting the deposit of one-fourth of the purchase price and, therefore, the order directing re-sale on the 13th amounted to a setting aside of the sale within the meaning of O. 21, R. 92, C.P.C., and the purchaser Balu Lal had a right of appeal under the provisions of O. 43, R. 1 (j) of the Civil Procedure Code. Another point urged by the learned counsel for the petitioner is that the purchaser Balu Lal was not authorised to deduct the amount of the mortgage money from the purchase price and, thereafter, to deposit only one-fourth of the net amount of the price and that the learned Munsiff took this point also into consideration in setting aside the sale as observed by him in his order of the 25th of January 1951.

(4) There is a difference of opinion among the High Courts in India as to whether acceptance of the highest bid by the Court is necessary. The Nagpur, Lahore and Rangoon High Courts have held that the sale is complete as soon as the property is knocked down in favour of the highest bidder by the officer conducting the sale. 'HOSHNAK RAM v. PUNJAB NATIONAL BANK LTD.', AIR (23) 1936 Lah 555; 'LOKMAN CHHABILAL v. MOTILAL TULSIRAM', AIR (26) 1939 Nag 269 and MAUNG OHN TIN v. P. R. N. P. S. R. M. CHETTYAR FIRM', AIR (16) 1929 Rang 311. The other view is that a sale is not complete till the highest bid is accepted by the Court though the officer conducting the sale may have knocked down the property in favour of a particular person as being the highest bidder. 'RATNASAMI PILLAI v. SABAPATHY PILLAI', AIR (12) 1925 Mad 318; 'FAZIL MEAH v. PROSANNA KUMAR', AIR (10) 1923 Cal 316 (1) and 'JAIBAHADUR v. MATUKDHARI', AIR (10) 1923 Pat 525. Order XXI, Rule 84, C. P. C., reads as follows:

> "(1) On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re-sold.
> (2) Where the decree-holder is the purchaser and is entitled to set-off the purchase-money under Rule 72, the Court may dispense with the requirements of this rule."

Under O. 31, R. 65, every sale in execution of a decree except as otherwise prescribed, is to be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in the manner prescribed. Under O. 21, R. 84, the provision for payment of twenty-five per cent. of the purchase-money to the officer or such other person conducting the sale is to be made after the person is declared to be the purchaser. So that up to that stage, it is the officer or such other person conducting the sale who is functioning and, therefore, the declaration as to who is purchaser can be made by that officer. The language of R. 84 of O. 21 does not require that the permission of the Court is to be obtained before a certain person can be declared to be a purchaser. The decision in the Patna case 'JAIBAHADUR v. MATUKDHARI', AIR (10) 1923 Pat 525, as appears from the first paragraph of the judgment, rested on the provisions of the Code taken together with the High Court General Rules and Circular Orders as observed in the Rangoon case. The Madras case does not give any reason for the decision and the decision actually relates to a sale by a Receiver appointed under O. XL of the Civil Procedure Code. In AIR (10) 1923 Cal 316 (1), the Court had ordered re-sale of the property on an offer of Rs. 700/- when the Nazir had reported the last bid to be of Rs. 450/- made by the petitioner in that case. The learned Judge referred to Form No. 29, Appendix E, of the First Schedule of the Civil Procedure Code in coming to the conclusion that the Court had a discretion in the matter to accept or refuse to accept a bid and to direct a re-sale of the property. Form No. 29 relates to conditions of sale settled by the Court under O. 21, R. 66 of the Code and condition No. 3 stated therein is:

> "The highest bidder shall be declared to be the purchaser of any lot, provided always that he is legally qualified to bid, and provided that it shall be in the discretion of the Court or officer holding the sale to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so."

It is argued by the learned counsel for the opposite party that the discretion is in the Court or in the officer holding the sale in the alternative. So that if the officer holding the sale has accepted, the highest bid, it would mean that he has refused to exercise the discretion of not accepting the highest bidder as the purchaser and thereafter no further discretion is left in the Court in that matter. In my opinion, the correct interpretation

would be that both the Court and the officer had discretion to act in the matter so that either of the two officers could adjourn the sale if the price offered by the highest bidder appeared so clearly inadequate as to make it advisable to do so. The word "or" seems to have been used in the meaning of "and" in this condition of sale. A different meaning would give an officer greater powers than would be vested in the Court. In the present case, however, the Court did not exercise its power when the Nazir intimated to the Court that Balu Lal was the highest bidder and that the twenty-five per cent. of the purchase money may be deposited in the Court. The Court on that report made an order that the amount be deposited. Although there is no specific order that the Court accepted Balu Lal, who was the highest bidder to be the purchaser, but as discussed above, the declaration that the highest bidder was the purchaser can be made by the officer conducting the sale. The Court could, however, notwithstanding a declaration, made by the officer conducting the sale, decline to accept the bid if in its opinion, the price offered appeared to be clearly inadequate in the circumstances of the case. This would further lead to the proposition that once the Court had omitted to exercise the discretion mentioned in this clause, it could not thereafter reopen its own order under this clause and if it purported to do so, it would not be an order under O. 21, R. 84 of the Code. In the present case, on Chhagan Lal's application, no notice was given to the previous purchaser or judgment-debtor or creditor and the order of re-sale was made which in other words amounted to a setting aside of the previous sale in favour of Balu Lal. The order setting aside the sale was appealable under O. 43, R. 1 (j) of the Code. The contention of the learned counsel for the petitioner is that there had been no application before the Court under Rr. 89, 90, or 91 of O. 21 and, therefore, the setting aside of the sale could not be considered to be one under Rule 92. This may be so but this is exactly the reason on which Balu Lal could file an appeal that the Court had no authority to set aside the sale except under the conditions mentioned under O. 21, R. 92 of the Code.

(5) In respect of the contention that no appeal had been filed against the order of the 13th January 1951, I find from the memorandum of appeal that the first ground taken is that the Executing Court had no jurisdiction to set aside the sale in favour of Balu Lal and direct a fresh sale of the property. The fact that a copy of the order of the 13th January was not produced along with the memorandum of objection, is, in my opinion, not fatal since that order of the 13th January was in a measure confirmed by the order of the 25th January 1951 and the copy of that order was produced along with the memorandum of appeal.

(6) As to the contention that the auction-purchaser Balu Lal had not depcsited twenty-five per cent. of the entire amount of the purchase-money viz., Rs. 6,310/-, it appears from a perusal of the record that in the proclamation of sale, the property was put up for sale subject to incumbrance of Rs. 5,200/- in respect of the mortgage in favour of Balu Lal. The sale that actually took place was thus of the equity of redemption only. In the list of bids also, it is clearly mentioned that the incumbrance on the property consisted of the mortgage in favour of Balu Lal for Rs. 5,200/- and the bid was started by adding Rs. 100/- thereto so that the parties and everybody who was present at the sale understood that the property was being sold subject to the incumbrance. Since the mortgagee himself happened to be the purchaser, he was justified in deducting the amount of incumbrance and considering the purchase-price of the equity of redemption to be Rs. 1,110/-. There was no dispute about the amount of incumbrance and there was, therefore, no point in paying the mortgage money in Court, which was only to be handed over again to Balu Lal. The revision against Balu Lal has, therefore, no force and is dismissed with costs. The revision against Khushal automatically fails.

B/R.G.D. Order accordingly.

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(JAIPUR BENCH)

SHARMA J.

Devi Singh, Applicant v. State of Rajasthan.

Criminal Misc. Petn. Nos. 37 and 40 of 1952, D/- 11-6-1952.

Public Safety — Preventive Detention Act (1950), S. 7 — Particulars of grounds of detention need not be furnished — Grounds supplied should not be irrelevant — Detenu can however ask for further particulars — Courts cannot enquire into truth of grounds, unless it is found that action of detaining authority is mala fide — Burden to establish mala fide is on detenu — Court cannot also enquire into sufficiency of grounds for satisfaction of detaining authority — It can only see whether grounds are relevant and whether the authority was reasonably satisfied — Since grounds had no bearing on objects, order of detention held bad — (Constitution of India, Art. 22).

Neither in Article 22 nor in the Preventive Detention Act is there any express provision that particulars of the grounds of detention should be given to the person detained. Looking to the wordings of Article 22 of the Constitution of India and Section 7 of the Act, it is not necessary that any particulars should have been given by the detaining authority in the grounds furnished to the detenu. Grounds, which form the basis of satisfaction when formulated are bound to contain certain facts but mostly they are themselves deductions of facts from facts. Simply because the grounds are such that no answer can be given to them excepting a simple denial, it cannot be said that the grounds are vague. Of course, it is desirable that the detaining authority should give the information with reasonable details to the detenu, but when it is not so given and only the grounds for the order are given, it cannot be said that the provisions of either Article 22 of the Constitution of India or of Section 7 of the Act are not complied with. An order of detention cannot therefore, be vacated simply on that ground so long as the grounds furnished are not irrelevant to the objects mentioned in Section 3 of the Act. It is open to a detenu to ask the detaining authority for further particulars if he thinks that he is not in a position to make an effective representation on the grounds supplied to him, or the Government itself might at a later date furnish such particulars, but it is not incumbent upon the detaining authority to furnish all sorts of particulars in its possession, besides the grounds having a bearing on the objects which satisfied the detaining authority that the detenu should be detained.

As regards the truth of the grounds, it is not open to the Court to go into them unless it records a finding that the action of the detaining authority was mala fide. The burden of proving the mala fides lies heavily on the detenu and (under the circumstances) by their mere affidavits which have been answered by the counter affidavit of the District Magistrate, it cannot be said that they have established a case of mala fide.

It is also not permissible for the Court to see whether the grounds were sufficient for the satisfaction of the District Magistrate that the detention of the detenu was necessary in the interest of the objects mentioned in the order of detention. All that it is authorised to see is whether the grounds bear any relevancy to the objects mentioned in the detention orders. Unless mala fides are proved, a Court cannot go into such questions. (Para 10)

The only thing, therefore, that the Court has to consider is whether the District Magistrate can be said from the grounds furnished to the detenu to have had mental satisfaction that it was necessary to detain him with a view to preventing him from acting in any manner prejudicial to the security of the State and the maintenance of the public order, (which objects were mentioned in the detention order). The term "satisfied" in this context means "reasonably satisfied". (Para 11)

Though it is not permissible for the Court to see whether the grounds given are true or sufficient, it is certainly permissible for it to be satisfied whether the detaining authority was reasonably satisfied that the material supplied showed that an intended detenu was acting in any manner prejudicial to one or more of the objects given in Section 3. It is not permissible to a detaining authority to issue an order of detention mechanically incorporating the words of Section 3. It is necessary for it to issue such order after mental satisfaction. In grave cases of detention without trial, it would not do to pass routine orders, but the detaining authority should carefully consider the materials before it, and then form its opinion whether it warrants order of detention for the fulfilment of any of the objects given in Section 3. When orders of detention are made for several reasons without distinguishing between them, there is a reasonable doubt as to whether the detaining authority was reasonably satisfied that the materials placed before it were sufficient for making a detention order, because it cannot be said which of the reasons principally influenced the detaining authority in making the detention order. It is necessary for the detaining authority to examine the materials before it, and then to form a clear opinion as to whether it was necessary to make an order of detention in the interest of one or the other object given in Section 3 of the Act. It is not permissible to recite all, or more than one objects given in Section 3 in the order of detention, and when it is shown by the grounds that they have no bearing upon some of those objects, to fall back upon the argument that they have at least bearing upon one or more of those objects. This argument does not take note of the fact that it is necessary for the detaining authority to apply its mind before making an order of detention to the question as to which of the acts alleged against the intended detenu have bearing on a particular object for which he is going to be detained: Case Law Rel. on. (Para 13)

C. L. Agrawal, for Applicant in Cri. Misc. Petn. No. 37 of 1952; S. R. Chandra, for Applicant in Cri. Misc. Petn. No. 40 of 1952; D. M. Bhandari, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('43) AIR 1943 FC 1: (44 Cri LJ 556) 6, 9, 13
('50) AIR 1950 FC 129: (51 Cri LJ 1480) 10
('50) AIR 1950 SC 27: (51 Cri LJ 1383) 10
('51) AIR 1951 SC 157: (52 Cri LJ 373) 6, 9, 10
('48) AIR 1948 All 78: (49 Cri LJ 11) 6
('49) AIR 1949 All 37: (50 Cri LJ 34) 6
('49) AIR 1949 All 148: (50 Cri LJ 214 (FB)) 6, 9
('49) AIR 1949 All 748: (1949 All LJ 246) 6
('49) AIR 1949 All 158: (50 Cri LJ 224 (FB)) 6
('50) AIR 1950 All 709: (52 Cri LJ 732) 6
('48) AIR 1948 Bom 334: (49 Cri LJ 465 (FB)) 6
('49) AIR 1949 Bom 95: (50 Cri LJ 320) 6
('50) AIR 1950 Bom 126: (51 Cri LJ 665) 6
('50) AIR 1950 Mad 162: (51 Cri LJ 525) 6
('49) AIR 1949 Pat 1: (50 Cri LJ 44 FB) 6, 10
(1942) AC 206: (110 LJKB 724) 7, 10, 13

ORDER: These are two applications, one by Shri Devi Singh of Mandawa and the other by Shri Gordhan Singh of village Chirana under Article 226 of the Constitution of India. It has been prayed that an appropriate writ, direction or order be issued or passed directing the State of Rajasthan to produce the person of the two petitioners before this Court, and that the petitioners be set at liberty. Rules nisi were issued in both the cases—in the case of Devi Singh (hereinafter to be called the first petitioner) on the 2nd of June 1952, and in the case of Gordhan Singh (hereinafter to be called the second petitioner) on the 4th of June 1952. Both the cases are substantially similar, and therefore I consider it convenient to dispose them of by this single judgment.

(2) The case of the first petitioner is that he is the only son and would-be successor of Shri Thakur Jaisinghji of Mandawa, who is a prominent landholder of Sheikhawati Pargana in Jaipur Division. He has been returned as a member of the Rajasthan Legislative Assembly from the Udaipur constituency of Jhunjhunu District in the last general elections on the ticket of Ram Rajya Parishad party, which is in opposition to the Congress. On account of his political activities, he was an eye-sore to the Congress leaders, who, on account of loss of quite a large number of seats in the last general elections, have been on the look out to find out some excuse to crush the Jagirdars of Rajasthan. With a view to win the support of the tenantry by rough and cheap methods and also to create class-hatred against the Jagirdars, the Congress Government reduced the kind rent to one-sixth of the gross produce.

The petitioner was arrested at Jaipur on the 19th of May 1952, on a warrant alleged to have been issued by Mr. B. N. Tankha, Collector and District Magistrate, Jhunjhunu, on the ground of preventing him from acting in any manner prejudicial to the security of the State and the

maintenance of public order. Soon after the arrest, grounds of detention were served on the petitioner in jail. The order about arrest & detention was not passed by the District Magistrate at Jhunjhunu, where he is posted, but at Jaipur, under the pressure of the Members of the Cabinet, Chief and Home Secretaries of the Rajasthan Government, and the Congress leaders, and was not the result of mental satisfaction of the District Magistrate himself. The order of detention is alleged to be a fabricated document. It has been stated that the grounds furnished to the petitioner are unfounded and are vague, which defeat the right of the petitioner of making an effective representation and some of the grounds are such as do not even bear any relation to any of the two objects mentioned in the order of detention. On these grounds it has been prayed that the petitioner be released from detention forthwith.

(3) In the case of the second petitioner also substantially the same grounds have been taken as have been taken by the first petitioner. It is added that as a matter of fact this petitioner was never served with an order of detention, nor was it ever disclosed to him why he was arrested. Both the petitioners allege that the action of the District Magistrate is mala fide.

(4) On behalf of the respondent in both the cases returns have been made and an affidavit has been filed by Mr. B. N. Tankha, the District Magistrate of Jhunjhunu, in the case of the first petitioner. It has been denied, in the case of the first petitioner, that the order of detention was made at Jaipur at the instance of the Members of the Cabinet, the Chief or Home Secretary, or the Congress leaders. It has been asserted that the District Magistrate was at Jhunjhunu on the day he passed the order, and that the order was passed at Jhunjhunu. It has also been asserted that the grounds supplied to the petitioner were neither vague nor irrelevant. It has further been asserted that by the police reports and other material placed before him, he was satisfied that it was necessary to detain the petitioner for maintaining public peace in Udaipurwati. It has further been stated that the order was passed after the mental satisfaction by the District Magistrate himself and not under pressure from any other source.

(5) In the case of the second petitioner, the reply of the respondent shows that an order of detention was actually served on the petitioner, and that from the material placed before the District Magistrate at Jhunjhunu, he had the mental satisfaction that it was necessary to arrest and detain the petitioner for the preservation of the security of State and the maintenance of the public order.

(6) I have heard the learned counsel for both the petitioners, and also Mr. D. M. Bhandari for the State. It was argued by Mr. C. L. Agrawal, appearing on behalf of the first petitioner, that the order of detention made by the District Magistrate was actually made at Jaipur under pressure from the Members of the Cabinet and other authorities mentioned in the petition, and that it was not the result of the mental satisfaction of the District Magistrate himself.

It was argued that the grounds which were served on the petitioner were either irrelevant to the objects mentioned in the order of detention or were too vague and indefinite to enable the petitioner to make an effective representation. It was argued that according to the affidavit of the District Magistrate himself, the only mental satisfaction that he had was that the order was necessary for maintaining public peace in Udaipurwati. According to this statement, which is made in paragraph 14 of the District Magistrate's affidavit, he did not have a mental satisfaction that the order was necessary for preventing the petitioner from acting in any manner prejudicial to the security of State or maintenance of public order.

It was submitted that public peace is not the same thing as public order, and as according to the District Magistrate's affidavit itself, the grounds which he considered gave him the only satisfaction that the detention of the petitioner was necessary for maintaining public peace in Udaipurwati, the grounds are foreign to the two objects mentioned in the order of detention, that is, security of the State or maintenance of public order. The order of detention was, therefore, made on the grounds which had no connection with the objects mentioned in the detention order, and, therefore, the petitioner was entitled to release. It was further argued that even if some of the grounds are foreign to the objects mentioned in the detention order, the fact that other grounds were relevant to the said objects would not make the order of detention valid, as it cannot be said that the District Magistrate was not influenced by irrelevant grounds in making the order of detention.

(6) It was further argued that the grounds were, at any rate, vague, and they were not adequate to enable the petitioner to make an effective representation as provided by Article 22 (5) of the Constitution of India and Section 7 of the Preventive Detention Act (No. IV of 1950) (hereinafter to be referred to as the Act). On the first contention that if the grounds or some of the grounds furnished to a detenu are irrelevant, the order of detention is bad, the learned counsel took his stand upon a ruling of the Federal Court of India reported in 'KESHAV TALPADE v. EMPEROR', A.I.R. 1943 F. C. 1. This ruling was also relied upon to show that if one of the reasons mentioned in the detention order is bad, the order cannot be upheld simply on the ground that other reasons are valid. Reliance was also placed upon a recent ruling of the Supreme Court of India reported in 'STATE OF BOMBAY v. ATMA RAM', A.I.R. 1951 S.C. 157, in support of the contention that the grounds furnished to the detained person should not be so vague and indefinite as to deny him an opportunity of making an effective representation under Article 22(5) of the Constitution of India and Section 7 of the Act. Rulings reported in 'M. R. S. MANI v. DISTRICT MAGISTRATE, MATHURAI', A.I.R. 1950 Mad. 162; 'IN RE RAJDHAR KALU PATIL', A.I.R. 1948 Bom. 334; 'NEK MOHAMMAD v. PROVINCE OF BIHAR', A.I.R. 1949 Pat. 1; 'IN RE ANANT MAHADEV', A.I.R. 1949 Bom. 95; 'IN RE BHAURAO KARBHARI', A.I.R. 1950 Bom. 126; 'EMPEROR v. SUMER SINGH', A.I.R. 1948 All. 78; 'INDER PRAKASH v. EMPEROR', A.I.R. 1949 All. 37; 'DURGADAS v. REX', AIR 1949 All. 148; 'RAM BILAS v. REX', AIR 1949 All. 748; 'FAIYAZ ALI v. DISTRICT MAGISTRATE KANPUR', A.I.R. 1949 All. 158; and 'ASHA RAM v. STATE', A.I.R. 1950 All. 709; were also relied on to show that as full particulars should be supplied to the detenu as are possible to enable him to make an effective representation.

(7) Reliance was also placed on a somewhat recent and important case of the House of Lords in England reported in 'LIVERSIDGE v. ANDERSON', 1942 A.C. 206, in order to show that the word "satisfied" which, like Section 3 of the Act, occurs in Reg. 18 B. of the Defence (General) Regulations, 1939, has been interpreted in this context as "reasonably satisfied". It was argued on the strength of this ruling, which has been followed in the Indian courts, including the Supreme Court, that the satisfaction of the detaining authority ought to have been reasonable satisfaction and not mere irrational or capricious satisfaction.

(8) In the case of the second petitioner, the same line of argument was adopted by his learned counsel. It was argued that in the case of this petitioner even the order of detention was not served on him. In both the cases, it was argued that the action of the District Magistrate was mala fide.

(9) On behalf of the State, it was argued in both the cases that it cannot be said that the grounds which were served on both the petitioners were in anyway irrelevant to both the objects mentioned in the detention orders. It was conceded that none of the grounds had any bearing on the question of the security of the State, but it was contended that all the grounds were relevant to the question of the maintenance of the public order. It was argued that because in the order of detention it was also mentioned that the arrest and detention of the petitioners was necessary in the interests of the security of the State as well, the order did not become bad simply because the grounds furnished had no bearing upon that object but only on the other object, that is the maintenance of public order.

With regard to the ruling in the case of 'KESHAV TALPADE v. EMPEROR', AIR 1943 F. C. 1, it was argued that in that case some of the reasons which led to the arrest and detention of the petitioner in that case did not come within the purview of Rule 26 of the Defence of India Rules. It was, therefore, held that it could not be said as to whether the order of detention would have been made if the detaining authority had not thought that it was also in the interest of other objects not coming within the purview of Rule 26. It was also argued that in that case Rule 26 itself was held to be ultra vires the provisions of Section 2(2) (x) of the Defence of India Act which authorised the Government to make rules for the apprehension and detention in custody of any person reasonably suspected of being of hostile origin or of having acted, acting or being about to act, in a manner prejudicial to the public safety or interest or to the defence of British India, whereas Rule 26 gave the Government power to arrest and detain any particular person only on being satisfied that it was necessary so to do with a view to preventing him from acting in any manner prejudicial to the Defence of British India, the public safety, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas or the efficient prosecution of the war. The rule, therefore, went beyond the powers given by Section 2(2) (x), and arrest and detention under that rule was, therefore, bad.

It was argued that it was not laid down in the said case that if a person was arrested and detained in the interest of two objects coming within the purview of Section 2(2) (x), and if it was found that there were grounds only in support of one object but not in support of the other, the arrest and detention would be unlawful.

As regards the vagueness of the grounds supplied to the two petitioners it was argued that, in the first place, they were not vague and as many facts had been given as were necessary for an effective representation by the petitioners; but even if it be considered that they were in some respects vague, the order of detention could not be invalidated on that ground. For that reliance was placed upon the ruling of the Supreme Court in the case of the 'STATE OF BOMBAY v. ATMA RAM SHRIDHAR VAIDYA' (AIR 1951 S. C. 157), quoted above. It was argued that according to the view held in the said case, the vagueness of the grounds did not vitiate the order of detention. It was argued that the cases of different High Courts relied on by the learned counsel for the petitioners were under the different Public Safety Acts of various States and were decided on the particular wordings of those Acts. Those Acts provided that besides the grounds, particulars should also be given. Under Article 22(5) of the Constitution of India, as well as Section 7 of the Act, it is necessary only to furnish the grounds and not particulars. Grounds are not necessarily the facts themselves, but mostly they are themselves deductions of facts from facts. From the materials placed before the District Magistrate, which this Court is not authorised to see on an application for habeas corpus, the District Magistrate made certain deductions of facts which are given in the grounds, and he was within his powers only to furnish those grounds to the petitioners and not to disclose to them any other facts.

It was argued, however, that if the petitioners thought that the grounds were vague and were not precise and full, there was no bar to their requesting the detaining authority to furnish them with further particulars so as to enable them to make an effective representation. Such a request was never made by the petitioners and they cannot be heard to say so long as the grounds furnished have relevancy to the objects mentioned in the detention order, that they are vague and do not give them full particulars in order to make effective representation. It was further argued that even without any request from the detenus, the detaining authority might itself furnish particulars to the petitioners not making out any additional grounds but supporting the grounds already furnished.

It was argued that the action of the District Magistrate was not mala fide. The allegation about mala fides has been denied on oath by the District Magistrate in both the cases in his written statement, and he has also affirmed that he made the order in the case of the first petitioner at Jhunjhunu, and that he also issued the order of detention in the case of the second petitioner which was served on him. Under these circumstances, this Court has no material to hold that the action of the District Magistrate was mala fide, the burden of proving which lay heavily upon the petitioners.

(10) I have considered the arguments of learned counsel on both the sides in both the cases. It cannot be denied that the rulings of the various High Courts referred to above cited on behalf of the petitioners, were based on the

particular phraseology of the Public Safety Act or Maintenance of Public Order Acts passed by the different States before the Constitution of India came into force. Those Acts provided that besides grounds, particulars should also be supplied to the detenus. Take for instance, the wordings of Section 5 of the U. P. Maintenance of Public Order (Temporary) Act of 1947, on which the ruling reported in 'DURGADAS v. REX', AIR 1949 All 148 is based. The said section is as follows:

> "As soon as may be after an order in respect of any person is made under clause (a) of sub-section (1) of S. 3, the officer or authority making the order shall communicate to the person affected thereby the grounds on which the order against him has been made and such other particulars as may in the opinion of such officer or authority, be sufficient to enable him to make a representation against the order and such person may at any time thereafter make a representation in writing to such officer or authority against the order. It shall be the duty of such officer or authority to inform such person of his right of making such representation and to afford him the earliest practicable opportunity of doing so. If the Government is satisfied on considering the representation made, that it is no longer necessary to maintain the order, the order made under S. 3 shall be cancelled."

It is therefore clear that the said section requires not only grounds but particulars also to be supplied, which should not be vague, indefinite or incomplete, and must convey sufficient information to the detenu to enable him to make a representation that the detaining authority was wrong in its belief that his detention was necessary in the interest of public safety etc.

Similarly, in the Bihar Maintenance of Public Order Act of 1947, it was provided in Section 4 that the detenu shall be served with the grounds on which the order of detention has been made against him and such other particulars as are in the opinion of such authority sufficient to enable him to make, if he wishes a representation against the order. The ruling reported in 'NEK MOHAMMAD v. PROVINCE OF BIHAR', AIR 1949 Pat 1, referred to above, is based upon the wordings of the Bihar Act. No assistance can, therefore be derived from these rulings as none of them is based upon the wordings of Section 7 of the Act or Article 22(5) of the Constitution of India. It was observed by his Lordship Patanjali Sastri J. in the case of 'STATE OF BOMBAY v. ATMA RAM', AIR 1951 S C 157, with respect to the rulings based on different Public Safety and Maintenance of Public Order Acts of various States passed before the Constitution of India came into force, that such decisions turned on the provisions of various provincial Public Safety Acts which were passed before the commencement of the Constitution and which in most cases specifically provided for the communication of particulars.

Those decisions were of no assistance as neither in Article 22 nor in the Act is there any express provision that particulars of the grounds of detention should be given to the person detained. Looking to the wordings of Article 22 of the Constitution of India and Section 7 of the Act, it was, therefore, not necessary that any particulars should have been given by the detaining authority in the grounds furnished to the petitioners. Article 22(5) of the Constitution of India uses the word "grounds" only and no mention is made therein of any particulars. Similarly Section 7 of the Act uses the word "grounds" only and does not speak of the furnishing of any particulars to the detenu. Grounds, as observed by his Lordship Kania C. J. in the majority judgment in the case of the 'STATE OF BOMBAY v. ATMA RAM', which form the basis of satisfaction when formulated are bound to contain certain facts, but mostly they are themselves deductions of facts from facts. It was further observed that simply because the grounds are such that no answer can be given to them excepting a simple denial, it cannot be said that the grounds are vague. Of course, it is desirable that the detaining authority should give the information with reasonable details to the detenu, but when it is not so given and only the grounds for the order are given, it cannot be said that the provisions of either Article 22 of the Constitution of India or of Section 7 of the Act are not complied with. An order of detention cannot, therefore, be vacated simply on that ground so long as the grounds furnished are not irrelevant to the objects mentioned in Section 3 of the Act. His Lordship has held that it is open to a detenu to ask the detaining authority for further particulars if he thinks that he is not in a position to make an effective representation on the grounds supplied to him, or the Government itself might at a later date furnish such particulars, but it is not incumbent upon the detaining authority to furnish all sorts of particulars in its possession, besides the grounds having a bearing on the objects which satisfied the detaining authority that a particular person should be detained.

I am, therefore, not impressed by the argument of the learned counsel for the petitioners that because the names of Bhomias with whom the petitioners are said to be associated, or the names of the members of the alleged committee of Bhomias, or the dates and places of certain events, mentioned in the grounds are not given, the grounds are bad, and the order of detention based thereon cannot be justified. As regards the truth of the grounds, I am afraid, it is not open to me to go into them unless I record a finding that the action of the District Magistrate was mala fide. There is the counter affidavit of the District Magistrate in reply to the affidavit filed by the petitioners that his action was bona fide, and in good faith and not mala fide. The burden of proving the mala fides of the detaining authority lies heavily on the petitioner and under the circumstances by their mere affidavits which have been answered by the counter affidavit of the District Magistrate, it cannot be said that they have established a case of mala fides. I cannot, therefore, go into the question of the falsity or truth of the grounds given. It is also not permissible for me to see whether the grounds were sufficient for the satisfaction of the District Magistrate that the detention of the two petitioners was necessary in the interest of the two objects mentioned in their orders of detention. All that I am authorised to see is whether the grounds bear any relevancy to the two objects mentioned in the detention orders. It has been held over and over again by different High Courts in India that under Section 491 of the Code of Criminal Procedure,

which provides a remedy in the nature of habeas corpus that unless mala fides are proved, a Court on a petition under Section 491 cannot go into such questions. This view is based on the leading English case of 'LIVERSIDGE v. ANDERSON', (1942) A. C. 206 in which it has been held that where the detaining authority recites that he has reasonable cause to believe a person to be of hostile associations and that by reason thereof it is necessary to exercise control over him and directs that, that person be detained, a court of law cannot inquire whether in fact the detaining authority had reasonable grounds for his belief. The matter is one for the executive discretion of the detaining authority. It was held also in the case of 'A. K. GOPALAN v. STATE OF MADRAS', AIR 1950 S C 27, that the satisfaction of the detaining authority being subjective, the court cannot arrogate to itself the power of examining the sufficiency or otherwise of the grounds. Further, in the case of 'STATE OF BOMBAY v. ATMA RAM', AIR 1951 S C 157, it was observed in the majority judgment by his Lordship Kania C. J. that so long as there is some connection, that is, the ground by itself is not so convincingly irrelevant and incapable of bringing about satisfaction in any rational person, the question whether such ground can give rise to the satisfaction required for making the order is outside the scope of the inquiry of the Court. It was held in 'MACHINDAR SHIVAJI v. KING', AIR 1950 F C 129, that

"the responsibility for making a detention order rests on the provincial executive, as they alone are entrusted with the duty of maintaining public peace, and it would be a serious derogation from that responsibility if the Court were to substitute its judgment for the satisfaction of the executive authority, and, to that end, undertake an investigation of the sufficiency of the materials on which such satisfaction was grounded."

(11) The only thing, therefore that I have to consider is whether the District Magistrate can be said from the grounds furnished to the petitioners to have had mental satisfaction that it was necessary to detain them with a view to preventing them from acting in any manner prejudicial to the security of the State and the maintenance of the public order, which objects have been mentioned in their detention orders. For this, it would be necessary to give the grounds furnished to both the petitioners in detail. They are as follows:

" 1. That as an influential landlord of Mandawa he has been actively associated with the resistance movement of Bhomias of Udaipurwati over the issue of the grain produce rents payable to them by the cultivators;

2. That in company of Shri Alamsingh and Barisal Singh of Jhajar and two others he waited on deputation before the authorities at Jaipur;

3. That on 19th March 1952 he called a meeting of the Bhomias in camera at Udaipur and formed a committee of 36 Bhomias who were directed to report to him day to day developments affecting the Bhomias resistance movement in Udaipurwati;

4. That he instigated the Bhomias not to accept the grain rent at the rate fixed by the Government of Rajasthan by legislation and thereby incited them to violence;

5. That as a result of his instigation, the Bhomias of Jhajhar resorted to violence against the tenants on 17th April 1952 at Jhajhar culminating in a riot;

6. That he contacted the leading Bhomias of Udaipurwati at Nawalgarh about the 24th April 1952 and instructed them that if Government insisted on the sixth of the produce as rent they should also insist on one sixth of the cash crop such as tobacco, chillies, dhania, garlic, onion etc.;

7. That on 10th May 1952 the feelings were very tense in village Chanwara but due to the timely intervention of the local police the situation was narrowly saved. The Bhomias then contacted him for necessary instructions. Extensive patrolling by the police was made in the ilaqa;

8. That he has been in active association with the Bhomias of Udaipurwati, particularly, the Bhomias of Deeppura Ponk and Ghuda who are bent upon violence;

9. That on 13th May 1952 at Chanwara Sri Karniram, Advocate, and Shri Ramdev Singh, Congress workers, who had come to settle the dispute between the Bhomias and the tenants and who were staying at Sedu Gujar ki Dhani were murdered in cold blood. It is reported that at about 12 noon some Bhomias came to this Dhani and after seeing where Shri Karniram and Shri Ramdeo Singh were sitting quietly went away and informed other conspirators who were standing outside closeby. At about 3 o'clock in the noon the Bhomias numbering about 40 came and entered inside the Chhapar where Shri Karniram and Ramdevsingh were resting. Four of them fired shots simultaneously killing Shri Karniram and Shri Ramdeo Singh instantaneously.

10. That the Bhomias of Udaipurwati are still continuing resistance on the question of grain produce rents and there is danger that if he is allowed to remain free there would be more wide-spread violence."

(12) Grounds to the second petitioner.

" 1. That as an influential leader of Bhomias he has been actively associated with resistance movement of Bhomias of Udaipurwati over the issue of the grain produce rents payable to them by the cultivators.

2. That he has been instigating the Bhomias of Udaipurwati particularly of Chirana and Jhajhar to eject the tenants unlawfully & to use force and violence in case of resistance.

3. That as a result of his instigations the Bhomias of Chirana resorted to violence against the tenants on 6-3-52 at Chirana culminating in a riot.

4. That on 19th March, 1952 a meeting of the Bhomias was called in camera by Shri Devi Singh of Mandawa who formed a committee of 36 Bhomias who were directed to report to him day to day developments affecting the Bhomias resistance movement in Udaipurwati. That you are a member of the Committee and you have been actively and secretly assisting unlawful aim.

5. That he instigated the Bhomias not to accept the grain rent at the rate fixed by the Government of Rajasthan by legislation and thereby incited them to violence;

6. That he contacted the leading Bhomias of Udaipurwati at Nawalgarh about the 24th of April 1952 and instructed them that if Government insisted on one sixth of the produce as rent they should also insist on one sixth of the cash crop such as tobacco, chillies, dhania, garlic, onion etc.;

7. That on 10th May 1952 the feelings were very tense in village Chanwara but due to the timely intervention of the local police the situation was narrowly saved. The Bhomias then contacted him for necessary instructions. Extensive patrolling by the police was made in the Ilaqa.

8. That on 13th May 1952 at Chanwara Shri Karniram Advocate and Shri Ramdev Singh, Congress workers, who had come to settle the dispute between the Bhomias and the tenants and who were staying at Sedu Gujar-ki-Dhani were murdered in cold blood.

9. That the Bhomias of Udaipurwati are still continuing resistance on the question of grain produce rents and there is a danger that if he allowed to remain free there would be more widespread violence."

(13) It has been conceded by the learned counsel for the State that none of the grounds has any bearing on the question of security of State. The District Magistrate, however, when he made the orders in the two cases, made it under a belief that the detention of both the petitioners was necessary with a view to preventing them from acting in any manner prejudicial not only to the maintenance of public order but also to the security of the State. In paragraphs 24 and 26 of the reply in the case of the first petitioner and paragraphs 17 and 20 in the case of the second petitioner, it is said that the acts of the petitioners were unlawful and dangerous to the security of the State and maintenance of public order in the State of Rajasthan. Both these replies have been signed and verified by Mr. B. N. Tankha, the District Magistrate of Jhunjhunu, who is responsible for the issuing of the order of detention in question and they make it clear that he thought that the facts furnished to him necessitated detention of both the petitioners in the interest of security of State as well as the maintenance of public order. It has been conceded, as noted above, by the learned counsel for the respondent himself that the grounds furnished to both the petitioners do not show that they were acting in any manner prejudicial to the security of the State.

What operated on the mind of the District Magistrate at the time of issuing orders of detention in the two cases was not only that it was in the interest of the maintenance of public order that the petitioners should be detained, but also that it was in the interest of the security of State. It cannot be said whether the District Magistrate would have ordered detention of the two petitioners if he were only satisfied that their acts were prejudicial only to the maintenance of public order. Under the constitution of India, it has been guaranteed by Article 21 that no person shall be deprived of his life or personal liberty except according to procedure established by law. It has been provided by Section 3 of the Act that a person can be deprived of his liberty if the Central Government or the State Government or any other detaining authority to whom the powers of detention have been delegated by either of the two Governments is satisfied with respect to him, inter alia, that with a view to preventing him from acting in any manner prejudicial to the security of State or the maintenance of public order it is necessary so to do.

The term "satisfied" in this context has been held in the case of 'LIVERSIDGE v. ANDERSON', (1942) A.C. 206 in which a provision similar to section 3 of the Act was under consideration, to mean "reasonably satisfied". From the grounds it cannot be said that the District Magistrate had a reasonable satisfaction that any of the two petitioners was acting in any manner prejudicial to the security of the State. It has been conceded by the learned counsel for the respondent himself, as stated above, that the grounds have no bearing upon this object. I am, therefore, of opinion that the learned District Magistrate did not apply his mind to the grounds at all with a view to satisfy himself whether they had any bearing upon the security of the State or the maintenance of public order or any other object mentioned in Section 3 of the Act. It appears as if he had some ready-made copies in his office with the words of Section 3(1) (a) (ii) of the Act, and without applying his mind whether the material furnished to him bore any relation to the security of State or the maintenance of public order or for the matter of that of any other object provided by Section 3 he issued the order of detention against the petitioners. Of course, as has been said above, it is not permissible for this Court to see whether the grounds given are true or sufficient. It is however, certainly permissible for it to be satisfied whether the detaining authority was reasonably satisfied that the material supplied to him showed that an intended detenu was acting in any manner prejudicial to one or more of the objects given in Section 3. It is not permissible to a detaining authority to issue an order of detention mechanically incorporating the words of Section 3. It is necessary for it to issue such order after mental satisfaction. This does not appear to have been done in the present case. In the case of 'KESHAV TALPADE v. EMPEROR', (A.I.R. 1943 F.C.1), quoted above, the order of detention of the Government of Bombay was in these terms:

"Whereas the Government of Bombay is satisfied that with a view to preventing the said Keshav Talpade from acting in a manner prejudicial to the defence of British India, the public safety, the maintenance of public order and the efficient prosecution of the war, it is necessary to make the order of detention against him."

It was observed by his Lordship Gwyer C.J., who delivered the unanimous judgment:

"This reads like a mere mechanical recital of the language of R. 26..... The order does nothing to remove the apprehension we have already expressed that in many cases the persons in whom this grave power is vested may have had no opportunity of applying their minds to the facts of every case which comes before them."

From a reading of the order of detention in the case of the first petitioner (order of detention in the case of the second petitioner has not been filed by him as he swears in his affidavit, not contradicted by any affidavit by the opposite party, that it was not delivered to him, nor has it been filed by the respondent) and the grounds and reply by the respondent in both the cases, as well as the admission of the learned counsel for the respondent at the bar that none of the grounds have any bearing on the question of

security of State, I am of opinion that the orders in the present case were not the results of mental satisfaction of the District Magistrate on the consideration of the materials supplied to him, but the orders were made like a routine order. In grave cases of detention without trial, it would not do to pass routine orders, but the detaining authority should carefully consider the materials before it, and then form its opinion whether it warrants order of detention for the fulfilment of any of the objects given in Section 3. In the same ruling of the Federal Court, which I have just cited, their Lordships observed that:

"If a detaining authority give four reasons for detaining a man, without distinguishing between them, and any two or three of the reasons are held to be bad, it can never be certain to what extent the bad reasons operated on the mind of the authority or whether the detention order would have been made at all if only one or two good reasons had been before them."

Of course, in that case one of the reasons for decision was that rule 26 of the Defence of India Rules was 'ultra vires' the provisions of section 2 (2) (x) of the Defence of India Act, but it was also argued on behalf of the detenu, that some of the reasons for which he was detained fell outside the purview of section 2(2)(X). Their Lordships had, therefore, to consider whether, granting that only some of the reasons given in the order of detention were good, the detention order could be upheld. It was held that it could not be upheld.

I see no difference in principle between a case in which some of the reasons for detention are warranted by law and some are not and another in which all the reasons of detention are warranted by law but for only some of them the detaining authority had grounds while for other it had none. In both the cases when orders of detention are made for several reasons without distinguishing between them, there is a reasonable doubt as to whether the detaining authority was reasonably satisfied that the materials placed before it were sufficient for making a detention order, because it cannot be said which of the reasons principally influenced the detaining authority in making the detention order. In the present case also two reasons are given for the detention of the petitioners that is the maintenance of the security of State as also of the Public Order, but it cannot be said to what extent the consideration that the detention of the petitioners was in the interest of the security of the State influenced the District Magistrate in detaining the petitioners. It cannot be said whether if the District Magistrate had only been satisfied that the materials showed that the petitioners were acting prejudicially to the maintenance of public order, he would have made the order of detention of the petitioners. It is necessary for the detaining authority to examine the materials before it, and then to form a clear opinion as to whether it was necessary to make an order of detention in the interest of one or the other object given in Section 3 of the Act. It is not permissible to recite all, or more than one objects given in Section 3 in the order of detention, and when it is shown by the grounds that they have no bearing upon some of those objects, to fall back upon the argument that they have at least bearing upon one or more of those objects. This argument, I regret to say, is only an argument in despair. It does not take note of the fact that it is necessary for the detaining authority to apply its mind before making an order of detention to the question as to which of the acts alleged against the intended detenu have bearing on a particular object for which he is going to be detained.

(14) For the reasons given above, I am unable to maintain the order of detention of the two petitioners. Both the applications are allowed, and it is ordered that they shall be released at once, if not required in connection with any other case.

A/R.G.D. Applications allowed.

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WANCHOO C. J. AND BAPNA J.

Rajmal and another Applicants v. Mt. Pepkanwar and others, Opposite Party.

Civ. Review (I.K.) No. 4 of 1950, D/- 9-4-1952.

(a) Civil P.C. (1908), O. 47 R. 2 — "Disposed of" — Meaning of — Abrogation of Rule by Ordinance 40 (XL) of 1949 — Review of order of Ijlas-i-Khas — No notice issued — Disposal by High Court — (Rajasthan Appeals and Petitions (Discontinuance) Ordinance (40 (XL) of 1949), (as amended by Ordinance 12 (XII) of 1950), Ss. 3 and 4).

The words "disposed of" in O. 47 R. 2 obviously mean disposal on the merits. But S. 4 of Ordinance 40 (XL) of 1949 does not mean that the disposal in every case shall be on merits; it only means that the disposal shall be according to law. Further, in view of S. 3 of the Ordinance, it cannot be said that S. 4 has abrogated the provisions of O. 47 R. 2. (Para 4)

Where, therefore, an application for review of an order of the Islas-i-Khas remained pending and no notice was issued on this application by His Highness before Ordinance 40 (XL) of 1949 came into force,

Held, that the High Court, as the successor to Ijlas-i-Khas, could not dispose of the application as no notice was issued. M. C. No. 7 of 1950 decided on 8-2-1952 explained and applied. (Paras 4 & 5)

Anno: C.P.C. O. 47 R. 2 N. 2.

(b) Rajasthan Ordinance (12 (XII) of 1950) — Judgment of Ijlas-i-Khas cannot become judgment of High Court.

It is by virtue of the special provisions of Ordinance No. XII (12) of 1950 that the High Court hears appeals, petitions etc. which were pending before the Ijlas-i-Khas, and by no amount of legal fiction can the judgment of the Ijlas-i-Khas become the judgment of the High Court. (Para 6)

Chandmal, for Applicants; Amritraj, for Opposite Party.

REFERENCE ..... /Paras

('50) Harlal v. Subh Karan, Misc. Case No. 7 of 1950: (AIR 1952 Raj 134) 3, 4, 5, 6

WANCHOO. C. J.: This is an application by Rajmal and Manmal for review of judgment of the Ijlas-i-Khas of the former State of Jodhpur and has come up to us for disposal in view of the provisions of Ordinance No. XL (40) of 1949 and Ordinance No. XII (12) of 1950.

(2) The application was made in the following circumstances. Rajmal and Manmal were decree-holders and put their decree in execution in the Court of the District Judge. While the execution proceedings were pending, the estate of the judgment-debtor Jalam Singh, who is now represented by his legal representatives, was taken over by the Court of Wards. The usual notice was then issued by the Court of Wards inviting claims against the estate of the judgment-debtor in the prescribed manner. No claim was said to have been presented by the decree-holders though the District Judge had sent information to the Court of Wards about the decree in execution.

Ultimately the estate was discharged from the superintendence of the Court of Wards and thereupon a fresh application for execution of the decree was made by the decree-holders. The question then arose whether the debt due under the decree had been discharged in view of S. 34 of the Marwar Court of Wards Act which provided that every claim of the nature specified in S. 32 against a ward or his property which had not been notified under that section shall be deemed, for all purposes and on all occasions, to have been duly discharged.

The District Judge decided this question in favour of the decree-holder. The High Court of the former State of Jodhpur in appeal allowed the appeal and decided the matter in favour of the judgment-debtor. Thereupon there was an appeal to the Ijlas-i-Khas and the Members of the Judicial Committee advised His Highness the Maharaja Sahib Bahadur that the appeal be dismissed and this recommendation was approved by His Highness on the 11th of April, 1948. Thereafter the present application was made for review of the order of His Highness on the 3rd of August 1948.

This application remained pending and no notice was issued on this application by His Highness till the integration on the 7th of April 1949. All petitions which were pending in the Ijlas-i-Khas, came to this Court for disposal under the provisions of the two Ordinances which we have already mentioned and notice was issued by a Bench of this Court on 21st of November, 1950.

(3) A preliminary objection has been taken on behalf of the respondents opposite party that as no notice had been issued by His Highness the Maharaja of Jodhpur before Ordinance No. XL (40) of 1949 came into force, Order XLVII, Rule 2 applied to this matter and we cannot dispose of the petition in view of the provisions of Order XLVII, Rule 2. A similar point arose before us in — 'Harlal v. Subh Karan', Misc. Case No. 7 of 1950 which was decided on the 8th of February 1952. In that case, after a review of the law, we came to the conclusion that we could not dispose of the petition as notice had not been issued by His Highness the Maharaja of Jodhpur and Order XLVII, Rule 2 stood in the way of our hearing the petition on the merits. In that judgment, we used the following words:

"In any case, the words of Order XLVII, R. 2 are quite clear and, therefore, this Court as the successor to Ijlas-i-Khas cannot dispose of this application as notice was not issued by the Ijlas-i-Khas."

(4) Learned counsel for applicant urges that under S. 4 of Ordinance No. XL (40) of 1949 read with Ordinance No. XII (12) of 1950, it has been specifically provided that this Court shall hear, determine and dispose of any appeals, revisions, references or petitions pending before any Ijlas-i-Khas if they relate to judicial matters. It is, therefore, urged that when we said in — 'Harlal's case', (Mis. Case No. 7 of 1950) that we could not dispose of the application, we had overlooked the specific provisions of S. 4 of Ordinance No. XL (40) of 1949 and that what we said in — 'Harlal's case', was in direct contradiction to these provisions.

It is enough to point out that we had not overlooked the provisions of Ordinance No. XL (40) of 1949 and that the so-called contradiction is only apparent and not real. The words "disposed of" when used in Order XLVII, R. 2 obviously mean disposal on the merits and this is what we meant by those words in the portion quoted above from — 'Harlal's case. Section 4 certainly provides that every appeal, revision, reference or petition which comes to this Court by virtue of the provisions of Ordinance No. XII (12) of 1950 shall be heard, determined and disposed of by this Court. That does not, however, mean that the disposal in every case shall be on the merits. It only means that the disposal shall be according to law.

Learned counsel for applicant urges that S. 4 of Ordinance No. XL (40) of 1949 in authorising the Court to hear, determine and dispose of petitions like the present, abrogated the provisions of Order XLVII, Rule 2. We are not prepared to accept this argument and need only point out to Sec. 5 of the Ordinance which specifically provides that nothing in this Ordinance shall be deemed to affect any express and specific provision to the contrary in or in pursuance of any law made by a competent legislative authority of the United State of Rajasthan.

Under S. 3 of Ordinance No. I (1) of 1949, all the laws in force in any Covenanting State immediately before the commencement of that Ordinance in that State shall, until altered or repealed or amended by a competent Legislature or other competent authority, continue in force in that State subject to certain modifications with which we are not concerned. Therefore, the provisions of the Marwar Civil Procedure Code remained applicable as before the integration and there is no question of any abrogation of Order XLVII, Rule 2 by implication by Ordinance No. XL (40) of 1949.

(5) There is no force, therefore, in this argument and — 'Harlal's case', (Mis. Case No. 7 of 1950) applies with full force to the facts of the present case.

(6) The next point that is urged is that a review is really a petition before the Court which passed the decree for further hearing and that as this Court has been authorized under Ordinance No. XII (12) of 1950 to hear all petitions including petitions of review pending before the Ijlas-i-Khas, the judgment of the Ijlas-i-Khas must be deemed by a legal fiction to be a judgment of this High Court and, therefore, the restriction imposed under Order XLVII, Rule 2 does not apply.

The argument is certainly ingenious but we see no substance in it. By no amount of legal fiction can the judgment of the Ijlas-i-Khas become the judgment of this High Court. It is by virtue of the special provisions of Ordinance No. XII (12) of 1950 that this Court is hearing appeals, petitions etc., which were pending before the Ijlas-i-Khas. In view, therefore, of the

decision in — 'Harlal's case', Misc. Case No. 7 of 1950, we are of opinion that Order XLVII, rule 2 applies and we cannot, therefore, dispose of this review on the merits. It is hereby dismissed; but under the peculiar circumstances of this case, we pass no order as to costs of this Court.

A/V.R.B. Order accordingly.

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(JODHPUR BENCH)

WANCHOO C. J. AND BAPNA J.

Rajasthan State v. Nathmal and another, Non-Petitioners.

Civil Certificate Case No. 4 of 1952, D/- 13-5-1952.

(a) Limitation Act (1908), S. 12(2) — Order under Art. 226 of Constitution — Leave to appeal to Supreme Court — Time requisite for obtaining judgment can be excluded — (Constitution of India, Arts. 226, 132 and 133).

In cases covered by Art. 226, judgment itself is the order to be appealed from and the time requisite for obtaining the copy of the same has to be excluded in computing the period of limitation for leave to appeal to the Supreme Court, from the order. AIR 1935 All. 99 and AIR 1925 Mad. 1241, Ref. (Para 7)

Anno: Lim. Act S. 12 N. 28.

(b) Civil P.C. (1908), O. 3 Rr. 1 and 4 — Presentation of application for leave to appeal to Supreme Court by clerk of Advocate General on behalf of Govt. is not according to law — (Constitution of India, Arts. 132 and 133).

The act of presentation of an application for leave to appeal to Supreme Court should be done by the party in person, or by his recognised agent or pleader. The Government Advocate naturally represents the State, but his clerk can neither be called the recognised agent of the State, nor a pleader acting for the State. The presentation, therefore, by the clerk is not according to law. (Para 8)

(Defect was condoned because it was found that a practice had prevailed of presenting petition on behalf of Govt. by clerk of the Advocate General. It was also held that this practice in future must stop). (Para 9)

Anno: Civil P.C. O. 3 R. 1 N. 3, O. 3 R. 4 N. 9 Pt. 3.

L. N. Mutha, for the State; Hastimal, for Non-petitioners.

REFERENCES: Courtwar/Chronological/ Paras
('35) AIR 1935 All 99: (57 All 455) 6
('25) AIR 1925 Mad. 1241: (48 Mad. 939) 6

WANCHOO C. J.: This is an application by the State of Rajasthan for leave to appeal to the Supreme Court under Articles 132 and 133 of the Constitution of India.

(2) The application has been opposed on behalf of the opposite party on two technical grounds, namely,

1. that it is barred by limitation, and
2. that it has not been properly presented.

Learned counsel for the opposite party agrees that but for these two technical matters, the case is a fit one for granting leave under Articles 132 (1) and 133 (1)(c) of the Constitution.

(3) The case arose on an application under Art. 226 of the Constitution by Nathmal and Mithalal. That application was allowed on the 19th October, 1951. The present application was filed on the 30th of January, 1952. It is contended on behalf of the opposite party that the application is barred by limitation for two reasons

1. that the applicant is not entitled to any deduction of time taken in obtaining a copy of the judgment to be appealed from under section 12 of the Limitation Act, and
2. that, in any case, Mithalal having been brought on the record on an application, dated 5th March, 1952, the application was barred against him.

(4) Articles 132 and 133 of the Constitution provide for appeal to the Supreme Court from any judgment, decree or final order of a High Court. The relevant provisions of section 12 of the Limitation Act in this connection are these:

"2. In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded.

3. Where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded."

(5) The contention on behalf of the opposite party is that this case is covered by Section 12 (2), and the time taken in obtaining a copy of the judgment cannot be excluded. We have already pointed out that the judgment was delivered on the 19th October, 1951. Application for copy was made on the 15th January, 1952, and copy was delivered on the 30th January, 1952. The application for leave to appeal was presented on the same day, namely, the 30th of January, 1952. Now if the period spent in obtaining the copy is excluded, the application would be within time, on the 30th of January. The question is whether this period can be excluded under sections 12 (2) or 12 (3) of the Limitation Act.

(6) There is difference of opinion among the various High Courts as to whether the time taken in obtaining copy of the judgment can be excluded in cases of application for leave to appeal. Some High Courts, as for example Allahabad, have held that as sub-section (2) expressly contains the words 'application for leave to appeal', while sub-section (3) does not, the time spent in obtaining copy of the judgment cannot be allowed in cases of applications for leave. Vide — 'Gulabchand v. Peary Lal', A.I.R. 1935 All. 99. Other High Courts have held that time taken in obtaining a copy of the judgment can be allowed under sub-section (3) Vide — 'In re, Secy. of State', A.I.R. 1925 Mad. 1241. We do not think it necessary to decide in the present case whether time for obtaining a copy of the judgment can be excluded in a case where there is a judgment as well as a decree following it. The present is a case, in our opinion, where there is no decree following the judgment of this Court. The application of the opposite party was under Art. 226 of the Constitution of India, and was disposed of by the judgment dated the 19th October, 1951. Both Articles 132 and 133 allow appeals from a judgment, decree or final order of a High Court. It may be mentioned that in section 109 of the

Code of Civil Procedure, the words used were 'decree' or 'final order', and the word 'judgment' has been added by Articles 132 and 133 of the Constitution.

It seems to us that the word 'judgment' has been added to provide for cases coming to the High Court under Article 226 of the Constitution of India. In cases under Article 226, there is no decree. The application is disposed of by a judgment of the court, and it is that judgment, in our opinion, which is liable to appeal under Articles 132 and 133. Section 12 (2) of the Limitation Act allows exclusion of time for copy of a decree, sentence or order. The word 'decree' is well understood, while the word 'sentence' refers to criminal proceedings. The word 'order' used in sub-section (2), in our opinion, must cover judgments in cases under Article 226 of the Constitution of India, otherwise it is difficult to understand what is the order a copy of which has to be filed in cases under Article 226. We are, therefore, of opinion that in cases covered by Art. 226, the judgment itself is the order to be appealed from, and the time taken in obtaining copy of the judgment has to be excluded. Once the time taken in obtaining the copy of the judgment is excluded, it is admitted that the application for leave to appeal was filed within time.

(7) As to the contention that, in any case, the application was barred by time as against Mithalal, it is enough to say that we accept the explanation that the name of Mithalal was left out by oversight from the application which was filed on the 30th January, 1952. We, therefore, condone the delay, under the circumstances, under section 5 of the Limitation Act.

(8) The next point that is urged that the application was not presented properly in so far as though it was signed by the Government Advocate, it was presented before the Registrar by his clerk and not by the Government Advocate himself. Under O. 3, Rule 1, C. P. C., any act in any court required or authorised by law to be made or done by a party may, except where otherwise expressly provided, be made or done by the party in person, or by his recognised agent, or by a pleader on his behalf. In this case, the act that was done was the act of presentation of the application for leave to appeal to Supreme Court. This act should have been done by the party in person, or by his recognised agent, or pleader. The Government Advocate naturally represents the State, but his clerk can neither be called the recognised agent of the State, nor a pleader acting for the State. The presentation, therefore, was not according to law in this case.

(9) It appears however that there has been a practice in this Court and in the High Court of the former State of Jodhpur that Government Advocate's clerk presents applications on behalf of the Government Advocate. That this is so also appears from the fact that in this very case, the application for amendment of the original application praying for bringing Mithalal on the record was also presented by Moolraj, clerk of the Government Advocate, and not by the Government Advocate himself. We are of opinion that this practice, unsupported as it is by any rule, must stop in future. At the same time, it would, in our opinion, be unfair to Government that it should suffer because of a wrong practice having grown up. The result of the improper presentation is that the application would not be deemed to have been presented on the 30th of January when it was actually presented. It may be taken to have been presented on the 3rd March, 1952, when the Government Advocate appeared in support of it at the preliminary hearing. Considering the peculiar circumstances of this case, we extend the time for making the presentation up to the 3rd of March, 1952, (on which date, at any rate, the application must be taken to have been properly presented.) under section 5 of the Limitation Act.

(10) We, therefore, reject the technical objections raised on behalf of the opposite party, and order that a certificate be granted as prayed under Arts. 132 (1) and 133 (1) (c) of the Constitution. In view of the technical defects in the case, we order parties to bear their own costs of the present application.

A/R.G.D. Certificate granted.

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(JODHPUR BENCH)

WANCHOO C. J. AND BAPNA J.

Chandanmal, Appellant v. Phool Chand, Respondent.

First Appeal No. 17 of 1949, D/- 5-5-1952.

(a) Civil P.C. (1908), O. 20 R. 14 — Decree for pre-emption passed conditional on payment into Court of certain sum within specified time — In default suit to stand dismissed — Plaintiff not paying amount within time allowed, but filing appeal after expiration of such time — Suit held stood dismissed by reason of plaintiff's failure to deposit amount within time allowed — Appeal held must be deemed to be against dismissal of suit and as such maintainable. 13 All. 189 (F.B.), Foll. (Para 11)

Anno: C.P.C. O. 20 R. 14 N. 6, 7 and 16.

(b) Court-fees Act (1870), S. 10 — Court passing decree in plaintiff's favour conditional on his paying Court-fee within certain time — Suit to stand dismissed if Court-fee was not paid within that time — Plaintiff failing to pay Court-fee within time — Order about making good deficiency in Court-fee held though not correct was not illegal — Order being good and operative suit held stood dismissed. (Para 14)

Anno: C.F. Act S. 10 N. 8.

(c) Civil P.C. (1908), O. 41 R. 2 — New point — Raising of — Leave of Court.

A fresh point, which had not been raised in the grounds of appeal, should not be allowed to be raised after the period of limitation had long expired, and when the appellant had ample time in the period during which the appeal was pending to raise it by way of amendment of the memorandum of appeal. AIR 1921 Lah. 228 and AIR 1946 Nag. 135, Foll. (Paras 16 & 17)

Anno: C.P.C. O. 41 R. 2 N. 4 Pt. 5.

(d) Marwar Law of Pre-emption (1922), Ss. 9 and 10 — Pre-emption suit — Decree passed conditional on payment of certain sum within specified time — Money not deposited within such time — No appeal also filed within such time — Order is in accordance with S. 9 — S. 10 comes into operation and right to pre-empt is lost — Majority view in AIR 1940 Oudh 120 (F.B.), Dissent. (Paras 28 and 31)

Sohannath, for Appellant; Maghraj, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras
('91) 13 All 189 (FB) 11, 29
('38) AIR 1938 All 497: (177 Ind Cas 824) 14
('46) AIR 1946 Oudh 52: (1945 Oudh WN 322) 14
('21) AIR 1921 Lah 228: (67 Ind Cas 44) 16
('46) AIR 1946 Nag 135: (ILR (1946) Nag 353) 16
('21) AIR 1921 Lah 6: (67 Ind Cas 772 FB) 22
('24) AIR 1924 All 218: (46 All 328 FB) 22
('50) 1950 RLW 34 23
('40) AIR 1940 Oudh 120: (16 Luck 1 FB) 24, 29

WANCHOO C. J.: This is an appeal by Chandanmal against the decree of the District Judge of Nagaur in a pre-emption matter.

(2) The appellant and others had brought a suit for pre-emption against Mangilal and other defendants respondents with respect to a house, and wanted to pre-empt it on payment of Rs. 900/- though the sale deed was for Rs. 1,700/-.

(3) The suit was contested by the defendants who claimed that Rs. 1,700/- were actually paid. The defendants also claimed Rs. 5,200/- for improvements made in the house by them after the purchase.

(4) The District Judge decreed the suit and ordered that the defendants shall deliver possession of the house in dispute to the plaintiffs on deposit of Rs. 6,900/-. He further ordered that this sum shall be deposited in court within three months from the date of his judgment, which was 28th of February, 1949. There was deficiency of court-fee also, and the District Judge ordered that the deficiency in court-fee would also be made good within the same period of three months. It was finally ordered that in case of default the suit shall stand dismissed with costs.

(5) An appeal was filed in the High Court of the former State of Jodhpur on the 1st July, 1949, and has come to this Court for disposal.

(6) It is admitted by the appellant that the sum of Rs. 6,900/- was not deposited within the period of three months allowed by the District Judge. It is also admitted that the deficiency in court-fee was not made good within that time.

(7) Three preliminary objections have been raised on behalf of the defendants respondents in this appeal.

(8) It has first been urged that the deposit of Rs. 6,900/- having not been made within the time allowed by the District Judge, and the appeal not having been filed within that time, the appeal is not maintainable.

(9) Secondly, it is urged that the court-fee having been not made good within the time allowed, and no ground of appeal having been taken with respect to deficiency in court-fee, the appeal is not maintainable.

(10) Lastly, it has been urged that in view of sections 9 and 10 of the Law of Pre-emption in Marwar of 1922, the pre-emptors have lost their rights of pre-emption, and the appeal therefore should fail.

(11) So far as the first point is concerned, it may shortly be disposed of. The appeal was within time when it was filed. Even if it be that on the 1st of July, 1949, there was no decree in favour of the plaintiffs, there would still be a decree of the District Judge dismissing the suit on failure of the plaintiffs to comply with the order requiring certain sums to be deposited within three months. The contention for the respondents that there was no decree which could be appealed against is not correct, and the appeal must be deemed to be against the dismissal of the suit.

We may in this connection refer to — 'Kodai Singh v. Jaisri Singh', 13 All. 189 (F.B.), which was a Full Bench decision of five Judges. That was also a suit for pre-emption, and a decree had been passed conditional on payment into court of a certain sum within a specified time with the condition that the suit would stand dismissed if the amount was not paid within the time allowed. The plaintiff, in that case, did not pay the amount within the time allowed, but after the expiration of the term mentioned therein filed an appeal.

It was held by the Full Bench that as the suit stood dismissed by reason of the plaintiff having failed to deposit the sum required within the time allowed the plaintiff could appeal from the decree dismissing the suit, and could raise questions as to the propriety of the first court's findings on the matter of price and the time allowed to him within which to pay the amount into court. The appeal was therefore treated as an appeal from the decree dismissing the suit. The facts in the present case are exactly similar, and we are therefore of opinion that there is no force in this contention on behalf of the respondents.

(12) Coming to the second point about the failure to deposit the deficient court-fee within time, the contention of the respondents is that as there was deficiency in court fee on the plaint, section 6 of the Marwar Court Fees Act, 1941, applied, and the plaint could not even be filed in any court of justice. As such there was no plaint before the court, and therefore the appeal was not competent.

(13) Learned counsel for the appellant, however, relies on section 10 of the Marwar Court Fees Act in this connection. That section provides that if the court sees reason to think that the valuation of the property in a case of this kind is wrongly estimated, the court shall make an investigation into the matter and find the correct valuation. If it is found thereafter that the valuation was less than what it should have been, the court shall require the plaintiff to pay so much additional fee as would have been payable on the correct valuation. In such a case, the suit shall be stayed until additional fee is paid, and if the additional fee is not paid within such time as the court shall fix, the suit shall be dismissed.

It is urged that the court should have followed this procedure, and should have asked the plaintiffs to make good the deficiency in court-fee within a certain time. If they failed to do so, the court could then have dismissed the suit. In this case, however, the court passed a decree in favour of the plaintiffs conditional on their paying the court-fee within a certain time with a penalty that if the court-fee was not paid within that time, the suit shall stand dismissed. As the proper procedure was not followed in this case, it is submitted that the order of the court is wrong.

(14) We do not approve of the form in which the order was passed in this case, and trust that subordinate courts will comply with the procedure laid down in section 10 of the Court Fees Act, but we do not think that there is anything illegal in the order passed by the District Judge In effect the order meant that three months' time was allowed to the plaintiffs

to make good the court-fee, and an order was passed in advance that if the court-fee was not made good within that time, the suit shall stand dismissed. Orders worded in the same terms were considered in — 'Beni Prasad v. Om Prakash', A.I.R. 1938 All. 497, and — 'Sheo Prasad Kaur v. Bhanu Pratap Singh', A.I.R. 1946 Oudh 52, and were not held to be illegal. Therefore, though the form of the order in this case about making good the deficiency in court-fee was not correct the order is not illegal, as there is nothing in law which forbids the passing of such an order. Under these circumstances, the order must be held to be good and operative, and the suit stood dismissed on this ground also viz. that the court-fee was not made good within the time allowed.

(15) As there is no ground of appeal with respect to this matter, it is urged on behalf of the respondents that the appellant should not be heard to challenge that order, and if that order stands, there is no properly stamped plaint before the court, and the appeal must therefore fail.

(16) Learned counsel for the appellant prays that he may be given leave to argue this matter of deficiency in court-fee under O. 41, R. 2 of the Code of Civil Procedure.

This prayer is however being opposed on behalf of the respondents on the ground that a valuable right has arisen to the respondents, and it would not be proper to grant leave now long after the period of limitation has expired to the appellant to raise this question of deficiency in court-fee. Reliance in this connection is placed on — 'Jiwan Shah v. Mt. Fateh Bibi', A.I.R. 1921 Lah. 228, and — 'Birdhichand v. Mt. Kachri Bai', A.I.R. 1946 Nag. 135. It was held in these cases that a fresh point, which had not been raised in the grounds of appeal, should not be allowed to be raised after the period of limitation had long expired, and when the appellant had ample time in the period during which the appeal was pending (in the present case almost three years) to raise it by way of amendment of the memorandum of appeal.

(17) We agree with the above cited cases, and refuse leave to the appellant to raise this fresh ground now almost three years after the period of limitation had expired. We may add that in view of what we are going to say just now on the third point raised on behalf of the respondents, it would be no use granting leave.

(18) The last point, that has been urged, is that in view of sections 9 and 10 of the Law of Pre-emption in Marwar, the right of the plaintiffs to pre-empt the property has been lost. Sections 9 and 10 of the Law of Pre-emption in Marwar read as follows:

"Section 9: 'If the Court finds for the plaintiff, the decree shall specify day on or before which the purchase money shall be paid in Court.'

"Section 10: 'If such purchase money is not paid into the Court before it rises on that day, the decree shall become void, and the plaintiff shall, so far as related to such sale, lose his right of pre-emption over the property to which the decree relates.'"

(19) The contention on behalf of the respondents is that the purchase money should have been deposited by the 28th of May, 1949, and as nothing was deposited by that date, the plaintiffs have lost their right of pre-emption over the property.

(20) This argument is met on behalf of the appellant in two ways. In the first place it is urged that as there was vacation from the 16th of May to the 30th of June, it was not possible for the plaintiffs to deposit the purchase money on the 28th of May. Therefore they had a right to deposit the money on the next re-opening day, namely, the 1st of July. On that day, however, they filed the appeal, and therefore they did not lose the right of pre-emption. In the alternative, it is urged that the period fixed in the decree counts from the date on which the decree of the final Court of appeal is passed, and as the High Court has not yet passed any decree, the time has not yet expired.

(21) So far as the first ground is concerned, it is enough to say that there is no force in it, and that it was possible for the plaintiffs to deposit the purchase money even on the 28th of May 1949, as the civil courts were not closed for all purposes during the vacation of that year. An order was passed by the High Court of the former State of Jodhpur on the 2nd of May, 1949, with respect to the vacation of that year in the Subordinate courts. It was ordered that no civil cases will be taken up except such as were more than one year old on the 1st of May, 1949. The civil courts were therefore not closed completely, and were open for the decisions of cases which were pending for more than one year on the 1st of May, 1949.

It was also ordered that, in order to avoid hardship to the litigant public, the civil courts would entertain plaints and petitions in urgent cases, even during the vacation. This was obviously an urgent case for the time fixed by the court was expiring during the vacation on the 28th of May. The District Judge would, therefore, have accepted the purchase money, even if it was deposited on the 28th of May. Therefore, the contention of the appellant that he could not possibly deposit the money on the 28th of May fails.

(22) Learned counsel for the appellant relies on — 'Himmun v. Fauja', A.I.R. 1921 Lah. 6 (F.B.), and — 'Muhammad Jan v. Shiam Lal', A.I.R. 1924 All. 218 (F.B.). It was held in these cases that where the court is closed on a day when a certain act has to be done, the act can be done on the next re-opening day. These cases, however, have no application to the facts of the present case, because the courts were not completely closed on the 28th of May, and it was open to the plaintiffs to deposit the purchase money on that day. The appellant, therefore, cannot claim that he could have deposited the money up to the 1st of July.

(23) In passing we may refer to another argument viz., that the plaintiffs had been ordered to deposit Rs. 6,900/-, though section 9 of the Law of Pre-emption in Marwar only requires the pre-emptor to deposit the purchase money which was at the best Rs. 1,700/- in this case. Reliance in this connection was placed on — 'Ramchandra v. Jailal', 1950 R.L.W. 34. In that case it was held that the plaintiff had to deposit only the purchase money to save the operation of section 10 of the Law of Pre-emption in Marwar. In the present case, however, the plaintiffs have deposited nothing, not even Rs. 1,700/-, which was held by the court to be the purchase money. Under these circumstances, they cannot take advantage of 'Ramchandra's case'. It must, therefore, be held that the plaintiffs failed to deposit the purchase

money within the time allowed by the District Judge.

(24) Then we come to the alternative argument, namely, that even if the plaintiffs failed to deposit the money within the time allowed by the District Judge, section 10 of the Law of Pre-emption in Marwar does not come into operation, because the time has to be counted from the date of the judgment of this Court. Reliance in this connection is placed on — 'Jai Krishna v. Brijpal Singh', AIR 1940 Oudh 120 (F.B.), where an exactly similar provision in the Oudh Laws Act came to be interpreted. In that case also the plaintiff had failed to deposit the money within the time allowed by the court, and had filed his appeal after the time allowed by the court for depositing the money had expired. The learned Judges by two to one held that the right of pre-emption was not lost when the pre-emptor had not deposited the amount, but had preferred an appeal contesting the amount either before or after the expiry of the time fixed by the trial court, and the appeal had not become infructuous by reason of his failing to deposit the money.

(25) This case certainly supports the appellant, but we must say with all respect that we are not in agreement with the majority decision, and prefer the view of the dissenting Judge. Where the plaintiff has been ordered to deposit the purchase money within a certain time, two contingencies can arise, namely,

1. that he deposits the amount within the time allowed, and
2. that he does not do so.

As regards the first, there is nothing more to be said, as the money has been deposited, and the order has been complied with. The second contingency may again be divided into two parts, namely, (1) that the money has not been deposited and no appeal has been filed, and (2) that the money has not been deposited, but an appeal has been filed. In the first case again there is no trouble. If money has not been deposited and no appeal has been filed, the order of the trial court becomes final, and the right of pre-emption is lost.

(26) The second case may again be subdivided into three parts, namely,

1. the appeal has been filed and decided before the time fixed by the trial court expires,
2. the appeal has been filed before the time fixed by the trial court has expired, but has not been decided when the time expires,
3. the appeal is filed after the time has expired, and naturally therefore it has not been decided before the expiry of the time.

(27) In the first of these cases, there is no difficulty, for the appeal has been decided within the time allowed, and the appellate Court would pass its own order about what further time it allows. In the second case, the appeal has been filed, but has not been decided before the time fixed by the trial court expires. In such a case, we are of opinion that the decree of the trial court is subject to the result of the appeal, and therefore even if the money has not been deposited within the time allowed, the right of pre-emption is not lost till the appeal is decided. Here again the appellate court will obviously extend time if it allows the appeal.

(28) It is the last case which presents some difficulty, and with which we have to deal. In such a case we have really to consider the situation on the day on which the period granted by the trial court expires. If, on that date, there is no appeal, and the money has not been deposited, section 10, in our opinion, comes into play, and the right of pre-emption is lost. We see no difference in principle between a case where an appeal is not filed at all, and the case where an appeal is not filed by the day the time fixed by the trial court expires, for, in either case, section 10 would apply.

If it were not so, it would mean that though on the date the time fixed expired the right of pre-emption was lost, it revived again later on when the appeal was filed subsequently. Further taking the other view would mean that the operation of section 10 would remain in suspense till the period of limitation for appeal has expired. There is, in our opinion, no warrant for holding this, and we have no doubt that if the money has not been deposited within the time fixed by the trial court, and no appeal has been filed by that time, section 10 comes into operation, and the right to pre-empt is lost.

(29) We have read the judgments of the two learned Judges who formed the majority in — 'Jai Krishna's case', AIR 1940 Oudh 120 (F.B.), and find that the arguments advanced by the learned dissenting Judge have not been met in those judgments. The learned Judges, who formed the majority, relied mainly on — 'Kodai Singh's case', 13 All. 189 (F.B.) which we have mentioned above. But if we may say so with respect they failed to notice that there was no law corresponding to section 15 of the Oudh Laws Act (which is similar to section 10 of the Law of Pre-emption in Marwar) in the Province of Agra over which the High Court at Allahabad had jurisdiction.

(30) We are, therefore, of opinion that the purchase money not having been deposited within the time allowed by the trial court, the plaintiffs in this suit lost the right of pre-emption under section 10 of the Law of Pre-emption in Marwar, and the decree became void. As such the present appeal is incompetent because the right having been lost we cannot give any relief to the appellant.

(31) Finally it is urged that the order of the District Judge was not in accordance with section 9 of the Law of Pre-emption in Marwar, and therefore section 10 does not come into play. Section 9 provides that a day would be fixed on or before which the purchase money shall be paid in court. In this case, the learned Judge did not fix a day, but said that the money should be deposited within three months, which, in our opinion, indirectly amounts to fixing a day, namely, the 28th of May 1949, and there is no force in this argument.

(32) The preliminary objections therefore prevail, and the appeal is hereby dismissed as incompetent with costs to the contesting defendants respondents.

B/V.R.B. Appeal dismissed.

A. I. R. 1952 RAJASTHAN 184
(JAIPUR BENCH)

RANAWAT AND SHARMA JJ.

Raghunandanlal and others, Applicants v. State of Rajasthan.

C. Writ No. 67 of 1950, D/- 23-4-1952.

(a) **Administration of Evacuee Property Act (1950), S. 7 — Jurisdiction — Order for delivery of possession of property in possession of mortgagee — Failure to issue notice — Waiver of objection to jurisdiction — Effect — (Civil P.C. (1908), S. 9).**

Where the property of an admittedly Muslim evacuee is under mortgage, it is only the equity of redemption which belongs to the evacuee that vests in the custodian without any notice issued under S. 7 of the Act. The right of the mortgagee being not the property of the evacuee does not so vest in the custodian and he cannot lay hands on that right unless he has reasons to think that it is also the property of the evacuee and he issues the notice under S. 7 and takes the necessary proceedings according to law. Therefore when he takes forcible possession of the property from the mortgagee without a notice under S. 7 his proceedings are without jurisdiction. (Para 2)

The want of jurisdiction in the custodian in such a case being of an inherent nature waiver on the part of the mortgagee cannot confer any jurisdiction on the custodian. (Para 5)

Anno: Civil P.C. S. 9 N. 5.

(b) **Civil P.C. (1908), S. 9 — Jurisdiction of Courts — Judgment without jurisdiction — Effect — Consent cannot confer jurisdiction.**

It is fundamental rule of law that the judgment of a Court without jurisdiction is a nullity. Want of jurisdiction is however distinguishable from an irregularity in the exercise or assumption of it and where the Court has no jurisdiction at all it cannot be conferred by consent. There is however an exception to this that where the Court has no jurisdiction because of the privilege attaching to a party, that party may waive the privilege. 9 All. 191 (P.C.) and 11 Mad. 26 (P.C.) Rel. on.; (1923) 1 Ch. D. 515, (1901) 2 K.B. 380 disting. (Paras 3 & 4)

Anno: Civ. P.C. S. 9 N. 3, 5.

(c) **Constitution of India (1950), Art. 226 — Order without jurisdiction — Consent to order — Petitioner's right to challenge order subsequently — Other remedies — Inadequacy of — Plea inconsistent with allegations in written statement — Tenability — (Administration of Evacuee Property Act (1950), Ss. 7, 26) — (Evidence Act (1872), S. 115).**

The Custodian of evacuee property passed an order for delivery of property in possession of mortgagee, without jurisdiction. The mortgagee did not object to the jurisdiction of the Custodian to pass the order. The Custodian after his order was confirmed in appeal proceeded to take forcible possession and the mortgagee after consenting to deliver possession filed an application under Art. 226 of the Constitution for a writ of certiorari, prohibition or mandamus quashing the order and restraining the Custodian from taking possession of the property.

Held (1) that it was not open to the opposite party, who has stated in his written statement that the petitioner had exhausted all remedies open to him, to object to the application on the ground that the applicant who had the right to file an application in revision under S. 26, Administration of Evacuee Property Act had not exhausted that remedy. (Para 7)

(ii) that the remedy of revision was inadequate in the case as the Custodian General could have no jurisdiction to adjudicate on the rights in revision when the custodian had no jurisdiction. (Para 7)

(iii) that the failure of the petitioner to take objection as to jurisdiction before the Custodian did not prevent him from challenging it in the application for a writ before the High Court. (Para 9)

(iv) that the conduct of the petitioner who gave his consent to deliver possession under force did not raise an estoppel against him and deprive him of the remedy under Art. 226 of the Constitution. (Para 8)

Anno: Civil P.C. App. III, Constn. Ind. Art. 226 N. 8, Evi. Act, S. 115 N. 3(c).

B. B. Sharma, for Applicants; Ram Avtar Gupta, Govt. Advocate, for the State.

REFERENCES: Courtwar/Chronological/ Paras
('85-86) 13 Ind App 134: (9 All 191 PC) 3
('86-87) 14 Ind App 160: (11 Mad 26 PC) 3
('51) C Writ No 66 of 1951, D/- 5-12-1951 (Raj) 9
(1901) 2 KB 380: (70 LJKB 675) 2, 6
(1923) 1 Ch D 515: (92 LJ Ch 345) 2, 6

RANAWAT J.: This is an application under Article 226 of the Constitution of India by Raghunandanlal and three others against an order of the Custodian of Evacuee Property, Rajasthan, dated the 2nd December 1950. It is alleged by the petitioners that a shop had been mortgaged in favour of Girdharilal the father of the petitioners, by Mohd. Taqi, Kasim Ali, Riazul Hasan, Khurshed Ali and Amjad Ali some time before the year 1941. The mortgagors left India and went to Pakistan. Under Section 4 of the Matsya Evacuee Property Ordinance the equity of redemption which belonged to the Muslim evacuees vested in the Custodian of the evacuee properties and under Section 5 (2) of the Rajasthan Administration of Evacuee Property Ordinance, 1949 any evacuee property which had vested in any person exercising the powers of a custodian under the Matsya Ordinance which had been repealed by the Rajasthan Ordinance is to be deemed to have vested in the Custodian appointed under the Rajasthan Ordinance. The equity of redemption therefore vested in the Custodian of Evacuee Property, Rajasthan, when the Rajasthan Ordinance came into force. Thereafter, the Rajasthan Ordinance was repealed by the Administration of Evacuee Property Act of 1950 which was enacted by the Parliament.

By Section 8 (2) of the Administration of Evacuee Property Act of 1950 all such property which had vested in any person under the laws repealed by the Act was to be deemed to have been vested in the Custodian appointed under the Act on its commencement. The equity of redemption of the shop in question therefore vested in the Custodian of the Evacuee property appointed under the Rajasthan Administration of Evacuee Property Act. The Deputy Custodian at Bharatpur initiated an enquiry and held that Raghunandanlal and three others were in possession of a shop as mortgagees and the amount of mortgage money was of Rs. 850/- only and that the mortgagors had left India and had gone to Pakistan. He therefore ordered payment of Rs. 850/- to the

petitioners and ordered them to deliver possession to the Deputy Custodian. An appeal was filed against that order to the Custodian, Evacuee property, Rajasthan, at Jodhpur, which was dismissed on the 2nd of December 1950. Steps were thereafter taken by the Deputy Custodian to eject the petitioners from the shop which was in their possession as mortgagees. They however took three days time from the Deputy Custodian to enable them to vacate the shop and in the meantime they have come to this court under Art. 226 of the Constitution of India.

The case of the petitioners is that the mortgagee rights relating to the disputed shop were not evacuee property and these rights did not vest in the Custodian under any of the Evacuee Property Acts or Ordinances. The Deputy Custodian or the Custodian therefore had no jurisdiction to order their ejectment. What had vested in the Custodian was the equity of redemption only. The Custodian, if he wanted to take possession of the shop, should have proceeded by way of a regular suit rather than attempting to take forcible possession of the shop. No notice, it is said, was issued under Sec. 7 of the Administration of Evacuee Property Act and there was no basis for the exercise of any jurisdiction by the Custodian. It is also stated by the petitioners that the Deputy Custodian has put a seal on the lock of the petitioners and thus the petitioners are deprived of the use of the shop. It is therefore prayed by the petitioners that a writ of certiorari, prohibition or Mandamus be issued quashing the order of the Custodian and restraining the Custodian from interfering with the use of the shop by the petitioners. A reply was filed on behalf of the Custodian, Evacuee property of Rajasthan, and it was stated that Section 7 of the Administration of Evacuee Property Act was not applicable to the present case, as this shop had vested in the Custodian under the Matsya Ordinance. It was said that the petitioners did not take any objection as regards the jurisdiction of the Custodian and they are therefore estopped from taking any such plea in this application. It is also said that the petitioners agreed to deliver possession of the shop to the Custodian and they are therefore not within their rights to dispute the validity of the Custodian's order.

(2) It is an admitted fact that the shop in question was in the possession of the petitioners as mortgagees and the mortgagors had left for Pakistan. It is therefore clear that the equity of redemption alone could have vested in the Custodian under the Matsya Evacuee Property Ordinance. The mortgagee rights of the petitioners which did not form part of the property of the Muslim evacuees could in no circumstance be considered to be an evacuee property and it could not have vested in the Custodian under the Matsya Ordinance. Similarly, the position of the Rajasthan Evacuee Property Ordinance is not different and the position under the Matsya Ordinance continued to hold good under the Rajasthan Ordinance. Under the Administration of Evacuee Property Act the same position continues. The equity of redemption therefore can be claimed to have been vested in the Custodian of the Evacuee property, Rajasthan, and there was no necessity of issuing a notice under section 7 of the Administration of Evacuee Property Act in so far as the question of the equity of redemption of this shop was concerned. However the question of the mortgagee rights is quite different and the Custodian of the Evacuee property, Rajasthan, cannot lay his hands on the mortgagee rights of the petitioners unless a notice under Section 7 of the Administration of Evacuee property Act is issued in proper form and proceedings are taken according to law, provided the Custodian has grounds to think that mortgagee rights are also evacuee property. No notice under Section 7 has been given in this case and obviously the Custodian cannot be said to possess any jurisdiction over the rights of the petitioners. The learned Government Advocate has vehemently argued that the petitioners failed to take an objection relating to the point of jurisdiction in the court of the Custodian or the Deputy Custodian and hence they should not be allowed now to agitate this point. He has referred to A. S. Chaudhri's Book of High Prerogative Writs, 1950 Edition, page 426 under the head "Acquiescence" wherein two English cases — 'Dierken v. Philpot', (1901) 2 K. B. 380 and — 'Giusti Patents and Engineering Works Ltd. v. Maggs', (1923) 1 Ch. D. 515 have been discussed.

(3) It may be observed that it is a fundamental rule of law that a judgment of a court without jurisdiction is a nullity, and consent cannot give jurisdiction to the court if it has none. There is however a distinction between the cases of want of jurisdiction and irregularity in the exercise of jurisdiction or irregularity in the assumption of jurisdiction. The leading case on the point is — 'Ledgard v. Bull', 13 Ind. App. 134 (P.C.) decided by the Privy Council in 1886. In that case the Judicial Committee of the Privy Council held that the suit having been instituted in a court which had no jurisdiction no order of transfer could be made, but that the District Court being competent to entertain and try the suit if it were competently brought, the defendant could waive the objection to the irregularities of its institution, but that he had not done so, and the decree of the District Court could not, therefore, stand and it ought to have been set aside by the High Court.

The principles laid down in — 'Ledgard v. Bull', were reiterated by their Lordships of the Privy Council in — 'Meenakshi Naidoo v. Subramaniya Sastri', 14 Ind. App. 160 (P.C.). That was a case in which the High Court of Madras had entertained an appeal from an adjudication from which no appeal was provided for by any enactment. Their Lordships held that the decree of the High Court was a nullity. In the course of the judgment their Lordships said:

> "In the present case there was an inherent incompetency in the High Court to deal with the question brought before it and no consent could have conferred upon the High Court that jurisdiction which it never possessed."

(4) There are however certain exceptions to this rule. If the court has no jurisdiction owing to some privilege attaching to a party, the party may waive that privilege. Thus, a defendant may waive his status as an agriculturist. Similarly, an objection relating to the pecuniary jurisdiction of a court under Section 11 of the Suits Valuation Act (VII of 1887) can be waived. The same is the case of an objection regarding place of suing or the local venue of suits within the cognizance of

a court. Such objections can however be waived.

(5) In the present case, there is inherent want of jurisdiction in the Custodian and waiver on the part of the petitioners cannot confer any jurisdiction on the Custodian. The objection, therefore, of the learned Government Advocate cannot help the case of the Custodian.

(6) The judgment in — 'Giusti Patents and Engineering Works Ltd. v. Maggs', (1923) 1 Ch. D. 515 also cannot help the case of the Custodian as in that case it was the plaintiff himself who voluntarily sought the exercise of jurisdiction of court and it was held that he could not, then having himself sought the exercise of jurisdiction, be allowed to go back and question the jurisdiction of the court. In the present case, the petitioners never sought the exercise of jurisdiction of the Custodian. The other case in — 'Dierken v. Philpot', (1901) 2 K. B. 380 relates to an illegality in the exercise of the jurisdiction. It was not a case of inherent want of jurisdiction. The decision in that case therefore cannot in any way help the opposite party.

(7) Even though in the written statement it was mentioned that the petitioners had exhausted all their remedies under the Evacuee Property Act, it was argued by the learned Government Advocate that under section 26 of the Administration of the Evacuee Property Act the petitioners had a remedy open to them by way of filing a revision petition in the court of the Custodian General of India. It may be pointed out that it is not open to a party to blow hot and cold in the same breath. The case of the opposite party was that the petitioners had exhausted all the remedies and now they cannot turn back and say that a remedy is now open to the petitioners. Furthermore, when it is held that a Custodian had no jurisdiction whatsoever to deal with the mortgagee rights of the petitioners, it cannot be said that the Custodian General would possess jurisdiction to adjudicate upon those rights. A remedy by way of revision, therefore, is no adequate remedy under the circumstances of this case.

(8) Lastly, the learned Government Advocate has argued that the petitioners agreed before the Deputy Custodian to deliver possession of the shop within three days. They should therefore not be allowed the indulgence of the exercise of discretion of this court in their favour, because it will amount to a fraud. Mr. Sharma on the other side has said that the Deputy Custodian was taking forcible possession of the shop from his clients and his clients had no other alternative but to give their consent under coercion so that they may get the breathing space to take legal measures against the Custodian. We are of opinion that the consent, if at all given by the petitioners in the present case, cannot be regarded as a free consent. The conduct of the petitioners in giving consent under these circumstances should not be taken into account to deprive them of a remedy under Art. 226 of the Constitution of India.

(9) We may here refer to a Division Bench decision of this court in — 'Satya Deo v. Custodian Jodhpur', in C. Writ Appln. No. 66 of 1951, D/- 5-12-1951 (Raj), wherein a similar objection of the opposite party, that because no objection had been raised, relating to the point of jurisdiction before the Custodian, a party could not challenge the exercise of jurisdiction of the Custodian, before this court, was disallowed.

(10) It may further be added that in the present case the mortgagee rights of the petitioners cannot be regarded as evacuee property and consequently there was no case for the Custodian to interfere with the rights of the petitioners. Further, there was no occasion for the Custodian to issue any notice under S. 7 against the petitioners relating to property which was not Evacuee property.

(11) This petition succeeds and the order of the Custodian dated the 2nd December 1950 is set aside and the Deputy Custodian, Bharatpur, is directed not to interfere with the mortgagee rights of the petitioners otherwise than in due course of law, and to remove the seal put by him on the shop in pursuance of the order which has been set aside by this court. The petitioners shall get the costs of this application, including counsel's fee which is fixed at Rs. 50/- from the opposite party.

A/M.K.S. Petition allowed.

A. I. R. 1952 RAJASTHAN 187
(JODHPUR BENCH)
BAPNA J.

Chiman Mal, Appellant v. Ganesh, Respondent.

Second Appeal No. 75 of 1951, D/- 2-1-1952.

T. P. Act (1882), Ss. 3, 6 and 130 — Assignment of rights under contract — Contract to deliver goods — Damages specified in case of breach — Breach — Suit by assignee to recover earnest money and damages — Maintainability — (Contract Act (1872), S. 74).

A agreed to deliver to B a particular number of bricks by a particular date at Rs. 14 per thousand and in default A was to pay Rs. 6 per thousand bricks not delivered by way of damages. On default by A to deliver the bricks B transferred his rights under the contract to C who sued for recovery of the earnest money paid to A and for damages for non-delivery of bricks at the agreed rate of Rs. 6.

Held (1) that so far as the recovery of earnest money was concerned C was entitled to a decree. The right to recover money paid under a contract of sale on failure of the seller to hand over possession of the property is not a mere right to sue. It is a claim for an ascertained amount and can be transferred as an actionable claim. AIR 1943 Nag 332, Rel. on. (Para 2)

(2) that as regards the claim for damages, C was not entitled to any decree. Although the amount of damages may be mentioned in the contract the party complaining of its breach is only entitled to reasonable compensation under S. 74, Contract Act. The claim for damages for breach of the contract is, therefore, not an ascertained amount and a transfer of the claim to recover damages even where they are mentioned in the contract is not permitted by law. AIR 1934 Mad 461 and AIR 1930 Bom 409, Disting. (Para 3)

Anno: T. P. Act, S. 3 N. 21, 22; S. 6 N. 16, 17; S. 130 N. 4, 8a; Contract Act, S. 74 N. 8.

Utsavlal, for Appellant.

REFERENCES: Courtwar/Chronological/ Paras
('30) AIR 1930 Bom 409: (127 Ind Cas 410) 3
('34) AIR 1934 Mad 461: (57 Mad 1074) 3
('43) AIR 1943 Nag 332: (ILR (1943) Nag 762) 2

JUDGMENT: This is a second appeal by the plaintiff in a suit for recovery of money. The appellant sued the respondent on the allegations that the respondent entered into an agreement with two persons Jawanmal Hansraj, and Motilal Punamchand on 7th June, 1946 to deliver 1,25,000 bricks at the rate of Rs. 14/4/- per thousand by — March 1947, and in default to pay Rs. 6/4/- per thousand bricks not delivered by way of damages. The bricks were not delivered and one of the two promisees, namely, Jawanmal Hansraj assigned his rights under the contract to the appellant Chiman Mal on 22nd June, 1947. This Chimanmal appellant brought the present suit on 25th June, 1947 for recovery of Rs. 220/- which had been paid by way of earnest money by Jawanmal Hansraj together with Rs. 390/15/6 as damages for non-delivery of half the quantity of bricks at Rs. 6/4/- per thousand, and the cost of notice. The defendant resisted the suit on various grounds including one that the suit being based on the assignment of the right to recover damages for breach of the contract was not maintainable under the law. The trial court decreed the suit but on appeal, the learned District Judge upheld the plea of the defendant that no assignment of the right to recover damages for breach of contract could take place and dismissed the suit.

(2) In this appeal, learned counsel has argued firstly, that so far as the claim for return of the earnest money is concerned, there is no bar to that claim. This is correct. It has been held in — 'Damodhar Jhingoojee v. Allabux Shekh Yewraj', AIR 1943 Nag 332 that the right to recover money paid under a contract of sale on failure of the seller to hand over possession of the property is not a mere right to sue. It is a claim for an ascertained amount and can be transferred as an actionable claim. The defendant, in the present case, had admitted having received this amount from Jawanmal Hansraj and so far as the claim for this amount is concerned, it must be decreed in favour of the plaintiff.

(3) As regards the remainder of the claim it was argued that as the rate of damages had been mentioned in the contract, the amount claimed as damages was also an ascertained amount. Reliance was placed on two authorities: — 'Mathu v. Achu', AIR 1934 Mad 461 and — 'Nagappa v. Badridas', AIR 1930 Bom 409. Both these cases are, however, distinguishable on facts as they related to debts and not to damages for breach of the contract. Under Section 74 of the Indian Contract Act, it is provided that where a sum is named in the contract as the amount to be paid in case of breach of the contract, the party complaining of the breach is entitled to receive reasonable compensation not exceeding the amount named in the contract. It is obvious that although the amount of damages may be mentioned in the contract, the plaintiff has to prove actual damages and in case they are less than the amount stipulated, he cannot get the amount mentioned in the contract. Therefore, even if the amount of damages are mentioned in the contract the party complaining of the breach is only entitled to reasonable compensation. The claim for damages for breach of the contract is, therefore, not an ascertained amount and a transfer of his claim to recover damages even where they are mentioned in the contract is not permitted by law. The claim in respect of damages and the cost of notice, therefore, cannot be allowed.

(4) As a result, the appeal is partially accepted, the judgment and decree of the lower court is set aside and the suit is decreed in favour of the plaintiff for recovery of Rs. 220/- with costs on this amount in all the three courts. The rest of the claim is dismissed but without costs.

B/K.S. Appeal partly allowed.

A. I. R. 1952 RAJASTHAN 188
(JODHPUR BENCH)

WANCHOO C. J.

Lakshmi Devi, Petitioner v. Muthralal, Opposite Party.

Civil Revn. No. 158 of 1951, D/- 18-4-1952.

(a) **Civil P. C. (1908), S. 144 — A standing surety for costs in suit by B — Suit dismissed with costs against B — Decree for costs realised from A — Decree for costs set aside — Proceedings by B under S. 144 — Suit by A against B for recovery of amount realised from him held maintainable and not premature. Since he did not get back his amount after decree for costs was set aside and he himself could not start proceedings under S. 144. (Para 3)**

Anno: Civil P. C., S. 144 N. 7, 8, 29.

(b) **Rajasthan Small Cause Courts Ordinance (VIII (8) of 1950), Sch., Art. 2 — The suits which concern acts purporting to be done by any person who is not a party to the suit in pursuance of a judgment or order of a Court are excepted from the cognizance of Small Cause Court — Suit by A — B standing surety for plaintiff for costs — Suit dismissed and decree for costs passed against A — Decree realised from B — Suit by B against A for recovery of amount realised from him — Suit held excepted under Art. 2 and not cognizable by Small Cause Court — (Provincial Small Cause Courts Act (1887), Sch. II, Art. 2). Case law reviewed. (Para 11)**

Anno: Prov. Small Cause Courts Act, Sch. II Art. 2 N. 1.

Shiv Lal Porwal, for Petitioner; B. B. Desai, for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras
('27) AIR 1927 All 27: (98 Ind Cas 976) 6
('28) AIR 1928 Lah 515: (108 Ind Cas 609) 8
('27) AIR 1927 Mad 253: (98 Ind Cas 726) 7
('50) AIR 1950 Mad 33: (1949-2 Mad LJ 400) 10
('33) AIR 1933 Oudh 146: (143 Ind Cas 843) 9

ORDER: This is a revision by Mt. Lakshmi Devi in a Small Cause Court matter. A suit was brought by Muthra Lal for recovery of Rs. 200/- in the following circumstances. The applicant Mt. Lakshmi Devi had brought a suit against Dr. Onkar Lal and others. In that suit, she had to file security and Muthra Lal stood surety for the applicant for the sum of Rs. 200/-. Mt. Lakshmi Devi lost that suit and there was a decree of costs to the extent of Rs. 203/- against her. In execution of that decree Muthralal had to pay Rs. 200 to the decree-holders as he had stood surety for costs. After this amount had been paid, Muthra Lal wanted Mt. Lakshmi Devi to repay him the money. She refused to do so & consequently this suit was brought by Muthra Lal in the Small Cause Court, Udaipur. The suit has been decreed and hence this revision.

(2) The first point that has been urged is that the amount of Rs. 200/- has been paid back. That is, however, a question of fact and the trial court came to the conclusion on a

consideration of the evidence that the amount had not been paid back. I see no reason to differ from the trial court in this matter.

(3) The second point that has been urged is that the decree of costs has been set aside and the applicant is taking action under S. 144 of the Code of Civil Procedure. Therefore, the suit was premature and Muthra Lal had no cause of action. I do not see how it can be said that the suit is premature and Muthra Lal has no cause of action, even if the applicant is taking action under S. 144 of the Code of Civil Procedure in view of certain orders of the appellate court. Muthra Lal's cause of action arose because the amount of Rs. 200/- was realized from him. He has not got back that money after the order of the appellate Court. Further, he cannot apply under S. 144 of the Code of Civil Procedure. Under these circumstances, Muthra Lal has a cause of action and the suit is maintainable.

(4) The last point that has been urged is that the suit is not cognizable by the Small Cause Court and reliance in this connection is placed on Art. 2 of the Schedule to the Rajasthan Small Cause Courts Ordinance, 1950 (Ordinance No. VIII of 1950). That article reads as follows:

"A suit concerning an act purporting to be done by any person in pursuance of a judgment or order of a Court or of a judicial officer acting in the execution of his office."

(5) The contention of the applicant is that this suit concerns an act which has been done in pursuance of an order of the court, namely, the order as to giving of security and the order as to payment of the amount secured. Stress is laid on the word "concerning" and it is urged that that word is of very wide import and any suit which concerns in any way an act done by any person in pursuance of a judgment or order of a court is excepted from the cognizance of the Court of Small Causes.

Learned counsel for the respondent, on the other hand, urges that if the suit in any way challenges the act which is purported to have been done in pursuance of a judgment or order of a court, then only its cognizance is barred by a court of small causes. Where, however, the suit does not challenge the order, and in the present case, the plaintiff Muthra Lal does not in any way challenge the order, Art. 2 does not apply and the suit is cognizable by the Court of Smalll Causes.

(6) The first case on the point is — Balwant Singh v. Har Jas', AIR 1927 All 27. That was a suit by a Supraddar and arose in the following circumstances. In execution proceedings, the crops of the judgment-debtors were attached and made over to a Supraddar. When the Amin went to sell the crops, it was found that the Supraddar had made them over to the judgment-debtors. The execution court then asked the Supraddar to deposit Rs. 75/- for having permitted the attached property to be made over to the judgment-debtors without the order of the court. The Supraddar did so and thereafter filed a suit for Rs. 75/- primarily against the judgment-debtors. But he also impleaded the decree-holder praying for relief against whichever defendant the court deemed fit. It was found that there had been a compromise between the decree-holder and the judgment-debtors in the execution proceedings and the decree-holder had been paid Rs. 75/- and the Supraddar had been told about this and, therefore, returned the crops. Subsequently the decree-holder played false and realized another sum of Rs. 75/- from the Supraddar. The Court passed a decree in these circumstances against the decree-holder. The question then arose whether the suit was cognizable by the Court of Small Causes.

The learned Judge observed that the suit undoubtedly concerned an act done by the plaintiff in pursuance of an order of a court, namely the deposit of Rs. 75/-. Learned counsel for the respondent however points out that in that case the decree-holder was a party and the order, therefore, depositing the sum of Rs. 75/- was challenged. But it must be pointed out that that was not the basis of the view taken by the learned Judge in that case and the decision turned on whether the suit concerned an act done by a person by order of the court. Art. 2 appears to be very widely worded and the present suit does appear to concern an act done by the plaintiff, opposite party under the order of the court.

(7) The next case is — 'Kuthala Mudaliar v. Venkata Reddiar', AIR 1927 Mad 253. That was a suit by an auction-purchaser for refund of the purchase money by reason of his dispossession under the orders of the Collector. The suit was apparently filed on the regular side. There was an appeal to the District Judge and a second appeal to the High Court. It was urged that there could be no second appeal in view of Sec. 102 of the Code of Civil Procedure as the suit was of a Small Cause Court nature. It was, however, held that the suit fell under Art. 2 of the Schedule and therefore, a second appeal lay. There is some discussion in the judgment as to whether the first defendant was a party to the suit or not and it appears as if something might have turned on this fact. But the Court held that the first defendant was a party and Art. 2 applied and, therefore, the second appeal lay. There is nothing in this case, however, to support the contention of the learned counsel for the opposite party that the order has to be challenged before Art. 2 applies.

(8) The next case is — 'Mangal Singh v. Bishen Singh', AIR 1928 Lah 515. That was a suit for refund of money paid as price for goods by a purchaser of stolen property who had been deprived of the goods by the police under the orders of the Sessions Judge for returning them to the owner. It was held that the suit could be tried by a Court of Small Causes. In that case, the defendants had sold certain ornaments to the plaintiff. Later those ornaments were found to be stolen property. They were then ordered to be returned to the real owners. The plaintiff then filed a suit against those who had sold the ornaments and also against the real owners for recovery of the amount which he had paid to those who had sold the ornaments. The suit was decreed and there was an appeal by the real owners and the question arose whether the appeal could be dealt with by the senior Subordinate Judge. He could only do so if the suit was of a Small Cause Court nature; otherwise the appeal would lie to the District Judge.

The senior Sub-judge held that Art. 2 applied and he could not hear the appeal. Thereupon there was a revision to the High Court. Though Art. 2 is mentioned in the judgment, the discussion is all about Art. 3. However, Art. 3 also is in the same words as Art. 2 and Art. 3 was not held to apply to this case. It is difficult to see how the suit did not concern an act or order purporting to be done or made

by an officer of the Government in his official capacity. Obviously the suit concerned such an order as it arose out of the delivery of the ornaments to the real owners in pursuance of an order of the Sessions Judge. The learned judge observed that "the suit did not in any way intend to alter or set aside any judicial decision". But the words in Art. 2 or Art. 3 are not "altering or setting aside any judicial decision" but only "concerning an act or order". The word "concerning" is much wider than the words "altering or setting aside". Further as the real owners were made, it could also be said that the suit challenged the order.

(9) The next case is — 'Ram Anand Singh v. Kheedoo Singh', AIR 1933 Oudh 146. That was a suit filed in the Small Cause Court. The defendant of that suit and another person had purchased a certain Zamindari which was subject to a mortgage in favour of the defendant and a third person. It was arranged that the other purchaser should pay half the purchase price partly to the third person who was the other mortgagee and partly to the vendors. The defendant, as he was also one of the mortgagees, retained out of his half share of the money the part due on the mortgage and was to pay the remainder to the vendor. Then there was a pre-emption decree and also a mortgage decree. This mortgage decree was put into execution and a sum of money was realized from the pre-emptors. Thereupon the pre-emptors filed a suit in the Court of Small Causes for refund of the interest which had been realized from them in execution in respect of the period preceding the date on which their possession began. It was urged that such a suit did not lie in a Small Cause Court in view of Art. 2. The learned Judge, however, held that Art. 2 did not apply as the suit was one for damages for money paid by the plaintiffs for which the defendant was liable. There was, however, no consideration of the terms of Art. 2 in this judgment and it is, therefore, not very helpful.

(10) The last case is — 'Subraya Bhatta v. Govinda Bhat', AIR 1950 Mad 33. That was a suit in which the plaintiff wanted to recover back the amount paid by him under a decree passed against him in a former suit. It is argued when the matter came to the High Court that no second appeal lay as it was barred under S. 102 of the Code of Civil Procedure as the suit was of a Small Cause Court nature. It was, however, contended on behalf of the appellant that the suit was covered by Art. 2 of Schedule II, Provincial Small Cause Courts Act which is in the same terms as Art. 2 of the Rajasthan Ordinance and, therefore, a second appeal lay. It was held that that article did not govern cases of parties to previous decrees but referred only to cases concerning orders to ministerial officers or third persons. This case is, therefore, not relevant because the plaintiff Muthra Lal was not a party to the litigation but was a third person.

(11) On a review, therefore of these authorities and taking into account the wide language of Art. 2, it seems to me that the intention of the legislature is that suits which concern acts purporting to be done by any person who is not a party to the suit in pursuance of a judgment or order of a court are excepted from the cognizance of Small Cause Court. The present is a suit of that kind and is, therefore, excepted under Art. 2 and should have been filed on the regular side. I, therefore, allow the revision, set aside the decree of the trial court and order that the plaint will be returned for presentation to proper court. Parties will bear their own costs of this Court. Costs of the trial court will abide the final result.

B/R.G.D. Revision allowed.

A. I. R. 1952 RAJASTHAN 190
(JODHPUR BENCH)

WANCHOO C. J. AND BAPNA J.

Akhey Singh, Appellant v. Mahaveer Chand and another, Respondents.

Appeal No. 19 of 1950, D/- 8-2-1952.

(a) Marwar Land Revenue Act (XL (40) of 1949) — Preamble — Scope of the Act.

The Act consolidates the land relating to the land revenue etc. and though it has come into force in 1949, the law contained in chapter X dealing with jagirdari land is the same as was in force before the Act. (Para 6)

(b) Marwar Land Revenue Act (XL (40) of 1949), S. 191 — Jagirdari lands — Transfer of — Principle of legal necessity — Applicability.

The provisions of the land in Chapter X clearly show that the 'Jagir' is not joint family property and the sons of 'Jagirdar' have no interest in it by birth. Under these circumstances, the doctrine of 'legal necessity' does not apply to the transfers of jagirdari land by the jagirdars. (Para 6)

(c) Marwar Land Revenue Act (XL (40) of 1949), Ss. 192, 183 — Lease by Jahagirdar — Death of Jahagirdar within period of lease — Effect.

There is no prohibition in the Act against a lease by the jagirdar which would enure after his death provided it does not extend for more than 24 years. It is obvious that under S. 192 a Jagirdar can make a lease for a period of 24 years as the maximum, and if he died within this period the lease would remain valid after his death for the stipulated period and his heirs would get back the property thereafter. The lease therefore does not come to an end by the death of the lessor and remains valid after his death if such death takes place within the term of the lease. (Para 7)

(d) Marwar Land Revenue Act (XL (40) of 1949), S. 192 — Lease by Jahagirdar — Condition to extend period of lease if possession was disturbed — Validity.

Under S. 192 a Jahagirdar can grant a lease only for 24 years and once the lessee is put in possession the period begins to run. The fact that the lessee's possession was disturbed and he remained out of possession for a number of years would not interrupt the running of the period of the lease, though the lessee may have a right to claim damages for the period during which his quiet enjoyment was disturbed and claim possession of the property for the remaining period mentioned in the lease. The lessee cannot be allowed to add the period during which he remained out of possession to the period mentioned in the lease even though there is a term in the lease to this effect, as such a term cannot be enforced so as to extend the period of the lease beyond twenty-four years. **(Para 9)**

Kistormal, for Appellant; Sohan Nath, for Respondents.

WANCHOO C. J.: This is an appeal by Thakur Akhey Singh against the judgment and decree of a Division Bench of the High Court of the former State of Jodhpur. It has come before us for hearing under the provisions of Ordinance No. XL of 1949 & Ordinance No. XII of 1950. The appellant is the representative-in-interest of the defendant in the suit.

(2) The suit was filed by Mutha Sumer Chandji, who is now represented in this appeal by his successors Mahaveer Chand and Shanti Chand. The case of the plaintiff was that Durjan Singhji, the father of the original defendant Sanwat Singh, had executed a registered deed of lease on Besakh Sudi 10, Smt. 1997 corresponding to 6th of May, 1941, in favour of the plaintiff. By this deed, Durjain Singhji leased out two villages, namely, Lavera Chhota, and Kalnau Bari, to the plaintiff for a period of 24 years. The plaintiff came in possession of the villages in July 1941, but the Thikana was taken under the Court of Wards in February, 1942, and therefore, the plaintiff was dispossessed from these villages. Later the Thikana was released from the Court of Wards and came in the possession of the Jagirdar. Thereafter, the present suit was filed on the 23rd of November, 1943 .and it was prayed that the plaintiff be put in possession of the two villages. In the alternative, it was prayed that in case it was found that the plaintiff was not entitled to possession of the two villages, a decree for Rs. 35,000/- be passed in his favour according to the terms of the deed of lease, and a charge of the decree should be created on the two villages.

(3) The suit was resisted by the defendant on a number of grounds and eventually the Additional District Judge, Jodhpur gave a decree for Rs. 18,006/- to the plaintiff and dismissed the suit for possession. Thereupon, there was an appeal to the High Court of the former State of Jodhpur by the defendant. That appeal was allowed and the decree of the District Judge was set aside and the suit was decreed in the plaintiff's favour by putting him in possession of the two villages for a period of 23 years and 3 months in accordance with the terms of the deed of lease. The present appeal is against this decree.

(4) The contention on behalf of the appellant is that this was a suit for specific performance and it was the duty of the plaintiff to allege specifically in the plaint that he was prepared to perform his part of the contract, and inasmuch as he did not do so, the suit is liable to be dismissed. It was further urged that this was a contract for the non-performance of which compensation in money was an adequate relief and the act agreed to be done was such that pecuniary compensation for its non-performance would afford adequate relief and could easily be had. Finally, it was urged that there was no legal necessity for entering into a contract of this nature and that in any case the Jagirdar was not competent to make a lease which would inure beyond his life-time.

(5) So far as the first two points are concerned, we are of opinion that they do not arise in this case. It is, in our opinion, incorrect to call this a suit for specific performance of a contract. It is clearly proved on the evidence that the lessee came into possession of the two villages soon after the lease was executed and remained in possession for a few months when he was dispossessed by the Court of Wards which had taken over the Thikana. Therefore, the contract in this case was performed and the lessee was dispossessed because of certain provisions of the law in the former State of Jodhpur relating to Court of Wards. The present suit was filed after the Thikana was released from the Court of Wards and had come back into the possession of the Jagirdar, and the Jagirdar (the lessor) had failed to return the possession to the lessee. This is, therefore, a suit based on the title of the plaintiff which he derives from the lease in his favour. One of the terms in the lease specifically provides that if the possession of the lessee is disturbed, the term of the lease would be extended and the lessee would be entitled to remain in possession for a full period of 24 years and can recover possession through court. The suit has been filed in accordance with this term in the lease and is not suit for specific performance of the contract which had, in fact, been performed by Durjan Singhji when the lessee was put in possession soon after the lease had been executed. There is, therefore, no force in the first two points raised on behalf of the appellant, and it is not necessary to consider the case law that was cited in support of those two points.

(6) Now we come to the other two points raised on behalf of the appellant, namely, that there was no legal necessity for the lease, and that in any case the Jagirdar was not entitled to execute a lease which would inure after his death. The two points are allied and may be taken together. The term 'legal necessity' is well known in law and applies to cases of alienations by kartas in joint Hindu families. We have, therefore, to see what the nature of the Jagirdari Law is, in order to decide whether any question of legal necessity arises at all in this case. The law relating to land revenue etc. was consolidated by Act No. XL of 1949, and Chapter X thereof deals with Jagirdari lands. We are referring to this Act because, though it came into force in 1949, learned counsel are agreed that the law even at the time when the lease was executed was the same. The Jagir in question is a scheduled Jagir and under section 182 of the Act, succession to it is governed by the rule of primogeniture. By section 183, the grant is confined to the life-time of the holder and no person is entitled to succeed to such Jagir until his succession is recognized and the grant is renewed in his favour by His Highness. Section 184 provides that subject to His Highness' pleasure, the grant of a Scheduled Jagir, on the death of the holder, shall be renewed in favour of the person entitled to succeed him in accordance with the provisions of this Act. Section 191 provides that no Jagir shall be transferable except to the extent provided in this Act. Section 192 permits the Jagirdar to grant a lease or 'ijara' of the estate or any part thereof, provided the period of such lease does not exceed 24 years. Section 195 permits the holder of a Scheduled Jagir to assign a part of the Jagir to a lineal male descendant of his own or of the previous holder who does not succeed to the Jagir, provided that the part so assigned shall be a reasonable share necessary for maintenance of the assignee. These provisions of the law clearly show that the Jagir was not joint family property and the

sons of Jagirdar had no interest in it by birth. Under these circumstances, we are of opinion that the doctrine of 'legal necessity' does not apply to this case and it is not necessary therefore, to consider whether in fact there was any legal necessity for making the lease in dispute.

(7) The next question then is whether a Jagirdar is competent to execute a lease which would inure after his life-time. In this connection, reference may be made to Sec. 192 of the Marwar Land Revenue Act of 1949 (Act, No. XL of 1949) which permits the Jagirdar to grant a lease of the estate or any part thereof for a maximum period of 24 years. Learned counsel urges that as under Sec. 183, all grants of the Scheduled Jagirs are for the life-time of the holder, the Jagirdar cannot create a lease which will inure after his death. There is, however, no prohibition in the Act against such leases provided they are not to extend for more than 24 years. If the intention was that a lease, whatever may be its term, would come to an end when the lessor dies, it would have been very easy to provide for it by adding a proviso to Section 192. This view is enforced by a reference to 'Bhoglawa' Rules of 1914 which appear in Marwar Gazette dated 17th October, 1914 at page 17. Reference may be made to Rule 8, which says that no Jagirdar would be permitted to mortgage his land for more than 20 years and it would be a condition of the mortgage that after the period of 20 years is over, the land would revert to the mortgagor or his heir free of all encumbrance. This rule was amended in 1915 and the amendment appears in the Marwar Gazette of 2nd October, 1915 at page 14. By this amendment, all kinds of transfers of usufructuary nature were forbidden beyond a term of 24 years, and it was provided that after the period of 24 years was over, the land would revert to the mortgagor or 'to his heirs' and the encumbrance would be wiped out. This rule, therefore, makes it obvious that the Jagirdar could make a mortgage for a period of 24 years as the maximum, and if he died within this period the mortgage would remain valid after his death for the stipulated period and his heirs would get back the property thereafter. The law is admitted to be the same for leases. It follows, therefore, that a lease like the one in dispute would remain valid after the death of the lessor if such death takes place within the term of the lease. It must, therefore, be held that the lease did not come to an end at the death of the lessor, namely, Durjan Singhji.

(8) We now come to the last question, namely, whether the High Court was right in giving a decree for possession to the respondents for 23 years and 3 months. The contention on behalf of the respondents is that there was a term in the lease which provided that if the possession of the lessee was disturbed, the term of the lease would be extended and the lessee would be entitled to remain in possession for the full period of 24 years. On the other hand, learned counsel for appellant contends that this term being against the law could not extend the period beyond 24 years from the date of the lease. We have already held that the lessee came into possession and the period of lease began to run. The law in Marwar with respect to Jagirs as we have already mentioned, is that no Jagir is "transferable except to the extent provided". (See Sec. 191 of the Marwar Land Revenue Act, 1949, Act No. XL of 1949). Further, the law also provides that a Jagirdar may grant a lease or 'ijara' and the period of such lease shall not exceed twenty-four years. (See Sec. 192).

(9) The lessee having been put in possession in this case soon after the lease was executed, the lease began to run. The fact that the lessee's possession was disturbed and he remained out of possession for a number of years would not interrupt the running of the period of the lease, though the lessee may have a right to claim damages for the period during which his quiet enjoyment was disturbed and claim possession of the property for the remaining period of the lease. If we were to allow the lessee to add the period during which he remained out of possession to the period mentioned in the lease, it would mean that we would be indirectly allowing the lease to run for a term of more than 24 years which is expressly forbidden by the law. We are, therefore, of opinion, that even though there is a term in the lease to this effect, that term cannot be enforced so as to extend the period of the lease beyond twenty-four years. In this view of the matter, the High Court was not right in granting a decree for possession for the period of 23 years and 3 months to the respondents. It should have only granted a decree for possession for the remaining period of the lease. The decree of the High Court, therefore, will have to be amended accordingly.

(10) We, therefore, partly allow the appeal and reduce the period for which the High Court has granted possession to the period of twenty-four years in all, beginning from the date of the lease, namely, the 6th of May, 1941. In other respects, the appeal is dismissed. As the appeal has, for all practical purposes, failed, we allow the respondents the costs of the appeal. Costs of the two courts below will be as directed by the High Court.

B/D.R.R. Order accordingly.

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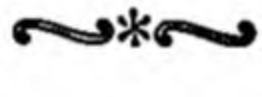
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SAURASHTRA HIGH COURT

1952

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" " Janardan Amaratlal Baxi, B.A., LL.B., Advocate (o. s.).

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THE

ALL INDIA REPORTER

1952

Saurashtra High Court

A. I. R. (39) 1952 SAURASHTRA 1 (C. N. 1)

SHAH, C. J. AND CHHATPAR J.

Bai Marium Haji Alimohmad and another, Applicants v. The Assistant Custodian of Evacuee Property, Jetpur, Opponent.

Civil Misc. Appln. No. 26 of 1950, D/- 30-8-1951.

(a) *Administration of Evacuee Property Act (1950), S. 56 — Rules under Administration of Evacuee Property Rules, 1950, R. 6 — Notice to other person or persons — Discretion of Custodian.*

Under R. 6 the Custodian is required to cause a notice to be served, on the person claiming title to such property or interest and on any other person or persons whom he considers to be interested in the property. So far as the other person or persons are concerned, it is in the discretion of the Custodian whether to issue the notice to them or otherwise and that depends upon whether he considers them to be interested in the property. And if it is not shown that there are grounds which should have induced the Custodian to consider that the applicants are interested in the property, then it is not necessary to issue a notice to the applicants under R. 6. (Para 2)

(b) *Administration of Evacuee Property Act (1950), Ss. 28, 46 — Jurisdiction of Court when not barred.*

The jurisdiction of the Court to consider any order passed by the Custodian or any action taken by him will not be barred if the order passed is without jurisdiction. It is only with regard to the orders passed under the Act that the jurisdiction of the Court is taken away. Any order passed or any action taken in excess of jurisdiction or in the improper exercise of jurisdiction would not be an order or action contemplated by S. 28 or S. 46 of the Act. A I R (38) 1951 Bom 440, Foll. (Para 3)

(c) *Constitution of India, Art. 226 —Writ of certiorari when will be issued even if another remedy is available.*

It cannot be laid down as a general rule that the High Court should interfere by a writ of certiorari in every case where there is a breach of a rule or a violation of fundamental principles of justice, in spite of there being an alternative remedy by a suit or appeal. But where there had been a non-compliance of a statutory rule laying down a fundamental principle of justice, viz., the right of being heard before an order of eviction is made and which order might cause irreparable injury to the party concerned:

Held that such party could apply to the High Court for a writ even though there was a right of appeal against the order. (Case under Administration of Evacuee Property Rules). (Para 4)

Anno: C. P. C., App. III, Const. Ind. Art. 226, N. 8.

(d) *Administration of Evacuee Property Act (1950), S. 56 — Rules under — Administration of Evacuee Property Rules 1950, R. 14 (4) — Provision mandatory — Non-compliance by Custodian — Effect.*

The right of being heard has been advisedly provided for in Rule 14 (4) bearing in mind that S. 12 (1) permits the Custodian to put an end to an existing lease and turn out a lessee in lawful possession, which he could not have done but for the provisions of the Act. These are provisions of a mandatory character and the failure to observe them will invalidate the orders passed by the Custodian. (Para 5)

(e) *Administration of Evacuee Property Act (1950), S. 12 — Power of Custodian to eject persons directly.*

Where the Custodian proceeds to exercise his powers under S. 12, it is competent to him to eject the persons in possession under subs. (3) of the section, and it will not be necessary for him to file a suit for ejectment. A I R (38) 1951 Bom 406, Rel. on. (Para 7)

A. R. Baxi, for Applicants; C. N. Shah, Advocate General, for Opponent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('50) 53 Bom L R 621 : (A I R (38) 1951 Bom 440) (Pr. 3)

('50) 53 Bom L R 654 : (A I R (38) 1951 Bom 406) (Pr 7)

SHAH, C. J.: This is an application filed by the applicants, Bai Marium wife of Valli Haji Dawood, and Bai Khatija wife of Umar Adam, both of Upleta, for a writ of prohibition to the opponent, the Assistant Custodian of Evacuee Property, Jetpur, restraining him from ejecting the applicants from the premises occupied by them. The property belonged to one Karim Haji Vallimohmad, who was declared an evacuee on 15-6-1950 and thereupon all his property has vested in the Custodian. The ap-

plicants' case is that their husbands are the lawful tenants of the premises in question, having taken them on lease on 1-6-1948 from the said Karim Haji Vallimohmad. They allege that their husbands are citizens of India and are not evacuee. The applicants were served with a notice dated 11-9-1950 and as the said notice was defective, they were served with a fresh notice dated 20-9-1950, calling upon them to vacate the premises and to hand over possession to the Assistant Custodian. They appealed against this order to the Deputy Custodian, Central Saurashtra, and at their request, the execution of the Assistant Custodian's order was stayed. The Deputy Custodian called for a report of the Assistant Custodian and after perusing the same he vacated the stay order, but asked the Assistant Custodian to give an opportunity of hearing to the applicants' pleader. It appears that pleader Mr. Mohanlal Chinoy subsequently appeared before the Assistant Custodian and stated that he had nothing more to urge and that he would advise his clients to vacate the premises. The applicants then filed the present application on 1-12-1950.

(2) Mr. Baxi for the applicants has firstly urged that no notice was served on the applicants or their husbands under S. 7 (1), Administration of Evacuee Property Act, XXXI (31) of 1950, and that the declaration of the property as evacuee property was therefore invalid. Now under R. 6, Administration of Evacuee Property Rules, 1950, where the Custodian is satisfied from information in his possession or otherwise that any property or an interest therein is prima facie evacuee property, he shall cause a notice to be served, in Form No. I on the person claiming title to such property or interest and on any other person or persons whom he considers to be interested in the property. It is not disputed that the notice had been issued and duly served, and the applicants' only grievance is that the notice had not been served on them. Now under the rules so far as the other person or persons are concerned, it was in the discretion of the Assistant Custodian whether to issue the notice to them or otherwise and that depended upon whether he considered them to be interested in the property. It is not shown that there were grounds which should have induced the Assistant Custodian to consider that the applicants were interested in the property. Therefore it was not necessary to issue a notice to the applicants under R. 6 of the Rules and it must be held that the property was duly and properly declared evacuee property.

(3) The next contention urged for the applicants is that before cancelling the lease, the Assistant Custodian ought to have served the applicants with a notice under R. 14 (4) of the Rules to show cause against the order proposed to be made and that a reasonable opportunity of being heard should have been afforded to them. The notices dated 11 and 20-9-1950 to vacate and deliver possession appear to have been issued without calling upon the applicants to show cause why the leases should not be cancelled and possession not be taken over, and this position is now admitted by the learned Advocate General. He however contends that the legality of the action taken by the Assistant Custodian cannot be questioned by this Court in view of S. 46 of the Act, and in support of the contention he relies upon a decision of Justice Shah of the Bombay High Court in 'Abdul Majid v. P. R. Nayak', 53 Bom L R 621. However, the view taken by Justice Shah has not been accepted in appeal by Chagla C. J. and Tendolkar J., and they have held that whether under S. 28 or under S. 46 of the Act, the jurisdiction of the Court to consider any order passed by the Custodian or any action taken by him would not be barred if the order passed was without jurisdiction. It is only with regard to the orders passed under the Act that the jurisdiction of the Court is taken away. Any order passed or any action taken in excess of jurisdiction or in the improper exercise of jurisdiction would not be an order or action contemplated by S. 28 or 46 of the Act. The order there impugned was made under S. 7 (1) of Ordinance No. XXVII (27) of 1949 and two conditions were necessary before declaring any property to be evacuee property : (1) that the Custodian must give a notice in such manner as may be prescribed to the person interested in the property, and (2) that he must hold such inquiry into the matters as the circumstances of the case permit. These are conditions precedent to the exercise of the jurisdiction, and if either of them was not complied with, the order passed would be an order without jurisdiction. Chagla C. J. observed :

> "It is true that it is not in the case of every procedural requirement that the failure to comply with that requirement would make an order without jurisdiction. It is for the Court to consider in every case whether a non-compliance with the mandatory provisions of a statute is merely procedural in character or substantive in its nature. But if the Court comes to the conclusion that certain conditions are laid down by statute as conditions precedent and if those conditions have got to be satisfied in order that the officer exercising his powers should have jurisdiction at all, then failure to comply with those conditions would make the order without jurisdiction. In my opinion, under S. 7 (1) the two conditions which I have indicated are not merely procedural in character, but they are substantive conditions laid down by the Legislature as a safeguard for the citizen and those conditions must be strictly complied with."

One of these essential conditions, it was held, had not been complied with, and the Custodian's order was therefore treated as one without jurisdiction. It was accordingly held that the High Court had jurisdiction to interfere.

(4) It was also contended on behalf of the Custodian, and a similar contention has been also made before us by the learned Advocate General, that the Court should not exercise its discretion in issuing the prerogative writ of certiorari because the petitioner had a right of appeal against the order of the Custodian to the Custodian General. Negativing this contention, it was held that the mere fact that it was open to the first petitioner to appeal to the Custodian General should not by itself lead them to the conclusion that they should not issue a writ of certiorari. The learned Judges have held that there was a violation of the fundamental principles of justice in refusing to the first petitioner a right of hearing, and that in such a case it was open to the party to come to the High Court for a writ. We agree gene-

rally with this view but would add that we should not be understood to lay down that the High Court should interfere by a writ of certiorari in every case where there is a breach of a rule or a violation of fundamental principles of justice, in spite of there being an alternative remedy by a suit or appeal. In the present case as, we will presently show, there has been a non-compliance of a statutory rule laying down a fundamental principle of justice, viz., the right of being heard before an order of eviction is made and which order may cause irreparable injury to the party concerned.

(5) Reverting to the contention, under S. 12 (1) of the Act, the Custodian may cancel any lease if the lease was subsequent to 14-8-1947 and upon such cancellation he can demand the surrender of possession of the property, and if the person in possession failed to surrender possession, the Custodian can eject him and take over possession under sub-s. (3) in the manner provided in S. 9. However under R. 14 (4) before cancelling or varying the terms of a lease or before evicting any lessee the Custodian shall serve the person or the person concerned with a notice to show cause against the order proposed to be made and shall afford him a reasonable opportunity of being heard. This right of being heard has been advisedly provided for bearing in mind that S. 12 (1) permits the Custodian to put an end to an existing lease and turn out a lessee in lawful possession, which he could not have done but for the provisions of the Act, in our opinion these are provisions of a mandatory character and the failure to observe them will invalidate the orders passed. Admittedly no notice had been given to the applicants and they were not afforded any opportunity of being heard as to why their lease should not be cancelled. We therefore think that this is a fit case in which we should correct the important omission by the Assistant Custodian, and at the same time impress upon such quasi-judicial tribunals the necessity of compliance with the rules framed for the exercise of their powers and functions.

(6) The learned Advocate General has urged that the Deputy Custodian, while vacating the stay order, had directed the Assistant Custodian to give a hearing to the applicants' pleader, and that subsequent thereto, viz., on 26-11-1950, the applicants' pleader Mr. Chinoy had stated to the Assistant Custodian that he had nothing more to urge and that he would advise the applicants that they will have to vacate the premises. The applicants deny that they had authorised Mr. Chinoy to give any such undertaking. In any event, the fact that the Assistant Custodian had discussed the matter with Mr. Chinoy will not cure the defect inherent in the procedure leading up to the notice dated 11 and 20-9-1950, calling upon the applicants to deliver possession. It does not appear from the record before us whether any order had really been made cancelling the lease, but even if it had been made, it is clear that it was made without issuing a notice under R. 14 (4) of the Rules and without affording to the applicants an opportunity of being heard. On these grounds therefore the notices dated 11 and 20-9-1950 must be held as invalid and must be set aside. Accordingly we order that the said notices are bad and invalid and we set them aside and direct that a writ be issued restraining the opponent, the Assistant Custodian, Jetpur, from ejecting the applicants from the premises in dispute in pursuance of the said notices dated 11 and 20-9-1950. It will be, however, open to the Assistant Custodian to take adequate proceedings in accordance with the law for cancelling the lease and to take such further steps as may be necessary to eject the applicants.

(7) Before concluding we may refer to a contention urged by Mr. Baxi that the applicants were entitled to the protection of the Rent Control Act. However if the Custodian proceeds to exercise his powers under S. 12, it is competent to him to eject the persons in possession under sub-s. (3) of the Section and it will not be necessary for him to file a suit for ejectment (see 'Nayak v. Bejen Dadiba Bharucha', 53 Bom L R 654, at p. 659).

(8) Since the point on which this application is allowed was not specifically taken at the beginning, we consider that the appropriate order as to costs will be to make the parties to bear their own costs of this application, and we order accordingly.

(9) CHHATPAR J. : I agree.

V.S.B. *Application allowed.*

A. I. R. (39) 1952 SAURASHTRA 3 (C.N. 2)

SHAH C. J. AND CHHATPAR J.

Jadeja Danubha Vanubha, Accused-Appellant v. State.

Criminal Appeal No. 8 of 1951, D/- 20-8-1951.

(a) Evidence Act (1872), Ss. 105, 3 — Criminal trial — Evidence — Burden of proof — Plea of justification by defence — Standard of proof required for prosecution and defence — If different.

In a criminal trial, once the prosecution has convinced the jury that they must act upon the assumption that the accused has committed the offence with which he is charged, the accused must prove the existence of circumstances bringing his case within the exception. If he does not prove that, then the act established by the prosecution stands as a criminal act and must be dealt with accordingly. There is no question of the jury being left with reasonable doubt of the guilt of the accused. If they are left with reasonable doubt as to the accused having committed the act which is the basis of the charge then of course the case for the prosecution has failed and no question of the proof of circumstances bringing the case within the exception arises at all. But if the act which is the basis of the charge is established, then in the same way it is for the accused to prove the existence of circumstances bringing his case within the exception and 'proof' must mean the same thing in either case. (Para 3)

In each case, whether proof of the case for the prosecution or proof of the defence set up by the accused, it is the estimate of probabilities arrived at from this practical standpoint by a prudent man; and in a case of this kind the two questions, the proof of the case for the prosecution and the proof of the exception put forward by the defence, are two separate questions to be decided separately, since the second question does not arise until the first has been decided. The English Law is that if the jury is left in reasonable doubt upon a review of all the evidence, even after the explanation of the accused has been rejected, then the acqittal of the prisoner must follow. But in India, where S. 105 is so specifically and clearly en-

acted, it is impossible to adopt such a principle unless the prosecution itself has failed to prove its own part of the case in the first instance. (Para 3)

So far as the question of the standard of proof required for the defence and the prosecution is concerned, there is nothing in the Evidence Act to suggest that the numerical values of the two sets of probabilities ought to be the same or that they ought not to be the same, though in practice it may well be that the standard of proof required to bring a case within one of the exceptions is lower than the standard of proof required of the prosecution to establish its own case. But that is not so much because the standard itself is lower as because the standard in every case is the requirements of the prudent man, and the prudent man might well consider it his duty to act upon circumstances in the one case which he might not consider to be a justification for action in the other case. The test either way is the estimate of probability by the prudent man and the result on the prudent man's mind as to what his duty really is in all the circumstances of the particulr case. 'A I R (34) 1947 Bom 38 (S B) Foll. (Para 3)

Anno: Evi. Act, S. 105 N. 2, 3.

(b) *Penal Code (1860), S. 300 Except (1) — Grave and sudden provocation.*

The accused, who was charged with the murder of his wife, pleaded grave and sudden provocation. The defence was that there were rumours regarding the bad character of the wife and when he returned home on the night of the occurrence, he saw a person in the 'osri' of his house and going away. On account of this provocation he dealt numerous 'dharia' blows to the deceased and killed her.

Held that the mere presence of a stranger in the osri would not constitute either grave or sudden provocation, nor would it be such provocation as to deprive him of his self control. Nor did the fact that the accused had dealt numerous blows to the deceased in a brutal manner suggest that he must have lost self control and that that must have been because of some grave and sudden provocation. (Para 6)

Anno: Penal Code, S. 300 N. 9.

(c) *Criminal P. C. (1898), S. 286 — Material witness — Option to prosecution not to examine him.*

If the witness is a material witness it is the duty of the prosecution to examine him even if the witness was not likely to support its case. 3 Sau L R 159, Foll; A I R (29) 1942 Bom 71, held went too far. (Para 7)

Anno: Cr. P. C., S. 286 N. 6.

D. N. Vakil and Jayantilal L. Hathi, for Appellant — C. N. Shah, Advocate-General with Asst. Government Pleader, B. R. Joshi, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('41) A I R (28) 1941 All 402: (43 Cri L J 177) (F B) (Pr 3)
('42) A I R (29) 1942 Bom 71: (43 Cri L J 529) (F B) (Pr 7)
('47) A I R (34) 1947 Bom 38: (48 Cri L J 168) (S B) (Pr 3)
('33) A I R (20) 1933 Cal 800: (35 Cri L J 156) (Pr 3)
('39) A I R (26) 1939 Lah 436: (40 Cri L J 868) (Pr 6)
('37) A I R (24) 1937 Rang 83 : (38 Cri L J 524) (F B) (Pr 3)
3 Sau L R 159 (Pr 7)
(1935) A C 462: (104 L J K B 433) (Pr 3)

SHAH, C. J.: The appellant Danubha Vanubha has been convicted by the Sessions Judge, Halar Division of the murder of his wife Rajba and sentenced to transportation for life. The accused was married to the deceased since three or four years and had a son aged about two. He lived with his parents and two sisters and on the night between the 8th and the 9th May 1950, he was sleeping with his wife in his room. During the night he killed his wife with a dharia inflicting numerous injuries on her. The cries of Rajba awakened his mother who was sleeping in the osri outside and his uncle Ranubha who lived in the adjoining house. The accused was persuaded to open the doors of the room which he had bolted from inside and on entering, his father, and uncle, and his mother found that the deceased had been brutally killed by the accused. Information of the offence was given by Ranubha to the Sub-Inspector of Police at 7 o'clock in the morning. The accused was subsequently prosecuted for the murder and was convicted and sentenced as stated above.

(2) The accused stated in a written statement filed by him in the committing Magistrate's Court that there were rumours in the village of the immoral character of the deceased, that he had told the deceased about it and had warned her that in case he heard such rumours again, the result will be bad, that inspite of it when he returned home on the night of the occurrence, he saw a person emerging from the room where his wife was sleeping, that he accosted the man but the man ran away, and that he went into his room and on account of grave and sudden provocation he killed her with a dharia. In the Sessions Court the accused stated that he had gone to his 'wadi' for keeping a watch at night and that when he returned home he saw a person in the osri of his house, but the man ran away immediately. There were already rumours regarding his wife's bad character and he saw the man going away and so on account of this provocation he dealt dharia blows to his wife and killed her.

(3) In view of the statement in the Sessions Court, it may be taken that according to the deceased he saw the said person in the osri, and that is also the basis adopted by the defence. The accused has caused as many as 50 to 60 injuries to the deceased and no less than 15 fractures and the whole of her face and the skull were completely smashed. There can be no question therefore that the intention of the accused must have been to cause injuries sufficient in the ordinary course of nature to cause death and that the act amounted to murder, and this position has not been disputed for the defence. The defence has however sought to bring the case under Exception I to S. 300, Indian Penal Code, viz., on the plea that the accused killed the deceased while deprived of the power of self control by grave and sudden provocation caused by the sight of a person in his osri that night which confirmed his suspicions as to his wife's chastity. Now under S. 105 of the Indian Evidence Act, the burden of proving the existence of circumstances bringing the case within an Exception to S. 300, Indian Penal Code is upon the accused and the Court shall presume the absence of such circumstances.

Illustration (b) to the section is to the point and says that where A, accused of murder, alleges that by grave and sudden provocation, he was deprived of the power of self-control, the burden of proof is on A. Therefore it will be for the accused to prove the existence, if any, of circumstances to show that grave and sudden provocation was caused to him and that by reason of its gravity and suddenness, he was deprived of the power of self-control and in that state he dealt the dharia blows which caused her death. Mr. Vakil for the accused has relied on 'Emperor v. U. Damapala', AIR (24) 1937 Rang 83 and 'Parbhoo v. Emperor', AIR (28) 1941 All 402, for the proposition that the burden of proof under S. 105 of the Evidence Act will be sufficiently discharged if the accused is able to introduce evidence about the circumstances bringing the case under any of the Exceptions and if such evidence is enough to raise a doubt that the circumstances alleged by the accused must have existed at the time of the commission of the offence. There is authority for this view in 'Woolmington's case' ('Woolmington v. Director of Public Prosecutions', 1935 AC 462), in 'Robert Stuart Wauchope v. Emperor', AIR (20) 1933 Cal 800. The majority decision of the Full Bench in the above Allahabad High Court Ruling has also taken the same view. This question has been also considered by a Special Bench of the Bombay High Court in 'Government of Bombay v. Sakur', AIR (34) 1947 Bom 38, and dealing with this contention it was observed:

"But in our view cases decided in England on the basis of the English Law ought not to be applied rigidly to the construction of an Indian Statute unless there is a corresponding statute in England; and here what we are dealing with is not the Common Law of England but the combined effect of Ss. 3 and 105, Evidence Act, where proof receives a statutory definition and it is stated that a Court shall presume the absence of circumstances bringing a case within the exceptions unless the accused discharges the burden of proving the existence of such circumstances."

Their Lordships agreed with the view of the learned Judges of the Allahabad High Court who were in a minority and went on to observe:

"When you have, as we have here, a statute which is perfectly plain in its terms, it is not we think, legitimate to construe it by reading into it a basis derived from the English Law which may not necessarily have been its basis at all (at any rate not the English Law as at present understood) and which is not in accordance with the plain meaning of the statute. The words of the statute are that an accused person has to prove that his case falls within one of the exceptions, and in the absence of such proof the Court is bound to presume the absence of such circumstances."

The accused there pleaded a right of private defence and the case was tried with the aid of a jury. The following observations are pertinent:

"Once the prosecution has convinced the jury that they must act upon the assumption that the accused has committed the act with which he is charged, the accused must prove to the jury that he has a right of private defence; if he does not prove that, then the act established by the prosecution stands as a criminal act and must be dealt with accordingly. There is no question of the jury being left with reasonable doubt of the guilt of the accused. If they are left with reasonable doubt as to the accused having committed the act which is the basis of the charge then of course the case for the prosecution has failed and no question of self-defence arises at all. But if the act which is the basis of the charge is established, then in the same way it is for the accused to prove the existence of circumstances bringing his case within the limits of the right of private defence; and 'proof' must mean the same thing in either case."

"In each case, whether proof of the case for the prosecution or proof of the defence set up by the accused, it is the estimate of probabilities arrived at from this practical standpoint by a prudent man; and we think that in a case of this kind the two questions, the proof of the case for the prosecution and the proof of the exception put forward by the defence, are two separate questions to be decided separately, since the second question does not arise until the first has been decided. The English Law is that if the jury is left in reasonable doubt upon a review of all the evidence, even after the explanation of the accused has been rejected, then the acquittal of the prisoner must follow. But in India, where S. 105 is so specifically and clearly enacted, it is surely impossible to adopt such a principle unless the prosecution itself has failed to prove its own part of the case in the first instance."

The question of the standard of proof required for the defence, and whether it differs from the standard of proof required for the prosecution was also considered, and it was pointed out that there was nothing in the Evidence Act to suggest that the numerical values of the two sets of probabilities ought to be the same or that they ought not to be the same, though in practice it may well be that the standard of proof required to bring a case within one of the exceptions is lower than the standard of proof required of the prosecution to establish its own case.

"In practice that is undoubtedly so in many cases, though not necessarily in all. But that is not so much because the standard itself is lower as because the standard in every case is the requirements of the prudent man, and the prudent man might well consider it his duty to act upon circumstances in the one case which he might not consider to be a justification for action in the other case. The test either way is the estimate of probability by the prudent man and the result on the prudent man's mind as to what his duty really is in all the circumstances of the particular case."

We entirely agree with the above view of the Bombay High Court.

(4) Now the first part of the accused's plea is that there were rumours in the village of his wife's immoral character but on this point there is scarcely any evidence worth the name. Neither Ranubha nor Dhanba who have been examined for the prosecution, say that they heard any rumours of the bad character of the deceased. Ranubha merely says that when he questioned the accused why he had killed his wife, the accused had stated that there was a talk about their family, meaning in respect of the immoral behaviour of the deceased. Dhanba does not say anything of the kind and it is

obvious that this allegation of there being rumours in the village of the deceased's bad character is deliberately false and is an after thought. The accused has not led any evidence on the point and there is thus not the slightest ground for holding that the deceased was a woman of bad character or that there were rumours about her in the village, and we believe that the accused has deliberately, though most unjustifiably, traduced the fair name of the deceased.

(5) As for the plea that the accused saw some one in the osri as he returned home from his wadi, here again the evidence is most unconvincing. There is a fali in front of the house; the house consists of an osri with an entrance door and a small kitchen on the left and the room proper in the rear of the osri with a connecting door. In the first place, it is doubtful whether the accused had at all gone to his wadi, and if so had returned at about midnight. But assuming that that was so, it is improbable that the person, who is alleged to be standing in the osri, could at all have escaped. The accused did not recognise who the person was nor did he give a chase nor raise a cry. There is no mention of this fact in the first information given by Ranubha early next morning, and had the justification for the act been, as is now alleged, it is inconceivable that Ranubha would omit to mention this vital fact. The fact that the accused had got exasperated on seeing a stranger in the osri at night, that he had lost self control and had therefore killed the woman, or at any rate the fact that the accused had seen some one in his osri in suspicious circumstances was an important part of the incident itself, and normally it would have been mentioned in relating the incident. The omission to mention it in the first information is therefore most significant. In Ranubha's statement under S. 164, Criminal P. C., which was recorded three days after the occurrence, he has not stated anything of the kind, and, on the other hand he has stated that he did not know why the accused had killed his wife. In the circumstances his evidence that when they questioned the accused he had said that he had seen some one in the osri of the house and had therefore killed his wife must be taken as false altogether. As for Dhanba her evidence is most unnatural and unconvincing, and the learned Advocate for the defence has frankly conceded that it is not at all credible. According to her, the accused nad left for the field at night after which she slept in the kitchen. She did not know when the accused returned home, but she was awakened, when he said to her that someone was going and as she came out she saw someone running away pursued by the accused. The accused then came back and went into his room. She herself slept and when she awoke at 5 o'clock in the morning she found that the door of the room was open and the deceased was lying dead and there was blood all round. The story is most unnatural and does not merit any detailed consideration. In her statement recorded under S. 164, Criminal P. C. she has admitted that the accused did not reply to her question why he had killed his wife and that she did not know why he had killed her. That is consistent with Ranubha's statement. Therefore beyond the bare statement of the accused, which is belated, there is no evidence whatever to show either that there were rumours of Rajba's bad character or that he had seen some one in the osri that night. This latter part of the statement is inherently improbable. According to him he had gone to his wadi for a night watch and in that case the door of the osri would have been bolted from inside. Dhanba and her two daughters were sleeping in the osri. The deceased was sleeping in a room which was behind the osri and ordinarily the door of her room too would be chained from inside. It is extremely improbable therefore that any one could have entered the osri without the door having been opened or could have gone into the room of the deceased without awakening the mother and the two girls. It is equally improbable that the man, even assuming that he could enter the osri and the room of the deceased, would stand in the osri after leaving the room without awakening Dhanba and the girls, or would be found standing there at all. The statement of the accused is besides not consistent in that in the committing Magistrate's Court he speaks of the man emerging from his room where as in the Sessions Court he speaks of having seen him in the osri. The learned Sessions Judge has therefore properly disbelieved this story of the accused.

(6) Mr. Vakil has contended that the statement of the accused, by itself, should be taken as sufficient to prove that there was grave and sudden provocation and that by reason thereof the accused lost self-control and killed his wife, and, in support of the contention, he has relied on 'Abdul Khanan v. Emperor', A I R (26) 1939 Lah 436. In that case there was no direct evidence as to the commission of the offence and the evidence consisted solely of the statement of the accused, which was that about 10 o'clock at night he saw a man going out of the chaubara where his wife was at the time, and that he pursued him but the man went away. He enquired from his wife who the man was and she instead of replying to him, abused him whereupon he picked up the Chhura which was lying close by and killed her. Early next morning the accused approached one Nizam Din, who was a material witness in the case, and told him that he had killed his wife the night before and on being questioned why he had done so, he also told him of the above facts. It also appeared that the swabs of the vaginal contents of the deceased which were taken and sent for examination to the chemical examiner showed that they had semen on them. The facts were thus quite different. The accused had stated at the earliest opportunity that he had killed his wife because he saw a stranger going out of his residence. He had questioned his wife but instead of replying straight she had abused him. Besides, marks of semen were found on her own vaginal contents. There was thus sufficient material to constitute grave and sudden provocation. The facts here are otherwise because the story that the accused had seen some one in his osri has been stated at a late stage, and there is not the slightest evidence to support it. The accused has not questioned the deceased after he saw the stranger going away and in fact he has not spoken to her at all which is indeed strange conduct. There was no justification at all to jump to the conclusion that the stranger must have entered his room or must have misbehaved with his wife. The mere presence of a stranger in the osri will not constitute either grave or sudden provocation, nor

will it be such provocation as to deprive him of his self-control. Mr. Vakil has urged that the fact that the accused has dealt numerous blows to the deceased in a brutal manner suggests that he must have lost self-control and that that must have been because of some grave and sudden provocation. The argument begs the question and to accept it will mean that the more cruel and merciless the hacking of the deceased is the chances of the accused proving the fact of a grave and sudden provocation and of his losing his self-control on that account are greater. It is indeed dangerous to accept a contention of that kind.

(7) Mr. Vakil has next made a grievance of the fact that the prosecution has not examined certain witnesses who were named in the charge-sheet and who were present in the Sessions Court. The Public Prosecutor had asked for the Court's permission to drop these witnesses, and the learned Judge has considered the question in some detail and has held that the prosecution was justified in not examining them. Most of the witnesses were on the point viz., that the accused had lost moneys in gambling and had asked the deceased for her ornaments. The prosecution has alleged that as a motive and feeling that these witnesses were not material, the prosecution decided to drop them. Of the other two witnesses Vanubha was the father and Davkunverba was the sister of the accused and the prosecution dropped them as it felt that they were not going to tell the truth. The question is whether the prosecution was bound to examine all these witnesses. In the Sessions Court reliance was placed for the prosecution on 'Emperor v. Kasamalli', A I R (29) 1942 Bom 71, where it was observed:

> "In our opinion, the duty of the prosecution in criminal cases is clear. It must always be perfectly fair. It has been said over and over again that it is not the function of the Crown to procure the conviction of an innocent person. That is obvious. But the Crown is not bound to call before the Court a witness who, it believes, is not going to speak the truth. If the Crown informs the accused of the name of the witness and produces him in Court, it can then leave it to the accused to call him or not, as he thinks fit."

In our opinion, the view that the prosecution is not bound to call before the Court a witness who it believes is not going to speak the truth perhaps goes too far, and it is possible to conceive of cases where the prosecution might withhold material evidence from the Court on the mere plea that the prosecution believed that the witnesses, whom it did not propose to examine, were not going to tell the truth. If the witness is a material witness it is the duty of the prosecution to examine him even if the witness was not likely to support its case. The question was considered by this Court in 'The State v. Chamanlal Harilal', 3 Sau L R 159, where it was observed:

> "There is an entirely erroneous notion prevailing in the Mofussil Courts that the prosecution should not examine any person, who is not likely to give evidence to support its case. It is true that it is not the duty of the prosecution to examine each and every person, whose name comes out in the prosecution story, but it is bound to examine the material witnesses i.e. witnesses connected with material part of the prosecution story, even though it may be suspected that they would not support the prosecution. It is not the duty of the prosecution to secure a conviction. Its duty is to lay all the relevant facts before the Court by examining all the material witnesses. If any witness does not favour the prosecution, it would be open to the prosecutor to request the Court to treat him as a hostile witness. The witnesses may be examined in chief, and if they turn round the prosecutor might request the Court to treat them as hostile, but the Court must have before it the version of the persons who are connected with the material part of the prosecution story."

We agree with this view which, in our opinion, lays down the correct principle. However on the facts, the ruling is distinguishable from the present case because the witnesses whom the prosecution has here not examined were not material witnesses, that is, they were not witnesses connected with the material part of the prosecution story, and the prosecution was therefore justified in not examining them.

(8) In the result, we hold that there was neither grave nor sudden provocation to the accused, nor had the accused lost his self-control on any such account, and that the case is not covered by Exception I to S. 300, Indian Penal Code. The accused's conviction for murder under S. 302, Indian Penal Code is therefore correct. We confirm the conviction and the sentence and dismiss the appeal.

(9) CHHATPAR J.: I agree.

V.B.B. *Appeal dismissed.*

A. I. R. (39) 1952 SAURASHTRA 7 (C. N. 3)

SHAH C. J. AND CHHATPAR J.

Koli Bhima, Accused-Applicant v. State.

Criminal Revn. Appln. No. 30 of 1951, D/- 22-8-1951.

Penal Code (1860), S. 193 — Deposition containing false statement — Prosecution for perjury — Non-compliance with S. 360, Criminal P. C. — Effect — Criminal P. C. (1898), Ss. 360, 476.

Where a deposition made by a witness contains a false statement, the deponent is guilty of perjury. The deposition is false notwithstanding its not being read over to the witness as required under S. 360, Criminal P. C. The provisions of Penal Code relating to punishment for perjury do not pay any regard to the question whether the deposition was read over or not. If a deposition is not read over to the witness, it is only an irregularity and the irregularity does not vitiate the conviction: A I R (37) 1950 All 501, Foll. (*Para 1*)

Anno: Penal Code, S. 193, N. 8, Cr. P. C., S. 360, N. 8; S. 476, N. 11, Pts. 27, 28.

V. G. Hathi, for Applicant, C. N. Shah Advocate General with B. R. Joshi Asst. Govt. Pleader, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('27) A I R (14) 1927 P C 44 : (28 Cr L J 259) (Pr 1)

('50) A I R (37) 1950 All 501 : (51 Cr L J 1346) (Pr 1)

('40) A I R (27) 1940 Nag 410 : (41 Cri L J 697) (Pr 1)

SHAH C. J.: This revision application has been filed against the order of the Additional Sessions Judge, Gohilwad Division, confirming

the conviction of the applicant and the sentence of three months' rigorous imprisonment and a fine of Rs. 50/- in default further rigorous imprisonment for one month, by the First Class Magistrate, Bhavnagar, for an offence under S. 193, Indian Penal Code. The applicant was examined as a witness for the prosecution in a case in which one Lakhman Ghela was tried for causing grievous hurt under S. 326, Indian Penal Code, and it was alleged that the applicant had given false evidence, viz., that he made directly contradictory statement in his evidence in the committing Court and in the Sessions Court in that case. The first contention made by Mr. Hathi is that the deposition of the applicant in the committing Magistrate's Court was not read over to him as required by S. 360, Criminal P. C., that the non-compliance of the Section rendered the evidence inadmissible under the Evidence Act, and that it amounted to an illegality and not an irregularity curable under S. 537, Criminal P. C., and that no prosecution for perjury could be ordered when the deposition was not read over. No, doubt there are decisions in support of this view, but a contrary view has been taken in 'Sheoshankar Dhondbaji v. Emperor', A I R (27) 1940 Nag 410, and other cases which need not be cited. The Privy Council has held in 'Abdul Rahman v. King Emperor', A I R (14) 1927 P C 44, that the object of reading over the deposition is to obtain an accurate record from the witness of what he really means to say, and to give him an opportunity of correcting the words which the Magistrate or his clerk has taken down. It is not to enable the accused or his advocate to suggest corrections. The Privy Council has also held that mere omission or irregularity to comply with S. 360 unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction. No doubt the objection was there taken by the accused, but the principle applies even where a witness is subsequently charged with perjury. In 'Mohammad Farooq v. Rex', A I R (37) 1950 All 501, the case law on the justice (sic) has been examined at length, and it has been held that where a deposition made by a witness contains a false statement, the deponent is guilty of perjury. The deposition is false notwithstanding its not being read over to the witness as required under S. 360, Criminal P. C. The provisions of Penal Code relating to punishment for perjury do not pay any regard to the question whether the deposition was read over or not. If a deposition is not read over to the witness, it is only an irregularity and the irregularity does not vitiate the conviction. In my opinion the above Allahabad decision sets out the law on the subject correctly, and I prefer to follow it.

(2) Mr. V. T. Vasavada, the committing Magistrate, has been examined and his evidence is that he has correctly recorded the deposition of the applicant. It is not alleged that the record of the deposition is inaccurate. It does not appear from Mr. Vasavada's evidence that the deposition was read over to the applicant, but as stated above, that at best is an irregularity and does not vitiate the conviction. The position, therefore, is that the witness can be convicted of perjury if it is found that he has given false evidence despite the fact that his evidence was not read over to him under S. 360, Criminal P. C.

(3) It was next urged for the applicant that the statements in consequence of which he has been prosecuted of perjury are not contradictory and are reconcilable and that the applicant has not given false evidence. Now the statement made by the witness in the committing Court was that he was walking ahead of Dana by about two cubits when Lakhman gave a dharia blow to Dana, that he (witness) turned back and saw that Lakhman gave another dharia blow and the said blow fell on Dana's head. His evidence in the Sessions Court is that he was walking ahead by two 'nadavas', that there was some disturbance behind and so he walked back and asked Dana what had happened and Dana then said that he was beaten by Lakhman. The meaning of these two statements is quite clear and whereas in the former the applicant definitely admitted having himself seen Lakhman dealing a dharia blow to Dana and the blow falling on Dana's head, in the latter he speaks of having questioned Dana and having been told by Dana that Lakhman had beaten him, which distinctly means that he had not himself witnessed Lakhman giving the blow to Dana. Now these are perfectly contradictory statements, and it is difficult to see how they can be reconciled. It is true that he has not said in terms that he did not witness Lakhman giving the dharia blow to Dana, but in effect it means the same. In his evidence in the Sessions Court, he has changed the entire position and instead of saying that he was quite close to Dana being ahead by about 2' only, he stated that he was some distance away and that he walked back and was told by Dana of the dealing of the blow. The witness obviously meant to deny and has in effect denied having witnessed the blow itself. He was thereupon declared a hostile witness and his evidence in the committing Court, which is brief, was read over to him, and he was asked whether he gave that evidence, to which he replied that he did not remember. It was therefore not a case of the witness having given the evidence in the Sessions Court innocently or without understanding its import. On the contrary he has given it deliberately and with the full knowledge that it was not true. In fact he has stuck to it in the course of his statement recorded by the trial Magistrate under S. 342, Criminal P. C., in this case. There can be no doubt therefore that the applicant has given false evidence knowing or believing it to be false. His conviction is therefore proper and is confirmed.

(4) Mr. Hathi has lastly prayed for a light punishment and has urged that the applicant is an illiterate agriculturist and a villager. The learned Advocate General has not pressed for maintaining the sentence and has left the question of the sentence to our discretion. Considering the circumstances of the case and the fact that the accused had to face the expense and worry of the trial, we think that the requirements of the case will be met if we remit the substantive sentence of imprisonment. Accordingly we set aside the sentence of three months' rigorous imprisonment, and maintain the sentence of fine and the sentence of one month's rigorous imprisonment in default of payment of fine.

(5) CHHATPAR, J.: I agree.

Sentence reduced.

G.M.J.

A. I. R. (39) 1952 SAURASHTRA 9 (C. N. 4)

CHHATPAR, J.

Pragji Valji, Defendant No. 2; Appellant v. Venilal Maganlal, Plaintiff-Respondent.

Second Appeal No. 2 of 1951, D/- 25-4-1951.

(a) Civil P. C. (1908), S. 100 — Questions of malice and want of reasonable and probable cause are questions of fact which cannot be challenged in a Second Appeal: 2 Sau. L. R. 8, Foll. (Para 2)

Anno: C. P. C. Ss. 100-101, N. 39, Pt. 19.

(b) Tort — Malicious Prosecution — Liability of instigator.

Where in a suit for damages for malicious prosecution it was found that 'A' who had launched the prosecution was instigated by 'B' who took active part in the prosecution and was also one of the prosecution witnesses:

'Held' that 'B' also was liable for damages as a joint tort-feasor. (Para 4)

V. G. Hathi, for Appellant; G. B. Joshi, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('08) 30 All 525: (35 Ind App 189 P C) (Pr 3)
('30) A I R (17) 1930 All 742: (53 All 44) (Pr 3)
('50) 2 Sau L R 8. (Pr 2)

JUDGMENT: This Second Appeal arises out of a suit filed by the respondent-plff. for Rs. 150/- as damages for malicious prosecution. The respondent filed a suit against the present appellant & one Labhshanker who was deft. 1, the present appellant being deft. 2. His allegation was that Labhshanker had instituted a false & malicious complaint of theft of a bucket against him & this prosecution was instigated by the present appellant in circumstances in which he should be also considered the prosecutor. In the trial Court, Labhshanker was ex parte & a decree for Rs. 130/- was passed against him, the trial Court holding the cause of action for malicious prosecution being proved. The trial Court Judge, however, dismissed the suit against deft. 2 — the present appellant. Against this decision, the present respondent filed an appeal & the learned Dist. J., held that the present appellant was also responsible as a prosecutor inasmuch as he had instigated Labhshanker in the prosecution. The District Judge consequently passed a decree in favour of the respondent also against the appellant. Against this decision, the appellant has filed the present appeal.

(2) Mr. V. G. Hathi the learned Advocate for the appellant has argued that so far as the appellant is concerned, the ingredients of a cause of action for damages for malicious prosecution have not been made out. His principal argument is that the appellant cannot be considered as a prosecutor as the prosecution was in fact launched by Labhshanker. He has also questioned the other findings as to malice & want of reasonable & probable cause. Our own Court in the case of Thakar Gokaldas Nanji v. Thakar Dwarkadas', 2 Sau L R 8, has held that the questions of malice & want of reasonable & probable cause are questions of fact which cannot be challenged in a Second Appeal. The only question worth considering is whether on the finding given by the learned Dist. J., that the appellant instigated Labhshanker to file the prosecution, he should be considered to have taken part in the prosecution to make him liable to an action for malicious prosecution. The facts relating to the prosecution are that both the defts. i.e., Labhshanker & the present appellant are tenants of the respondents & there is considerable ill-feeling between them, which has led to several suits & criminal prosecution between them. The incident connected with the alleged offence of theft as appears in the judgments of the two lower Courts was that a leaking bucket belonging to Labhshanker was found by the respondent under a water tap which was open & as he has to bear the water charges payable to the Municipal Corporation & which charges are payable in accordance with the quantity consumed registered by a meter, he very rightly closed the tap & removed the bucket from the tap & put it in the 'Ravesh.' On the next morning, Labhshanker inquired about his bucket & was told by the respondent that if the bucket lying in the 'Ravesh' belonged to him, he could take it. Thereupon the present appellant who is also a tenant in the same building came out from his house & told Labhshanker not to take the bucket but to proceed against the respondent legally. As a result of this instigation, the criminal prosecution for theft was filed & the appellant himself gave evidence against the respondent. The respondent was acquitted, whereafter he filed the present suit.

(3) The question whether a person can be considered to have launched a prosecution or not in a suit for damages for malicious prosecution has been considered by some High Courts. In the Privy Council case of 'Gaya Prasad v. Bhagat Singh', 30 All 525, it was observed:

> "The answer to the question who is the 'prosecutor' must depend upon the whole circumstances of the case. The mere setting the law in motion is not the criterion; the conduct of the complainant before & after making the charge must also be taken into consideration. Nor is it enough to say that prosecution was instituted & conducted by the police; that is again a question of fact. Theoretically, all prosecutions are conducted in the name & in behalf of the Crown, but in practice this duty is often left in the hands of the person immediately aggrieved by the offence, who 'pro hac vice', represents the Crown."

In that case the defts. though their names did not appear on the face of the proceedings except as witnesses, were directly responsible for a charge of rioting being made against the plff., had produced false witnesses to support the charge at the investigation by the police, had taken the principal part in the conduct of the case before the police & in the Magistrate's Court, had instructed a counsel who appeared for the prosecution at the trial that the plff. 'had joined the riot' & had done all they could to procure the conviction of the plff. who was acquitted being found not to have been present at the rioting. It was held by the Privy Council that the defts. were rightly found liable for damages in an action for malicious prosecution. This case has been followed in the case of 'Mohamed Shariff v. Nasir Ali', A I R (17) 1930 All. 742, which was a suit for damages for malicious prosecution & the finding was that all the three defts. conspired to prosecute the plff. maliciously & without reasonable & probable cause & that in furtherance of their design one of the defts. figured as the complainant in a cognizable offence of which information was lodged by him to the police & the latter prosecuted the plff. on the faith of such information. Evidence in the case was given by all the three. It was held that under these circumstances, all the three defts. were liable to be sued in an action for malicious prosecution.

(4) In the present case, there is the finding of fact of the learned Dist. J., that the prosecution was instigated by the present appellant. The circumstances of the case clearly show that the appellant had instigated & had taken an active part in the prosecution of the respondent. He was also one of the prosecution witnesses. These cir-

cumstances make him liable as a joint tort-feasor. I hold therefore that the learned Dist. J., had rightly granted the decree for damages against the present appellant also. The appeal consequently fails & is accordingly dismissed with costs.

G.M.J. *Appeal dismissed.*

A. I. R. (39) 1952 SAURASHTRA 10 (C. N. 5)

SHAH, C. J., AND CHHATPAR, J.

Bharwad Rama Gova and another — Accused-Appellants; v. State.

Criminal Appeal No. 14 of 1951, D/- 17-4-1951.

(a) Penal Code (1860), S. 366 — "Seduce" — Interpretation.

The word 'seduce' in S. 366 is used in the general sense of enticing or tempting and not in the limited sense of committing the first act of illicit intercourse, so that a person can be convicted of an offence under S. 366 in spite of the fact that he had previous illicit connection with the girl: Case law discussed. *(Para 3)*

Anno: Penal Code, S. 366, N. 5.

(b) Penal Code (1860), S. 366 — Sentence — Seduced girl, although a consenting party and grown up and having previous intimacy with accused, a married woman to the knowledge of accused — Offence of seduction held most reprehensible and sentence of two years held not excessive. *(Para 6)*

Anno: Penal Code, S. 366, N. 9.

H. I. Bhatt, for Appellants; C. N. Shah; Advocate General, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('32) A I R (19) 1932 All 409: (33 Cri L Jour 669) (Pr 3)

('35) 37 Bom L R 176: (A I R (22) 1935 Bom 189) (Pr 3)

('44) 46 Bom L R 203: (AIR (31) 1944 Bom 159: 45 Cri L Jour 750) (Prs 3, 4)

('30) 57 Cal 1074: (AIR (17) 1930 Cal 209: 31 Cri L Jour 903) (Pr 3)

('33) 60 Cal 1457: (AIR (20) 1933 Cal 718: 35 Cri L Jour 307) (Pr 3)

('34) A I R (21) 1934 Lah 227: (35 Cri L Jour 1386) (Pr 3)

('30) A I R (17) 1930 Mad 980: (32 Cri L Jour 357) (Pr 3)

('29) A I R (16) 1929 Pat 651: (31 Cri L Jour 306) (Pr 3)

('03) Emperor v. Naga Ni Ta: (10 Bur L R 196) (Pr 3)

CHHATPAR, J.: This is an appeal from an order of conviction by the Ses. J., Jhalawad Division, of the two appellants. The first appellant Bharwad Rama Gova was convicted of offences under Ss. 366 & 457, I.P.C. & sentenced to rigorous imprisonment of two years for the first offence & six months for the second offence. The second appellant Vaghri Sura Chotha was convicted of an offence under S. 366, I.P.C., & sentenced to rigorous imprisonment of six months. The offence related to the kidnapping of a young married girl by name Bai Laxmi Shiva, who was living at the time of the offence with her father Patel Shiva Vashram at Dhudkot in Jhalawad district. The prosecution story was that on the night between 10th September & 11th September 1950, the girl was sleeping alone in the 'Osri' of her room, the western wall of which had fallen down in monsoon & was patched up with thorns & dry stalks of cotton & that accused 1 entered this room by making a passage by removing thorns & stalks, aroused Bai Laxmi who was sleeping & forced her to leave the house. It was alleged that accused 2 was a friend of accused 1 & he was waiting outside this wall & both of them took Bai Laxmi from the lawful guardianship of her parents with the intention that she may be forced or seduced to illicit intercourse. It was alleged that they started from Dhudkot towards Mathak & reached Vankaner on the morning of 12-9-1950. There while accused 2 had gone to purchase 'Bidis' for the first accused, the latter & Bai Laxmi were seen by a constable at Vankaner whose suspicion being aroused, they were taken in charge to the Police Station Officer, where their statements were recorded & detained in custody. In the meantime, the parents of Bai Laxmi having found her missing the next morning, made inquiries & information was lodged with the Sub-Inspector of Police, Halvad, who immediately took steps & sent telegrams to various places as a result of which accused 1 & Bai Laxmi were arrested & they were brought to Halvad on the evening of 15-9-1950. The second accused had absconded as soon as he saw accused 1 & Bai Laxmi being detained by the constable at Vankaner. He however surrendered on 5-10-50. The two accused were then charge-sheeted & convicted as above stated.

(2) Mr. Bhatt, the learned Advocate for the appellants, has not challenged on behalf of accused 1 the act of kidnapping of the girl & his main arguments on behalf of this accused have been concentrated on the question whether the offence fell under S. 363 or S. 366, I.P.C. He has however challenged the conviction of accused 1 of the offence under S. 457, I.P.C. On behalf of accused 2 he has pleaded that there is no reliable evidence to connect him with the offence & that he should be acquitted.

(3) Now there is no doubt that Bai Laxmi was below 18 years of age. It has been proved conclusively that her age at the time of the offence was 16 years & 7 months & this has not been disputed by the learned Advocate for the appellants. The act of kidnapping by accused 1 is also not disputed as there is ample evidence on the record. The main argument of the learned Advocate is that the offence falls under S. 363, as the kidnapping of the girl could not be considered to have been with intent that she may be forced or seduced to illicit intercourse in view of the fact that the girl was a consenting party & there is also some evidence on the record that there was previous intimacy between Bai Laxmi & accused 1. The learned Ses. J., has found that no force was used & that the girl went with the accused with her own free will. The moot point on which arguments have been advanced both by the learned Advocate for the accused & the learned Advocate-General is whether in the circumstances of the present case it could be inferred that the kidnapping was in order that the girl may be seduced to illicit intercourse. It is not questioned that the intercourse would be illicit as she was a married woman, whose husband was living. The stress has been laid on the interpretation of the word 'seduced.' This word has been the subject of interpretation by several rulings of the High Courts. The word 'seduction' itself is capable of two meanings; one in the specific sense of meaning inducing a girl to part with her virtue for the first time & the second in the general sense meaning to entice, allure or corrupt. The Allahabad High Court in the case of 'Baijnath v. Emperor', A I R (19) 1932 All, 409, and the Lahore High Court in the case of 'Nura v. Emperor', A I R (21) 1934 Lah 227, have interpreted the word in the specific sense of inducing a girl to part with her virtue for the first time. These High Courts have consequently held that the act of seduction alleged must be subsequent to the kidnapping in order to make S. 366, I.P.C., applicable & that this Section cannot be applied to a case where an accused is stated to have been

carrying on an intrigue previous to her kidnapping; kidnapping with the intention of continuing illicit intercourse cannot be said to amount to seducing to illicit intercourse. On the other hand, the Calcutta High Court in the case of 'Prafullkumar Basu v. Emperor', 57 Cal. 1074, the Madras High Court in the case of 'Suppiah v. Emperor', (A I R (17) 1930 Mad 980: 32 Cri. L. J. 357), the Bombay High Court in the case of 'Emperor v. Lakshman Bala', 37 Bom L R 176, and in the case of 'Emperor v. Ayubkhan', 46 Bom L R 203, and the Patna High Court in the case of 'Krishna Maharana v. Emperor', A I R (16) 1929 Pat. 651, have held that the word 'seduce' in S. 366 is used in the general sense of enticing or tempting & not in the limited sense of committing the first act of illicit intercourse, so that a person can be convicted of an offence under S. 366, in spite of the fact that he had previous illicit connection with the girl. In a later case of 'Shaheb Ali v. Emperor', 60 Cal 1457, the Calcutta High Court while accepting the interpretation of the word 'seduced to illicit intercourse' given in the earlier case of 'Prafullkumar Basu v. Emperor', (57 Cal 1074), has added a rider that it must be proved that at the date of the offence, the girl had resumed a life of purity. If the girl was leading a life of indulgence in unlawful sexual intercourse, it cannot be said that she was kidnapped in order that she might be seduced to illicit intercourse. In my opinion, the interpretation of the Bombay, Madras, Patna & Calcutta High Courts of the word 'seduce' seems the correct one. I agree with the oft-quoted passage from the Judgment of Adamson, J., of the Lower Burma Chief Court in the case of 'King-Emperor v. Nga Ni Ta', (10 Bur L R 196), cited in many cases that it would be monstrous to hold that, because a man may have seduced a girl while in the custody of her parents to surrender her chastity, he committed no further act of seduction to have illicit intercourse when he persuaded her to go away with him. I would add to this observation that a girl having once gone astray with a man cannot be assumed to have abandoned herself to him to such an extent as to make any overtures to further acts of intercourse unnecessary.

(4) In the present case the girl is a married woman; the evidence of previous connection is very meagre. It appears that accused 2 had a sister named Bai Gomi, who though married lived with her brother at Dhudkot; it was this Gomi who was trying to induce Bai Laxmi to have illicit intercourse with accused 1. Bai Laxmi says that before this offence was committed, when she was once returning from the field, she was assaulted by accused 1 & on another occasion when she was returning after attending a call of nature, he met her & asked her to be ready at night to accompany him. It is possible to infer that on one or two occasions the girl might have had illicit intercourse with him. The girl says that he held out promises of a gay & happy life free from drudgery of work, if she lived with him as his wife. The girl must be conscious that she was a married woman & her eloping with him would land her into serious trouble. This can only be counter-balanced by the supposition that the promises of good things of life held out by him overweighed her apprehensions. These circumstances would, in my opinion, bring the case under 'seduction,' i.e., enticing or tempting. To put the position in the words of Blagden, J., in the case of 'Emperor v. Ayubkhan', 46 Bom L R 203, above referred to:

> "The girl's consent might always be revoked, & if it were revoked force or a further seduction would be essential before an act of illicit intercourse could take place; & even if it were not revoked, it is difficult to see how the act of illicit intercourse could take place without at least some overture, however slight being made by the male person, which overture, however slight, could probably be called a 'seduction' to illicit intercourse."

I therefore hold that the girl Bai Laxmi was kidnapped from lawful guardianship in order that she may be seduced to illicit intercourse & that accused 1 was rightly convicted of the offence under S. 366, I.P.C.

(5) So far his conviction of the offence under S. 457, I.P.C., is concerned, the only evidence is of the girl Bai Laxmi that he had effected entrance into her room by removing a portion of the improvised wall of thorns & dry stalks. I am of the opinion that since the girl was a consenting party it is equally possible that the girl herself went over to the accused who was waiting outside by making an opening through this wall. The learned Advocate-General has not pressed for maintaining the conviction under S. 457, I.P.C. I therefore acquit accused 1 of the offence under S. 457, I.P.C.

(6) The learned Advocate for the appellants has made an earnest plea for reduction of the sentence for the conviction of the offence under S. 366, I.P.C., on the ground that the girl was a consenting party, that she was fairly grown up & that there was previous intimacy between her & the first accused. But this is a serious offence. The accused knew that she was a married woman, as he was a resident in the same locality where the girl's father was residing. He belonged to a different community. I cannot take a lenient view of the case. His conduct in seducing a young married woman from the path of virtue & kidnapping her was highly reprehensible, I therefore see no reason to reduce the sentence of two years imposed by the learned Ses. J., which cannot be considered excessive in the circumstances of the present case. I consequently maintain the conviction & sentence awarded to accused 1 for the offence under S. 366, while acquitting him of the offence under S. 457, I.P.C. The appeal of accused 1 is partly allowed to that extent only.

(7) As regards accused 2 his learned Advocate has contended that there is no evidence except of the girl Bai Laxmi; her evidence should not be relied upon unless corroborated by independent evidence. But the learned Advocate-General has pointed out several circumstances which prove his complicity in the offence. It was his sister Gomi who was trying to induce Bai Laxmi to have illicit connection with accused 1. Both the accused are friends & accused 2 must be knowing of the evil intention of accused 1 towards Bai Laxmi & the part that his own sister was playing in bringing about an intrigue between the two. It is further in evidence that accused 2 was seen on the previous day of the offence in the village Dhudkot & he was found missing from the next morning till he surrendered himself on 5-10-50. No satisfactory explanation has been offered by him as to why he suddenly disappeared from the village immediately after the offence. There is also the evidence of the girl Bai Laxmi implicating him, which appears natural & convincing. I am therefore of opinion that his complicity in the offence is satisfactorily established. He has been sentenced to rigorous imprisonment for six months only in view of the minor part that he played & in view of his young age. I see no reason to interfere with the conviction and the sentence; I therefore dismiss his appeal.

(8) SHAH, C. J.: I agree.

G.M.J.

Appeal dismissed.

A. I. R. (39) 1952 SAURASHTRA 12 (C. N. 6)

SHAH, C.J., AND CHHATPAR, J.

Jhala Jorubha Hematsih, Applicant v. State.

Criminal Misc. Habeas Corpus Appln. No. 3 of 1951/- 26-3-1951.

(a) Public safety — Preventive Detention Act (1950), S. 3 (1) (a) — Detention for investigation — High Court to enquire into.

Where the Govt. is 'prima facie' satisfied about the activities of the detenu, then it is not open to the High Court to go into the merits, and enquire about the reasons of such detention. A I R (36) 1949 All 748, Foll. (Para 3)

(b) Public safety — Preventive Detention Act (1950), S. 3 (1) (a) — Detention for investigation of crime — Validity — Criminal P. C. (1898), S. 491.

If the main ground of detention be investigation of a crime, detention of person under the Preventive Detention Act would be colourable and improper. But where the grounds have been definitely mentioned with sufficient precision and details there is little scope for the allegation that the detention is for a collateral purpose. A I R (32) 1945 Nag. 8; A I R (33) 1946 Lah. 36; AIR (37) 1950 Bom 202 (FB); AIR (37) 1950 Hyd. 68, Disting.

(Paras 5, 6)

Anno: Cr. P. C. S. 491, N. 7.

(c) Public safety — Preventive Detention Act (1950), S. 3 (1) (a) — Question of ill-treatment of detenu prior to detention order whether relevant — Criminal P. C. (1898), S. 491.

The detention of which the detenu complains by his application is the detention in the jail on the date when he makes the application; and it is immaterial for the determination of the question in issue as to whether his prior alleged ill-treatment by the police is or is not legal. This alleged ill-treatment cannot affect the merits of the detention order, the validity of which is to be determined independently of any such considerations. A I R (36) 1949 Bom 319 (FB) Rel. on. (Para 6)

Anno: Cr. P. C. S. 491, N. 7.

(d) Public safety — Preventive Detention Act (1950), S. 3 (1) (a) — Mistake in describing detenu by name — Validity of order.

Where the mistake as to the surname and the slip in the spelling of the father's name of the detenu had been sufficiently accounted for and these mistakes did not affect his identity as the person meant to be detained was the detenu and none other:

'Held' that the contention that the District Magistrate had not applied his mind with due diligence before issuing the order of detention was altogether unsustainable. A I R (35) 1948 All 440 Rel. on; 2 Sau. L R 113; A I R (32) 1945 Bom 212 (FB); A I R (36) 1949 Bom 75 Disting.

(Paras 7, 10)

(e) Public safety — Preventive Detention Act (1950), S. 3 (1) (a) — Prosecution or detention — Choice is of Govt.

Whether the person should be prosecuted under the ordinary law, or the Govt. should exercise their powers under the Preventive Detention Act is a matter for the authorities to decide. A I R (37) 1950 Bom 202 (FB), Rel on.; 2 Sau L R 41, Dissent. (Para 11)

V. G. Hathi, for Applicant; C. N. Shah; Advocate-General; for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('48) A I R (35) 1948 All 440: (49 Cri L Jour 735) (Pr 10)

('49) AIR (36) 1949 All 748: (1949 All L Jour 246) (Pr 3)

('45) A I R (32) 1945 Bom 212: (46 Cri L Jour 608 FB) (Pr 8)

('49) A I R (36) 1949 Bom 319: (51 Cri L Jour 184 FB) (Prs 3, 6)

('49) A I R (36) 1949 Bom 75: (50 Cri L Jour 173) (Pr 9)

('50) 52 Bom L R 268: (A I R (37) 1950 Bom 202: 51 Cri L Jour 1126 F B) (Prs 5, 11)

('50) A I R (37) 1950 Hyd 68 (Pr 5)

('46) A I R (33) 1946 Lah 36: (47 Cri L Jour 212) (Pr 4)

('45) A I R (32) 1945 Nag 8: (I L R (1945) Nag 6) (Pr 4)

('49) A I R (36) 1949 Nag 50: (50 Cri L Jour 165) (Pr 3)

('49) 2 Sau L R 41 (Pr 11)

('49) 2 Sau L R 113 (Pr 8)

('50) Cri Misc 'Habeas Corpus' Appln. No. 31 of 1950 (Sau) (Pr 3)

('51) Cri Misc Appln No. 1 of 1951: (4 Sau L R 45) (Pr 3)

('51) Cri Misc 'Habeas Corpus Appln. No. 5 of 1951 (Sau) (Pr 3)

SHAH, C. J.: This is an application under S. 491 Cr. P. C. by Jhala Jorubha Hemtasingh who has been detained by an order of the District Magistrate, Central Saurashtra, dated 26-12-1950 made under S. 3 (1) (a) (ii), Preventive Detention Act 1950 (No. IV (4) of 1950.) According to the applicant he was taken in custody from his house at Ratanpur on 18-12-1950 & was interrogated by the Police in connexion with information, viz., that he had harboured the notorious dacoit Bhupat. On the night of 19th December he along with his brother Raghubha & one Dungarji Hematsing Zala was taken to Nes near Wankaner, & from there they were taken to other places & were brought back to Ratanpur on 20th December where the Police let off Raghubha and Dungarji Hemat Singh. On the next day, viz., 21st December the applicant was removed from Ratanpur and taken to the Sardhar Jail where he was hand-cuffed and severely beaten by the police & he was later served with a detention order by the District Magistrate on 26-12-1950. The applicant has disputed the truth of th grounds stated in the District Magistrate's order & has denied the various acts imputed to him therein.

(2) The Advocate-General on behalf of the Saurashtra State has denied the allegation that the applicant was in police custody from the 18th to the 26th December & he has also denied the allegations of ill-treatment & beating, etc., or of the applicant having been detained in the jail at Gardhar or at Rajkot. Police Officers had gone to Ratanpur on 19th December in order to verify the information which they had received, viz., that the son of one Hematsing of Ratanpur was harbouring Bhupat, & they had in that connection called the applicant, his brother Raghubha & Dungarji Hematsing & had taken them to Nes near Wankaner & after making the necessary enquiries they had returned to Ratanpur on the 20th December & left the applicant & the two others there. The applicant was next called to Rajkot on 23rd December for the purpose of identification & from there asked to go to Sardhar for the same purpose, but it is denied that he was taken to Sardhar Jail at any time, or was beaten. They returned to Rajkot the same day & the applicant went back to his village. He was called by the police from time to time for the purpose of identification which was necessary in order to ascertain who the harbourer of Bhupat was.

(3) Mr. Hathi, who appears for the applicant, has not disputed that the grounds of detention are within the purview or ambit of the Preventive Detention Act; & apart from it it is plain that

for the reasons stated in the order it was open to the District Magistrate to direct the detention of the applicant with a view to preventing him from acting in a manner prejudicial to the maintenance of public order. The grounds stated in the order are (i) that he met Bhupat Meruji near Bileshwar Temple on Monday 21-8-1950 & harboured him for five days thereafter, (ii) that he again harboured Bhupat on 15th and 16th October in the Shakti Temple near Ratanpur, (iii) that he met Bhupat & his two associates on 11-11-1950 & took them to Virvav & there arranged for a meeting between them & Jadeja Takhubha Kalyansang (applicant in 'Criminal Misc. Habeas Corpus Appln No. 5 of 1951), before the dacoity at Sarpadad & (iv) that on 26-11-1950 he took Bhupat & his associates to Dhiyawad & attempted to get shelter for them at the house of Jatubha Jamubha of Dhiyawad & on the same night also attempted to secure shelter for them at the Wadi of Jadeja Lakhubha Dilubha of Rajkot prior to going to the Nes of Dhiyawad. The grounds are thus as specific & detailed as they could be, & though the detention order has been disputed on various other grounds, it has not been urged that the grounds stated are neither vague or insufficient. However the applicant has denied the truth of the facts stated in the said grounds & has urged that he was at his own village all along & was engaged in his other pursuits & that he had not left the village on any of the occasions stated in the order. These statements have been denied on behalf of the State. But assuming that the various preoccupations stated in the application & the affidavits filed on applicant's behalf, which incidentally have been denied by the police officers in their counter affidavits, were there they do not still rule out the possibility of his engaging in the various activities stated in the order & these grounds could still exist. However, the question need not be pursued any further because it is not open to the Courts to enquire into the truth or otherwise of the grounds stated in the detention order. This Court has held in Cri Misc. Habeas Corpus Appln. No. 31 of 1950, that if the Government is 'prima facie' satisfied about the activities of the detenu, then it is not open to the High Court to go into the merits, & enquire about the reasons of such detention. The same view was taken in 'Jadav Modha v. Saurashtra State', Cri Misc Appln No. 1 of 1951, viz., that the Court cannot go into the merits of the order of detention. In 'Ram Bilas v. Rex', A I R (36) 1949 All 748, which was a case under the U. P. Maintenance of Public Order (Temporary) Act (IV (4) of 1947), it was observed:

"It is now well settled that in dealing with 'habeas corpus applications against the detention under the Act, the High Court cannot go into the questions of facts to ascertain whether the allegations of the detenu are correct or whether there existed in fact sufficient & valid grounds for the detaining authority to pass the order of detention. Once the detaining authority was satisfied of the neccessity of passing the detention order, the Court cannot go behind it."

(See also 'In re Jayantilal Nathubhai', A I R (36) 1949 Bom 319, & 'Wasudeo Anant v. Emperor', AIR (36) 1949 Nag 50.) Therefore it is not the function of the Court to enquire into the merits of the grounds of detention, & the question whether the applicant did really give shelter to Bhupat or harboured him, or whether he was at his village & was engaged in his own pursuits at the time are outside the scope of any enquiry by the Court.

(4) The next contention urged by Mr. Hathi is that the detention order has been made for a collateral purpose & is 'mala fide' & in support of this contention reliance has been placed on certain reported decisions. The first of these is 'Vimlabai Deshpande v. Emperor', A I R (32) 1945 Nag &. There the police were conducting an investigation into an offence of dacoity involving the looting of Government treasury in the East Khandesh District of the Bombay State, & the two detenus Deshpande & Lele were detained in custody under Rr. 26 & 129 of the Defence of India Rules during the investigation & for the purpose of the said investigation. On these facts it was held, & rightly so that:

"Rule 129 gives the Provincial Govt. special power to regulate the place of detention & the nature of the custody but not to regulate the manner of an investigation. Therefore the procedure regulating the manner of the investigation is the procedure set out in the Criminal Procedure Code. If either the police or the Provincial Govt. desire an investigation into any offence, whether under the Penal Code or under the Defence of India Rules, then they are bound to conduct their enquiry in accordance with the provisions of the Criminal P. C. They cannot call in aid their powers of detention & under the guise of exercising these powers conduct a secret investigation into a crime. If they have information that these detenus have committed crime or offences, they are not bound to investigate into them. They can rest content with detaining them under R. 26 or R. 129. But if they want an investigation they must proceed in accordance with the provisions of the Criminal P. C. If they do otherwise it is a fraud upon the Act & their action is not taken in good faith. They cannot make the best of both worlds."

This decision was followed in 'Basheshar Dayal v. Emperor', AIR (33) 1946 Lah 36. The contention made on behalf of the petitioner, viz., that Baij Nath & Khusha Singh were arrested & were being detained in order to be made witnesses in connection with a case that the police contemplated stating against certain contractors & Supply Officers appears to have been accepted by the Court, & it was therefore held that under the pretence of exercising powers under R. 129 the police cannot conduct an investigation into a crime. If the police desire an investigation they should proceed in accordance with the provisions of the Criminal P. C. If no ground for detention is made out by the police or if detention is made with a view to facilitating the investigation of a crime it is a misuse of R. 129.

(5) Another decision bearing on this point is 'Maledath Bharathan v. Commissioner of Police', 52 Bom L R 268. That was a case under the Bombay Public Security Measures Act & the order of detention made by the Commissioner of Police was challenged as mala fide & for a collateral purpose, viz., for conducting investigation into an offence. The applicant Maledath was present at a public meeting held at Lal Baug in the city of Bombay on 8-5-1949, & at the close of the meeting the persons present formed themselves into a procession & marched to the Delisle Road maidan after 7 p.m. in violation of an order issued by the Commissioner of Police banning all processions in that area, the police tried to disperse the procession, & in their attempt to do so arrested several persons including the applicant & the applicant was then served with an order of detention under the Bombay Public Security Measures Act. On these facts it was held & very rightly so that it was not permissible under the cloak & guise of the Bombay Public Security Measures Act, to override the ordinary criminal law of the land & to deprive the subjects of the safeguards provided under the law. It was observed:

"When an offence has been committed, the police authorities may investigate it, in which case they must comply with the provisions of the law

with regard to investigation, or they may feel that the detention of the accused is more essential in the interests of the State, & what is more important is what he is likely to do rather than what he has already done, in which case it would be open to them to detain him under the Security Act. But they cannot pursue both the rights a the same time, because, on the facts of this case, it is apparent that these two rights are inconsistent & cannot be exercised at the same time; they cannot detain the applicant under the Security Act and at the same time carry on the investigation without providing the applicant with the safeguards to which he is entitled under the law. The authorities have laid down that the powers of the detaining authority are very wide under the law as it exists today. Government may detain a person even though the grounds clearly disclose that he could have been prosecuted under the ordinary criminal law with regard to those very grounds. The detaining authority may, as I pointed out earlier, detain a person although a Criminal Court has acquitted him in respect of the very charge for which he is being detained under the Security Act. Therefore, in our opinion, when the detaining authority makes up his mind to detain a person who is alleged to have committed an offence, then the detaining authority has made his choice and it would not be permissible to him to investigate the offence while still keeping the person under detention & not complying with the provisions of the law with regard to investigation. Of course, it would be open to the detaining authorities to carry on an investigation into the offence provided they submit to the provisions of the law in this respect."

The same view was taken in 'Narayanamma v. The State of Hyderabad', AIR (37) 1950 Hyd 68, where it was observed:

"If the main ground of detention be investigation of a crime, detention of a person under the Preventive Detention Act would be colourable, and improper & amount to circumventing important provisions of the constitution, & as such it cannot be allowed."

(6) Now in the Nagpur & the Lahore cases referred to above the detention was under the Defence of India Rules which did not require the authorities to supply specific grounds of detention & the detenu naturally made allegations that the detention was for a collateral purpose & the Courts were anxious to enquire into the facts & to ascertain if the detention was really for a collateral purpose & therefore a cloak. Here the grounds have been definitely mentioned with sufficient precision & details & there is little scope for the allegation that the detention is for a collateral purpose. Apart from it, the facts in the present case are entirely different. There was a dacoity at Sarpadad & in the investigation of that offence the police got information that the son of one Hematsing of Ratanpur was concerned in harbouring Bhupat & his associates & the police were naturally anxious to find out who that person was. It was with a view to verifying that information that they called three persons, viz. the applicant, his brother Raghubha and Dungarji Hematsing, also of Ratanpur and took them to different places for the purpose of ascertaining the truth or otherwise of the information. On the clue thus obtained, the police dropped the other two & pursued the enquiry in respect of the applicant, all with a view to having him identified as the person regarding whom they had the information, & it was for that reason that he was called again on 21st December & taken to Rajkot and Sardhar. He was allowed to go home on the 23rd December. The police did not suspect him as being concerned in the Sarpadad dacoity, there was no investigation against him for that offence and he had nothing to do with the Sarpadad dacoity proper. Nor is there any substance in the suggestion that the detention order was made in order to facilitate the investigation of that offence. In fact that has not been alleged in the application itself & what has been stated in para. 22 of the application is that he has been detained in order to harass him and to strike to terror (sic.). The allegation is false on the face of it. It is quite clear that the detention order has been passed in this case for the reasons stated in the order itself & not for any collateral purpose. There are no mala fides & no fraud & this contention of the applicant must be rejected. The allegations that the applicant was in police custody from 18th December to 26th December & during this time he was ill-treated & beaten by the police have been denied in the counter-affidavits filed by Deputy Superintendent Oza and Inspector Takhatsinhji. They deny that the applicant was at all taken to the Sardhar Jail where he is alleged to have been severely beaten. On a consideration of the affidavits & counter-affidavits filed by either side, I am not satisfied as to the truth of these allegations. Besides the alleged ill-treatment of the applicant is not the point in issue and it cannot affect the merits of the detention order, the validity of which is to be determined independently of any such considerations. It was pointed out in 'In re Jayantilal', AIR (36) 1949 Bom 319, that where a person is arrested illegally & imprisoned an order of detention under Bombay Public Safety Measures Act is served upon him & the detenu applies for a writ of habeas corpus what the Court is concerned, is not whether the arrest of the applicant is legal or illegal but whether his detention under the order passed is legal or illegal. The detention of which he complains by his application is the detention in the jail on the date when he made the application, and it is immaterial for the determination of the question in issue as to whether his prior arrest and his prior detention were or were not legal. The question is

"as to whether the detention of which the detenu complains, that means the detention at the time when he seeks to take out a writ of habeas corpus, is valid or not, which again resolves itself into the question whether at the moment there is for his detention a valid order in existence, & if there be such an order, then no writ of habeas corpus can be issued in his favour."

Evidently, therefore, the happenings complained of by the applicant prior to 26th December will not be relevant to the question at issue.

(7) Another contention made for the applicant is that his surname is Jhala and not Jadehja, and his father's name is Hematsingh and not Himatsinh, as stated in the detention order, and that this mistake as to his surname and father's name indicates that the District Magistrate, Central Saurastra, had not applied his mind in issuing a detention order and the detention order is therefore invalid. The fact of this mistake is not denied, and it is true that the applicant's surname is Jhala and his father's name is Hematsinh. The mistake as to the surname has been explained by the police officers in their affidavits, as being due to the fact that the Girassias in Central Saurashtra, in which Ratanpur is situated, are usually Jadejas, in the same manner as the Girassias in the Jhalavad District are usually Jhalas, those in the Gohilvad District are Gohils and those in the Halar District are Jadejas. It was under this impression that the applicant's surname was stated as Jadeja instead of Jhala in the reports which

the Police authorities submitted to the District Magistrate, and the surname Jhala was therefore mentioned in the detention order. Regarding 'Himatsinh' it appears to be just a mistake of typing in the papers submitted by the police to the District Magistrate. The District Magistrate, Mr. Jobanputra, has also filed his affidavit and it is to the same effect as the affidavits of the police officers. These mistakes are genuine errors and have been explained satisfactorily. They are on matters of mere detail and they do not affect the grounds of the detention. The person to be detained was the applicant himself and that is evident from the fact that he had been called for interrogation and identification prior to the issuing of the detention order and there was therefore no scope for any mistake in the identity of the person whom the authorities intended to detain. There were three persons in Ratanpur who were sons of Hematsinh and the authorities have taken care to see that the right person was proceeded against. It is clear from the affidavits filed by the District Magistrate that he has applied his mind to the facts of the case before issuing the order and that is borne out by the details of the grounds furnished in the order. The mistake as to the surname and the slip in the spelling of the father's name have been sufficiently accounted for and I am satisfied that there is no question here of the District Magistrate having failed to apply his mind to the facts before issuing the order of detention.

(8) The facts in 'Govubha Kashiyaji Zala v. The United State of Saurashtra', 2 Sau L R 113, cited for the applicant were altogether different and the facts stated in the order themselves showed that the District Magistrate had failed to apply his mind properly for otherwise the sequence as to the grounds and the dates thereof could not have happened. Here the mistakes as to the surname of the applicant and his father's name have occurred in the papers submitted to the District Magistrate and there was no question of the District Magistrate having misread them or of his having dealt with the matter in a cursory manner. In 'Keshav Gokhale v. Emperor', A I R (32) 1945 Bom 212, also cited for the applicant, the District Magistrate, Mr. C. N. Millard, had on the face of it not discharged the obligation of the detaining authority to consider reasons or grounds for making the order and to be satisfied upon material laid before him, and he had simply signed the form, produced by a cyclostyled process, on which the name of the person was typed out and the other details were filled in. The document as signed was inappropriate to the case of a single person since it read that he was satisfied in respect to the persons named in the first column of "the Schedule", and it continued at four other different places as if it was dealing with a plurality of persons. No grounds were required to be furnished, and the order could be made by simply signing on the cyclostyled form; and the question naturally arose whether the District Magistrate had merely signed the order or whether he had at all considered the question on the merits, and it was held that the District Magistrate had not properly applied his mind and had not satisfied himself as to the need for detaining that person.

(9) 'In re Shollen Dey', A I R (36) 1949 Bom 75, the detention order was made by the Commissioner of Police, Bombay, and the reason stated for the detention was that Shoilen Dey was inciting a section of labourers of Tata Air India, Bombay, to use violence against the officers of Tata Air India, and that he was also inciting this section of workers to acts of sabotage. There was no such company in existence as "Tata Air India" and the Police Commissioner attempted to explain that what was meant was the Air India, Ltd., and he stated in his affidavit that he used the expression "Tata Air India, Bombay", because according to him the Air India Ltd., belonged to Tatas, which again was incorrect because it was a limited company & belonged to the share-holders of the company. It was urged that the error had not caused any prejudice to the detenu and the detenu knew exactly what was being intended, but this explanation was not accepted evidently because the Tatas were interested in more than one air company in India, and to describe the company as Tata Air India did not necessarily lead to the inference that the Company intended by the Commissioner of Police was the Air India Ltd. The question arose whether the Commissioner of Police had exercised that degree of care & caution in making the order which the law required him to do, and it was held that meticulous care should be taken to see that whatever was stated in the grounds was stated with absolute accuracy.

> "The emphasis is not so much on the accuracy, or on the nature or extent of the error; the emphasis is on the state of the mind of the detaining authority. If the state of the mind of the detaining authority discloses that he has been casual in his approach and that he has not applied his mind with that diligence which it is necessary when you are taking away the liberty of a subject, the Court will certainly interfere and will set at liberty the detenu arrested by the orders of the detaining authority."

On the facts of that case, it was held that the error was not trivial and that it showed want of due care and caution on the part of the detaining authority. This case too is distinguishable, because the error that has occurred here is not one of substance inasmuch as the person intended to be detained was the applicant himself and there has been no mistake regarding the identity of that person. Besides, the District Magistrate has not committed the error and it could not be said that he has not applied his mind properly or has failed to exercise due care and caution.

(10) In 'Kameshwar v. Rex', A I R (35) 1948 All 440, a mistake as to the father's name of the detenu had occurred. The order under Section 3, U. P. Maintenance of Public Order (Temporary) Act, IV (4) of 1947, under which he was detained, was passed on 23-3-1948, & in the said order he was described as Kameshwar Agarwal of Allenganj. He was arrested before the notice under S. 5 was given on 1-4-1948, and in that notice he was described as the son of Rameshwar Prasad. His contention was that he was the son of Someshwar Prasad and not Rameshwar Prasad as stated in the notice. It was urged for the Crown that by mistake his father's name was mentioned as Rameshwar Prasad instead of Someshwar Prasad, and this plea was accepted by the Court because the detention order under Section 3 was meant for Kameshwar, the applicant, and it was only by mistake that his father's name was mentioned as Rameshwar Prasad instead of Someshwar Prasad. There was another Kameshwar Prasad in Allahabad; however the orders of detention were passed not only against the applicant, but also against the said other Kameshwar Prasad. There was therefore no question of confusion in the mind of the District Magistrate relating to the two Kameshwar Prasads. It was not suggested that there was any other person called Kameshwar Prasad son of Rameshwar Prasad, resident of Allenganj, and it was therefore held that the order in question was made for Kameshwar the applicant and not for any one else. Here it is not alleged that there is any other person bearing the name of Jhala Jorubha Hematsinh, or for the matter of that Jadeja Jorubha Himatsinh, in Ratanpur, and there

is thus no scope for a suggestion that the order was intended for the said other person. It is a mere error in the description of the person which does not affect his identity and the person meant to be detained was the applicant and none other. That is obvious from the fact that the police had taken all due precaution in seeing that the right person was reported against. The contention that the District Magistrate had not applied his mind with due diligence before issuing the order of detention is thus altogether unsustainable.

(11) Mr. Hathi finally urged that if the authorities suspected that the applicant was harbouring or sheltering dacoits, he should have been proceeded against under Section 216A, I. P. C., and no action under the Preventive Detention Act, which takes away the liberty of a subject, should have been resorted to, and in support of the contention he has relied on certain observations in 'Jadeja Kirtisinhji Harisinhji v. Saurashtra State', 2 Sau L R 41. There, the applicant was detained under the Public Safety Measures Ordinance No. IX of 1948 as amended by Ordinance No. XXXVIII (38) of 1948, and the grounds of the detention were that he threatened certain cultivators with burning their harvested crops, that he uttered threats to cause physical injuries to the females and children of certain other cultivators, and that he was concerned in the burning of harvested crops that occurred in October and November 1948 in the area of Sajjanpur. There were specific instances of the detenu's criminal acts and it was a case in which action could properly have been taken against the detenu under the provisions of the Penal Code or under Section 107, Cr. P. C. It appears that owing to the peculiar facts of that case, it was held that the Ordinance should be resorted to in exceptional circumstances, that is, where the person sought to be detained cannot be proceeded against under the ordinary law. The learned Advocate General has pointed out that in subsequent rulings this High Court has not accepted the above dictum and has upheld orders of detention. Whatever that might have been, if the ruling referred to above attempts to lay down the principle, viz., that where a person can be prosecuted under the ordinary criminal law, no order of detention can ever be passed against him, then with all respect I differ from that view because that would render nugatory the provisions of the Preventive Detention Act. Cases can be conceived in which the activities of a person might be of a most dangerous type and yet either there may not be evidence enough to secure a conviction or witnesses may not be forthcoming for certain reasons. In cases like these and others it might not be possible to take action under the ordinary law and the detention of the person, in exercise of the powers under the Preventive Detention Act, may be considered essential. Or there may be cases in which the detention of the person is deemed to be more essential in the interests of the State. Whether the person should be prosecuted under the ordinary law, or the Government should exercise their powers under the Preventive Detention Act is a matter for the authorities to decide. In 'Maledath Bharathan Malyali v. The Commissioner of Police', 52 Bom L R 268, to which reference has been made above in another connection, an offence had been committed by the detenu. It was held that

> "when an offence has been committed, the police authorities may investigate it, in which case they must comply with the provisions of the law with regard to investigation; or, they may feel that the detention of the accused is more essential in interests of the estate."

In which case it would be open to them to detain him under the Security Act, but they cannot pursue both the rights at the same time.

> "Government may detain a person even though the grounds clearly disclose that he could have been prosecuted under the ordinary Criminal Law with regard to those very grounds. The detaining authority may detain a person although a Criminal Court has acquitted him in respect of the very charges for which he is being detained under the Security Act."

The authority has here made its choice to detain the applicant under the Preventive Detention Act and if that is so, it cannot be validly contended that he should have been prosecuted under the ordinary Criminal Law and should not have been detained.

(12) The order of detention of the applicant is valid and is upheld and this application is dismissed.

(13) CHHATPAR, J.: I agree.

V.S.B. *Application dismissed.*

A. I. R. (39) 1952 SAURASHTRA 16 (C. N. 7)

SHAH, C. J.

Sama Nathu, Appellant v. Kachara Mavji, Respondent.

Second Appeal No. 89 of 1950, D/- 18-7-1951.

(a) Civil P. C. (1908), S. 100 — Finding of fact — Want of reasonable and probable cause.

The question whether there was malice or want of reasonable and probable cause for the prosecution is a question of fact, which cannot be gone into in second appeal. 2 Sau. L R 1 Foll. A I R (3) 1916 Pat. 174 Not Foll. (Para 2)

Anno: C. P. C., S. 100, N. 39, 52.

(b) Tort — Malicious prosecution — Person lodging false information to police and helping police by suborned evidence — Liability.

Where a person by lodging a false information with the police that his money purse was stolen misleads the police to send an innocent man for trial and also supports the complaint by bringing suborned witnesses and even engages a pleader to conduct the prosecution, it scarcely lies in his mouth to say that the police and not he himself was the prosecutor so as to escape from liability to pay damages for the malicious prosecution. 30 All 525 P C Foll. (Para 4)

(c) Civil P. C. (1908), S. 100 — Finding of fact — Amount of damages to be awarded for malicious prosecution is a question of fact — Finding thereon is conclusice in second appeal. (Para 5)

Anno: C. P. C., Ss. 100 & 101, N. 28, 51.

V. G. Hathi, for Appellant; H. P. Mankad, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('01) 25 Bom 332: (2 Bom L R 938 P C) (Pr 2)
('08) 35 Ind App 189: (30 All 525 P C) (Pr 4)
('09) 31 All 333: (1 Ind Cas 760) (Pr 5)
('35) 37 Bom L R 468: (A I R (22) 1935 Bom 355) (Pr 2)
('49) A I R (36) 1949 Bom 100: (I L R (1949) Bom 386) (Pr 4)
('16) A I R (3) 1916 Pat 174: (1 Pat L Jour 149) (Pr 2)
('49) 2 Sau L R 1 (Pr 2)

JUDGMENT: This second appeal arises from a suit to recover damages for malicious prosecution brought by the respondent-plaintiff against the appellant-defendant, the prosecution being for a theft of a money purse of the appellant containing Rs. 20/-. The appellant's story was that he and others had put up in a Dharamshala at Latipur, on the occasion of the marriage of the daughter of Bava Rupdas, ...that his

purse was stolen while he was asleep, and that the respondent returned the empty money purse ten days later but gave no satisfactory reply regarding the moneys and so he complained of the theft to the police. The respondents' version on the other hand was that the appellant and other farmers were at the Dharamshala which was near the house of Bava Rupdas, and that as Rupdas approached them for help for purchasing ghee for his daughter's marriage, the appellant gave to Rupdas Rs. 20 - on condition that the sum was returned to him from the collection that was to be made for helping Rupdas on the occasion. It appears that the collection could not be made and the sum could not be returned to the appellant, and so after a fortnight he lodged complaint of theft against the respondent. The respondent was acquitted by the Magistrate and after the acquittal he filed a suit to recover Rs. 280/- comprising of Rs. 80 - for expenses and Rs. 200/- as damages alleging that the appellant had no reasonable and probable cause for prosecuting him and that the prosecution was malicious. The appellant denied that it was so, and contended that it was the police who prosecuted the respondent and not he and for that reason he was not liable in damages. The learned trial Judge held that there was no reasonable and probable cause for the prosecution, that the charge of theft was altogether false and that the prosecution was malicious. He also negatived the plea that the appellant was not the prosecutor, and passed a decree for the full amount. In appeal the learned District Judge accepted these findings but reduced the quantum of damages to Rs. 100/- and modified the trial Court's decree to that extent.

(2) In this second appeal Mr. Hathi for the appellant has disputed the finding that the complaint had been filed without reasonable and probable cause and was malicious, but this being a pure question of fact the finding of the lower Courts is conclusive and cannot be questioned in second appeal. There is authority for this view in a decision of our own High Court in 'Thakker Gokaldas Nanji v. Thakker Dwarkadas Jethabhai', 2 Sau L R 1 at p. 8. There the finding of the two lower Courts was that the respondent of that case was not actuated by any malice against the appellant and that he believed in good faith that the appellant was or must have been in possession of the account books. The question was whether in second appeal this finding could be interfered with and it was held that on a true construction of the Privy Council decision in 'Pestonji Muncherji v. Queen Insurance Co.', 25 Bom 332, the question whether there was malice or want of reasonable and probable cause was a question of fact which could not be gone into in Second Appeal. The decision of the Bombay High Court in 'Municipality of Ahmedabad v. Panubhai', 37 Bom L R 468, was also referred to with approval. Mr. Hathi has cited 'Naik Pandey v. Bidya Pandey', A I R (3) 1916 Pat 174. There the complaint of the defendants was found to be false and it was held that malice and absence of reasonable and probable cause follow as an inference of law from the finding that the complaint was false and that these were questions not for the jury but for decision by the judge as questions of law. The Privy Council ruling above referred to (25 Bom 332) was there referred to and explained but the same ruling has been construed differently by our High Court in 'Gokaldas Nanji's case', and with respect that view is correct. In any event, that being the decision of our own High Court, I would prefer to follow it and would hold that the question whether there was malice or want of reasonable and probable cause is a question of fact, which cannot be gone into in second appeal.

(3) Assuming however that it was a question of law or a mixed question of law and fact, there is here definite evidence that the complaint was false to the knowledge of the appellant. As Bava Rupdas was poor and had no moneys to purchase the necessary articles for his daughter's marriage, the village people had decided to help him and the appellant had himself given to Bava Rupdas Rs. 20 - in order to enable him to purchase ghee for the occasion. The evidence also shows that the villagers were to collect a fund for the purpose from which this sum was to be returned to the complainant. Bava Rupdas's evidence is that he had spent Rs. 18 - for the ghee and he returned the remaining Rs. 2 - to the appellant. The story of theft of a money purse containing Rs. 20 - from the Dharamshala where the appellant was residing along with other Kanbis was thus definitely false. The appellant's version that the respondent had returned the empty purse to him after a few days is also false and witnesses Kaku and Sidi who have been examined by the appellant on the point have been disbelieved by both the lower Courts. It is plain that as the money could not be returned to the appellant he twisted the fact and made a false accusation of theft against the respondent. There is not the slightest doubt that he made the complaint without any reasonable and probable cause and that the complaint was also malicious.

(4) Mr. Hathi's next contention is that the appellant was not the prosecutor in the case, that it was the police who prosecuted the respondent and that he was therefore not liable in damages. He has cited 'Dattatraya Pandurang v. Hari Keshav', A I R (36) 1949 Bom 100 in support of his contention. There the defendants had lodged a first information with the police of a theft on which they had laid their suspicion on the plaintiff, an employee of their shop. The police investigated the offence and arrested the plaintiff and on application to the Magistrate the plaintiff was remanded in custody. As there was no evidence forthcoming to show that the plaintiff had committed the offence, the police applied for discharge upon which the bail bond was cancelled and the plaintiff was discharged. On these facts, it was held that the defendants did not prosecute the plaintiff and that they had merely laid information before the police and that it was the police, who after being satisfied that there was reason to suspect the commission of the offence, proceeded to investigate the fact and circumstances of the case, and took necessary orders for remand which in law they were bound to do. The facts of the case were thus altogether different. Even so the principle enunciated by their Lordships of the Privy Council in 'Gaya Parshad Tewari v. Bhagat Singh', 35 Ind App 189, was accepted as laying down the correct position in law. The following observations of the Privy Council are pertinent:

> "But if the charge is false to the knowledge of the complainant, if he misleads the police by bringing suborned witnesses to support it, if he influences the police to assist him in sending an innocent man for trial before the Magistrate, it would be equally improper to allow him to escape liability because the prosecution has not. technically, been conducted by him."

Bhagwati, J., has accepted this as the correct method of approach and it was because in the Bombay Case the defendant had not gone beyond giving what he believed to be the correct information to the police, and the police without further interference on his part, thought fit to prosecute, that the defendant was held not liable for damages for the prosecution. The facts here

are otherwise. The appellant has here made a false complaint charging the respondent with the theft of the money purse when in actual fact he had himself given the sum to Bava Rupdas in order to enable the Bava to purchase ghee. If that is so, his complaint of theft could not be anything but false; and if by lodging false information and by misleading the police he made the police to send up an innocent man for trial before the Magistrate, he cannot be heard to say that the police and not he was the prosecutor. He himself gave evidence at the trial and tried to support the complaint by suborned witnesses and even engaged a pleader to conduct the prosecution. In the circumstances it scarcely lies in his mouth to say that he did not prosecute the respondent. The contention is unsustainable, and he must be held liable in damages for false and malicious prosecution.

(5) The question of the amount of damages is a question of fact and it is not open to the High Court to interfere with it in second appeal 'Mt. Dhuman v. Abdullah Khan', 31 All 333. Assuming, however, that the question was open for consideration, the sum of Rs. 100/- awarded by the lower appellate Court is perfectly reasonable and there is no valid reason to reduce it.

(6) The appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. (39) 1952 SAURASHTRA 18 (C. N. 8)

SHAH, C. J.

Sunderji Bhanji and another, Appellants v. Ghanchi Isa Raja, Respondent.

Second Appeal No. 138 of 1950, D/- 18-7-1951.

(a) Civil P. C. (1908), O. 41 R. 33 — Applicability to single plaintiff or defendant not filing appeal or cross-objection.

The general principle is that a decree is binding on the parties to it, until it is set aside and as an ordinary rule an appellate Court must not reverse or vary a decree in favour of a party who has not preferred any appeal or cross-objections against it, and this general rule holds good notwithstanding the provisions of O. 41 R. 33. The power conferred by the said rule will ordinarily be confined to those cases where as a result of the interference in favour of the appellant, further interference with the decree of the lower Court becomes necessary in order to adjust the rights of the parties or in order to avoid inconsistent or contradictory decrees. The rule does not apply to a case of a single plaintiff or defendant because to apply it would mean that the trial Court's decree can be reversed or modified on an appeal filed by the other party even though the party himself has not filed an appeal or cross-objection and it would mean injustice to the party appealing. AIR (22) 1935 Nag 243, Rel. on; AIR (17) 1930 Mad 707 Disting. *(Para 4)*

Anno: C. P. C., O. 41 R. 33 N. 6.

(b) Partnership Act (1932), S. 13(c) — Interest after dissolution.

The right to interest on capital contributed by one of the partners even when there is stipulation for payment of such interest ordinarily ceases at the date of dissolution and in taking of accounts between the parties no interest under this head can be allowed after dissolution. It is only out of the profits, if any, that the capital-contributing-partner can be expected to take his stipulated interest under S. 13(c). The law may recognise an exception to this rule where the contract expressly provides for payment of interest regardless of profits. AIR (24) 1937 Bom 81 and AIR (27) 1940 Mad 505, Rel. on. *(Para 5)*

Anno: Partnership Act, S. 13 N. 3.

H. P. Mankad, for Appellants — G. B. Joshi, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('37) A I R (24) 1937 Bom 81: (167 Ind Cas 208) (Pr 5)

('30) A I R (17) 1930 Mad 707: (123 Ind Cas 39) (Pr 4)

('40) AIR (27) 1940 Mad 505: (190 Ind Cas 748) (Pr 5)

('35) A I R (22) 1935 Nag 243: (158 Ind Cas 576) (Pr 4)

JUDGMENT: This second appeal arises from a suit for taking accounts of a partnership. The suit was instituted by the plaintiff Isa Raja alleging that he and the defendants carried on business in partnership in certain commodities in Samvat years 1985 to 1988, that while the defendants contributed the capital he was a working partner, and that while he had a seven anna share in the partnership till Samvat 1987, in 1988 both partners had an eight anna share in it. He alleged that the partnership had been dissolved and he prayed for accounts of the dissolved partnership. The defendants admitted the fact of the partnership, but denied that the plaintiff's share was increased to eight annas in 1988 and contended that it was seven annas till the end. They contended that accounts of the years 1985-1986 and 1987 had been duly settled and both parties had accepted them and that they could not be reopened. They disputed certain transactions of the partnership and claimed that by virtue of an agreement they were entitled to interest at 12 per cent on the capital advanced by them to the partnership.

(2) The learned trial Judge held that the partnership had been dissolved on the closing of the business in St. 1988, that the accounts had been settled as alleged and that the shares of the partners were as stated by the defendants. He also held that the defendants were entitled to claim interest even after the date of dissolution and till the date of realisation. After going into the various contentions of the parties, the learned Judge passed a preliminary decree and appointed a commissioner to take accounts of the partnership in the manner directed by him. In appeal by the plaintiff, the learned District Judge varied the said preliminary decree and laid down the directions according to which the commissioner was to take accounts. It is unnecessary to detail the several modifications made and the directions given by the learned Judge in his decretal order, except to state that in the opinion of the learned Judge there was an agreement as regards interest and by virtue thereof the defendants were entitled to interest on their capital up to the date of realisation. In that view the learned Judge varied the lower Court's order by which interest was allowed only up to the date of dissolution and awarded it till the date of realisation. He felt that interest should have been allowed by the trial Court at the rate of 12 per cent but as the defendants had not filed an appeal or cross-objections he maintained the trial Court's order as to the rate of interest.

(3) In this appeal filed by the original defendants two points have been urged, the first of which relates to an item of Rs. 201-10-6 and it arises in this way. 34 bales of cotton belonging to the suit partnership were sent to one Chatrabhuj Jeram for sale at Bombay. The defendants drew a hundi of Rs. 3400/- on the said Chhatrabhuj against the 34 bales of cotton. It is admitted that the price of the said baies was Rs. 3198-5-6 only and it is also admitted that the actual sum received by the partnership for the price of the said bales was

Rs. 3198-5-6 and not Rs. 3400/-. The partnership was not concerned with the balance of Rs. 201/- odd in as much as it had received only the price of the bales viz., Rs. 3198-5-6. As the defendants failed to return the sum to Chaturbhuj, Chatrabhuj filed a suit and obtained a decree against them. The suit partnership was not a party to that suit and the decree did not affect the partnership at all. The defendant's contention is that as the sum was payable by the partnership the plaintiff is bound to contribute his share thereof, but on the face of it the contention is untenable for the simple reason that the partnership has not, in fact, received the sum and, on the contrary, it is the defendants who have received it. Evidently the partnership cannot be held responsible for it merely on the ground that Rs. 3400/- were sent by Chatrabhuj against the 34 bales of cotton. Strictly speaking this latter is not a correct statement because Chatrabhuj simply honoured the hundi of that sum, and he never intended to pay nor did pay the entire sum as the price of the 34 bales. In any case the partnership has received Rs. 3198-5-6 and the plaintiff's liability, if any, can extend to that sum and not further and this contention of the defendants has been properly rejected by the lower appellate Court.

(4) The next contention is that the lower appellate Court should have awarded interest at 12 per cent in exercise of its powers under O. 41, r. 33 Civil Procedure Code. The learned Judge has held that the trial Court was not right in awarding interest at 6 per cent in the face of an agreement to pay interest at 12 per cent, and this view of the lower appellate Court appears to be correct. However, as the defendants had not filed any cross-objections the learned Judge could not enhance the rate of interest. Mr. Joshi for the respondent-plaintiff has urged, relying on a decision in 'Narasimham v. Narasinga Rao', AIR (17) 1930 Mad 707, that on this point no second appeal lies. It was there held that the refusal of the lower appellate Court to act under O. 41, r. 33 which is not preparatory but is discretionary is not an error of law with which the second appellate Court is bound to interfere. The decision however does not go to the length urged for by Mr. Joshi and it simply decides that the provisions of O. 41, r. 33 being discretionary the lower appellate Court had the power to refuse to exercise that discretion, and that such a refusal did not amount to an error of law, which required to be corrected in second appeal. It does not lay down that no second appeal lies altogether. I will therefore assume, for the present purpose, that a second appeal lies and will reserve my decision on the point raised to an appropriate occasion in future. Now the general principle is that a decree is binding on the parties to it, until it is set aside and as an ordinary rule an appellate Court must not reverse or vary a decree in favour of a party who has not preferred any appeal or cross-objections against it, and this general rule holds good notwithstanding the provisions of O. 41 r. 33. The power conferred by the said rule will ordinarily be confined to those cases where as a result of the interference in favour of the appellant, further interference with the decree of the lower Court becomes necessary in order to adjust the rights of the parties or in order to avoid inconsistent or contradictory decrees. In 'Mohommad Hussain v. Islamiya Madarasa', A.I.R. (22) 1935 Nag 243, it was held that:

> "the object of this new rule (O. 41, R. 33) is to enable the Court to do justice between the parties where the strict application of the previous rule might result in conflicting decrees or result in actual injustice. It is certainly not intended in a case where there are two conflicting parties to allow one against whom an appeal has been preferred and who has himself not preferred an appeal against that part of the judgment which was not in his favour, to argue in the appellate Court as if he had preferred an appeal, without any payment of court-fee."

With respect I agree with that view. Under the rule the appellate Court has the power to pass any suitable decree or to make any suitable order as the circumstances of the case may require, and this the appellate Court can do even where the appeal is preferred against a part of the decree, and the Court has also the discretion to exercise that power in favour of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or cross objection. In my judgment the rule does not apply to a case of a single plaintiff or defendant because to apply it would mean that the trial Court's decree can be reversed or modified on an appeal filed by the other party even though the party himself has not filed an appeal or cross-objection and it would mean injustice to the party appealing. The party preferring the appeal does so against the decree which has gone against him and it will be unfair to the appellant to pass a decree in respondent's favour in respect of matters which do not embrace the appeal and against which the respondent has not taken any steps. The lower appellate Court was therefore right in refusing to exercise its discretion in favour of the defendants in the matter of the rate of interest. No other ground is urged in the appeal.

(5) The respondent-plaintiff has filed cross-objections but of these only one has been pressed at the hearing, and that relates to the order regarding interest. The trial Court has allowed interest on the capital till the date of dissolution, but the lower appellate Court has awarded the same up to the date of realisation on the ground that there was a specific agreement between the parties. Now as to awarding interest on capital advanced it was held in 'Motilal Chimanram v. Sarupchand', A.I.R. (24) 1937 Bom 81, that in the absence of an agreement no interest would run on the capital account of each partner after dissolution. The decision in 'Somasundaram v. Sevugan Chattiar', A.I.R. (27) 1940 Mad 505, is to a similar effect, viz., that the right to interest on capital contributed by one of the partners even when there is stipulation for payment of such interest ordinarily ceases at the date of dissolution and in taking of accounts between the parties no interest under this head can be allowed after dissolution. It is only out of the profits, if any, that the capital contributing partner can be expected to take his stipulated interest under Section 13(c) of the Indian Partnership Act. The law may recognise an exception to this rule where the contract expressly provides for payment of interest regardless of profits. The learned District Judge has here held that there was an express agreement between the parties not only to pay interest but to pay it till realisation. No doubt there are certain admissions of the plaintiff that there was an agreement to pay interest on the moneys advanced by the defendants but the admissions are that the interest was to be paid till the date of the sale of the goods and not till the final realisation of the defendants' sum. I have read the relevant portions of the plaintiff's evidence, and in my judgment they do not constitute any agreement to pay interest till the realisation of the sum. The defendants do not themselves speak of any such agreement. In the circumstances the trial Court's order awarding interest at 6 per cent till the dissolution of the partnership is correct and must be upheld. I therefore allow the

cross-objections to this extent and restore the trial Court's order allowing interest at 6 per cent on the capital subscribed by the defendants to the partnership till the date of the dissolution of the partnership. The remaining cross-objections are not pressed and are dismissed.

(6) In the result the appeal is dismissed with costs. Cross-objections are allowed to the extent stated above and the remaining cross-objections are dismissed. Parties to bear their own costs of the cross-objections.

D.H. Appeal dismissed; Cross objections partly allowed.

A. I. R. (39) 1952 SAURASHTRA 20 (C. N. 9)

CHHATPAR, J.

Bai Hirubai Kanji, Appellant v. Darji Girdhar Keshav and another, Respondents.

First Appeal No. 70 of 1950, D/- 30-6-1951.

Limitation Act (1908), Ss. 5 and 14 — Sufficient cause — Appeal — Existence of circumstances contemplated by S. 14, if ground for excusing delay.

Although S. 14 is not directly applicable to appeals, the principles underlying it, on grounds of equity should be applied to appeals in considering an application under S. 5. The existence of circumstances contemplated by S. 14 consequently can be regarded as a ground for excusing the delay caused by the wrong proceedings, and a sufficient cause for the delay within the meaning of S. 5, it being assumed that the party would be deemed to have acted with reasonable diligence where such circumstances existed. AIR (4) 1917 P C 156; AIR (5) 1918 P C 135 and AIR (24) 1937 P C 276, Rel. on. (*Paras 2, 3*)

Anno: Lim. Act, S. 5 N. 9; S. 14 N. 6.

G. B. Joshi, for Appellant; T. U. Mehta, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('18) 45 Cal 94: (A I R (4) 1917 P C 156) (Pr 2)
('18) A I R (5) 1918 P C 135: (43 Bom 376) (Pr 2)
('37) A I R (24) 1937 P C 276: (31 Sind L R 672) (Pr 2)
('26) A I R (13) 1926 All 252: (91 Ind Cas 865) (Pr 5)
('88) Karm Bakhsh v. Daulat Ram, (183 Pun Re 1888 FB.) (Pr 2)
('33) A I R (20) 1933 Lah 541: (14 Lah 206) (Pr 5)
('01) 25 Mad 166 (Pr 5)
('37) A I R (24) 1937 Mad 357: (I L R (1937) Mad 161) (Pr 4)
('42) A I R (29) 1942 Mad 170: (201 Ind Cas 84) (Pr 5)
('44) AIR (31) 1944 Oudh 193: (216 Ind Cas 107) (Pr 5)
('30) A I R (17) 1930 Pat 307: (129 Ind Cas 660) (Pr 5)

ORDER: This is an application under Section 5 of the Indian Limitation Act to condone delay in presenting an appeal on 26-9-50 from the decree of the Civil Judge, Veraval, dismissing the applicant's suit on 25-6-1948. It arises out of the following facts: The applicant had filed a suit in the Court of Veraval for recovery of Rs. 7000/- being the value of certain trust property comprising goods, money, gold ornaments etc., in the possession of the opponents — defendants — which property was claimed by the plaintiff to be hers. The suit was filed on 8-5-47; a written statement was filed on 14-6-47; issues were framed on 14-8-47; owing to the partition of India just about that time and the tragic disturbances which occurred soon thereafter, it seems the suit could not proceeded with. It is however, alleged that in February 1948, the plaintiff who was residing at Bombay, came down to Veraval and stayed for two months for the prosecution of the suit, but no progress was made; even her evidence was not recorded. The suit ultimately came for hearing on 25th June 1948. She is alleged to have arrived at Veraval in the evening of that date, while the suit was dismissed during the early part of the day as she was not present. On 2-7-48, the plaintiff applied to the trial Court for restoration of the suit under Order IX Civil Procedure Code. This application was dismissed on 1-4-49. Against this order, the plaintiff filed an appeal to the District Court, Junagadh which allowed the appeal by an order dated 27-4-49 and restored the suit to the file setting aside the order of dismissal by the trial Court. Against this order of the District Court, the defendants filed a revision application to the High Court on 20-2-50. This application was heard by Jhala J. on 23-6-50; it was allowed, the learned Judge holding that the order of dismissal of the suit by the trial Court should be considered as an order under Order XVII, rule 3, Civil Procedure Code, and that an appeal lay directly from that order as a decree, implying that the procedure of setting aside the order of dismissal of the suit by an application to the trial Court under Order IX Civil Procedure Code was improper. The learned Judge observed as under:

> "The first order of the trial Court dismissing the suit was definitely under Order 17, Rule 3, Civil Procedure Code, an adjournment was specifically granted at the instance of the plaintiff for production of her evidence. She omitted to do so and the case was dismissed. Naturally, the order came under Order 17, rule 3, Civil Procedure Code, and the proper course was to file an appeal to the lower appellate Court. The omission to do so has been due to an honest mistake on the part of the plaintiff. Misapprehension on the part of the trial Court also was partly responsible for it: Thus it is possible that the plaintiff might get the benefit of Section 5 of the Indian Limitation Act, but that is a matter within the province of the lower appellate Court. It is, however, certain that the order of restoration under the circumstances passed by the lower appellate Court is definitely irregular and in a way without jurisdiction. It cannot be maintained."

Pursuant to this order of this Court, the applicant has now filed an appeal to this Court on 26-9-1950, as the amount involved in the suit is more than Rs. 5000/-. Along with the appeal the applicant has filed an application under Sec. 5 of the Indian Limitation Act for condoning delay, as the appeal is from the decree of the trial Court dated 25th June 1948, on which date the plaintiff's suit was dismissed by the trial Court. The present appeal has been presented on 26th September, 1950.

(2) The question now before me is whether under the circumstance of the present case, I should condone the delay. The applicant has filed her own affidavit stating that at the time of the order of Jhala J. on 23-6-50, she was at Bombay and thereafter she went to Veraval to await the receipt of the order. After she got a copy of the order, she went to Junagadh probably being misled by the observations of Jhala J. that the appeal lay to the lower appellate Court i.e. the District Court, Junagadh. At Junagadh she was advised by lawyers that the appeal should be filed at Rajkot in the High Court. She consequently came to Rajkot but was told that she will have to pay ad valorem Court-fees on the amount of the claim, and as she had no money then, she had to send for it from Bombay. This took time and therefore she could not file the appeal till 26-9-50. Prima

facie, it may appear that the delay of about three months after the date of Jhala J.'s order on 23-6-50 was much too great to be condoned under Section 5 of the Indian Limitation Act but the learned Advocate for the applicant has relied upon certain rulings of the Privy Council, which seem to indicate that although the provisions of Section 14 of the Indian Limitation Act are not directly applicable to appeals, the equity underlying the principles of the Section should be applied and the entire period that she was prosecuting proceedings in good faith in a Court of wrong jurisdiction should be excluded, and if this is done, there is delay of only one day, which under the circumstances of the case, should be condoned, as the unfortunate plaintiff has been tossed from one Court to another to seek her remedy. The learned Advocate for the applicant claims that the period from 26-6-48 to 23-6-50 should be excluded from computing the period of limitation prescribed for the appeal to the High Court and deducting further the four days spent in obtaining certified copies of the judgment and decree, the appeal would be considered to have been filed on the 91st day, there being a delay of one day only. The first Privy Council ruling relied upon is the case of 'Brij Indar Singh v. Kanshi Ram', 45 Cal. 94 where it was held that for the exercise of the judicial discretion allowed by Sec. 5 of the Limitation Act, to admit for sufficient cause an appeal which would be otherwise barred as being out of time, the true guide was whether the appellant had acted with reasonable diligence in the prosecution of his appeal and he ought to be deemed to have so acted where after deducting the time spent in prosecuting with due diligence a proper application for review of judgment, the period between the date of the decree appealed from and the date of presenting the appeal does not exceed the period prescribed for preferring in appeal. This case was referred to in the case of 'Sunderbai v. Collector of Belgaum', A. I. R. (5) 1918 P. C. 135, where it was held:

> "Where an appeal was presented in a wrong Court owing to mistaken legal advice, but later on it was presented in a right Court and it was then time barred, the time which was spent in the wrong Court may be excused."

These two rulings of the Privy Council have been applied in the case of 'Rajendra Bahadur Singh v. Rajishwar Bali', A. I. R. (24) 1937 P. C. 276, wherein their Lordships of the Privy Council observed:

> "They are of opinion that in applying Sec. 5 to such a case as the present, the analogy of Section 14 (which applies only to suits) is an argument of considerable weight."

These three Privy Council rulings seem to lay down that although Sec. 14 of the Limitation Act is not directly applicable to appeals, the principles underlying it on grounds of equity should be applied to appeals in considering an application under Section 5 of the Limitation Act. The existence of circumstances contemplated by Sec. 14 has consequently been regarded as a ground for excusing the delay caused by the wrong proceedings, and a sufficient cause for the delay within the meaning of Section 5 of the Limitation Act, it being assumed that the party would be deemed to have acted with reasonable diligence where such circumstances existed. In 'Brij Indar Singh's case', the Privy Council cited with approval the following observations of the Full Bench of the Punjab Chief Court in 'Karm Baksh v. Daulat Ram', 183 P R 1888:

> "we think further that he ought ordinarily to be deemed to have acted with reasonable diligence where the whole period between the date of the decree appealed against and the date of presenting the appeal does not, after excluding the time spent in prosecuting with due diligence a proper application for review of judgment, exceed the period prescribed by law for preferring an appeal.

These observations seem to imply that an appellant would be entitled to exclusion of time for the period he was pursuing in good faith another remedy in another Court which had in fact no jurisdiction.

(3) In the present case, there is not the slightest doubt that the applicant was bona fide pursuing her remedy in the trial Court when she filed an application under Order IX, Civil Procedure Code, for setting aside the order of dismissal of the suit; she actually got the relief in the appeal to the District Court and thereafter it was only when a revision application was filed against the order of the District Judge that it was held by the High Court that this remedy pursued by her was improper and that she should have filed an appeal directly from the decree to the higher Court. Jhala J. has specifically mentioned in his order that there was an honest mistake on the part of the applicant. There was also a misapprehension on the part of the trial Court and the District Court and that the applicant might be entitled to the benefit of Section 5 of the Limitation Act. There is no doubt, therefore, that the conditions of prosecuting with due diligence in good faith proceedings in a wrong court required by Section 14 of the Indian Limitation Act were complied with.

(4) Mr. T. U. Mehta, the learned Advocate for the opponents has contended that the time which should be excluded should be from 2-7-48 which is the date of the application under Order IX, Civil Procedure Code, for setting aside the order of dismissal to the date of Jhala J.'s order, that is 23/6/50, and that she should not get exclusion of time from 26/6/48 to 1/7/48; but I am of opinion that this period should also be excluded, as it should be assumed that she was pursuing her remedy during this period also, as law gives her 30 days' time to file an application for restoration of the suit. In this view, I am supported by analogy by observations in the case of 'Pusapati Simhadriraju v. Unlimited Aryan Bank, Vizagapatam', AIR (24) 1937 Mad 357. I am, therefore, of the opinion that the applicant should get benefit for this period also.

(5) The learned Advocate for the opponents has further contended that since the provisions of Sec. 14 are not directly applicable, and that as in dealing with an application under Section 5 of the Limitation Act the Court has to consider whether there is sufficient cause the applicant should account for everyday's delay in presenting the appeal after she came to know of the correct forum in which she should file it. He consequently argued that the applicant has not sufficiently accounted for the delay from 23-6-50 to 26-9-50. He contends that it was the duty of the applicant to file her appeal immediately after 23-6-50 and that as she has taken more than three months to do so, it could not be said that she had acted with due diligence. There are no doubt certain rulings of some Courts which lend colour to this contention; (See 'Ram Rup v. Naik Ram' A. I. R. (13) 1926 All 252, 'Kichilappa Naicker v. Ramanujam Pillai', 25 Mad 166, while others hold differently on the basis of exclusion of time in pursuing a wrong remedy. (See 'Ghulam Mahomed v. Usman', AIR (20) 1938 Lah 541; 'Noor Beg v. Abdul Rahman', AIR (31) 1944 Oudh, 193; 'Jivan Ram Ram Chunder v. Hazarilal Bhagat', AIR (17) 1930 Pat. 307; 'Kayambu Pillai v. Court of Wards', AIR (29) 1942 Mad 170). In my opinion the Privy Council rulings referred to above seem

to lay down that the equity underlying Sec. 14 of the Limitation Act should be applied to its fullest extent and that the time taken in diligently pursuing a remedy in good faith in a wrong Court should be excluded. On principle also, I do not see any reason why a distinction should be made between a case where Sec. 14 is directly applicable and a case where its principles are applied on grounds of equity. The rule laid down in Sec. 14 is itself based on principles of equity that the bar of limitation should not come in the way of a litigant who has been diligently pursuing his remedy in good faith in a wrong Court. I am, therefore, of opinion following the Privy Council cases referred to above that the applicant is entitled to the exclusion of time for the entire period from the date of the decree to the date of Jhala J.'s order. If this time is excluded there is delay of only one day. Considering the peculiar circumstances of this case that the plaintiff was residing at Bombay and she had to come to Veraval first and thereafter to seek her remedy in the Court at Junagadh and thereafter she had to defend a revision application in the High Court, which passed an order wrongly indicating the Court of the District Judge as the forum of appeal, in consequence whereof she had to run upto Junagadh and thereafter she had ultimately to come to this Court, I am of opinion that the delay of one day may well be excused in the present case. I therefore grant the application under Section 5 of the Limitation Act condoning the delay and order that the appeal be taken on the Register and submitted for orders in due course. In the peculiar circumstances of the present case, I make no orders as to costs of this application under Section 5 of the Limitation Act.

V.B.B. *Application allowed.*

A. I. R. (39) 1952 SAURASHTRA 22 (C. N. 10)

SHAH, C. J. AND CHHATPAR, J.

Jasvantsinhji Bapubha and others, Accused-Applicants v. Gordhandas Dhanji Malaviya, Complainant-Opponent.

Criminal Revn. Appln. No. 42 of 1950, D/- 11-7-1951.

(a) *Penal Code (1860), Ss. 378, 441 — Questions of title and past possession — Relevancy.*

In a case of theft of crop and criminal trespass question of title and of past possession will incidentally arise and cannot be ignored altogether. They become relevant for the purpose of appreciating the evidence of the present possession of the land. A. I. R. (31) 1944 Pat. 274 Rel. on. (*Para 2*)

Anno: Penal Code S. 378 N. 11, 22; S. 441 N. 20.

(b) *Penal Code (1860), Ss. 378, 441 — Bona fide claim of right.*

Where there is a bona fide dispute as to the rights of the parties however high-handed their action might be, the accused cannot be convicted of theft or criminal trespass. The dispute may best be decided in a Civil Court and it will be improper to convict the accused of criminal trespass and theft, if acting under such a bona fide belief, they removed the crops on the land. A I R (4) 1917 Cal 648, A. I. R. (37) 1940 Pat. 588, A. I. R. (37) 1950 Orissa 196 Rel. on. (*Para 4*)

Anno: Penal Code, S. 378 N. 9, 11; S. 441 N. 5.

J. N. Boghani, for Applicants — C. N. Shah, Advocate General, for the State — M. H. Parekh, for Opponent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('17) 44 Cal 66: (AIR (4) 1917 Cal 648: 17 Cri L Jour 456) (Pr 4)

('50) AIR (37) 1950 Orissa 196: (51 Cri L J 1333) (Pr 4)

('40) A I R (27) 1940 Pat 588: (41 Cri L Jour 509) (Pr 4)

('44) A I R (31) 1944 Pat 274: (46 Cri L Jour 83) (Pr 2)

SHAH, C. J.: This is an application in revision against an order of the Additional Sessions Judge, Gondal, setting aside an order of discharge passed by the First Class Magistrate of Upleta and directing the said Magistrate to make further enquiry and reconsider the case against the accused. Accused No. 1 Jasvantsinhji is the father-in-law of the Darbar of the Dhank Jagir in Gondal and the present Kamdar of the Jagir, and accused Nos. 2 & 3 are the servants of the Jagir. The complainant Gordhandas is an ex-Kamdar of the Dhank Jagir and his father Dhanji Odhavji too was the Kamdar of the said Jagir. He claimed that survey Nos. 154, 317 and 331 of the Jagir and another field survey No. 119 were given in 'Jiwai' to his father Dhanji by the then Darbar Vakhatsinhji in Samvat year 1956 and on Dhanji's death the grant was renewed in favour of the complainant in Samvat 1969. He alleged that by a writing dated January 25, 1927 the present Darbar Harischandrasinhji renewed the grant in his favour giving in perpetuity survey Nos. 154, 317 & 331 in 'jivai', that he was in possession of and was taking the income, meaning the 'Rajbhag' of the said three fields, since then, and that on 11th March 1949 the three accused unauthorisedly entered survey No. 154 and forcibly removed three bags of roundnut from the produce of the land, and thereby committed offences of theft and criminal trespass. The accused were charged with these offences and after an elaborate enquiry the learned Magistrate discharged them holding that the complainant had failed to prove his present possession of survey No. 154, and that the removal of the ground-nuts did not constitute offences of criminal trespass and theft. The complainant having applied in revision to the Sessions Court, the Additional Sessions Judge, Gondal, held that the approach of the learned Magistrate to the questions is dispute was wrong in asmuch as he had laid undue stress on the question of title and of past possession and had thereby confused the real issue. He therefore remanded the case for further enquiry and for a reconsideration of the evidence from the point of view as to in whose actual or constructive possession survey No. 154 was at the time of the removal of the ground-nuts.

(2) Now so far as the learned Magistrate is concerned, he has written, on the whole, a well considered judgment, which fact even the Additional Sessions Judge concedes, and although at times his expression of certain views is not quite appropriate, he has shown a clear grasp of the real point at issue, and has definitely held that the complainant had failed to prove his possession of survey No. 154 in Samvat 2005 the year in dispute, and that his present possession not having been established, no offence was made out. It is true that he has considered at some length the history of the dispute and the title claimed by the complainant and his past possession, but that has not really affected his final judgment. Admittedly the complainant is not in actual possession of the land, and he is entitled, even according to his own case, to receive a share in the income of the land from the tenant. Survey No. 154 is culivated by Meghji Bhana, and although the material question will be as to whether Meghji cultivated the land on behalf of and as a tenant of the complainant in Samvat 2005, questions of title and of a past possession will incidentally arise, though in a secondary manner. They become relevant for the

purpose of appreciating the evidence of the present possession of the land, and the learned Magistrate was justified in looking at them from that point of view.

It was held in 'Harihar Narain Singh v. Bankey Singh', A I R (31) 1944 Pat 274, that

"in a case of theft of crops from a field, generally speaking the question who grew the crop is the first matter to look to, but it is not the only thing in all cases. The question of title though secondary is relevant and so is the state of evidence as regards past possession."

These questions therefore become relevant though incidentally and cannot be ignored altogether.

(3) Survey Nos. 154, 317 and 331 were granted in 'jiwai' by the late Darbar Vakhatsinhji to the complainant's father Dhanji Odhavji, by a document dated Shravan Sud 11 of Samvat 1956, under which the grant was to enure till Dhanji loyally and faithfully served the Darbar as a Kamdar (Exhibit 10). By the document of Samvat 1969 corresponding to 1913 A. D., the grant was renewed by Darbar Vakatsinhji to the complainant on the same terms. However, the complainant relies on a writing dated 25th January 1927 (corresponding to Samvat year 1983) which is in the shape of a letter written by Dansinhji, father of the present Darbar addressed to the complainant which mentions 'inter alia' that the possession of three survey Nos. 154, 317 and 331 was handed over to the complainant after the raising of the management and that the complainant may enjoy the income thereof in perpetuity. This writing is not admitted by the accused, who challenges it as a spurious document, and, as the learned Magistrate holds, it has not been satisfactorily proved. According to the complainant he enjoyed his share of the income of the fields for ten years from then, that is, till Samvat year 1993. In that year the Dhank Jagir was placed under management and the manager was in possession of the Jagir including these survey numbers and it is admitted that the complainant did not receive any share of the income from Samvat 1994 to Samvat 2000. The management was raised in Samvat 2001, but it is admitted that for that year as also for Samvat year 2002 the complainant did not receive any share of the income. According to him, that was because he could not go to the village on account of certain political restrictions; but whatever that might have been, the fact remains that from Samvat 1994 to Samvat 2002, inclusive the complainant received no share of the income and could not be said to be in possession of the lands. It does appear that in Samvat 2003 and 2004 he received a share of the income of the lands, but at the same time it might be stated that he has not received any share in the wheat crop in these two years. Apart from it, however, it is material to note that he was the Kamdar of the Jagir in the said years 2003 and 2004 and there is therefore nothing surprising in his taking the income in those years. According to the accused the complainant was entitled to receive the income during the time he worked as a Kamdar, and in that view the learned Magistrate will be justified in holding that the receiving of the income and the consequential possession of the fields in those years was ascribable to the complainant's being the Kamdar of the Jagir in the said years. Admittedly he was not the Kamdar in Samvat 2005 and it cannot be said that the learned Magistrate's finding, that the complainant's possession in Samvat 2005 had not been established, is wrong. The evidence shows that the complainant has not received any income in the years in which he was not working as a Kamdar. The learned Magistrate has taken into account other significant and material facts in arriving at the conclusion, and it is unnecessary to enter into any detailed examination of the same, and it will be sufficient to observe that, on the whole, his appreciation of the evidence is proper. Meghji Bhana who was the best witness to say whose tenant he was and to whom he gave the income and in what manner has not been examined, and the explanation for the omission, viz., that he was originally charged with these offences along with the present accused in unconvincing, because no process was issued by the Magistrate against Meghji and there was nothing to prevent the complainant from calling him as a witness. On the evidence in the case and having regard to all the relevant facts, the learned Magistrate was justified in holding that the complaintiff's possession in Samvat 2005 had not been established and that no offence of theft and criminal trespass had been made out.

(4) It appears to me quite clear that there is in this case a 'bona fide dispute as to the rights of the parties, and if the accused believed bona fide', which it seems they did, that the complainant can claim a share of the income of the lands provided and only so long as he worked as the Kamdar of the Jagir, however high handed their action might be, they could not be convicted of theft or criminal trespass. It was held in 'Arfan Ali v. Emperor', 44 Cal 66, that

"the removal of property in the assertion of a 'bona fide' claim of right, though unfounded in law and fact, does not constitute theft. But a mere colourable pretence to obtain or keep possession of property does not avail as a defence."

Similarly in 'Advocate-General, Orissa v. Bhikari Charan Mahant, A I R (27) 1940 Pat 588, it was held that

"the essential ingredient of theft is an intention to take dishonestly. Without such intention the taking of moveable property does not amount to theft. If the person taking any moveable property does it under a 'bona fide' claim of right, then he cannot be found guilty of the offence of theft unless the Court holds that the claim is a mere pretence."

In 'Sada Panigrahi v. Raghunath Das', A I R (37) 1950 Orissa 196, the facts were that the complainant's house encroached upon a tiny bit of land belonging to the accused. The parties had been in dispute regarding their boundary wall between their adjoining plots. The accused 'bona fide' believed that the encroached portion belonged to them, demolished it and took away the materials. It was held that

"in the absence of proof of criminal intent, however reprehensible or high-handed their action might have been, the accused could not be convicted under Sections 379 and 427 Indian Penal Code."

In the original grants the income of the lands was granted to the complainant's father on the condition that he served as Kamdar well and faithfully, and the complainant now seeks to enjoy these lands in perpetuity, shorn of that condition by the writing of January 25, 1927. That writing is not admitted by the accused who call it a fictitious document. Whatever that might be, it cannot be denied seriously that there is a 'bona fide' dispute between the parties and that the assertion of the accused that the complainant is not entitled to receive the income of the land when he ceases to serve as a Kamdar is a 'bona fide' claim. This dispute may best be decided in a Civil Court and it will be improper to convict the accused of criminal trespass and theft, if acting under such a 'bona fide' belief, they re-

moved the groundnuts, in question to the Khalawad of the village.

(5) I, therefore, allow this application, set aside the order of the Additional Sessions Judge, Gondal, and restore the order of discharge passed by the First Class Magistrate, Upleta.

(6) CHHATPAR, J: I agree.

D.H. *Revision allowed.*

A. I. R. (39) 1952 SAURASHTRA 24 (C. N. 11)

SHAH, C. J.

Abdul Satar Abdul Sakur and another, Judgment-Debtors-Applicants v. Memon Mahmad Amin Haji Hasam and others, Opponents.

Civil Revn. Appln. No. 192 of 1950, D/- 10-7-1951.

Civil P. C. (1908), O. 21, R. 66 — Sale proclamation — Value of property.

It is not necessary in every case to value the property to be sold and state the value in the sale proclamation but if in any case the Court thinks it desirable it may do so. However the execution Court should state in the proclamation the value of the property given by the decree-holder and the judgment-debtor: A I R (26) 1939 Bom 182, Rel. on. (*Para 5*)

Anno C. P. C., O. 21, R. 66, N. 14.

T. U. Mehta, for Applicants; M. U. Shah, for Opponents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('98) 20 All 412: (25 Ind App 146 P C) (Pr ?)

('35) AIR (22) 1935 Bom 331: (159 Ind Cas 358) (Pr 3)

('39) AIR (26) 1939 Bom 182: (I L R (1939) Bom 389) (Prs 1, 3, 5)

('33) A I R (20) 1933 Cal 511: (60 Cal 581) (Prs 2, 3)

('49) A I R (36) 1949 Mad 398: (1948-2 Mad L Jour 569) (Pr 4)

ORDER: This application arises in execution proceedings and is preferred against an order of the Civil Judge, Senior Division, Junagadh, relating to the issue of a proclamation of sale of the mortgaged property. The applicant judgment-debtors asked that the value of the property may be determined by the Court after recording evidence and the same be stated in the proclamation of sale, and further that the property may be sold in two lots, one after the other. The property consists of a building at Vanthali and while the decree-holders value it at Rs. 30,000/- the judgment-debtors value it at Rs. 60,000/-. The learned Judge noted this great difference in the valuation and held relying on a decision of the Bombay High Court in 'Chrandas Vasanji v. Dossabhoy', A I R (26) 1939 Bom 182, that it was not necessary to determine the value of the property and to state it in the sale-proclamation. He also held that there were no adequate reasons for selling the property in two lots and he therefore rejected both the contentions and directed the issue of a sale-proclamation.

(2) Mr. Mehta for the applicants has urged that the Court was bound to state the value of the property in the sale-proclamation and for that purpose to determine the same after recording the evidence of the parties, and in support of his contention he has relied on 'Ban Behari v. Bhukhan Lal', A I R (20) 1933 Cal 511, where it was held that it was the duty of the Court to make the valuation, the result of which was to be included in the sale-proclamation, and that such duty, save in exceptional circumstances, was not discharged by merely stating the values respectively put upon the property by the parties. However subsequent to this decision, the Calcutta High Court has amended Rule 66 Clause (2) of Order 21, Civil Procedure Code, in July 1938 by adding the following proviso to Clause (e):

"provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property but the proclamation shall include the estimate, if any, given by either or both of the parties."

The Patna High Court, as also the Judicial Commissioner's Court, Nagpur, originally took the same view, but they too have since amended Rule 66 and whereas the Nagpur High Court has added the words "including the decree-holder's estimate of the approximate market price" to Clause (e) of Sub-rule (2), the Patna High Court has added a proviso, viz.,

"provided that no estimate of the value of the property, other than those, if any, made by the decree-holder and judgment-debtor respectively together with a statement that the Court does not vouch for the accuracy of either, shall be inserted in the sale-proclamation."

An amendment similar to the one made by the Calcutta High Court was made by the Lahore High Court in 1929. As a result of these amendments the earlier decisions of the Calcutta, Patna, Nagpur and Lahore High Courts requiring the Court to value the property and state its own valuation in the proclamation are no longer good law.

(3) In Bombay, it was held in 'Sitabai v. Gangadhar', A I R (22) 1935 Bom 331, that in order to state the value of the property, an enquiry was necessary; and if an enquiry into the value of the property was necessary, the Court was bound to hold an enquiry and the Court was not at liberty to take any imaginary figure, or to state the value of the property at any figure which it thought proper. The Privy Council decision in 'Saadatmand Khan v. Phul Kaur', 20 All 412, was there referred to and followed, but in a later Bombay decision, 'Charandas Vasanji v. Dossabhoy', A I R (26) 1939 Bom 182, it was held that it was not necessary in every case to value the property to be sold and to state the value in the sale-proclamation, but if in any case the Court thought it desirable to value the property and state the value in the proclamation, then it might be so stated. The Privy Council decision in '20 All 412', was taken as merely laying down that if the valuation was stated but stated inaccurately, that was a material irregularily and that proposition was not disputed. However, as Beaumont, C. J., observed, the Privy Council did not hold that it was necessary in every case to state the value of the property in the proclamation. The decision in 'Ban Behari v. Bhukhan Lal', A I R (20) 1933 Cal 511, to the contrary was there dissented from; but as I said above, the said Calcutta decision is no longer good law.

(4) The above Privy Council decision was also referred to in 'Srinivasan v. Andhra Bank Ltd.', AIR (36) 1949 Mad 398, and was construed as not making it obligatory upon the executing Court to embark upon an enquiry regarding the value of the property and to insert such value in the proclamation. However, the Madras High Court has amended Rule 66, Clause (2) by adding a new Clause (e) making the present Clause (e) to read as Clause (f) requiring the value of the property as stated (i) by the decree-holder and (ii) by the judgment-debtor, to be included in the sale-proclamation. Dealing with the contention urged on behalf of the judgment-debtor, viz., that it was the Court's duty to determine the value after

taking such evidence as was found necessary and to state it in the proclamation, it was observed:

"In so far as one of the necessary requisites of a sale-proclamation, viz., the value of the property, is concerned there is a specific clause regarding what the proclamation should contain and that clause is clause (e). Clause (f) cannot be reasonably construed as including within its ambit any statement about the Court's view about the market value. By enacting the new clause (e) it should be deemed that the residuary clause (f) is intended to cover matters other than the market value. This does not prevent the Court, if it thinks necessary, from including the market value as decided by it."

(5) In view of the amendment of Rule 66, Clause (2), there is no longer any conflict of opinion between the various High Courts, and none of the amendments requires the execution Court to embark on an enquiry as to the value of the property and to state it in the sale-proclamation, and so far as Bombay is concerned, by its later decision, in AIR (26) 1939 Bom 182, it has definitely held against such a view. In my opinion, there is nothing in the language of sub-rule (2) of Rule 66 requiring the Court to fix the value after an enquiry as to it and to state it in the sale-proclamation. Sub-clause (e) requires other things which in the Court's opinion the purchaser should know in order to judge of the nature and value of the property, but even so it does not prescribe that the Court must determine the value of the property and state in the proclamation. The other High Courts have veered round to the view that the Court need not fix its own valuation and state it in the proclamation and that it was enough if the value of the property, if any, given by the parties was stated in the proclamation. The position as it obtains in Bombay is thus more lenient and it leaves a discretion to the execution Court to state its own valuation in the sale-proclamation, after an enquiry as to the same, if it thinks desirable to do so. I am inclined to agree with the Bombay view and to hold that it is not necessary in every case to value the property to be sold and state the value in the sale-proclamation but if in any case the Court thinks it desirable it may do so. However the execution Court should state in the proclamation the value of the property given by the decree-holder and the judgment-debtor.

(6) There is a vast difference between the valuation of the property given by the decree-holder the judgment-debtor in this case, the latter's valuation being twice that of the former, and probably both might be wrong. I do not consider it desirable in this case that the Court should hold an enquiry as to the value and state it in the proclamation for that is likely to give scope to the parties to create unnecessary complications. However it may be mentioned in the sale-proclamation that whereas the decree-holder values the property at Rs. 30,000/- the judgment-debtor values it at Rs. 60,000/- and I direct that the respective valuations of the parties should now be stated in the proclamation, which may be issued afresh.

(7) As for the second plea of the judgment-debtor that the property should be sold in two lots, the property is a building consisting of four shops on the ground floor and three rooms on the first floor with a terrace. There is a common roof and a common plinth to the building and the passage too is common and in the very situation of the property a sale thereof in two lots will not be conducive to the interests of the intending purchasers and might even affect the prospects of the sale altogether. The applicant has not shown any valid reasons for such a course and the executing Court was right in rejecting this prayer and in ordering the sale of the property in one lot. Subject to the variation indicated at the end of paragraph six above, the lower Court's order is maintained and this application is dismissed with costs.

V.B.B. *Order modified.*

A. I. R. (39) 1952 Saurashtra 25 [C. N. 12.]

SHAH, C. J. AND CHHATPAR J.

State v. Shukla Hariprasad Jethalal, Respondent.

Criminal Appeal No. 19 of 1951, D/- 24-7-1951.

(a) Press (Emergency Powers) Act (1931), S. 4 (1) (d), (f) — Validity — Constitution of India Art. 19 (1) (a), (2).

Clause (1) (d) of S. 4 is inconsistent with the fundamental right of freedom of speech and expression guaranteed by Art. 19 (1) (a) of the Constitution and does not come within the purview of the saving legislation contemplated by clause (2) of Art. 19. Every news sheet which brings into hatred and contempt Govt. does not necessarily undermine the security of the State or tend to overthrow it and as the clause is capable of including within its ambit many news sheets which may bring into hatred and contempt the Government but at the same time not undermine the security of the State or tend to overthrow it, the clause cannot be held to come within the limits of the permissible legislation under clause (2) of Art. 19. The same argument applies with greater force so far as the validity of sub-clause (f) of S. 4 (1) is concerned. Every act of interference with the administration of law and the maintenance of law and order does not neccessarily undermine the security of the State or tend to overthrow it. Cls. (d) and (f) of S. 4 (1) have ceased to be operative in view of the present Constitution. AIR (37) 1950 SC 124, AIR (37) 1950 SC 1 9, Foll.; A I R (38) 1951 Mad 70; A I R (38) 1951 Pat 12, Rel. on. (Para 6)

Anno : Press (Emergency Powers) Act, S 4 N. 5.

(b) Constitution of India, Art. 19 — Freedom of speech and expression.

Freedom of speech and expression includes freedom of propagation of ideas and that freedom is ensured by the freedom of circulation. Writing on the black board set up in a public place in the town criticisms of Government and their officers including Ministers would be protected by the right of freedom of speech and expression. A I R (37) 1950 S C 124, Foll. (Para 2)

A. R. Baxi, Govt. Pleader, for the State; V. S. Doshi, for Respondent.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('50) 1950-13 S C J 418 : (A I R (37) 1950 S C 124 : 51 Cri. L Jour 1514) (Prs 2, 3)

('50) 1950-13 S C J 425 : (A I R (37) 1950 S C 129 : 51 Cri L Jour 1525) (Prs 2, 4)

('51) A I R (38) 1951 Mad 70 : (1951-1 Mad L Jour 115) (Pr 2)

('51) A I R (38) 1951 Pat 12 : (52 Cri L Jour 309 S B) (Pr 5)

CHHATPAR, J.: This is an appeal by Government under Section 417 to set aside the ac-

quittal of the appellant who was charged with an offence under Section 18 (1) of the Press (Emergency Powers) Act, 1931 as adapted and applied to the State of Saurashtra. The accused is a resident of Halvad and had set up a board in a public place in this town and used to write on the board from time to time criticisms of Government and their Officers including Ministers. It was contended on behalf of the prosecution that such writings constituted news sheets within the definition of Section 2 (6) which reads as under :

> "Newsheet" means any document other than a newspaper containing public news or comments on public news or any matter described in sub-section (1) of section 4.

The word "document" is also defined by clause (2) of Section 2 which definition runs as under: "Document" includes also any painting, drawing or photograph or other visible representation." It is also defined by Section 29 of the I. P. C. and by Section 3 of the Indian Evidence Act. There is no doubt and it is not disputed on behalf of the respondent that such writings on the black board do amount to publishing news sheets. Under Section 15 of the Press (Emergency Powers) Act, as it stands at present, the publisher would require a licence from the District Magistrate. It is also not disputed that no such licence was obtained by the accused. The sole question in the prosecution and in the present appeal is whether in view of the provisions of the Constitution of India and the fundamental rights of freedom of speech guaranteed therein under Section 19 (1) (a) the publication of such news sheets can be controlled by the existing provisions under the Press (Emergency Powers) Act. Mr. A. R. Baxi the learned Government Pleader has argued that these news sheets contain matters which fall within Section 4 (1) sub-clauses (d) & (f) and his contention is that these clauses come within the purview of the saving legislation contemplated by clause (2) of article 19 of the Constitution which reads as under :

> "Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates, to, or prevent the State from making any law relating to, libel, ,slander defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State".

This appeal has been argued on the assumption that the offending news sheets do contain matters which come under sub-clauses (d) & (f). As we are of the opinion that these two sub-clauses of the Press (Emergency Powers) Act are inconsistent with the fundamental rights guaranteed by the Constitution by article 19 (1) (a) of the Constitution and do not come within the purview of the saving legislation provided by clause (2), we have not thought fit to go into the substance of the news sheets. The sub-clauses (d) and (f) of Section 4 (1) of the Press (Emergency Powers) Act read as under :

> "(d) to bring into hatred or contempt His Majesty or the Government established by law in British India or the administration of justice in British India or any class or section of His Majesty's subjects in British India, or to excite disaffection towards His Majesty or the said Government, or
>
> (f) to encourage or incite any person to interfere with the administration of the law or with the maintenance of law and order, or to commit any offence, or to refuse or defer payment of any land revenue tax, rate cess or other due or amount payable to Government or to any local authority or any rent of agricultural land or anything recoverable as arrears of or along with such rent."

The definition of 'news sheet' includes documents which contain matters described in sub-section 4 (1). The point therefore for consideration is whether sub-clauses (d) & (f) have ceased to be operative being inconsistent with the Constitution. The learned Government Pleader has contended that anything which "brings into hatred and contempt the Government" (the words of clause (d))—"undermines the security of or tends to overthrow the State," the penultimate words of clause (2) of article 19 of the Constitution. He has also further contended that the words "to interfere with the administration of the law or with the maintenance of law and order" (occurring in clause (f) similarly come within the purview of clause (2) of article 19.

(2) We have heard the learned advocates for the Government and the respondent at length on the point. Fortunately there are some decisions on the subject both of the Supreme Court and of some High Courts. In the case of 'W. N. Srinivasa Bhat and another v. State of Madras', AIR (38) 1951 Mad 70 a Special Bench of the Madras High Court had occasion to consider the provisions of the Press (Emergency Powers) Act 1931 and held that section 4 (1) (d) as it stands amounts to a restriction on the freedom of speech and expression guaranteed to the citizen under article 19 (1) (a) and must be held to be an unconstitutional limitation not warranted by article 19(2) of the Constitution. That case dealt with two petitions under article 227 of the constitution. We are however concerned only with the second petition which was made by the publisher of the newspaper entitled "Aruna" a Kannada weekly of Mangalore published at Mangalore. In the opinion of the Madras State Government the paper contained in its issue of 26th February 1950 a matter which came under section 4(1) (d) of the Press Act. In exercise of the powers conferred by Section 3 of the Act the publisher was called upon to deposit with the District Magistrate of South Kanara security to the extent of Rs. 1000/-. The petitioner contested this order and contended that clause (1) (d) of Section 4 was inconsistent with the fundamental rights guaranteed by the Constitution and therefore was void and the demand of security was consequently not justified. With advantage I may quote the following passage from the judgment of Basheer Ahmed Sayeed J. at page 93 of the report :

> "The second point raised by the learned Advocate-General for the petitioner in the second petition is that the order of the Government under Ss. 3 (3) and 4 (1) (d), Press Act does not offend Art. 19 (1) (a) of the Constitution and that the two sections are saved by the first part of Art. 19 (2). He, therefore, contends that the impugned sections of the Press Act should not be considered to be void, because of the fact that article 19(2) of the Constitution gives ample scope to any State to legislate on libel and libel must be construed in a general and comprehensive sense so as to include what is known

as 'seditious libel' or 'libel on Government', He, of course, concedes that the term 'freedom of speech and expression' may include the 'liberty of the press' as well. But a reference to the history of the Constitution so far as it related to the framing of Art. 19 (2) would show that the makers of the Constitution deliberately omitted the word "sedition" from the scope of Art. 19 (2) of the Constitution and the cases cited by the learned counsel for the petitioner namely 'Romesh Thappar v. The State of Madras', 1950-13 S C J 418: (A I R (37) 1950 S C 124:51 Cri L Jour 1514) and 'Brij Bhushan v. The State of Delhi', 1950-13 S C J 425: (A I R (37) 1950 S C 129 : 51 Cri L Jour 1525) seem to warrant the position taken up by the learned counsel for the petitioner to the effect that the matter complained of against the petitioner in this petition does not fall within the scope of permissive legislation contemplated by Art. 19 (2) of the Constitution. In view of what we have already stated in the foregoing parts of this judgment and also in view of what our learned brother, Panchapagesa Sastri, J. has observed in his elaborate judgment on this point we do not think it is necessary for us to traverse the same ground. Suffice it for us to say that an examination of the scope of S. 4 (1) (d) leaves us with no other impression than that it will be straining too much to bring it within the scope of Art. 19 (2) of the Constitution. The omission to include 'sedition' in Cl. (2) of Art. 19 may perhaps be due to the fact that the Constitution has envisaged a republican form of Government and also has provided for an amendability of the Constitution itself. Numerous cases of the Supreme Court of the United States of America have also been cited to us which have dealt with this point under the American Constitution. We have already examined in general terms the trend of the decisions on seditious libel in so far as they related to the American Constitution and it is not necessary for us to recapitulate the effect of those decisions over again. In our opinion S. 4 (1) (d), Press Act, cannot be claimed to be consistent with the Constitution, nor could we say that S. 4 (1) (d), Press Act, is saved by the reservations relating to permissive legislation contained in Art. 19 (2) of the Constitution. In our view, even applying the clear and present danger test of the Supreme Court of America, S. 4 (1) (d) as it stands amounts to a restriction on the 'freedom of speech and expression' guaranteed to the citizen under Art. 19 (1) (a) and must be held to be an unconstitutional limitation not warranted by Art. 19 (2) of the Constitution. Therefore, while we have to dismiss the first petition for the reasons above stated, we think the second petition has to be allowed, and we do so accordingly".

The two cases of the Supreme Court referred to in this judgment of the Madras High Court are those of 'Romesh Thappar v. The State of Madras', A I R (37) 1950 S C 124 and 'Brij Bhushan v. The State of Delhi', A I R 1950 S C 129. In the first case it was held that freedom of speech and expression includes freedom of propagation of ideas and that freedom is ensured by the freedom of circulation. Hence publication of a news sheet like the one in the present case would be protected by the right of freedom of speech and expression. It was also held that unless a law restricting the freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it such law cannot fall within the reservation under clause (2) of article 19 although the restrictions which it seeks to impose may have been conceived generally in the interests of public order. Clause 2 of article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to public security is involved, an enactment,—which is capable of being applied to cases where no such danger would arise, cannot be held to be constitutional and valid to any extent. It was further observed in that case that the constitution in formulating the varying criteria for permissible legislation imposing restrictions on the fundamental rights enumerated in article 19 (1) has placed in a distinct category those offences against public order which aim at undermining the security of the State or overthrowing it, and made their prevention the sole justification for legislative abridgment of freedom of speech and expression. Thus, nothing less than endangering the foundations of the State or threatening its overthrow could justify curtailment of the rights to freedom of speech and expression.

(3) In 'Romesh Thappar's case', (A I R (37) 1950 S C 124) their Lordships of the Supreme Court had occasion to interpret and decide the validity of Section 9 (1) (a) of the Madras Maintenance of Public Order Act, 1949, which authorised imposition of restrictions for the wider purposes of securing public safety or the maintenance of public order and it was held that these provisions were outside the scope of authorised restrictions under clause 2 of article 19 of the Constitution and therefore void and unconstitutional. It was held that the words "public order and public safety" were expressions of wider connotation than what would comprise matters which undermine the security of the State or which tend to overthrow it.

(4) 'Brij Bhusan's case', (A I R (37) 1950 S C 129) was one of pre-censorship on a journal under Section 7 (1) (a) of the East Punjab Public Safety Act against the printer and publisher of an English Weekly of Delhi called the "Organizer" directing them to submit for scrutiny in duplicate before publication till further orders all communal matters and news and views about Pakistan including photographs and cartoons etc. An application was made to the Supreme Court for a writ of certiorari and prohibition under article 32 of the Constitution, and their Lordships of the Supreme Court held by majority that the order was void as the Section which authorised the imposition of such restrictions fell outside the reservation of clause 2 of article 19. In that case also the words "public safety and public order" were considered in relation to the words "security of the State" contained in clause (2) of article 19.

(5) The learned Advocate for the respondent has also drawn our attention to the decision of a special bench of the Patna High Court in the matter of 'Bharati Press v. The Chief Secretary Government of Bihar', A I R (38) 1951 Pat 12. The majority judgment in that case held that sub-clauses (a) and (b) of Section 4 (1) of the Press (Emergency Powers) Act 1931 were inconsistent with the fundamental rights given under article 19 (1) (a) of the Constitution and were therefore void by virtue of article 13

clause (1) and were not saved as permissible legislation under article 19 (2) of the Constitution.

(6) Giving my anxious consideration to the case I agree with the decision of the Madras High Court that clause (1) (d) of Section 4 of the Press (Emergency Powers) Act is inconsistent with the fundamental right of freedom of speech and expression guaranteed by article 19 (1) (a) of the Constitution and does not come within the purview of the saving legislation contemplated by clause (2) of article 19. Every news sheet which brings into hatred and contempt Government does not necessarily undermine the security of the State or tend to overthrow it and as the clause is capable of including within its ambit many news sheets which may bring into hatred and contempt the Government but at the same time not undermine the security of the State or tend to overthrow it, the clause cannot be held to come within the limits of the permissible legislation under clause (2) of Article 19. The same argument applies with greater force so far as the validity of sub-clause (f) of Section 4 (1) is concerned. It has already been held that public safety and public order are terms of wider import than security of State. The learned Government Pleader has argued that matters which interfere with the Administration of law or maintenance of law and order must necessarily have a tendency to overthrow the State and undermine its security. I am not impressed by this contention. Every act of interference with the administration of law and the maintenance of law and order does not necessarily undermine the security of the State or tend to overthrow it. I am therefore clearly of the opinion that clauses (d) & (f) of Section 4 (1) of the Press (Emergency Powers) Act have ceased to be operative in view of the present Constitution.

(7) Under the circumstances I see no reason to interfere with the order of acquittal passed by the learned Magistrate and dismiss this appeal.

(8) SHAH, C. J. : I agree.

D.H. *Appeal dismissed.*

A. I. R. (39) 1952 Saurashtra 28 *[C. N. 13.]*

CHHATPAR, J.

Sukhvantlal Nrusinhprasad and others, Appellants v. Bai Rupaliba Madhavsang, Respondent.

First Appeal No. 72 of 1950, D/- 12-7-1951.

Civil P. C. (1908), S. 48 — Subsequent order — Decree amended under S. 11 Saurashtra Agriculturists' Relief Act — Starting point — Debt laws — Saurashtra Agriculturists' Relief Act (1934), S. 11.

Where a decree is scaled down under S. 11, Saurashtra Agriculturists' Relief Act, the period of 12 years under S. 48, Civil P. C. would run from the date of the amended decree. The words "as if the agriculturist has instituted a suit for taking accounts in accordance with the provisions of S. 5 and the amount remaining due by the agriculturist should then be ascertained" in S. 11 of the Saurashtra Agriculturists' Relief Act seem to show that for all practical purposes the inquiry under S. 11 should be deemed as if a new suit is instituted and the amount ascertained which is incorporated in a formal order should be considered as a new decree or in any case a subsequent order within the meaning of clause (1) (b) of S. 48, Civil P. C. Civil Misc. App. No. 7 of St. 1997 (Sau) (Jumagad Huzur Adalat) AIR (30) 1943 Oudh 412, Foll. AIR (22) 1935 Lah 292 and AIR (30) 1943 Mad 765, Dist. (Paras 4, 5)

Anno. ; C. P. C., S. 48 N. 10 Pt. 4 and N. 11.

B. M. Buch, for Appellants; P. C. Mandavia, for Respondent.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('39) AIR (26) 1939 P C 80 : 1939 Oudh W N 313 : (14 Luck 192) (Pr. 3)
('40) AIR (27) 1940 All 423 : (ILR (1940) All 536) (Pr 3)
('38) AIR (25) 1938 Cal 25 : (ILR (1937-2 Cal 373) (Pr 3)
('35) AIR (22) 1935 Lah 292 (Pr 2)
('43) AIR (30) 1943 Mad 765 : (210 Ind Cas 624) (Pr 5)
('34) 11 Oudh W N 1103 : AIR (21) 1934 Oudh 465 (Prs 2, 3)
('43) AIR (30) 1943 Oudh 412 : (19 Luck 291) (Pr 3)
Civil Misc A No. 7 of St 1997 (Sau) (Pr 2)

JUDGMENT : This is an appeal from an order passed by the Civil Judge, Senior Division, Junagadh, in Execution Proceedings dismissing the Execution Application of the appellants on the ground that it was barred under S. 48, Civil P. C. having been filed more than twelve years from the date of the decree. The appellants are the holders of a decree which was passed on 27-6-22 for Rs. 10,000/- and odd. On 27-10-28, an adjustment was arrived at between the parties. In 1934 the Saurashtra Agriculturists' Relief Act was passed by the Junagadh State, which came into force from 1-11-34. In pursuance of S. 11 of this Act, an account was taken between the parties of the decretal debt and on 10-1-39 the Court passed order whereby a sum of Rs. 8912-4-0 was found due to the decree-holders. Thereafter from year to year execution applications were filed for the attachment of the produce of the Giras of the judgment-debtor. A Havaldar was appointed to take possession of the crops and he realised the produce and distributed the sale proceeds amongst the several creditors of the judgment debtor. The last but one execution application was filed on 5-4-50 in which Rs. 2678-7-6 were claimed as the balance due to the decree-holders. This application was withdrawn as the Govt. of Saurashtra had introduced the system of Vighoti and therefore no Havaldar could be appointed to take charge of the crop coming to the share of the judgment-debtor. This execution application was consequently followed up by another application filed on 17-4-50 wherein the amount claimed was Rs. 1691-7-3. In this execution application the prayer was made for collection of the Vighoti falling to the share of the judgment-debtor in respect of the same Giras. This application was dismissed by the learned Civil Judge holding that S. 48, Civil P. C. was a bar, as this application was filed more than twelve years from the date of the original decree which was passed on 27-6-22. A plea was raised on behalf of the decree-holder that the original decree was superseded by the order passed on 10-1-1939 under S. 11 of the Saurashtra Agriculturists' Relief Act, which should be considered as either a fresh decree

or a "subsequent order" within the meaning of clause (1) (b) of S. 48, Civil P. C. and that the period of twelve years provided by S. 48, Civil P. C. should run from the date of this order, i.e. from 10-1-39 and consequently the execution application was within time. There was no question about the decree having been kept alive by execution applications being filed from time to time for the purpose of Article 182 of the Limitation Act. So the sole objection was whether Section 48 came in the way of the decree-holders.

(2) The learned Civil Judge relied upon two rulings one of the Oudh Court reported in 'Narendra Bahadur v. Oudh Commercial Bank Ltd. Fyzabad', A I R (21) 1934 Oudh 465 and the second of the Lahore High Court reported in 'Ganesh Das v. Vishan Das', A I R (22) 1935 Lahore 292, and held that a fresh starting date for the purpose of Sec. 48, Civil P. C. did not arise when any decree was amended. A judgment of the Junagadh Hazur Adalat given in 'Civil Misc. Appeal No. 7 of St. 1997' was cited before him on behalf of the decree-holders that in the circumstances of the present case where an original decree was scaled down after an inquiry under S. 11 of the Saurashtra Agriculturists' Relief Act. The period of twelve years should run from the date of the order under this Section. But the learned Civil Judge did not follow this ruling.

(3) The decision in the Oudh case cited by the Civil Judge has been reversed by the Privy Council and the Privy Council judgment is reported in 'Oudh Commercial Bank Ltd. Fyzabad v. Bind Basni Kuar', A IR (26) 1939 P C 80. Thereafter the Oudh Court in the case of 'Mangnoo Singh v. Bineshri', A I R (30) 1943 Oudh 412 held that where a decree had been amended under S. 5, U. P. Agriculturists' Relief Act, the period of twelve years provided in S. 48 would run from the date of the amendment and not the original decree. It was observed as under :

"It may be mentioned that the order amending the decree in 1935 was passed by the Court passing the decree. This order amending the decree, although not passed on the basis of any compromise or agreement of parties, was one passed under the provisions of a statutory enactment, namely the U. P. Agriculturists' Relief Act. The fact that it was made in exercise of the jurisdiction conferred by the provisions of the statute is no ground for holding that it should not be treated as a subsequent order directing the payment of money at a certain date or at recurring periods as mentioned in S. 48 (1) (b). I hold therefore that the limitation should be computed from the date of the subsequent order passed in 1935.

In discussing the P. C. ruling referred to above the learned Judge of the Oudh High Court observed as under :

"It has been argued for the applicant upon the strength of a decision in 'Narendra Bahadur Singh v. Oudh Commercial Bank Ltd., Fyzabad', 11 O W N 1103; A I R (21) 1934 Oudh 465 that 12 years' limitation should be computed from the date of the original decree, as the period of 12 years allowed by S. 48 is final and cannot be extended by any amendment of the decree. This case was overruled by their Lordships of the Judicial Committee in '1939 Oudh W N 313. AIR (26) 1939 P C 80. It appears from the facts of this case that the case was one in which the original decree had been altered by a compromise arrived at between the parties. Their Lordships did not discuss the view taken by this Court of the provisions of S. 48 and proceeded on the broad ground that a compromise which is arrived at between the parties and governs the liability of the debtor under the decree as regards the time or manner of its enforcement is one which should be enforced in the execution proceedings. Their Lordships held that the Code contained no general restriction of the parties' liberty of contract with reference to their rights and obligations under the decree and that if they do contract upon terms which have reference to and affect the execution, discharge or satisfaction of the decree, the provisions of S. 47 involve that questions relating to such terms may fall to be determined by the executing Court. Following this view, it was held by the Allahabad High Court in 'Chhatrapati Pertab Bahadur v. Hariram', A I R (27) 1940 All 423 that the period of 12 years provided in S. 48 should be computed from the date of the default mentioned in a compromise decree which altered the original decree. A similar view was taken in 'Kartic Chandra v. Bata Krishna Roy', A I R (25) 1938 Cal 25, where an order of the Court embodying the compromise passed subsequent to the original decree was regarded in the nature of a subsequent order made by a competent Court under S. 48 (1) (b), Civil P. C."

The decision of the Lahore High Court cited by the learned Civil Judge rested upon the fact that the amendment of the decree was occasioned by the original decree not conforming to the judgment. It was under those circumstances that it was held that the date of the amendment of the decree could not be taken as the starting point of the period of 12 years for the purpose of S. 48, Civil P. C. In the present case there is no question of the original decree not being in conformity with the judgment. The decree has been varied in pursuance of statutory provisions which since the passing of the decree came into force.

(4) Section 11 of the Saurashtra Agriculturists' Relief Act lays down as under :

Re : former decrees. "Decrees standing against the agriculturist when this Act comes into force, and decrees included in other debts, when coming before the Court in execution or in a suit, account should also be taken of such decretal debts in accordance with the provisions of section 9. In taking such account, if it appears to the Court that the transactions which have led to the passing of the decrees are a part and parcel of other transactions entered into between the parties, then the whole of the transactions should be inquired into, as if the agriculturist has instituted a suit for taking accounts in accordance with the provision of section 5 and the amount remaining due by the agriculturist should then be ascertained. But the ascertainment of such amount, shall not except under circumstances mentioned in section 12 entitle the creditor to realize from the agriculturist debtor any sum in excess of the balance due under the decree, which on coming before the Court had led to order the taking of accounts in accordance with the provisions of this section".

The words "as if the agriculturist has instituted a suit for taking accounts in accordance with the provision of S. 5 and the amount remaining due by the agriculturist should then be ascertained" seem to show that for all practical purposes the inquiry under S. 11 should be deemed as if a new suit is instituted and the amount ascertained which is incorporated in a formal order should be considered as a new decree or in any case a subsequent order within the meaning of clause (1) (b) of S. 48, Civil P. C. This was the reasoning of the Hazur Adalat of Junagadh in the decision cited before the learned Civil Judge. I am in entire agreement with this view, which appears to me to be sound on principle and in consonance with the decision of the Oudh High Court.

(5) The learned Advocate for the respondent has relied upon the case of 'Jagannadham v. Venkatappanna', A I R (30) 1943 Mad 765, wherein a decree was amended under the Madras Agriculturists' Relief Act pending execution and it was held as under :

"A decree as amended under the Madras Agriculturists' Relief Act bears the same date as the old decree, which would not be the case if the amended decree had to be regarded as an entirely new decree. It is based on the old judgment and therefore when the revised decree is executed it is really the old decree amended and not an entirely new decree, which under S. 48, Civil P. C., would give the decree-holder a fresh period of twelve years from the date of the amendment. If it is the old decree that is still being executed then the old execution petition must be deemed to be pending."

This decision seems to have been based upon the practice prevailing to give the amended decree under the Madras Agriculturists' Relief Act the same date as the old decree. The provisions of the Madras Agriculturists' Relief Act are not cited before me, and the learned Judge in that case did not consider the question whether the amended decree should be construed as a subsequent order within the meaning of clause (1) (b) of Section 48, Civil P. C. I prefer to follow the Oudh case which appears to be on all fours with the present case. I consequently hold that the period under S. 48 should be considered to run from 10-1-39, and as the execution application was filed within 12 years from this date, it was within time. I therefore set aside the order of the trial Court and allow this appeal with costs.

(6) No other ground as to the maintainability of the execution application has been urged before me by the learned Advocate for the respondent. I therefore grant the execution application and order execution to issue.

K.S. *Appeal allowed.*

A. I. R. (39) 1952 Saurashtra 30 *[C. N. 14.]*

CHHATPAR J.

Lohana Bulakhidas Durlabhji and another, Applicants v. Lohana Shantilal Haridas and others, Opponents.

Civil Revn. Appln. No. 109 of 1950, D/- 12-7-1951.

(a) Civil P. C. (1908), O. 20, R. 13 — Administration suit — Who can file — Valuation — Court-fees Act (1870), S. 7 (iv) (f).

Any legatee under a will can file a suit for administration where it is necessary to take an account of the estate of the deceased and such a suit can be filed against a party who was during the life time of the deceased in possession and management of the property on behalf of the deceased. The mere fact that such party refutes the claim of the plaintiff does not alter the nature of the suit. The nature of the suit is to be determined from the allegations in the plaint. Whether those allegations are substantiated or not will be a question to be decided in the case itself. The fact that the plaintiffs rely upon the will for getting their share in the property of the deceased makes little difference so far as the frame of the suit is concerned. It would be necessary in the plaintiff's case to ascertain what the estate of the deceased was, what debts had to be paid; after the collection of the outstandings and other assets and payment of debts, the plaintiffs' share would be capable of ascertainment. Such a suit can be for an account of the administration of the estate of the deceased. Being a suit for accounts, it is open to the plaintiffs to put any valuation they please and pay ad velorem Court-fees thereon. A I R (2) 1915 Bom 59, Rel. on. A I R (27) 1940 Lah 179 and 2 Sau L R 221, Dist. Chitaley's Civil P. C. cited with approval. (*Paras 2, 3*)

Anno : C. P. C., O. 20, R. 13, N. 5, 5a. Court fees Act, S. 7 (iv) (f) N. 3.

(b) Civil P. C. (1908), S. 115 — Interlocutory orders.

A decision upon Court-fees or the frame of a suit which is adverse to the plaintiff amounts to refusing to exercise jurisdiction to try the case; and in such cases a Court of revision can interfere and give relief to the plaintiff. A I R (37) 1950 Pat. 470, A I R (37) 1950 Cal 386, A I R (37) 1950 Nag 249, Rel. on. A I R (36) 1949 P. C. 165, referred. (*Para 4*)

Anno : C. P. C., S. 115, N. 5.

K. M. Takar, for Applicants, G. B. Joshi, for Opponent (No. 1), C. H. Doshi, for guardian of minors (Nos. 10 and 11) V. M. Udani, for guardian of minors (Nos. 6 to 9).

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('49) A I R (36) 1949 P C 165 (Pr 4)
('15) 39 Bom 545 : (A I R (2) 1915 Bom 59) (Pr 2)
('22) 45 Bom 75 : (A I R (8) 1921 Bom 424) (Pr 2)
('36) A I R (23) 1936 Bom 353 : (165 Ind Cas 964) (Pr 2)
('50) A I R (37) 1950 Cal 386 (Pr 4)
('40) A I R (27) 1940 Lah 179 : (189 Ind Cas 894) (Pr 2)
('50) A I R (37) 1950 Nag 249 : (I L R (1950) Nag 748) (Pr 4)
('50) A I R (37) 1950 Pat 470 (Pr 4)
('49) 2 Sau L R 221 (Pr 3)

ORDER : This is a revision application from an order of the Civil Judge, Senior Division, Junagadh, deciding issue No. 4 about the frame of the suit and issue No. 5 about court-fees against the applicants-plaintiffs. The plaintiffs had filed a suit for administration of the estate of one Gandhi Makanji Shamji who died on 17-2-47. The plaintiffs alleged that the deceased had left a will dated 25-8-45 and ac-

cording to it they were entitled to a share in the estate of the deceased. They alleged that the entire estate was in possession of the defendant No. 1, who is a daughter's son of the deceased. He was alleged to have been in charge of the property and the management thereof during the life time of the deceased. This allegation is not denied by the defendant No. 1. The plaintiffs had joined several other parties to the suit as defendants who are entitled to certain shares and legacies under the will propounded by the plaintiffs. The defendant No. 1 who is the chief contesting defendant has pleaded that the deceased had revoked the will said to have been made in favour of the plaintiffs on the basis of which the suit has been filed for administration and accounts by subsequent wills in his favour and he claimed that under the last will and testament of the deceased, he was the sole legatee. Various issues were framed by the trial Court and the two issues on which the decision has been given and which are the subject matter of this revision application are (1) whether the suit for administration was maintainable and (2) whether the court-fee paid was sufficient ? The plaintiffs had valued the suit for the purpose of court-fees under Section 7 (IV) (f) of the Court-fees Act. The contention of the defendant No. 1 was that the plaintiff's suit was for the partition of the estate of the deceased and for declaration as to the will under which they claimed, and that they should value the share of the property and pay ad valorem Court-fees thereon. The learned Civil Judge, Junior Division, who tried these issues, held that the plaintiffs had no right to bring a suit for administration and that the suit as framed was not maintainable. He also held that the plaintiffs should file a suit for a specific share, value the same and pay the Court-fees thereon and they should consequently make the necessary amendments in the plaint. Against this order the present revision application has been filed.

(2) I have heard Mr. K. M. Thakar the learned Advocate for the plaintiffs and Mr. G. B. Joshi for the defendant No. 1 at length. The learned Civil Judge has relied upon commentary in Basu's Succession Act, 1946 Edition, at page 1114 wherein the case of 'Chand Narain v. Ghasi Ram', AIR (37) 1940 Lah. 179 has been cited, which held that where a suit is one between rival claimants to the estate of the deceased each one claiming to be the sole heir, such a suit is not for an account of any property and for its due administration under the decree of the Court. Hence, an administration suit could not be filed by one of the heirs to obtain possession of the property wrongfully withheld by another person claiming to be the heir. This case is clearly distinguishable from the present case. That was a case in which each of the parties claimed to be the sole heir and there was no question of ascertainment of the estate left by the deceased and taking an account, payment of debts etc. It was under those circumstances that the suit for administration was held to be not maintainable. On the other hand, it is quite clear from the commentary of Chitaley on the Civil Procedure Code 5th Edition at page 2135-36 that any legatee under a will can file a suit for administration where it is necessary to take an account of the estate of the deceased and such a suit can be filed against a party who was during the life time of the deceased in possession and management of the property on behalf of the deceased. The mere fact that such party refutes the claim of the parties plaintiff does not alter the nature of the suit. The nature of the suit is to be determined from the allegations in the plaint. Whether those allegations are substantiated or not will be a question to be decided in the case itself. Reference may be made in this connection to the ruling of the Bombay High Court in the case of 'Khatija v. Adam Husenally', 39 Bom 545, where the plaintiff had filed a suit for an order directing the administration through Court of the estate of the deceased and for ascertainment, separation and delivery to the plaintiff of her share of the residue of the estate. The suit was valued at Rs. 130/- for purposes of court-fees and for purposes of jurisdiction and pleader's fee at Rs. 30,00,000/-. The defendants contended that the suit was not properly valued for the purpose of court-fees and that the suit was not maintainable as an administration suit. The trial Court held in favour of the defendants and rejected the plaint. On appeal, the District Judge upheld the decision. He also ordered her to pay ad valorem Court-fees on the amount of her share. When the case, however, came before the High Court, the views of the lower Courts were dissented from and it was held that the suit was properly framed and valued for purposes of Court-fees. Scott C. J., in setting aside the decision of the lower Court remarked that there was no reason why the suit should not be treated as a suit for account and for the share which may be found due to the plaintiff upon taking of such account and if it was a suit for an account falling under Section 7 clause IV (f) of the Court-fees Act, the plaintiff was at liberty to value it at Rs. 130/- or any other sum the plaintiff pleases. This case was cited in a later case of 'Issafally Alibhai v. Abdeali Gulam Hussain' of the same High Court, 45 Bom 75. The facts of this case were that one Gulam Hussain died leaving among other heirs his father and mother. They having died their shares passed to their son the plaintiff. The plaintiff filed a suit for an account and administration of the estate of Gulam Hussain. Both the lower Courts dismissed the suit on the grounds that an administration suit did not lie and that the only suit that could lie was for partition. On appeal to the High Court, it was held that the plaintiff having an interest in the estate of Gulam Hussain was entitled to come to the Court and ask for a preliminary decree for the administration of that estate and that he was not bound to file a suit for partition. 'Khatija Bai's case', (39 Bom 545) was referred to and relied upon by the same High Court in the case of 'Maganlal Chunilal v. Kanchanlal Manchharam', AIR (23) 1936 Bom 353 at p. 354. The headnote reads as under :

> In an administration suit the reliefs prayed for were that certain will of the deceased alleged to be fabricated should be declared null and void, that the moveable and immoveable property, claims, debts and legacies of the deceased should be ascertained, and the property might be determined and administered and that the same should be finally ordered to be made over to the executors of the will. The plaintiffs valued their claim at Rs. 200/- for the purposes of Court-fee and valued the claim at the same figure for the purposes of jurisdiction.

Held : that the suit was one for administration in spite of the fact that the final decree to be passed might award possession of immoveable properties. Further S. 17, Court-fees A t, did not apply because the suit did not embrace two or more distinct subjects as the other reliefs claimed by the plaintiff were all incidental to the chief item of relief which was the administration of the estate.

For these reasons the suit was one for accounts coming under S. 7 (4) (f), Court-fees Act, and in view of the valuation placed by the plaintiffs on the relief claimed by them and the provisions of S. 8, Suits Valuation Act, the subject matter of the suit was less than Rs. 5,000/- in value and the appeal lay to the District Judge."

(3) The fact that the plaintiffs in the present case rely upon the will for getting their share in the property of the deceased makes little difference so far as the frame of the suit is concerned. It would be necessary in the plaintiffs' case to ascertain what the estate of the deceased was, what debts had to be paid; after the collection of the outstandings and other assets and payment of debts, the plaintiffs share would be capable of ascertainment. Such a suit can be for an account of the administration of the estate of the deceased. The learned Civil Judge has also relied upon a ruling of this Court given in the case of 'Thakar Karsondas Lavji v. Thakar Nathalal Jiwa', 2 Sau L R 221. This case is clearly distinguishable. There the plaintiff had claimed the cancellation of the will under which the property was being administered by the two defendants and he also claimed that the accounts of the administration of the estate should be taken and the property should be handed over to the plaintiff in the same state in which it was prior to the defendants Nos. 1 and 2 coming in possession of the property. The plaintiff, in the alternative had claimed compensation for conversion of the property, if there was any. It was held that on a plain reading of the relief clause of the plaint, it was clear that the plaintiff wanted the possession of the property and that property was mentioned in a schedule which was in the proceedings. The real character of the suit was therefore not for accounts but a suit to recover the property from the possession of the third party. It was under those circumstances that it was held that the suit as filed for accounts would not lie, and therefore the frame of the suit was bad. In the present case the plaintiffs are only two of the legatees under the will propounded by them, the other legatees being some of the defendants. The estate is in the possession of the defendant No. 1, who was managing it during the life time of the deceased. He is not a trespasser and never set up a title adverse to that of the deceased. It would be necessary ordinarily to take accounts of the estate of the deceased, pay the debts and recover the outstandings whereafter what is left by the deceased can be ascertained and partition made. Giving my anxious consideration to the case, I am of opinion that the learned Judge has erred in deciding these issues against the plaintiffs, and I hold that the frame of the suit is unobjectionable. Being a suit for accounts, it is open to them to put any valuation they please and pay ad valorem Court-fees thereon.

(4) A technical plea has been raised by the opponents whether a revision application would lie at this interlocutory stage. There is no doubt that the ruling given in the case of 'Venkatagiri Ayyangar v. Hindu Religious Endowment Board, Madras', A I R (36) 1949 P C 165 lays down the scope of interference by a Court of revision. But the learned Advocate for the applicants has drawn my attention to several recent rulings of High Courts after the Privy Council ruling, wherein it has been construed that a decision upon Court-fees or the frame of a suit which is adverse to the plaintiff amounts to refusing to exercise its jurisdiction to try the case; and in such cases a Court of revision can interfere and give relief to the plaintiff. These cases are reported in 'Basuki Prasad v. Satya Kinkar', A I R (37) 1950 Pat 470, 'Surendra Narayan v. Bhairabendra', A I R (37) 1950 Cal 386 and 'Baldeo Gulabrao v. Abdul Hafiz', A I R (37) 1950 Nag 249. In view of the present trend of the rulings of the High Courts, in my opinion this is a fit case wherein I should interfere in the exercise of my revisional powers and set aside the order at this stage. Accordingly I allow this revision application and set aside the order of the learned Civil Judge and hold that the suit as framed is maintainable and proper court-fee has been paid on the valuation made in the plaint. The applicants will get their costs from the opponent No. 1. The opponents will bear their own costs.

D.H. *Revision allowed.*

A. I. R. (39) 1952 Saurashtra 32 *[C. N. 15.]*

SHAH C. J.

Thakkar Manekchand Motichand, Defendant-Applicant v. Parmar Natubha Jiwabhai and others, Plaintiffs-Opponents.

Civil Review Appln. No. 7 of 1950, D/- 14-8-1951.

Civil P. C. (1908), O. 41 Rr. 4, 33 and O. 47 R. 1 — Failure to consider effect of O. 41 R. 4 and 33 by appellate Court — If sufficient ground for review.

In execution of a money decree against the father (defendant 1) and sons (defendants 2 to 4) the properties in the hands of sons were attached. The sons objected that the properties in their hands were not liable to attachment as the suit debt was incurred by their father after a partition had taken place amongst them. The objection was dismissed as barred by res judicata. In the appeal filed by defendants 3 and 4 defendant 2 was not even made a party. The appellate Court remanded the case for determination of the objection on merits. After taking evidence of all the defendants including that of defendant 2, the trial Court held that the partition was subsequent to the suit debt and therefore dismissed the objection. On appeal by defendants 2 to 4, the appellate Court reversed the decree in favour of defendants 3 and 4 only and observed that defendant 2 was not entitled to get the benefit of the appellate order of remand as he was not a party to it. Defendant 2 therefore applied for review of this order:

'Held' that the benefit of the order of remand passed by the appellate Court must be taken as operating in favour of defendant 2 also though he was not a party to the appeal filed by defendants 3 and 4 as the appellate Court had ample powers to pass the order in favour of defendant 2 under O. 41, Rr. 4 and R. 33.

'Held further' that as the appellate Court had failed to consider the vital point in the case, namely, whether defendant 2 was entitled to the benefit of O. 41, R. 33, C. P. C. there was a mistake or error apparent on face of record or at least a sufficient ground for review within the meaning of O. 47, R. 1. A I R (36) 1949 F C 106 Rel. on. *(Para 9)*

Anno : C. P. C., O. 41, R. 4, N. 1, 6, O. 41, R. 33, N. 9; O. 47, R. 1, N. 15, 16.

C. C. Shah, for Appellant; H. V. Trivedi and G. N. Mehta, for Opponents.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('49) A I R (36) 1949 F C 106 : (1949 F C R 36) (Prs 4, 9)

('37) A I R (24) 1937 Bom 101 : (I L R (1937) Bom 150) (Pr 3)

('33) A I R (20) 1933 Mad 529 : (145 Ind Cas 289) (Pr 6)

('43) A I R (30) 1943 Mad 160 : (207 Ind Cas 621) (Pr 5)

JUDGMENT : This review application arises out of the following facts. The opponents sued for and obtained a decree for Rs. 4930-3-0 together with costs and further interest from the Dhrangdhra Sar Nyayadhish Court against the person and property of Motichand Odhavji and against his sons defendants 2, 3 and 4 to the extent of the joint family property in their hands, and in execution of the decree attached certain immoveable property in the hands of the defendant judgment-debtors, 2, 3 and 4. The said judgment-debtors Nos. 2, 3 and 4 objected to the attachment on the plea that the attached properties were their separate properties having come to them at a partition between them and their father in Samvat 1972 long prior to the incurring of the debt by their father, which was in Samvat 1975. The objection was disallowed by the executing Court mainly for the reason that the issue raised was barred as res judicata, the same having been already decided in the suit itself. Judgment-debtors Nos. 3 and 4 appealed against this order to the High Court. Judgment-debtor No. 2 Manekchand did not appeal nor was he made a co-respondent in the appeal filed by judgment-debtors Nos. 3 and 4. In appeal, being appeal No. 31 of 1948 Justice Shukla set aside the order of the lower Court and framed an issue whether the partition relied upon by the judgment-debtors was anterior to the incurring of the debt by the deceased Motichand, and directed the lower Court to decide the issue and to proceed with the execution, in the light of its finding. After the remand, the matter came up before the Civil Judge, Senior Division Surendranagar, who recorded the evidence of the judgment-debtors, including judgment-debtor No. 2 Manekchand, and held that the partition took place in Samvat 1982 and that therefore the properties in the hands of judgment-debtors Nos. 2, 3 and 4 were liable to be attached and sold in execution of the decree. Judgment-debtors 2, 3 and 4 came up in appeal against the said order and Justice Jhala, who heard the appeal, decided as follows :

"It is further to be held that there was partition of houses between the sons before Samvat 1975, the date of suit transaction. Under the circumstances, it cannot be said that the houses are liable to attachment and sale in execution of the decree. As regards the other properties, there is no question and they are liable for execution. Even if they are held to be spent up by the sons, they are bound to account for the same."

However the learned Judge set aside the order of the lower Court against judgment-debtors 3 and 4 only and as regards judgment-debtor No. 2 Manekchand the learned Judge observed as under :

"Manekchand, it is said was not a party to the original appeal before this Court (Civil First Appeal No. 31 of 1948) . Somehow, he joined later when the case was remanded to the Court below. The properties, concerned so far as the various defendants, are different and Manekchand cannot get the benefit of appeal to which he was not originally a party. If he had joined later, it must be beyond the period of limitation and waiver or error of the opposite party in such a case cannot help a litigant, who has slept over his right for a considerably long time."

The result was that even though according to the finding of Justice Jhala the houses in the hands of the sons were not liable to be sold in execution of the decree as the partition had taken place prior to the incurring of the debt, Manekchand's property was liable to be proceeded against in execution of the decree because he was not a party to the appeal No. 31 of 1948. Manekchand has now applied for a review of the order of Justice Jhala.

(2) Mr. Shah for the applicant has urged that the partition being anterior to the contracting of the debt the properties fallen to the share of the sons were not liable for the decretal debt and he has pointed out that this question was agitated in appeal No. 31 of 1948 and that Justice Shukla has set aside the order of the Lower Court completely and directed a further enquiry on the issue regarding the date of the partition and its legal effect. Mr. Shah relied on O. 41, R. 4, Civil Procedure Code, according to which where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs, or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be. It is urged that even though Manekchand had not filed an appeal, the defence of all the judgment-debtors being common, viz., that the partition was anterior to the debt, it was open to the appellate Court in appeal No. 31 of 1948 to reverse the executing Court's Order in favour of all the defendants under O. 41, R. 4. This position is perfectly plain and is unassailable. In my judgment the appellate Court could pass an order in favour of all the defendants even though one of the defendants was not joined as a party to the appeal and this is in accordance with the view taken by the High Courts of Bombay, Madras and Calcutta, viz., that the benefit of O. 41, R. 4 can also be extended to a plaintiff or defendant who is not formally impleaded as a party to the appeal. The order in appeal No. 31 of 1948 could therefore operate for the benefit of Manekchand though he was not a party to that appeal since the ground was common to all the sons judgment-debtors.

(3) In 'Gurunath v. Venkatesh', A I R (24) 1937 Bom 101, which was a case of restitution under S. 144, Civil P. C., the same principle was applied. It was held :

"Before restitution can be made under this section, however, the following conditions must be satisfied : (1) That the applicant must be a party to the litigation which has terminated according to law; (2) that he has either lost something or been deprived of something by reason of the decree or order which has been subsequently varied or reversed; (3) that on the final pronouncement of his rights, he is entitled to the benefit of restitution. The section, it should be noted, does not in terms say that the applicant for restitution must be a party to the proceeding which has resulted in the original decree being reversed or varied; nor does it state that the final decree should provide for a right in him to apply for restitution. All that is necessary is that the final decree must be of such a nature that it would be inequitable to allow his opponent to retain what he has obtained from the former on the strength of a decree which ultimately is held to be erroneous or wrong. It is argued that even if the original decree is reversed in appeal, yet if the applicant for restitution was not a party to the appeal in which it was reversed, he cannot get the benefit of this section. In my opinion, there is no warrant upon the plain meaning of the section for accepting this construction. The only question is whether the applicant was a party to the litigation in the first instance, and, if, so, whether the final decision can be said to be in his favour as accepting his contentions made in the suit and declaring his rights."

Order 41, Rule 4, Civil P. C., was there referred to in support of the view taken by the learned Judge in the above case. Though that was a case falling under S. 144 of the Code the principle is the same and it applies to a case covered by O. 41. R. 4 as well.

(4) Then under O. 41, R. 33, the appellate Court has power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection. In 'Hari Shanker v. Anath Nath', A I R (36) 1949 F C 106, the Calcutta Improvement Tribunal had apportioned the compensation awarded for compulsory acquisition of premises between the proprietors and the lessees and against the decision of the said Tribunal an appeal was taken to the High Court by some of the proprietors who represented one-third share in the proprietary interest. The other co-sharer proprietors were made respondents to the appeal. The High Court allowed the appeal and reversed the decision of the Improvement Tribunal. As however the appeal was not filed by all the proprietors but some of them who had one-third share in the proprietary right the appellants were declared entitled to a sum which was one-third of the total sum and no relief was given to the non-appealing proprietors with regard to whom the decision of the Improvement Tribunal was left intact. Subsequently the other proprietors who had not joined in filing the appeal but figured merely as respondents therein, presented an application for review of the judgment on the ground that even though they did not file any appeal, relief could and should have been given to them under the provisions of O. 41, R. 33 inasmuch as their case rested entirely on the same footing as that of the appealing proprietors and the entire decision of the Improvement Tribunal was pronounced to be wrong. The application was allowed by the High Court, purporting to act under O. 41, R. 33 and this decision was upheld by the Federal Court on the ground that the case was a fit one for the exercise of powers under O. 41 R. 33. The benefit of O. 41, R. 33 can also be extended in favour of a party to the suit who is not impleaded as a party to the appeal.

(5) In 'Palani Mudali v. Athiappa Goundan', A I R (30) 1943 Mad 160 it was held that under O. 41, R. 33 the Court had jurisdiction to alter a decree in favour of a party who is not a respondent in the appeal. It could have no such jurisdiction unless the decree as a whole is the subject-matter of the appeal, although of course it cannot pass an adverse order in the absence of one of the parties affected.

(6) In 'Thirumala v. Athimoola', A I R (20) 1933 Mad 529 the facts were even more adverse to the defendants. There an ex parte decree was passed against several defendants and some of them having applied to have the said decree set aside it was set aside against all the defendants. The plaintiff having gone to the High Court in revision the ex parte decree against the non-applying defendants was restored. The suit was then tried by another subordinate Judge and dismissed on the finding that the documents produced were false. The plaintiff appealed to the High Court but the High Court dismissed the appeal. The question arose whether the High Court could dismiss the suit also against the defendants against whom the ex parte decree stood and who had not appealed or were not parties to plaintiff's appeal. It was held that the previous restoration by the High Court of the ex parte decree could not now come in its way of setting it aside under O. 41, R. 33. When the appeal came before the Court the whole suit was under the appellate Court's control and as the basis of the suit was found to be false, the non-appealing defendants could be relieved from the ex parte decree and neither the provisions of S. 107 nor the fact that the ex parte decree was passed by a Judge different from one whose decree was under appeal, was a bar to the exercise of the very wide discretionary powers under O. 41, R. 33.

(7) Therefore it was competent to the Court in appeal No. 31 of 1948 to reverse the order of the executing Court not only against the appealing judgment-debtors Nos. 3 and 4 but also against Manekchand judgment-debtor No. 2. No doubt it appears that the appellants were taken to be the judgment-debtors and probably it was not present to the mind of Justice Shukla that Manekchand was also a co-judgment-debtor. All the same, judging from the concluding part of his judgment where the issue had been framed and remanded it seems clear that in his view if the partition took place before the date of the incurring of the debt by Motichand then the property fallen to the share of the sons was not liable to sale in execution of the decree. And it was therefore that the learned Judge has set aside the executing Court's

order in its entirety. The order made by him is without reservation and it allows the parties to lead oral and documentary evidence on the issue and directs the executing Court to proceed further with the matter. It is vital to remember that the lower Court's Order was reversed on the finding that the contention was not barred as res judicata and the reversal had nothing to do with facts. When the matter went to the executing Court all the three judgment-debtors engaged Mr. Shah as their pleader and Manekchand gave evidence and for all purposes he was treated as a party to the dispute and a finding was given against all the judgment-debtors. The opponents too thus accepted the position that the executing Court's order was set aside in toto and it was open to Manekchand as well to prove that the partition had taken place before the debt was incurred and the issue was fought in that light.

(8) On a careful consideration of the facts and the circumstances of the case therefore Justice Shukla's order must be taken as operating in favour of Manekchand also under O. 41, R. 33, Civil P. C.

(9) It was urged for the opponents that even on such a finding the order of Justice Jhala is not liable to be reviewed because he has given reasons for holding that Manekchand could not get the benefit of the order in appeal No. 31 of 1948. Now the reasons stated are that Manekchand was not a party to the said appeal and that he has joined somehow later when the case was remanded to the lower Court, that it must have been beyond the period of limitation and that waiver or error of the opposite-party cannot help a litigant who has slept over his right for a considerably long time. In my judgment these are not relevant considerations and, with respect, it must be said that he has really not considered the question whether Justice Shukla's order in Appeal No. 31 of 1948 was such as to extend the benefit thereof to Manekchand or not. That being so the omission to consider that vital point under O. 41, R. 33 will constitute a sufficient ground analogous to those mentioned in O. 47, R. 1 and it would be competent to reconsider the matter by way of a review. 'Hari Shanker v. Anath Nath', AIR (36) 1949 FC 106. No doubt if the view taken is merely erroneous, the order will not be the subject of a review, but here the learned Judge has failed to consider the real point, viz., whether the order in appeal No. 31 of 1948 operated for the benefit of Manekchand or not. Therefore this is a case of a mistake or error apparent on the face of the record so as to attract the provisions of O. 47, R. 1, Civil P. C.

(10) In the result, I allow this review application and order that the houses fallen to the share of Manekchand at the partition between Motichand and his sons, which took place prior to Samvat 1975, i.e., prior to the incurring of the suit debt, are not liable to be attached and sold in execution of the decree obtained by the opponents plaintiffs against the judgment-debtors. The rest of the order of Justice Jhala will stand. As regards the costs of this application the proper order will be to make the parties to bear their own costs and I order accordingly.

K.S.

Review allowed.

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SHAH, C. J. AND CHHATPAR J.

State v. Pranjivan Gandalal, Respondent.

Criminal Appeal No. 165 of 1950, D/- 2-8-1951.

(a) *Bombay Prohibition Act (XXV (25) of 1949), S. 66 (b) — Offence under — Duty of prosecution to prove consumption of liquor within limits of Magistrate's jurisdiction — Failure to prove — Presumption under S. 114, Evidence Act, if can be drawn — Evidence Act (1872), S. 114.*

In order that a Magistrate may have jurisdiction to convict a person for the offence of drinking an intoxicant without a permit, it is necessary for the prosecution to prove that the intoxicant was consumed within the limits of his jurisdiction.

Where the accused is merely found drunk within the local limits of the jurisdiction of a Magistrate it would be for the prosecution to prove the place where the liquor was consumed in order to give the Magistrate jurisdiction to try the case. If the prosecution fails to prove this the Court is not justified in drawing a presumption under S. 114, Evidence Act, that the accused must be considered to have taken liquor at the place where he is found, especially when there is a possibility of the accused reaching that place within a short period of time. (Para 3)

Anno : Evi. Act, S. 114, N. 13.

(b) *Evidence Act (1872), S. 106 — Scope.*

S. 106, Evidence Act, applies to Criminal cases e.g. to a case contemplated by illustration (b) to the Section when the prosecution cannot prove a negative fact. But positive facts giving jurisdiction to a Court must in all cases be established by evidence by the prosecution. Hence where the prosecution has failed to prove that the accused drank liquor within the local limits of the jurisdiction of the Magistrate, S. 106 cannot be invoked to cast the burden on the accused of proving that he drank liquor outside the jurisdiction though it might be a fact within his special knowledge. (Para 4)

Anno : Evi. Act, S. 106, N. 1, 2.

(c) *Criminal P. C. (1898), S. 182 — Scope and applicability.*

Section 182, Criminal P. C. is intended to provide for the difficulty that would arise where there is an uncertainty as to in which of the different areas an offence is committed. The offence of drinking liquor without a permit is complete the moment the liquor is drunk. There can be no uncertainty of the place of drinking and therefore of the area in which the offence is committed. Hence S. 182 cannot be invoked in such cases to give the Magistrate jurisdiction to try the offence. (Para 4)

Anno : Cr. P. C., S. 182, N. 2, 3.

C. N. Shah, Advocate General, for the State; A. R. Baxi, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('36) 41 Cal WN 65 : 164 Ind Cas 545 : 1936-3 All ER 36 : (AIR (23) 1936 PC 289 : 37 Cri. LJ 963) (Pr 4).

('39) 50 Mad L W 452 : 1939 Mad W N 883 : (A I R (27) 1940 Mad 1 : 41 Cri L J 369) (Pr 4)

('40) 21 Pat L T 1021 : (A I R (28) 1941 Pat 175 : 42 Cri L J 215) (Pr 4)

('39) A I R (26) 1939 Sind 209 : (41 Cri L J 28) (Pr 4)

CHHATPAR J. : This is an appeal under S. 417, Criminal P. C., by Government to set aside the acquittal of the respondent who was charged under S. 66 (b) of the Bombay Prohibition Act as applied to the State of Saurashtra, by the Sessions Judge. The trying Magistrate had convicted him of the offence and sentenced him to suffer rigorous imprisonment for three months and to pay a fine of Rs. 25/-, but the Sessions Judge on appeal set aside the conviction but at the same time remanded the case to the trial Court with a direction that the accused should be retried for offence under S. 85, Cl. (1) of the Act.

(2) It was alleged that the accused was coming on a bicycle to Bhavnagar from the side of Chitra in Dhanduka. He was found at Bhavnagar in a drunken condition. He was consequently charged with an offence under S. 66, Cl. (b) of having consumed an intoxicant without a permit. There was no evidence on the record as to where the accused had taken the intoxicant. The learned Sessions Judge under the circumstances, held that it not being proved that the respondent had taken the intoxicant within the local limits of the jurisdiction of the Magistrate, the accused could not be convicted at Bhavnagar of the offence of having taken an intoxicant. But at the same time the learned Sessions Judge was of the opinion that if the accused was found to be drunk and incapable of taking care of himself in any public street or thoroughfare at Bhavnagar he could be tried for an offence under S. 85 Cl. (1) of the Act.

(3) It is not disputed that the words "consuming any intoxicant" would include drinking liquor. The definition of the words "to drink" and "intoxicant" given in Cls. (12) and (22) of S. 2 of the Act makes this abundantly clear. But in order that a Magistrate may have jurisdiction to convict a person for the offence of drinking an intoxicant without a permit, it is necessary for the prosecution to prove that the intoxicant was consumed within the limits of his jurisdiction. In the present case there is no proof of this fact. The learned Advocate General has however contended that the Court should have raised a presumption under S. 114 of the Indian Evidence Act that the accused should be presumed to have taken liquor at the place where he was found to be drunk. Now S. 114 states :

"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case."

The learned Advocate General argues that in the common course of natural events, a person is found drunk at the place where he takes liquor and the Court should draw a presumption to that effect. I am unable to agree with the learned Advocate General's argument. It is common knowledge that the effect of drink may last for several hours and during that interval a man may proceed from place to place. The local limits of the Magistrate at Bhavnagar are confined to the limits of Bhavnagar Taluka and Gadhada Mahal, and it is quite possible that a person may reach Bhavnagar from outside such limits within a very short period of time, especially in the modern times of quick travel by plane, car and railway. I am therefore of the opinion that I shall not be justified in holding that a presumption should be drawn that in the natural course of events, a person should be considered to have taken liquor at the place where he is found drunk. It would be for the prosecution to prove the place where liquor was consumed in order to give the local Magistrate jurisdiction to try the case.

(4) The learned Advocate General next relied upon S. 106 of the Indian Evidence Act and argued that the fact of drinking was within the special knowledge of the accused and therefore the burden lay upon him to prove that he drank liquor outside the limits of the jurisdiction of the Magistrate. So far as the applicability of the S. 106 to criminal cases is concerned, I might refer to the following commentary of Sarkar on Evidence, 7th Edition at page 940 :

"*Applicability of the section to criminal cases:* The Judicial Committee have definitely laid down that S. 106 does not cast any burden on an accused person to prove that no crime was committed by proving facts lying specially within his knowledge. The section does not warrant a direction to the jury, that if anything is unexplained which the jury think the accused could explain they not only may but must find guilty ('Seneviratne v. The King', (1936) 3 All E R 36 : 41 C W N 65 : 164 Ind Cas 545. This authoritative pronouncement on the true meaning of S. 106 will it is hoped dispel the unfounded notion that if anything remains unexplained by the accused there can be an inference of guilt. Section 106 cannot by any implication be utilised to cast on the accused the burden of proving his innocence). Section 106 is not a proviso to the rule that the burden of proving the guilt is on the prosecution but on the contrary the section is subject to that rule ('Shewaram v. Emperor', A I R (26) 1939 Sind 209). So it has been held that S. 106 would not absolve the prosecution from the duty of proving that a crime was committed even though it is established that the accused had special knowledge on the point, the deceased being the wife of the accused ('Kanakasabai v. Emperor', 50 L W 452 : 1939 Mad W N 883). If any explanation that the accused chooses to give is not proved beyond doubt, he cannot claim to be innocent; but even so, if his explanation throws any reasonable doubt on the prosecution story he would be entitled to an acquittal not because he proves the facts and circumstances referred to, for instance in Ss. 105 and 106, but because the prosecution has failed to establish his guilt beyond reasonable doubt Raghunath v. Emperor', 21 Pat L T 1021."

The section applies to criminal cases e.g. to a case contemplated by illustration (b) to the Section when the prosecution cannot prove a negative fact. But positive facts giving jurisdiction to a Court must in all cases be established by evidence by the prosecution. I am

therefore of the opinion that the prosecution is not entitled to invoke the aid of S. 106 to make good the lacuna in the present case. The learned Advocate General has next relied upon S. 182, Criminal P. C., for the purpose of giving jurisdiction to the Magistrate. This section is intended to provide for the difficulty that would arise where there is an uncertainty as to in which of the different areas an offence is committed. The offence of drinking liquor without a permit is complete the moment the liquor is drunk. There can be no uncertainty of the place of drinking and therefore of the area in which the offence is committed. The learned Advocate General has not been able to point out which are the areas in which the accused in the present case is likely to have committed the act of drinking. Section 182 under the circumstances of the present case has no application. I therefore see no reason to disturb the order of the Sessions Judge and dismiss this appeal. We have refrained from going into the question how far there is evidence to support the finding that the accused had consumed liquor prohibited by law as this question is likely to affect the retrial ordered by the learned Sessions Judge.

(5) SHAH C. J.: I agree.

K.S. *Appeal dismissed.*

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SHAH C. J. AND CHHATPAR J.

Sobhagchand Vasanji, Defendant-Applicant.
v. Girdharlal Chatrabhuj, Plaintiff-Opponent.

Civil Misc. Appln. No. 20 of 1950 D/-9-8-1951.

Constitution of India, Art. 133 — Retrospective effect.

Where the decision of the High Court given prior to the coming into force of the Constitution is final, that finality cannot be affected by the right of appeal given to a ligigant under the Constitution: A I R (14) 1927 P C 242 and A I R (38) 1951 S C 217, Rel. on. *(Para 2)*

S. D. Doshi, for Applicant. — C. H. Doshi, for Opponent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('27) AIR (14) 1927 P C 242: 30 Bom LR 60: (9 Lah 284) (Pr 2)

('51) 6 D L R (S C) 262: (A I R (38) 1951 S C 217: 52 Cr L J 736) (Pr 2)

(1905) A C 369: (74 L J P C 77) (Pr 2)

CHHATPAR J.: This is an application under Art. 133 of the Constitution of India for leave to appeal to the Supreme Court from the decision of this High Court given on 25-11-1949, and for grant of the necessary certificate.

(2) A preliminary question arises whether the applicant has a right of appeal to the Supreme Court. If he has none, the question of leave to appeal does not arise and the application will have to be dismissed. The present application was filed in October 1950. We are of the opinion that the applicant has no right of appeal to the Supreme Court, the decision of this High Court given on 25-11-49 being final. At that date, according to the Constitution of the Saurashtra State, there was no further appeal against the decision of the High Court. The decision was final and this finality cannot be affected by the right of appeal given to a litigant under the Constitution of India which came into force on 26th January 1950. In this view of ours, we are supported by a ruling of the Privy Council in the case of 'Delhi Cloth and General Mills Co., Ltd. v. Income-tax Commissioner, Delhi', A I R (14) 1927 P C 242: 30 Bom L R 60, wherein the question was whether the right of appeal given by the Income-tax (Amendment) Act (1926) to the Privy Council applied to a case already decided by the High Court before coming into force of this Amendment. Their Lordships of the Privy Council observed as under:

> "The principle which their Lordships must apply in dealing with this matter has been authoritat vely enunciated by the Board in the 'Colonial Sugar Refining Co. v. Irwing', (1905) A C 369, where it is in effect laid down that, while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. Their Lordships can have no doubt that provisions which, if applied retrospectively, would deprive of their existing finality orders which, when the statute came into force, were final, are provisions which touch existing rights. Accordingly, if the section now in question is to apply to orders final at the date when it came into force, it must be clearly so provided. Their Lordships cannot find in the section even an indication to that effect. On the contrary, they think there is a clear suggestion that a judgment of the High Court referred to in sub-s. (2) is one which under sub-s. (1) has been pronounced, by "not less than two Judges of the High Court", a condition which was not itself operative until the entire section came into force. In Their Lordships' judgment, therefore, the petitioners in these cases have no statutory right of appeal to His Majesty in Council."

This decision has been followed in various cases by High Courts in India to which we need not refer, as the Supreme Court has very recently reiterated the same principle in the case of 'Janardhan Reddy v. State of Hyderabad', 6 D L R (S C) 262, the following remarks at page 272 leave no doubt that the decision of this High Court was final before the new Constitution came into force and the right of appeal given under it cannot affect such finality:

> "There is also another difficulty in the way of the petitioners which may be briefly stated. From the facts already narrated, it should be clear that the judgment of the High Court affirming the convictions and sentences of the petitioners had acquired finality in the fullest sense of the term before 26th January 1950, and by reason of this finality, no one could question the validity of the convictions at the date when the Constitution came into force. Can then a new law or a change in the old law entitle us to reopen a transaction which has become closed and final? It is common ground that the provisions of the Constitution which are invoked here, were not intended to operate retrospectively, and therefore something which was legally good on 25th January 1950, cannot be held to have

become bad on 26th January 1950. If we had no jurisdiction to sit in appeal over the judgment of the Hyderabad High Court, can we now investigate the cases and pass orders which cannot be passed without virtually setting aside the judgments of the High Court which have become final. Can we, in other words ,do indirectly what we refused to do directly? It is argued that we are asked not to reopen a past transaction but to deal with the present detention of the petitioners i.e., their detention at this moment. But, how can we hold the present detention to be invalid, unless we reopen what could not be reopened prior to 26th January 1950. This is, in our opinion, one of the greatest difficulties which the petitioners have to face, and it rests not merely on technical grounds but on sound legal principles which have always been and should be respected."

(3) Under the circumstances, we do not think it necessary to consider various other objections raised by the opponent and we dismiss this application with costs.

(4) SHAH C. J.: I agree.

V.B.B. *Application dismissed.*

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SHAH, C.J. AND CHHATPAR, J.

Manek Harji and others, Plaintiffs-Appellants v. Jivan Daya and others, Defendants-Respondents.

Second Appeal No. 62 of 1950, D/- 18-9-1951.

Limitation Act (1908), S. 12 (2) — Period between date of judgment and date of signing decree — Exclusion of.

In computing the period of limitation, the time allowed to be excluded for obtaining a copy of the decree under Section 12 of the Limitation Act should include the time between the date of the judgment and the date when the decree was signed even though an application for the copy was made after the signing of the decree. 'Case law discussed. AIR (37) 1950 Cal 356 and unreported judgment of Bombay High Court in L. P. A. No. 25 of 1950, D/- 31-7-1951 (Bom) (FB), Foll. (Para 7)

Anno: Limitation Act, S. 12, N. 25.

T. U. Mehta, for Appellants; P. C. Mandavia, for Respondents Nos. 1, 2 and 3.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('22) AIR (9) 1922 PC 352: (49 Cal 999) (Pr 4)
('28) AIR (15) 1928 PC 103: (30 Bom L R 842) (Pr 4)
('90) 12 All 79: (1890 All W N 25) (Pr 3)
('90) 12 All 461: (1890 All W N 149 FB) (Pr 3)
('51) AIR (38) 1951 All 122: (1950 All L J 946 FB) (Pr 3)
('50) AIR (37) 1950 Assam 83: (ILR (1950) 2 Assam 12) (Pr 5)
('99) 23 Bom 442 (Pr 4)
('37) AIR (24) 1937 Bom 162: (ILR (1937) Bom 443 FB) (Pr 4)
('40) AIR (27) 1940 Bom 415: (42 Bom L R 872) (Pr 4)
('46) AIR (33) 1946 Bom 437: (ILR (1946) Bom 431) (Pr 4)
('50) L P A No. 25 of 1950, D/- 31-7-51 (FB) (Bom) (Pr 4)
('86) 13 Cal 104 (FB) (Pr 3)
('37) AIR (24) 1937 Cal 732: (176 Ind Cas 361) (Pr 3)
('39) AIR (26) 1939 Cal 711: (186 Ind Cas 58) (Pr 3)
('50) AIR (37) 1950 Cal 356: (ILR (1949) 1 Cal 318) (Pr 3)
('26) AIR (13) 1926 Nag 349: (22 Nag L R 60) (Pr 5)
('33) AIR (20) 1933 Nag 125: (29 Nag L R 220) (Pr 5)
('40) AIR (27) 1940 Oudh 173: (15 Luck 376) (Pr 4)
('42) AIR (29) 1942 Oudh 392: (200 Ind Cas 608) (Pr 4)
('44) AIR (31) 1944 Oudh 154: (19 Luck 456) (Pr 4)
('16) AIR (3) 1916 Pat 267: (1 Pat L J 573 FB) (Pr 4)
('21) AIR (8) 1921 Pat 175: (6 Pat L J 350 FB) (Pr 4)
('36) AIR (23) 1936 Pat 45: (15 Pat 284 FB) (Pr 4)
('41) AIR (28) 1941 Pesh 74: (196 Ind Cas 654) (Pr 5)
('29) AIR (16) 1929 Rang 116: (7 Rang 18) (Pr 5)
('49) AIR (36) 1949 Sind 18: (Pak Cas 1949 Sind 60) (Pr 4)

CHHATPAR, J.: This is a Second Appeal from the decision of the Assistant Judge, Junagadh, dismissing the appeal of the present appellants on a preliminary point of limitation. The Appellants had filed a suit for redemption of a mortgage and the preliminary decree was passed by the Vanthali Civil Court for redemption on payment of Rs. 2,535/- costs and interest. The plaintiffs being aggrieved by this decree, filed an appeal in the District Court, Junagadh, which was heard by the Assistant Judge, Junagadh. The Assistant Judge held that the appeal was time barred. The appeal was filed on 30-12-1947; an application for copies of the judgment and the decree was made on 22-11-1947 and the copies were ready for delivery on 16-12-1947. The judgment of the trial Court was admittedly delivered on 29-10-1947. The record of the case shows that a draft of the decree was submitted by the office to the Judge for signature. This draft bore the same date as the date of the judgment, i.e., 29-10-1947. The Judge while signing the decree altered this date to 9-11-1947 apparently as this was the date on which the decree was actually signed by him. The lower appellate Court construed this as a subsequent unauthorised alteration by the Judge of the trial Court. But I am clearly of the opinion that this inference is not justified. I have seen the draft of the decree; the original date 29-10-1947 appears to be in the handwriting of the person who had drafted the decree, while the correction of the date to 9-11-1947 is clearly in the handwriting of the Judge; the correction of the date is also initialled by him. The altered date, the initials and the signature of the Judge to the decree appear to be in the same ink and written by the same pen. I am satisfied that 9-11-1947 is the date of the actual signing of the decree, and that there was no subsequent unauthorised alteration by the Judge of the trial Court.

(2) It may be borne in mind that the application for copies was made on 22-11-1947 some days after the decree was signed. The question arises whether in computing the period of limitation, the time allowed to be excluded for obtaining a copy of the decree under Section 12 of the Limitation Act should include the time between the date of the judgment and the date when the decree was signed even though an application for the copy was made after the signing of the decree. If this time is allowed the appeal was admittedly in time. If not, the appeal would be time-barred.

(3) The question of the interpretation of Section 12 of the Limitation Act arising out of a case on similar facts has been considered by most of the High Courts. The earliest decision cited before us is that of the Calcutta High Court, where the Full Bench of that Court in the Case of 'Bani Madhub v. Matungini Dassi', 13 Cal 104, held:

"Where a suitor is unable to obtain a copy of a decree from which he desires to appeal, by reason of the decree being unsigned, he is entitled under Section 12 of the Limitation Act to deduct the time between the delivery of the judgment and that of the signing of the decree in computing the time taken in presenting his appeal."

In that case as in the present case, an application for copies was made some days after the decree was signed. The learned Judges observed:

"But in our opinion the fact that the decree was not in existence, that is, signed by the particular Judge, and could not therefore be copied until the 23rd of July, that is six days after the date that it bears, entitles the appellant to ask us to deduct those six days in addition (to the eight days) and thus to hold that under Section 12 the appeal has been presented within the prescribed period."

The Calcutta High Court has consistently held that view and the latest case is that of the 'Province of Bengal v. Amulya Dhon Addy',; AIR (37) 1950 Cal 356. The intervening cases are those of 'Sudhansu Bhusan v. Majho Bibi', AIR (24) 1937 Cal 732 and 'Sarat Chandra v. Rati Kanta', AIR (26) 1939 Cal 711. The case of 'Bani Madhub v. Matungini Dassi', cited above was considered by a Full Bench of the Allahabad High Court in the case of 'Parbati v. Bhola', 12 All 79, and the decision of the Calcutta High Court was dissented from. The learned Chief Justice of the Allahabad High Court observed:

"In my opinion, applying S. 12 of the Limitation Act to such a case, allowance should be made for the time between the date when a judgment was pronounced and the date when the decree was signed. if the delay in signing the decree delayed the applicant in obtaining a copy of the decree, and not otherwise In such a case as that it would clearly be, within the meaning of S. 12, time which was requisite for obtaining a copy of the decree, because a copy of the decree could not be obtained until the decree was signed by the Judge. But that is not the case here. Here no application was made until the 15th April; so that in no sense was the applicant delayed in obtaining a copy of the decree by the fact that the decree was not signed by the Judge on the date the judgment was pronounced, but was signed on the 1st April. Consequently the period between the 29th March and the 1st April cannot in my opinion be allowed."

This ruling of the Allahabad High Court was followed shortly after by another ruling of the Full Bench of the same Court in the case of 'Bechi v. Ahsan-ullah Khan', 12 All 461, wherein it was held,

"In computing the time to be excluded under S. 12 of the Limitation Act from a period of limitation, the 'time requisite for obtaining a copy' does not begin until an application for copies has been made. If therefore after judgment, the decree remains unsigned, such interval is not to be excluded from the period of limitation unless an application for copies having been made, the applicant is actually and necessarily delayed from the decree not having been signed."

This ruling also dissented from the Calcutta case of 'Bani Madhub Mitter v. Matungini Dassi', 13 Cal 104. The Allahabad High Court has stuck to their view, as appears from the recent ruling of that Court given in the case of 'Keshar Sugar Works, Bombay v. R. C. Sharma', AIR (38) 1951 All 122, where a Full Bench of five Judges with one dissenting reaffirmed the principle enunciated in the earlier case of 'Bechi v. Ahsanullah Khan', 12 All 461 and dissented from the contrary view held by the Calcutta and some other High Courts following the Calcutta decision.

(4) The Calcutta High Court's view has been followed by the Patna High Court, and reference may be made to the case of 'Ram Asray Singh v. Sheonandan Singh', AIR (3) 1916 Pat 267 and the subsequent Full Bench case of 'Gabriel Christian v. Chandra Mohan', AIR (23) 1936 Pat 45, which overruled an earlier case of 'Jotindranath v. Lodna Colliery Co. Ltd.', AIR (8) 1921 Pat 175 which had followed the Allahabad High Court's view. It may be mentioned that the Privy Council, in the meantime, had interpreted the words 'time requisite for obtaining a copy' in S. 12 of the Limitation Act in the case of 'Jijibhoy N. Surty v. T. S. Chettyar. Firm', AIR (15) 1928 P C 103: 30 Bom L R 842, and also in an earlier case of 'Pramatha Nath v. William Arthur Lee', AIR (9) 1922 P. C. 352. The remarks of their Lordships of the Privy Council have been interpreted in different ways by the High Courts holding contrary views. These remarks are as under:

"The word 'requisite' is a strong word; it may be regarded as meaning something more than the word required. It means 'properly required', and it throws upon the pleader and counsel for the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his default. But for that time which is taken up by his opponent in drawing up the decree, or by the officials of the Court in preparing and issuing the two documents, he is not responsible."

The Calcutta High Court's view has also been followed by the Oudh Chief Court (vide 'Yusuf Ali v. Mahomed Kazim Ali', AIR (27) 1940 Oudh 173, 'Kallu Mal v. Municipal Board, Nawabganj', AIR (29) 1942 Oudh 392 and 'Jadubir Singh v. Sheonaresh Singh', AIR (31) 1944 Oudh 154, Lahore High Court (Vide 'Ghulam Nabi v. Kishin Chand', AIR (36) 1949 Sind 18. The Bombay High Court in the case of 'Yamaji v. Antaji', 23 Bom 442 had originally followed the Allahabad High Court's view. But this case was overruled by a Full Bench ruling of the same High Court given in the case of 'Murlidhar Shrinivas v. Motilal Ramcoomar', AIR (24) 1937 Bom 162. The subsequent cases of the Bombay High Court adhering to that view are reported in 'Balappa v. Dyamappa', AIR (27) 1940 Bom 415; Bhausaheb Jamburao v. Sonabai', AIR (33) 1946 Bom 437. Very recently a Full Bench of the Bombay High Court decided in the case of 'Dr. Jayashanker Mulshanker v. Shah Mayabhai Lalbhai', L P A No. 25 of 1950 (Bom), that in computing the period which a litigant is entitled to exclude under S. 12 of the Limitation Act, the appellant is entitled to deduction of the time between the date of the judgment and the date of the signing of the decree, although he had not filed any application for the copy during that period, provided the applicant was not negligent in taking the steps required by any rule for getting the decree prepared. Chagla C. J. in delivering the judgment set out the facts and the question to be decided by the Full Bench in the following terms:

"The question that we have to consider in this Full Bench is whether the time that elapses between the pronouncement of the judgment and the signing of the decree should be excluded under S. 12(2) of the Limitation Act, and if it is to be excluded whether it should be excluded

wholly or should be excluded under certain limitations. The facts that give rise to this Full Bench may be briefly stated. The trial Court delivered its judgment in Ahmedabad on the 1st of May 1948. The decree was signed on the 29th of June 1948. The plaintiffs filed the appeal to the District Court on the 4th of August 1948, and the question that arose was whether the appeal was in time. The learned District Judge took the view that the appeal was out of time and the same view was taken by Mr. Justice Dixit in Second Appeal. Mr. Justice Dixit gave leave under the Letters Patent and the matter came before a Divisional Bench which referred the question to a Full Bench. A further fact may be stated which is also material that the plaintiffs applied in this case for certified copies of the judgment and the decree on the 17th June 1948. The certified copies were ready on the 7th of July 1948. The appeal would only be in time if the period between the 1st of May and the 29th of June 1948, a period of 59 days, is to be excluded. If that period is not to be excluded, then the appeal would be out of time."

I may reproduce with advantage the following passage from his judgment which discusses the principles to be followed in deciding the question:

"It is well settled that the time 'requisite' is not the time actually taken but it is the time properly required. The question that raises certain amount of difficulty is whether the time that is required for preparing a decree is a time of which it could be said that it is a time requisite for obtaining a copy of a decree. Two views are possible. One view is that the time taken for preparing the original, of which a copy is to be obtained, must necessarily be the time requisite for obtaining a copy of the original. This view puts greater emphasis on the expression 'requisite' than on the expression 'obtaining' used in this sub-section. The other view is that unless the appellant takes some step in order to obtain a copy of the decree, it could not be said that the time which expired before he took that step was a time requisite for obtaining a copy of the decree. In other words, although the decree was not ready, if the appellant did not apply for a copy, the time taken for preparing the decree could not be excluded because the appellant had not taken any step for obtaining the decree. In our opinion, equal emphasis should be placed on both the expressions used in this sub-section. What has got to be excluded is the time which is properly required and the time which has got to be so excluded is the time which is necessary for obtaining a copy of the decree. It is difficult to understand why the action on the part of the appellant in applying for a copy of the decree should be a decisive factor in considering whether time should be excluded under this sub-section or not. It is also difficult to understand why an appellant should apply for a copy of a decree which is non-existent and which has not yet been prepared or signed by the Judge. It would seem that if the appellant had applied for a copy of a decree which was not ready then the time taken up to prepare the decree would have been excluded, but merely because he did not apply for a copy that time should not be excluded. It seems to us that it is further futile on the part of the appellant to apply for a copy when in fact the original is not ready and when in fact no copy of the original could be given to him. From this it does not follow that the whole of the time required for preparing the decree should necessarily be excluded in every case. We may have a case where the preparation of the decree is entirely left to the Court, where the intervention of the parties is not at all necessary, and all the time spent for the preparation of the decree is the result of what the Court has got to do and the various steps that the Court has to take. In a case like this it may be that the whole time would have to be excluded. But we may have a case where the intervention of the party is necessary in order to prepare the decree. Various steps might have to be taken by the parties or their lawyers before a decree could be ready and before it could be signed. In a case like this the Court would have to consider whether any of the time taken up for the preparation of the decree could be attributed to the fault of negligence of the appellant. If any of the time could be so attributed then that time could not be excluded under S. 12(2)."

(5) The Allahabad High Court's view has been followed on the other hand by the Nagpur High Court vide 'Mukunda Ramkrishna v. Bisansa Sakharamsa', AIR (20) 1933 Nag 125; 'Din Dayal v. Anopi', AIR (13) 1926 Nag 349; Rangoon High Court vide 'Maung Po Kyaw v. Ma Lay', AIR (16) 1929 Rang 116; Peshawar Chief Court, vide Shivan Ditta v. Radha Kishan', AIR (28) 1941 Pesh 74 and recently by the Assam High Court vide Governor General in Council v. Jesraj Tilakchand', AIR (37) 1950 Assam 83.

(6) In the present case before us no rule has been pointed out casting upon the litigant the duty to take any proceedings for the preparation of the decree. Ordinarily, it is the duty of the Court to prepare a decree. There is no occasion, therefore, in the present case for considering any negligence on the part of the appellants in deciding the question what was the time requisite for obtaining a copy of the decree.

(7) Giving the matter my anxious consideration, I am of the opinion that the view held by the Calcutta High Court and recently followed by the Full Bench ruling of the Bombay High Court, correctly interprets the provisions of S. 12 of the Limitation Act. I accordingly hold that the appellants should be given the benefit of the period between 29-10-47 when the judgment was delivered and 9-11-47 when the decree was signed for the purpose of exclusion of time under S. 12 of the Limitation Act. If this is done the appeal filed in the District Court would be in time. I, therefore, set aside the order of the learned Assistant Judge and remand the appeal to the District Court for disposal in accordance with law. In view of the conflicting decisions of the High Courts, I make no order as to costs of this appeal.

(8) SHAH C. J.: I agree.

D.R.R. *Appeal allowed.*

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SHAH C. J., AND BAXI J.

Bhojraj, Applicant v. The Chief Secretary, Govt. of Saurashtra, Rajkot and another, Opponents.

Civil Misc. Appln. No. 11 of 1951, D/- 23-10-1951.

(a) Constitution of India, Art. 311(1) — Person appointed by Government —Collector's order terminating service on strength of Government order is valid.

Where the services of a Goverment servant who was appointed by the Government were terminated by an order of the Collector which specifically mentioned the Government order on the strength of which the order was passed, in making the order neither the Government nor the Collector contravened the provisions of Art. 311(1) of the Constitution. The Collector was merely a channel through

which Government's decision was communicated to the petitioner. But the decision to terminate his services was the Government's decision. (Para 2)

(b) Bombay Civil Service Conduct, Discipline and Appeal Rules, Rr. 33 and 55 — Temporary Government servant — Service terminable on month's notice — Rule 55, when applies — Scope of Rr. 33 and 55 — Held on facts that termination was as punishment and that the case was governed by R. 55.

Rule 33 prescribes penalties which may be imposed on a Government servant. They include reduction, removal from service or dismissal. Explanation C to R. 33, according to which the discharge of a Government servant engaged under a contract in accordance with the terms of a contract is not removal or dismissal within the meaning of R. 33, clearly contemplates the removal of a temporary servant engaged on contract by way of punishment and if the removal is intended as a penalty the provisions of R. 55 are clear that the removal cannot be ordered before the inquiry as prescribed by that Rule is made. The question therefore to be decided is whether the removal was by way of a penalty or merely under the contract of employment. This question is one of intention to be gathered from the circumstances of each case. It may be that the Government might not have strictly adhered to the terms of the contract in terminating the employment. But if the paramount intention of the Government was to end the contract and not to punish the servant, the latter cannot demand that he should have been dealt with under R. 55. The Government does not act capriciously and they must have sound reasons for removing their servant. In terminating his employment, the Government might have been influenced by the Government servant's incapacity or neglect of duty. But that element can scarcely enter into consideration if the Government merely terminated the contract. The Government is undoubtedly acting within their rights under the contract and the servant has no cause of action against them. But if the intention underlying his removal is to punish him, then R. 55 comes into operation and the Government servant should be given an opportunity of defending himself if he so desires.

Where according to the terms of the contract the services of the Govt. servant who was engaged temporarily, were terminable by a month's notice, his suspension and notice to him that an action under R. 33 was proposed to be taken against him and the subsequent termination of his services suddenly without notice, shows that the intention of the Government in removing him from service was to punish him and not discharge him according to the terms of the contract. In such a case it was incumbent on the Government to proceed under R. 55 before terminating the services. (Para 4)

(c) Bombay Civil Service Conduct, Discipline and Appeal Rules, R. 55 — Servant called upon to give written explanation and also asked whether he desired to be heard in person — Servant submitting written statement but not availing of opportunity of being personally heard — Ex parte enquiry — R. 55, if observed.

A charge sheet was served on the Govt. servant and he was called upon to submit a written explanation of his defence and also to state whether he desired to be heard in person. The servant submitted a written explanation whereby he generally denied the charges as baseless but did not say that he desired to be heard in person. On the contrary he adopted a contumacious attitude by questioning the Deputy Collector's authority to hold the enquiry. He further asked for copies of statements of witnesses on which the charge was formulated before he would reply. He had no right to question the authority of the Deputy Collector nor had he any right to demand copies of statements recorded by that Officer for the purpose of framing the charge. He did not demand an oral inquiry. If this demand were made the Government was under an obligation to hold an oral inquiry where witnesses would have been examined in his presence and he could have cross-examined them on their previous statements:

'Held' that the complaint that the inquiry by the Deputy Collector was ex parte and that no opportunity was given to the servant to defend himself was unfounded and that the termination of his services without notice, was in accordance with R. 55. (Para 6)

(d) Constitution of India, Art. 311 (2) — "Person holding a civil post" — Temporary employee of Government.

It makes no difference for the application of the Article that the post is temporary or the incumbent thereof is a temporary employee of the Government. Such employee is a "person holding a civil post". This Article requires that before any order of dismissal, removal or reduction in rank of any person holding a civil post can be passed it is incumbent on the Government to give him an opportunity of showing cause against the action proposed to be taken against him. AIR (37) 1950 Lah 59, Rel. on. (Para 7)

(c) Constitution of India, Arts. 311(2), 226 — Temporary employee of State wrongfully dismissed — Employee obtaining services under another State — Ordering re-instatement in former service useless since he could be discharged any time after one month's notice — Issue of writ not in any way beneficial to employee — Mere declaration that services were wrongfully terminated also having no utility — No prejudice to employee, since he was re-employed in another State — Court refused to issue writ, either mandamus or certiorari — If employee insisted for empty declaration, held, he should get it by regular suit. (Para 8)

Vasudeo Mangaram, for Applicant; Advocate General, C. N. Shah with B. P. Joshi, Asst. Govt. Pleader, for Opponents Nos. 1 and 2.

Case referred to:

('50) AIR (37) 1950 Lah 59: (Pak L R (1949) Lah 236) (Pr 7)

BAXI, J.: The petitioner was appointed by the Government as Assistant Custodian of Evacuee Property at Jamnagar for the Halar District under Ordinance No. VIII of 1948 by an order dated 17th June, 1949. The terms and conditions of his appointment were that he was to draw Rs. 180/- plus dearness allowance in the grade of Rs. 180-10-240-E. B. 15 Rs. 300/-. That the post was temporary and was terminable at one month's notice on either side. In November the petitioner proceeded on leave and when he returned to Jamnagar on 25-11-49 he was served with an order to give a full and correct statement regarding money in his charge when he proceeded on leave. He gave the statement as required and resumed charge of his office. On 28th November an order from the Collector dated 26th November 1949 suspending him from service with the approval of the Chief Secretary to the Government pending further orders was served on him. On 25th February 1950, he was served with a charge sheet under the signature of the Deputy Collector containing several charges of misappropriation and criminal breaches of trust. It was stated in the charge sheet that action was proposed to be taken against him and it was proposed to punish him according to R. 33 of the Bombay Civil Services Conduct, Discipline and Appeal

Rules. He was also required to put in a written statement of defence and reply to each of the charges and to state whether he desired to be heard in person. The petitioner submitted a reply dated 28th February 1950 to the Deputy Collector. By his order dated 27th April 1950, the Collector terminated the petitioner's service with immediate effect. This order purports to have been passed on the strength of Revenue Order No. 1526 dated 21st April 1950. The petitioner preferred an appeal to the Government and submitted a Memorial to H. H. the Rajpramukh, but received no reply thereto. He has therefore preferred this petition praying for a writ of Certiorari or in the alternative a writ of Mandamus directing the Opponents to reinstate him in service and praying for the issue of any other directions, which the Court may deem fit and proper.

(2) The petitioner challenges the validity of the order terminating his services on the ground that as his appointment was made by the Government he could only be removed from service by the Government and the order of the Collector was invalid under Art. 311(1) of the Constitution. This contention is without any substance. The Collector's order specifically mentions the Government's orders on the strength of which he had passed the order. The Collector was merely a channel through which Government's decision was communicated to the petitioner. But the decision to terminate his services was the Government's decision, and in making the order neither the Government nor the Collector contravened the provisions of Art. 311(1) of the Constitution.

(3) The next ground on which the Collector's order has been attacked was that before passing the order the provisions of R. 55 of the Bombay Civil Services Conduct, Discipline and Appeal Rules were not complied with. It was submitted on behalf of the petitioner that the Deputy Collector had made ex parte enquiry and he was not given the enquiry as prescribed by R. 55. It was further submitted that under that rule no order of reduction, removal or dismissal could be made against the petitioner unless the inquiry prescribed by that rule was first made, and therefore the present order was null and void and inoperative. The case of the Government on the other hand was that the Deputy Collector's inquiry and the calling for the petitioner's explanation by serving the charge sheet on him were intended for the Government's private satisfaction. The petitioner's employment was temporary and liable to termination at any time by one month's notice and therefore it was not governed by the Bombay Civil Services Conduct, Discipline and Appeal Rules, The Collector's order was in the exercise of the Government's undoubted right to terminate his services under the contract and therefore cannot be challenged on this ground.

(4) We cannot accept this argument. Rule 33 of the Bombay Civil Services Conduct, Discipline and Appeal Rules prescribes penalties which may be imposed on a Government servant. They include reduction, removal from service and dismissal. Explanation C to the Rule says that the discharge of a Government servant engaged under a contract in accordance with the terms of a contract is not removal or dismissal within the meaning of R. 33. This explanation clearly contemplates the removal of such a temporary servant by way of punishment and if the removal is intended as a penalty the provisions of R. 55 are clear that the removal cannot be ordered before the inquiry as prescribed by that Rule is made. The question has therefore to be decided whether the removal was by way of a penalty or merely under the contract of employment. This question is one of intention to be gathered from the circumstances of each case. It may be that the Government might not have strictly adhered to the terms of the contract in terminating the employment. But if the paramount intention of the Government was to end the contract and not to punish the servant, the latter cannot demand that he should have been dealt with under R. 55. The Government does not act capriciously and they must have sound reasons for removing their servant. In terminating his employment, the Government might have been influenced by the Government servant's incapacity or neglect of duty. But that element can scarcely enter into consideration if the Government merely terminated the contract. The Government is undoubtedly acting within their rights under the contract and the servant has no cause of action against them. But if the intention underlying his removal is to punish him, then R. 55 comes into operation and the Government servant should be given an opportunity of defending himself if he so desires.

(5) The petitioner was first suspended as several instances of gross neglect in the performance of his duties had come to the notice of the Collector. He was next served with a charge sheet containing several instances of criminal breaches of trust alleged to have been committed by him. His services were then terminated with immediate effect. The charge sheet clearly informed him that it was proposed to take action against him and punish him under R. 33. These facts clearly indicate that the action which was proposed to be taken against the petitioner was not under the terms of his employment but as a punishment. His removal was not in accordance with the terms of his employment as he was not given a month's notice even if after serving the charge sheet, the petitioner had been discharged after a notice, the termination of his employment would not have amounted to a penalty under Explanation (c) of R. 33. But his employment was not terminated according to the contract and therefore the only conclusion which the history of the proceedings points to is that in removing him from service the Government intended to punish him and the order of removal was in the nature of the penalty under R. 33. It was therefore incumbent on the Government to follow the procedure laid down by R. 55 before making the order.

(6) This leads us to the question whether the provisions of R. 55 were not complied with before the final order was passed. In para 6 of their reply it is stated that the Government asked the petitioner to explain the charges against him and put in a written statement. He did not avail himself of that opportunity and the Government after consideration of all the facts decided to terminate his services. Rule 55 requires that no order of dismissal, removal or reduction shall be passed on a member of the service unless he has been informed in writing of the grounds on which it is proposed to take such action and has been afforded an adequate opportunity of defending himself. These grounds should be reduced to the form of a definite charge or charges and shall be communicated to him with a statement of the allegations on which his charge is based and of any other circumstances which it is proposed to take into consideration in passing orders. He shall be required to put in a written statement of his defence and to state whether he desires to be heard in person. If he so desires an oral enquiry shall be held. At that enquiry oral evidence shall be heard as to those allegations which have not been admitted and the person charged shall be entitled to give evidence in person and to have witnesses examined

on his behalf. He is also given the right of cross-examining witnesses tendered against him. The proceedings shall contain a sufficient record of the evidence and a statement of the defence and the grounds thereof. In the present case a charge sheet was served on the petitioner and he was called upon to submit a written explanation of his defence and also to state whether he desired to be heard in person. Now the petitioner complained that the provisions of R. 55 were not followed because the enquiry held by the Deputy Collector was ex parte and no opportunity was given to him to defend himself. This complaint is not well-founded. The petitioner submitted a written explanation whereby he generally denied the charges as baseless but did not say that he desired to be heard in person. On the contrary he adopted a contumacious attitude by questioning the Deputy Collector's authority to hold the enquiry. He further asked for copies of statements of witnesses on which the charge was formulated before he would reply. It is quite certain that he had no right to question the authority of the Deputy Collector nor had he any right to demand copies of statements recorded by that Officer for the purpose of framing the charge. It was his clear duty to answer the point of each of charge and to have stated that he wanted to be heard in person. He should further have demanded an oral inquiry. If this demand were made the Government was under an obligation to hold an oral inquiry where witnesses would have been examined in his presence and he could have cross-examined them on their previous statements. He could even have examined himself and called defence witnesses. But instead of asking for any oral enquiry, or stating that he desired to be heard in person he indulged in an insolent and evasive reply making impossible demands, in the absence of a demand to be heard in person or for an oral inquiry. The Government was not bound to examine any witnesses and the charge that the petitioner has not been heard must be dismissed in the light of his conduct as entirely unfounded and unjust.

(7) It was then contended on behalf of the petitioner that the order terminating his services was in contravention of Art. 311(2) of the Constitution and was therefore illegal and inoperative. The Art 311 runs as follows:

"(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State....."

"(2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him."

The petitioner's contention is that he should have been given a reasonable opportunity of showing cause against the order before he could be dismissed. The words "no such person" appearing in Cl. (2) clearly mean the classes of Government servants mentioned in Cl. (1). The whole article therefore applies to a member of the Civil Service of the Union or an all India Service or a civil service of a State and to every person who holds a civil post under the Union or the State. The petitioner being a temporary employee and not being incorporated in the Civil Services of the Saurashtra State, it is doubtful whether he can be called a member of the Civil Service of the Saurashtra State but he did hold a civil post under the State and came within the scope of the second category of the Servants mentioned in this Article. It makes no difference for the application of the Article that the post is temporary or the incumbent thereof is a temporary employee of the Government. This Article requires that before any order of dismissal, removal or reduction in rank of any person holding a Civil post can be passed it is incumbent on the Government to give him an opportunity of showing cause against the action proposed to be taken against him which in this case is his removal from service. In 'Yusuf Ali Khan v. Province of Punjab', AIR (37) 1950 Lah 59, which was decided under S. 240, Government of India Act (1935) (corresponding with Art. 311 of the Constitution) it was held as under:

"Section 240 relates to every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India! Where it does not appear that the personnel of the Civil Supplies Department had been incorporated into a service, all incumbents of appointments in that department would fall into the second category viz. of persons 'holding civil posts under the Crown in India! It cannot be said that because the post is declared to be temporary, or the holder thereof is a temporary employee he is not within the expression "person holding a civil post under the Crown in India."

The principle laid down in this decision applies equally after the Constitution came into force. It is not the Government's case that before the order terminating his services was passed the petitioner was given any opportunity of showing cause against that order. Therefore though the order does not violate the provisions of R. 55, it is certainly in contravention of Art. 311 (2) of the Constitution and cannot be upheld.

(8) The next question that has to be decided is whether we should issue any writ against the Government. It may be stated that the petitioner has obtained service in Rajasthan State Therefore even if the Government were willing to reinstate him it will not be possible for him to rejoin the Saurashtra State's service. Moreover the petitioner has no legal right to continue in service because the Government can discharge him at any time without assigning any reason by paying one month's salary. Under the circumstances if the writ is issued against the Government the petitioner is not in a position to be benefited thereby and it can be rendered ineffective immediately by the Government by exercising their powers under the conditions of the petitioner's employment. The attention of the petitioner's Advocate was drawn to this aspect of the case and he gave up his prayer for a writ of Mandamus for reinstating him in service. We are not inclined to issue a writ of Certiorari also for the very reasons for which the prayers for the writ of Mandamus and for reinstatement have been dropped. The learned Advocate however requested that we should give a declaration that the petitioner's services were wrongfully terminated. After a careful consideration of the case we have come to the conclusion that it is not necessary to give any declaration. It will do no substantial good to the petitioner. He has already been employed elsewhere and presumably his removal from the Saurashtra State service has caused him no prejudice. If the petitioner wants to have the satisfaction of an empty declaration which is not to be of any utility to him, it is open to him to get it by means of a regular suit. We have already expressed our opinion that the order terminating his services is in contravention of the terms of Article 311 (2) and invalid. The petitioner should rest satisfied with that.

(9) We order that for the reasons stated above the petition be dismissed. There will be no order for costs.

(10) SHAH, C. J.: I agree.

R.G.D.

Petition dismissed.

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SHAH, C.J. AND CHHATPAR, J.

Kantilal Motichand, Plaintiff-Appellant v. Vimla and others, Defendants-Respondents.

Second Appeal Nos. 102 and 103 of 1950, D/- 6-10-1951.

(a) *Civil P. C. (1908), S. 100 — Finding of fact, when not binding.*

A finding of the lower appellate Court not in accordance with proved facts cannot be accepted as binding in second appeal. (Para 2)

Anno: Civil P. C., Ss. 100-101, N. 53.

(b) *Evidence Act (1872), S. 114 — Suit for dissolution of marriage on ground of wife's impotency — Wife examined by medical practitioner before suit — Court can draw adverse inference from her subsequent refusal in suit to submit for re-examination by the same doctor.* (Para 2)

Anno: Evidence Act, S. 114, N. 27.

†(c) *Hindu Law — Marriage — Marriage with impotent woman — Whether void.*

Under Hindu law a marriage of a person with a woman who is impotent cannot be treated as void or a nullity nor can it be dissolved. AIR(29) 1942 Mad 693 (FB); AIR (29) 1942 All 267 (2), Foll.; 'Case law and Texts reviewed. (Paras 6 and 7)

A. R. Baxi, for Appellant; H. C. Shah, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('11) 38 Cal 700: (38 Ind App 122 PC) (Prs 5, 6)

('50) AIR (37) 1950 FC 142: (1949 F C R 715) (Pr 6)

('42) AIR (29) 1942 All 267 (2): (ILR (1942) All 518) (Pr 6)

('49) AIR (36) 1949 Cal 404: (ILR (1945) 1 Cal 407) (Pr 4)

('91) 14 Mad 316: (1 Mad L J 85) (Pr 5)

('20) 43 Mad 464: (AIR (7) 1920 Mad 652 (2)) (Pr 5)

('42) AIR (29) 1942 Mad 693: (ILR (1942) Mad 807 FB) (Prs 5, 6)

SHAH, C. J.: These are plaintiff's appeals arising in a suit for a declaration that his marriage with defendant-respondent No. 1 was void and, in the alternative that it may be dissolved. The plaintiff also claimed a sum of Rs. 925/- spent at the time of the marriage. The appellant Kantilal and respondent No. 1 Vimla were married in March 1943 and the appellant's case was that on the respondent going to live with him, he discovered that she was a sexless woman and was impotent. The appellant also alleged that the marriage was brought about by the respondent's father, original defendant No. 2, by fraud. The respondents denied both the allegations and contended that a marriage duly performed under the Hindu Law was indissoluble and could not be declared void. They also denied the liability for the sum of Rs. 925/-. The learned trial Judge held that Vimla was impotent and he declared the marriage a nullity. He did not accept the plaintiff's plea of fraud in bringing about the marriage, and he also rejected the plaintiff's claim for the sum of Rs. 925/-. Defendant No. 1 and the plaintiff both appealed against this decree and the Assistant Judge, who heard the appeals, held that Vimla was not proved to be impotent and that a Hindu marriage could not be avoided on the ground of the impotency of the wife. He agreed with the trial Judge's finding that the marriage had not been brought about by respondent No. 1's father by fraud or misrepresentation and that the appellant (plaintiff) was not entitled to recover the sum of Rs. 925/-. Accordingly he allowed the wife's appeal and dismissed the appeal of the husband, and, in consequence, dismissed the suit with costs. Of the two appeals, Appeal No. 102/50 relates to the dissolution of the marriage, and Appeal No. 103/50 relates to the money part of the claim.

(2) The first question arising for consideration, in the main appeal, is whether Vimla is impotent and though the learned Assistant Judge has held in her favour, that finding is not in accordance with proved facts and cannot be accepted as binding on us. Immediately after the marriage, Kantilal discovered that Vimla was a sexless woman and that it was not possible to have any sexual connection with her, and this was the subject of his constant complaint. Some time later, he got Vimla examined by Dr. Hemantkumar Vaidya, Chief Medical Officer, Bhavnagar, and by another doctor. He also got her examined by Dr. Freny of the Gopinath Maternity Hospital of Bhavnagar on 14th October 1947, and she gave a certificate on the same day that Vimla had very rudimentary development of the internal genital organs and that the secondary sex characteristics were not developed at all. Dr. Freny has given evidence in this case and has stated that Vimla had no development of womanhood and that this defect is congenital, that her vagina is not developed, that the ovaries too did not seem to be developed and that the uterus is in a rudimentary state. Of the secondary characteristics, her chest is not developed at all and is flat and even though she is aged about 20 years she has not been menstruating at all. Dr. Freny no doubt says that it was possible to have sexual intercourse with Vimla, but by it she probably means the physical act of the penetration of the male organ into the hole that Vimla has, but as to this the evidence of Kantilal as also Vimla's own is to the contrary. Sexual intercourse was attempted on the first night, but according to Kantilal it was not possible to have the intercourse and though Vimla says that the attempt had succeeded, that is only her feeling; her evidence on the point carefully read rather shows that the attempt had failed. Sexual intercourse was attempted on the second night but was again unsuccessful, and this is admitted by Vimla herself, and thereafter Kantilal gave up all attempts at sexual intercourse. If the intercourse on the second night was not possible, it will mean that it could not have been possible on the first night too. In fact according to Kantilal he had never a sexual intercourse with Vimla because it was not physically possible to have any. Dr. Freny found her hymen intact and, though in some cases the hymen may not be ruptured after the intercourse, it is improbable that in this case it would have remained intact in spite of the intercourse. It seems that the intercourse was not possible because of the undeveloped genital parts of Vimla. Dr. Vaidya was called as a witness by the trial Court to give evidence on the point of Vimla's impotency, after examining her, and Vimla was directed to remain present in the Court, but she did not remain present and did not submit herself to the examination. It is true that she had been examined by Dr. Vaidya before, but evidently the doctor could not give any opinion from his recollection and a fresh examination was necessary in order that he could give a definite opinion. Vimla's refusal to submit to an examination by Dr. Vaidya was therefore not justified and it could not be said that the learned trial Judge was wrong in drawing an adverse inference against her. However, it is unnecessary to rely on any such in-

ference because the other evidence in the case, referred to above, sufficiently establishes that Vimla is impotent and is a sexless woman. Her genital organs are not at all developed and she has not the ability to perform the sexual act and be an active party to coitus.

(3) The next question is whether under the Hindu Law impotency is a valid ground for nullifying a marriage solemnly performed and in support of his contention that it is a valid ground, Mr. Baxi has relied upon Mayne's Hindu Law, tenth edition, p. 150. It is there stated that a marriage of a lunatic, an idiot or an impotent person is invalid under the Hindu Law, and the observation is based on the text of Vasishtha which is translated as under:

> "A damsel betrothed to one devoid of character and good family or affected by impotency, blindness and the like or an outcaste or an epileptic or an infidel or incurably diseased or to one who is an ascedic or when she has been married to sagotra, should be taken away from him and married to another."

This, however, relates to a betrothed girl and does not refer to the case of a marriage already performed. The other text on which the observation is based is from Katyana cited in Parasara Madhaviyam and which is translated as follows:

> "Madness, being an outcaste, leprosy, impotence, being both of the same gotra, being devoid of sight and hearing and being afflicted with epilepsy, these are stated to be the blemishes in a suitor and also a malden."

Obviously these appear to have been treated as disqualifications for marriage, but the text does not again go to the extent of saying that a marriage performed is invalid. Another text referred to is Manusmriti, Chapter IX, verse 203, which says that:

> "If the impotent and the rest should somehow or other desire to take wives, the offspring of such among them as have children is worthy of a share."

Kulluka's gloss on this is that the impotent and the rest have no capacity to marry, but that construction can be reached by a process of inference only, and so far as the text is concerned, it does not prohibit the impotent and the rest from marrying. It is necessary to read verse 203 in the context of the two preceding verses. Verse 201 says that the impotent, the fallen, the congenital blind and deaf, etc., are not eligible to inherit their father's estate and verse 202 says that they should be maintained. Then occurs verse 203 which says that in case the impotent and the rest desire to marry then the offspring of such among them as have children is entitled to inheritance. Obviously in the case of an impotent husband the son born to the wife will be by the process of 'Niyoga', but even so, the text of Manu does not go so far as to say that a marriage contracted between an impotent man and a normal woman is invalid. On the contrary, it recognises the validity of the marriage and prescribes the method by which the wife may have a Kshetraja son from another person by the process of 'Niyoga.' According to the text of Yajnavalkya 1, 52, & 55, as interpreted in the Mitakshara, neither an impotent man nor a sexless woman can marry, the text being "to prohibit marriage with a sexless woman, the womanhood must be examined." The Smriti Chandrika and other works, which are held as authoritative — in the South, are also taken as laying down that lunacy, idiocy and impotency are disqualifications for marriage. The commentary in Mayne's Hindu Law (10th Edition) proceeds to say that there is certainly no clear rule of Hindu Law that a person who is, at the time of marriage, a lunatic, idiot or impotent man, can validly marry, and that in the absence of any rule of Hindu Law, principles of justice, equity and good conscience should be applied. However the above said view has not been adhered to in the 11th Edition of Mayne's Hindu Law to which I will refer presently.

(4) Mr. Baxi has relied on 'Ratan Moni Devi v. Nagendra Narain Singh', AIR (36) 1949 Cal 404, which is a decision of a single Judge given on 29th May 1940, but reported in 1949. The parties were Sikhs, who were governed by the Hindu Law, and the wife brought a suit for a declaration that her marriage with the defendant was void and inoperative and therefore a nullity on the ground of the husband's impotency. The learned Judge has held that under the Hindu Law the marriage of a female with a male who is impotent and has never been able to consummate the marriage is a nullity, and the decision is based principally on the commentary in Mayne's Hindu Law, 10th Edition. The learned Judge has arrived at his decision mainly on the ground that the niyoga system was now obsolete and that this had an important bearing on the question whether a decree of nullity should be pronounced in the case of impotency on the part of either party to the marriage. Reliance was also placed on the following observations of Dr. Sarvadhikari:

> "Just as a marriage within the prohibited gotra or degrees or a marriage brought about by fraud or force is altogether invalid, notwithstanding the performance of the marriage rites, so too, a gift and acceptance by parent or guardian of a lunatic, and idiot or an impotent man being invalid, the performance of marriage rites does not constitute the relation of husband and wife. In the one as in the other, there is a fraud on the policy of the marriage ceremony. This conclusion is in accordance with the clear general principle of Hindu Law that marriage is for the perpetuation of one's line. It is, therefore, necessary that the bride and the bridegroom should be physically capable of consummating the marriage if adults, at the time of marriage, or if children, when they would be adults, in the course of nature.....Where archaic rules of Hindu Law very plainly transgress the rule of justice, equity and good conscience, they cannot be enforced. The marriage of impotent person not being merely sterile, or of a lunatic or of an idiot clearly tends to promote immorality and may also be regarded as contrary to public policy."

Reference was also made to the following observations of Sir Gooroodas Banerjee (Hindu Law of Marriage and Stridhan, P. 40):

> "Impotency, which is generally considered as a disqualification for marriage, is not viewed in that light in the Hindu Law, as will appear from the passages of Manu and the Dayabhag already quoted. This is because impotency did not formerly render marriage absolutely fruitless, as the impotent could appoint kinsmen to beget issue in their wives. This vicarious mode of fulfilling one of the primary objects of matrimony being, however, interdicted in the Kali or present age it is doubtful whether impotency ought not now to be regarded as a disqualifying cause especially as Parasara the sage whose institutes are held to be peculiarly authoritative in the present age, in his celebrated text in favour of the remarriage of widows, allows a woman to take a second husband if the first is impotent. Among the inferior classes, impotence is a ground of disqualification for marriage. Among the higher

classes, happily the point has never been raised but some authorities hold that impotence in their case would not nullify marriage."

The following passage from Sir Earnest Trevelyan's Hindu Law, 3rd Edition, was also quoted:

"The ancient authorities permitted a eunuch to marry on the ground that his wife could raise up a son to him by a man legally appointed, but now that the system of niyoga is obsolete, it may be a question whether the Courts will not declare the marriage of an impotent person to be void."

(5) This decision has however not taken note of an earlier Madras decision in 'Amirthammal v. Vallimayil Ammal', AIR (29) 1942 Mad 693. The question for decision in that case was whether a disqualified person is a coparcener and has a title to his legitimate share of the family property notwithstanding the disqualification, being only excluded from enjoyment during the period of disqualification. Chellakrishna the person concerned in that case was a congenital idiot. The point in dispute also raised a question whether a congenital idiot could be lawfully married. Placita 9, 10 and 11 of Chapter 2, S. 10 of the Mitakshara were taken by the learned Chief Justice, Leach, as clearly contemplating the marriage of a disqualified person. It was then contended that in these days it is unthinkable that a congenital idiot should be allowed to marry, and counsel pointed to the observations of the learned editor of 10th edition of Mayne's Hindu Law pp. 150 to 153. The learned Chief Justice observed:

"There is to be found from there the statement that the marriage of a lunatic, idiot, or an impotent person is invalid under Hindu Law and reliance is placed on the decision of the Privy Council in 'Mouji Lal v. Chandrabati Kumari', 38 Cal 700. On the basis of that decision the learned editor regarded an earlier decision of the Madras High Court, 'Venkatacharyulu v. Rangacharyulu', 14 Mad 316, as being erroneous."

The learned Chief Justice then pointed out Mayne's own view of the subject which appears from the following statement at p. 106 of the sixth edition of Mayne's Hindu Law:

"As the great and primary object of marriage is the procuring of male issue, physical capacity is an essential requisite, so long (sic. far) as mere selection of a bridegroom is concerned; but a marriage with a eunuch is not an absolute nullity as with us. Mental capacity stands in the same position. While the matter rested in contract, no Court, I imagine, would treat a promise to marry a lunatic or an idiot as binding; but the marriage, if celebrated, would be valid."

Incidentally, the same statement is also contained in the third edition of Mayne's Hindu Law. Therefore so far as Mr. Mayne is concerned, his view has been that a marriage of a lunatic or an idiot or even a eunuch, if be celebrated, would be valid, though a betrothal of a girl with such a person can be broken off. In 38 Cal 700, the Privy Council did not consider the question whether a Hindu lunatic is competent to marry. Their decision rested on the fact that the person concerned was not proved to have suffered from such a degree of unsoundness of mind as would rebut the presumption of the validity of the marriage. The learned Chief Justice then examined the decision in 14 Mad 316 and 'Muthusami Gurukkal v. Meenammal', 43 Mad 464, and held that he preferred the opinions expressed in those decisions and by Mr. Mayne in the 6th edition of his work to those expressed by the learned author of the 10th edition. He observed:

"It is undoubtedly abhorrent to a modern mind that a congenital idiot should be allowed to marry, but the Court here can only have regard to the personal law, and the personal law of the Hindu undoubtedly does regard such a marriage as being possible."

With respect, I agree with the observations of the learned Chief Justice, and though in these modern times the very notion that an impotent person can at all marry is abhorrent, there is nothing in the Hindu Law itself to treat such a marriage, one celebrated as invalid. Hindu Law does not regard mental or even physical incapacity as a ground for nullifying the marriage because marriage according to Hindu Law is a sacrament and a holy union for the performance of religious rites and not a contract.

(6) 'Bhagwati Saran v. Parmeshwari Nandan', AIR (29) 1942 All 267 (2) is another decision where the question of a marriage of a lunatic has been considered. The relevant discussion commences at p. 288. The contention there urged was that a marriage was invalid for the reason that among the Hindus a marriage is not only sacrament, but is also a contract, for which consent is necessary and a lunatic is incapable of giving his consent. However an impotent person does have the capacity to give consent and in his case such a question obviously will not arise. The observations in Mayne's Hindu Law, 10th edition were referred to in the course of the discussion that followed as also several other texts and the view taken was that the Mitakshara contemplated that a Hindu lunatic may take a wife and that such a marriage will be valid. The following pertinent observations in Mandlik's Hindu Law at p. 426 were quoted:

"Outsiders can hardly form a correct notion of how present usage has so changed the old structure that but little remains of the old texts; and this change must in each case be carefully ascertained from practice. Even in matters most dear to the Brahmans and the other twice-born classes usage has fearfully twisted the Smritis. Thus, in marriages the bridegroom should, it is laid down, be free from defect of limb; he should not be patita (fallen into sin), nor kliba (impotent), and he should be free from the ten doshas (blemishes.) Usage has, however, made a clean sweep of this. Even the marriage of an impotent person in the higher classes is held good and binding; and the wife can get no divorce. Again a man born deaf and dumb can get married."

Finally the learned Judge, Collister, J., observed:

"There is no actual prohibition of such a marriage in the ancient text books and, having regard to the various authorities which I have mentioned, I am of opinion that the marriage of a Hindu lunatic, though improper and immoral and discouraged by Hindu Law, is not invalid if duly solemnised. Whatever injunction against such a marriage may be read into the ancient commentaries, it would appear to be of a directory rather than of a mandatory character."

In the preface to his work on Hindu Law, Sir W. Magnathten says:

"It by no means follows that because an act has been prohibited it should, therefore, be considered as illegal. The distinction between the 'vinculum juris' and the 'vinculum pudoris' is not always discernible."

The distinction between an injunction or a prohibition of a directory character and those of a mandatory character is real and must be recognised distinctly, and though the marriage of a lunatic or an impotent person may be improper and immoral and one which should be discouraged a mar-

riage once celebrated will not be rendered invalid or void. 'Bhagwati Saran's case', went in appeal and the Federal Court decision in appeal is reported in 'Ratneshwari Nandan v. Bhagwati Saran', AIR (37) 1950 FC 142. It was held that there can be a coparcenary with a lunatic member, and the appeal was dismissed mainly on the ground that the insanity of Gaurishanker was a supervening insanity. Mahajan, J., has, in considering the question whether the marriage of Gaurishanker with Jodha Kunwar was invalid, referred to the Privy Council decision in '38 Cal 700', and has held that as Gaurishanker did not suffer from such mental infirmity which wholly incapacitated him from understanding what a marriage was, the objection as to the validity of his marriage could not prevail. His Lordship left open the question whether the marriage of a lunatic, if performed in fact, would be legal. Mukherjea, J., has observed in paragraph 153 of the judgment as follows:

> "Even considering Hindu marriage to be entirely a sacrament, as the acceptance of the bride is a necessary indispensable part of the ceremony, he, whose loss of reason is complete, should be deemed incompetent to accept the gift of the bride. Such marriage would not be a proper marriage at all and it could be regarded as invalid on the ground that the capacity for performance of the essential ceremony of the marriage was lacking in the bridegroom."

The decision of the learned Judge has however proceeded on the interpretation of the Privy Council decision in '38 Cal 700', and on the findings of fact, viz., that Gaurishankar was not suffering from such mental incapacity as would wholly incapacitate him from understanding what a marriage was. However taking it that the view of Mukherjea, J., as to the validity of a lunantic's marriage is entirely contrary to the one taken by the Allahabad High Court, his view is distinguishable on the facts of the present case, because here there is no question of the want of capacity to give a valid consent or to perform the essential ceremony of marriage. The learned editor of Mayne's Hindu Law, 11th edition, has deleted the views expressed by the learned editor in the 10th edition of Mayne's Hindu Law, pp. 150-153 and has reverted to the statement contained in the earlier editions. He has referred to the decisions in ILR (1942) Mad 807, and ILR (1942) All 518, as dissenting from the views expressed in the 10th edition of Mayne, but at the same time he calls their decisions as of questionable correctness. Speaking for myself, I prefer to follow the said Madras and Allahabad decisions in the absence of any authoritative pronouncement to the contrary by a superior Court.

(7) In the result therefore we hold that the marriage of the appellant with the respondent cannot be treated as void or a nullity nor can it be dissolved. We therefore confirm the decree of the lower appellate Court and dismiss Appeal No. 102 of 1950 with costs. Mr. Baxi has not pressed the other Appeal No. 103 of 1950, which relates to the claim for the sum of Rs. 925/- and the said appeal will also be dismissed wih costs.

(8) CHHATPAR, J.: I agree.

R.G.D.

Appeal dismissed.

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SHAH, C. J. AND BAXI, J.

Bhatia Damodar Hirji and another, Appellants v. Receiver in the matter of insolvency petition Padamshi Gordhandas, Respondent.

First Appeal No. 25 of 1951, D/- 16-10-1951.

(a) Provincial Insolvency Act (1920), Ss. 53 and 54 — Applicability — Tests — S. 54, if controls S. 53 — Transfer in consideration of pre-existing debt.

The true test whether S. 53 applies to a transaction or not is not whether the transferee is not the creditor of the insolvent but whether the transferee creditor is proved not to have acted in good faith. The creditor's good faith will afford a complete answer to an application under S. 53 and the burden is on the Receiver to establish the absence of good faith on the part of the creditor. There is nothing either in S. 53 or S. 54 to justify the construction that the provisions of S. 54 which are meant to meet the specific case of the debtor's fraudulent act controls in any way the general provisions of S. 53 or that the latter Section makes any exception in favour of the creditors. Transfer in favour of a creditor in consideration of a pre-existing debt is as much subject to the provisions of S. 53 as any other transfer provided that the conditions laid down in that Section have been fulfilled. (Para 4)

Anno: Provincial Insolvency Act, S. 53, N. 2, S. 54, N. 1.

(b) Provincial Insolvency Act (1920), S. 53 — Good faith — Mortgage for pre-existing debt — Creditor aware of precarious financial position of debtor at time of mortgage — Plea of good faith, if can stand — T. P. Act (1882), S. 53.

The fact that a transfer by way of a mortgage of the only property of the debtor was made to one of the creditors, who was a relative of the debtor in consideration of pre-existing debts, (almost equal to the value of the property) even though the debtor had notice of the debtor's precarious financial circumstances may be a complete answer to a suit against the creditor under S. 53, T. P. Act. But when the creditor's good faith is questioned under S. 53, Provincial Insolvency Act that the fact that he had notice of the financial position of the debtor and that he made no contemporaneous advance would be sufficient to destroy his plea of good faith even though the creditor in fact acted honestly and attempted to secure what was due to him. Such a mortgage in favour of the creditor is voidable against the receiver. AIR (14) 1927 Mad 1013, Rel. on; AIR (26) 1939 Cal 503, Commented and not followed. (Paras 5 and 8)

Anno: Provincial Insolvency Act, S. 53, N. 2 and 21; T. P. Act, S. 53, N. 19, 30.

A. R. Bakshi, for Appellants; H. P. Manked, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('92) 19 Cal 223: (19 Ind App 15 PC) (Pr 7)
('28) AIR (15) 1928 Bom 341: (113 Ind Cas 148) (Pr 4)
('07) 34 Cal 999: (11 Cal W N 889) (Pr 7)
('25) 29 Cal W N 374: (AIR (12) 1925 Cal 640) (Pr 7)
('39) AIR (26) 1939 Cal 503: (183 Ind Cas 635) (Prs 7, 8)
('27) 50 Mad 948: (AIR (14) 1927 Mad 1013) (Prs 6, 7, 8)
('49) First Appeal No. 19 of 1949 (Sau) (Pr 4)
(1902) 2 K B 58: (71 L J K B 710) (Pr 7)

BAXI, J.: This appeal arises from the Receiver's application dated 20-7-1950, praying for annulment of a second mortgage created by the insolvent on his residential house to secure a debt of Rs. 5,470/- in favour of the appellant No. 1. The mortgage is created by a registered document dated 22-4-1947

The petitioner was adjudged insolvent on his own petition filed on 26-2-1949. The mortgage is thus within two years of the filing of the petition and has been annulled by the learned District Judge under S. 53 of the Provincial Insolvency Act.

(2) The consideration for the mortgage is stated to be 2 items. Rs. 3,500/- were deposied by the Appellant No. 1 on Fagan Vad 11 Samvat 2001 as the Padla or dowry for the insolvent's daughter on the occasion of her betrothal with his son who is appellant No. 2. This sum together with interest come to Rs. 3,761-11-0, on the date of the mortgage. The second item was a loan of Rs. 1,500/- advanced by the appellant No. 1 to the insolvent on Chaitra Sud 8 Samvat 2001 and amounted with interest to Rs. 1,639-2-0. The appellant No. 1 did not make any cash advance except a sum of Rs. 64-3-0 to meet the expenses for the drafting, registration and other legal expenses connected with the document. The mortgage is therefore intended to secure part debts. The house has been sold by the Receiver and we are informed that after satisfying the first mortgage the sale proceeds will be just sufficient to pay the second mortgage and nothing will be left for other creditors. It has been found that when the appellant took the second mortgage the insolvent had become heavily indebted to others to the tune of about Rs. 20,000/- and he was in no condition to repay his debts, the equity of redemption in respect of his house being the only property left to him and that the appellant knew of the insolvent's financial condition when he took the mortgage. On these findings the learned District Judge held that though the mortgage was supported by consideration there was an absence of good faith on the appellant's part and annulled the mortgage under S. 53 of the Provincial Insolvency Act.

(3) The findings of facts have not been disputed in appeal. The books of the insolvent and the appellant prove that the debts which formed the consideration of the mortgage were genuine debts. The appellant's admissions and the insolvent's testimony prove the financial ruin of the insolvent and further show that the appellant had notice of it when he took the mortgage. The appellant states that after 6 or 8 months of the betrothal of his son he began to suspect the insolvent's financial difficulties and therefore demanded repayment of the debts due to him. The latter did not repay and he threatened legal proceedings. The insolvent then executed the second mortgage. The appellant admits in his cross-examination that he got the mortgage because he had heard that the insolvent had become financially weak. It is therefore clear that the appellant's object in getting the mortgage was to secure himself against the eventuality of the debtor being unable to pay his debts.

(4) Mr. A. R. Bakshi for the appellant contended that the appellant was admittedly the insolvent's creditor at the time of the mortgage which was made to secure pre-existing debts and that the mortgage in his client's favour could only be avoided as a fraudulent preference under S. 54 of the Provincial Insolvency Act. The petition having been filed more than three months after the creation of the mortgage the receiver's application should have been rejected by the learned District Judge as out of time. He referred to a decision of this Court in 'First Appeal No. 19 of 1949.' That appeal however dealt with the question whether an encumbrancer who had made a contemporaneous advance with the transfer could be considered a creditor within the meaning of S. 54 of the Provincial Insolvency Act. The Court held that the transaction could not be called a fraudulent preference under S. 54. The debts were newly created and were not in continuation of old debts and a case of fraudulent preference could arise only when there were pre-existing debts and the debtor preferred one creditor against another. All that the appeal thus decided was that S. 54 of the Provincial Insolvency Act was inapplicable except to a transfer made in consideration of old debts because only then the transferee could be called a creditor to whom preference was given by the insolvent. But the proposition that a transfer in favour of a creditor can only be governed by the provisions of S. 54 is nowhere supported by that decision. Another case to which reference was made was 'Sholapur Spinning and Weaving Co. Ltd. v. Pandharinath', AIR (15) 1928 Bom 341. In that case Baker, J., no doubt expressed the view at page 346 of the report that the transfer contemplated by S. 53 appeared to be transfer to a third party and did not cover the case of a creditor. But Patkar, J., who delivered the principal judgment stated as one of the grounds of the judgment that the creditor who was a purchaser in good faith for consideration was protected under S. 53 of the Act. This decision cannot therefore be taken as an authority for the proposition that a transfer to a creditor cannot be governed by S. 53 of the Act. We think that the true test whether S. 53 applies to a transaction or not is not whether the transferee is not the creditor of the insolvent but whether the transferee creditor is proved not to have acted in good faith. The creditor's good faith will afford a complete answer to an application under S. 53 and the burden is on the Receiver to establish the absence of good faith on the part of the creditor. There is nothing either in S. 53 or S. 54 to justify the construction that the provisions of S. 54 which are meant to meet the specific case of the debtor's fraudulent act controls in any way the general provisions of S. 53 or that the latter Section makes any exception in favour of the creditors. The cases which will be considered later were all cases of creditors and decided under Section 53. Every one of them turned on the question whether the creditors' good faith was established. We therefore hold that a transfer in favour of a creditor in consideration of a pre-existing debt is as much subject to the provisions of S. 53 as any other transfer provided that the conditions laid down in that Section have been fulfilled.

(5) As Section 53 applies to the present mortgage we have to see whether the appellant paid consideration and acted in good faith. That his mortgage was for good consideration cannot be disputed. The debtor was in this case in completely insolvent circumstances when the mortgage was made. Excepting his house there was no other property left out of which his other creditors could be paid The appellant is in a sense the insolvent's relative and had notice of the debtor's condition when he took the mortgage. Against these facts may be mentioned the fact that the appellant paid a consideration almost equal in value to the property and that excepting that he took preference over other creditors he did nothing to suggest that he gave any undue advantage to the insolvent. But even with these facts in his favour, the appellant must be regarded as not having taken the mortgage in good faith within the meaning of S. 53 of the Provincial Insolvency Act.

(6) In the 'Official Assignee Madras v. Moideen Rowther', 50 Mad 948, the facts were that the creditor took conveyance of all the immovable properties of the debtor with notice of the fact

that the debtor was in insolvent circumstances and there was no property left out of which his other creditors could be paid. The creditor was the insolvent's paternal uncle and the document of transfer had been antedated. On these facts the Court held that the Receiver had established that the transfer had not been made in good faith and should be annulled under S. 55 of the Presidency Towns Insolvency Act. The facts as found in that case and particularly the antedating of the document to which he was a party put the creditor completely out of Court and the decision ultimately turned on these facts, but the High Court discussed certain principles and followed the Calcutta High Court and certain English rulings which laid down certain tests in considering the question of the creditor's good faith. The learned District Judge followed the decision and held that the appellant's mortgage was voidable against the receiver and annulled it.

(7) Mr. Bakshi for the appellant referred to 'Nagendra Nath v. Pramatha Nath', AIR (26) 1939 Cal 503, in which the Calcutta High Court relying upon 'Hakim Lal v. Mooshafar Sahoo', 34 Cal 999, held that a preferential transfer of property to one creditor in satisfaction of an existing debt due to him is not fraudulent as to other creditors although the debtor in making the transfer intended to defeat the claims and the transferee had knowledge of such intention, if the only purpose of the latter is to secure his own debt and the property is not worth materially more than the amount of his debt. This case no doubt favours Mr. Bakshi's contention; but the decision in 34 Cal 999, upon which the High Court relied has been distinguished in the 'Official Assignee, Madras v. Moideen Rowther', 50 Mad 948, on the ground that it was decided under S. 53 of the Transfer of Property Act. It was pointed out that in cases arising under the Insolvency Act it has been held that under similar circumstances the transfer would be void against the Official Assignee. The case of the 'Official Assignee of Bengal v. The Yokohama Specie Bank, Ltd.', 29 Cal W N 374 was relied on and the learned Judge observed (page 954):

> "Sanderson, C. J., and Buckland, J., held that an assignment executed in favour of one of the creditors of the insolvent of all the properties of the insolvent without any contemporaneous advance, was void against the Official Assignee when the transferor was adjudicated insolvent without two years after the date of the transfer. Finding that the transferee had knowledge of the state of affairs of the assignor at the time of the assignment the Court held that the transfer was not in good faith within the meaning of S. 55 of the Act. (S. 53 of the Provincial Insolvency Act.) Mr. Justice Buckland was of the opinion that in considering the effect of transactions of such a nature the facts must be considered in the light of the law of bankruptcy, the object of which is to ensure rateable distribution of an insolvent's property among his creditors, and that a transaction which may in other circumstances be free from all taint would become an offence when it is established that it contravenes the law of bankruptcy."

This judgment further relied upon 'Khoo Kwat Siew v. Wooi Taik Hwat', 19 Cal 223 (PC) and quotes the following observations of Lord Hobhouse:

> "The well-known rule of law is that if a trader assigns all his property, except on some substantial contemporaneous payment, or some substantial undertaking to make payment in future, that is an act of bankruptcy and is void against the creditors and the Assignee, simply because nothing is left with which to carry on his business, whereas, if he receives substantial assistance, something is left to carry on the business."

In 'Jukes, In re: 'Official Receiver, ex parte (1902) 2 K B 58 was also referred to in the judgment. The decision in the 'Official Assignee of Madras v. Moideen Rowther', 50 Mad 948, and the cases cited therein lay down the rule that the transfer by a debtor of all his property in consideration of past debts to a creditor who had notice at the time of the transfer 'that' the debtor was in insolvent circumstances amounts to an act of bankruptcy which is voidable against the Receiver and other creditors of the insolvents.

(8) These cases and the principles underlying them were not noticed in 'Nagendra Nath v. Pramatha Nath', AIR (26) 1939 Cal 503, upon which Mr. Bakshi relied. We would therefore prefer to follow the principles referred to in the decision on 'The Official Assignee of Madras v. Moideen Rowther', 50 Mad 948. The fact that the transfer was made to a creditor in consideration of pre-existing debts even though the latter had notice of the insolvent's circumstances may be a complete answer to a suit against the creditor under S. 53 of the Transfer of Property Act. But when the creditor's good faith is questioned under S. 53 of the Provincial Insolvency Act the fact that he had notice of the insolvent's circumstances and that he made no contemporaneous advance would be sufficient to destroy his plea of his good faith even though the creditor in fact acted honestly and attempted to secure what was due to him. We hold therefore that the mortgage in favour of the appellant is voidable against the receiver and was quite properly annulled by the learned District Judge. For the above reasons we confirm the order of the lower Court and dismiss the appeal with costs.

(9) SHAH, C. J.: I agree.

R.G.D. *Appeal dismissed.*

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(FULL BENCH)

SHAH, C. J. CHHATPAR AND BAXI, JJ.

State of Saurashtra v. Bholanath Jatashankar Thakkar, Plaintiff-Respondent.

First Appeal No. 19 of 1951, D/- 26-10-1951.

Act of State — Covenant entered into between, Rulers of States to form United States of Kathiawar — Covenant is act of State — Covenant guaranteeing continuance of services of state servants or payment of compensation — Service conditions not to be less advantageous — Suit for compensation on strength of the terms of covenant — Suit held maintainable — Constitution of India, Art. 363, held did not bar suit — Article does not apply when suit is by third party who is not party to covenant — Legislative power of Rulers of individual states, signing covenant ceased upon signing of Covenant and not when administration was handed over to Raj Pramukh sometime afterwards — Service Rules made by one of such states after signing but before handing over administration are not valid — Servant of such state, unabsorbed by Saurashtra State cannot claim compensation on basis of such Service Rules, under guarantee of the Covenant — (Constitution of India, Art. 363) — (Kathiawar States Union.)

The Rulers of the Kathiawar States entered into a Covenant for the formation of the United States of Kathiawar, and the Ruler of the Wadhwan

State signed the said Covenant on 24-1-1948 and in accordance with it made over the administration of his State to the Raj Pramukh on 16th March 1948. By Article XVI of the Covenant the United State of Kathiawar guaranteed either the continuance in service of the members of the public services of each of the Covenanting States on conditions which were not to be less advantageous than those on which they were serving before the date the administration of that State was made over to the Raj Pramukh, or the payment of reasonable compensation. This guarantee had been recognised by the Saurashtra State. By S. 4 of Ordinance No. IV of 1948, among other things, all servants of the covenanting States, were deemed to be officers duly appointed by the Government of Saurashtra and they unless otherwise directed by the Government of Saurashtra were to continue to exercise all the powers and jurisdiction and discharge all the functions and duties which they were exercising before the date of the making over of the administration. On the administration of the Wadhwan State being made over to Raj Pramukh, the respondent (a civil servant of the State) was kept on the unabsorbed list by the State of Kathiawar, called the Saurashtra State, but was retired from 29th June 1948 as he had passed the age of superannuation, which was taken at 55 years, on payment of three months leave salary and a monthly pension of Rs. 40-13-0. He accepted the amount of the leave salary, viz., Rs. 716-4-0 under protest and without prejudice to his claim for compensation on the ground that under the Wadhwan State Service Rules framed by the Ruler of the Wadhwan State on 3rd February 1948 he was entitled to continue in service till completion of 60 years. He filed a suit for compensation claiming Rs. 20,000/- which included the claim for premature retirement:

Held (1) that the covenant was an act of State. (Para 3)

(2) that apart from the fact whether the respondent's claim would be justiciable by reason of the right conferred by the covenant alone or otherwise, in the present case as that right had been recognised by the new State it became justiciable and the Courts had jurisdiction to entertain the claim arising out of the breach of such an obligation. AIR (11) 1924 PC 216 Relied. on. 'Case law reviewed. (Para 15)

(3) that Art. 363, Constitution of India, also did not bar the jurisdiction of the Courts. The bar to the jurisdiction of the Court contained in the Article applies to the case of disputes which arise out of the provisions of the Covenant, etc., and between the parties to the Covenant, etc., and not to cases where a third party claims a benefit from the provisions of the Covenant, etc. Where the Rulers of the Indian States are themselves not parties to the dispute, the dispute does not become non-justiciable because such a proceeding does not touch the rights, privileges and dignities of the Rulers. AIR (38) 1951 PC 253, Ref. (Para 17)

(4) (on merits) that under Art. XVI of the Covenant, the Saurashtra State had the right of election either to continue the respondent or not to continue him, and the decision not to continue him could not amount to a wrongful termination of the services. The State's only liability was to pay reasonable compensation in that event. (Para 18)

(5) (on the contention that the suit was really for damages for wrongful dismissal, that such suit was not maintainable because the service was always during the pleasure of the Government and that the only remedy was by way of a suit for declaration that the dismissal was wrongful) that upon construing the various clauses of the plaint it was clear that though the respondent mistakenly called his non-absorption as wrongful termination, his grievance was against his non-absorption or non-continuance in service and that the suit was for compensation for the same on the strength of Art. XVI of the Covenant. (Para 19)

(6) that the continuance of the respondent from the 16th March 1948 to the 29th June 1948 during the transition period did not amount to his absorption in the state service. That being so, the contention that the suit should be treated as one for damages, for wrongful termination and for that reason as incompetent was unsustainable. (Para 20)

(7) that on the signing of the Covenant (on 24-1-1948) the covenanting States formed part of the United State of Kathiawar and so far as the legislative powers were concerned, these vested in the Raj Pramukh as from the 1st February 1948, the date on which he entered upon the duties of his office, by virtue of Clause (3) of Art. IX. The making over of the administration of the various States did naturally take some time but during that time the Rulers of the States were merely in the position of caretakers and were to run the day to day administration till the actual handing over of the administration to the Raj Pramukh. In any event they had no legislative powers to enact any laws. Therefore, as the 'Dhara' in question (Wadhwan State Service Rules) promulgated by the Ruler of the Wadhwan State was without legislative competence, it was altogether invalid. Consequently the conditions of service therein prescribed did not bind the Saurashtra State, and the result therefore was that there was no rule regarding the age of superannuation in the Wadhwan State at or before the time the administration of that State was handed over to the Raj Pramukh. Respondent's claim for compensation on the footing that he was entitled to continue in service till the age of 60 and thereby to earn a salary for five years more and a pension on that basis was therefore entirely unsustainable. (Para 22)

(8) ('obiter') that assuming that the Wadhwan Service Rules were validly made reasonable compensation within terms of Art. XVI, did not mean the full salary for the unexpired period of service, taking 60 years as the age of superannuation, nor the pension calculated on that basis. There was a general right in the Wadhwan State (and so also in Saurashtra State by virtue of Art. XVI of the Covenant) to retire a servant before the age of superannuation. (Para 24)

(9) that what the respondent got as compensation from the Saurashtra State was much more liberal than what he would have got from the Wadhwan State, had he been retired on the same date by that State, on basis of 60 years as age of superannuation. From every point of view the compensation awarded by the Saurashtra State was reasonable. (Paras 24, 25)

C. N. Shah, Advocate-General, with B. R. Joshi, Asst. Govt. Pleader, for the State; M. O. Shah, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

(1827) East India Co. v. Syed Ally', (1827-7 Moo Ind App 555) (Pr 4)

('57-59) 7 Moo Ind App 476: (1 Sar 684 PC) (Pr 4)

('72) Forester v. Secy of State for India in Council (1872— I A Sup Vol 10 PC) (Pr 6)

('15) AIR (2) 1915 PC 59: (39 Bom 625 PC) (Pr 9)

('24) AIR (11) 1924 PC 216: (48 Bom 613 PC) (Prs 10, 13, 15)
('31) AIR (18) 1931 PC 248: (132 Ind Cas 739) (Pr 11)
('41) AIR (28) 1941 PC 64: (ILR (1941) Kar PC 94) (Pr 12)
('41) AIR (28) 1941 PC 109: (196 Ind Cas 567 PC) (Pr 13)
('51) AIR (38) 1951 SC 253: (1951 SCR 474 SC) (Pr 16)
('04) 6 Bom L R 131 (Pr 7)
('49) AIR (36) 1949 Bom 277: (ILR (1950) Bom 1) (Pr 14)
('11) 38 Cal 754: (9 Ind Cas 862) (Pr 8)
('38) AIR (25) 1938 Mad 672: (181 Ind Cas 138) (Pr 24)
(1793) Nabab of Arcot v. The East India Co.: (1793 4 Bro C C 180) (Pr 4)
(1906) 1 K B 612: (75 L J K B 418) (Prs 6, 8)

SHAH, C. J.: This appeal has been brought from a decree of the Civil Judge, Senior Division, Surendranagar, in a suit by the respondent Bholanath Thakkar to recover Rs. 20,000/- as compensation for wrongful termination of his services by the appellant the Saurashtra State. The respondent was employed as a Sar Nyayadhish in the former Wadhwan State, having been appointed to that post in August 1936 on a salary of Rs. 150/- a month. At the end of December 1947 his Salary stood at Rs. 185/- a month and with effect from 1st January 1948 his Salary was raised to Rs. 220/-. The Rulers of the Kathiawar States entered into a Covenant for the formation of the United State of Kathiawar, and the Ruler of the Wadhwan State signed the said Covenant on 24th January 1948, and in accordance with it made over the administration of his State to the Raj Pramukh on 16th March, 1948. By Art. XVI of the Covenant the United State of Kathiawar guaranteed either the continuance in service of the members of the public services of each of the Covenanting States on conditions which were not to be less advantageous than those on which they were serving before the date the administration of that State was made over to the Raj Pramukh, or the payment of reasonable compensation. On the administration of the Wadhwan State being made over to the Raj Pramukh, the respondent was kept on the unabsorbed list by the State of Kathiawar, hereinafter called the Saurashtra State, but was retired from 29th June 1948 as he had passed the age of superannuation, which was taken at 55 years, on payment of three months leave salary and a monthly pension of Rs. 40-13-0. He accepted the amount of the leave salary, viz., Rs. 716-4-0 under protest and without prejudice to his claim and later filed this suit, claiming compensation on the ground that under the Wadwan State Service Rules framed by the Ruler of the Wadhwan State on 3rd February 1948 he was entitled to continue in service till completion of 60 years, and that his premature retirement by the Saurashtra State caused him a loss of salary amounting to Rs. 14125/- odd. He alleged that he suffered a loss of dearness allowance of the value of Rs. 3200/- which he might have received if he was continued in service by the Saurashtra State, and that on retirement after 60 years he would have received a pension of Rs. 70/- per month which would have come to Rs. 12,600/-. According to him the aggregate sum thus due to him came to Rs. 29,925/-, but he claimed a round sum of Rs. 20,000/- only.

(2) The claim was disputed by the appellant State on several grounds. It was contended that the Ruler of the Wadhwan State had no competence to frame the pension and gratuity rules, that the rules framed were ultra vires as being without jurisdiction, and that retirement at the age of 60 was not one of the conditions of the respondent's service in the Wadhwan State at the time when the administration of that State was made over to the Raj Pramukh. The other contentions were that the formation of the United State of Kathiawar was an act of State and that as the dispute arose under the Covenant by which the said State was formed was not justiciable and the Municipal Courts had no jurisdiction to decide such a dispute; and further that the suit was barred under Art. 363 of the Constitution. It was also contended that the suit was really one for damages for wrongful dismissal and that service being during the pleasure of the Saurashtra State, no suit for damages could lie against the State. The quantum of the sum claimed was also disputed. The learned Judge below rejected these contentions and upheld the respondent's claim for compensation on account of the loss of salary, which the respondent would have received if he was continued in service till the completion of 60 years. He however rejected the claim in respect of dearness allowance and pension, and passed a decree for Rs. 13409-2-0 against the appellant, making the parties to bear their own costs. The State of Saurashtra has appealed against the decree and the respondent has filed cross-objections in respect of the rejected claim.

(3) I will first deal with the learned Advocate General's contention that the entering into the Covenant by the Rulers of the Kathiawar States was an act of State. Now on the lapse of paramountcy on the 15th August 1947 the States of Kathiawar became Sovereign States, and there can be no doubt that the Covenant which the Rulers of these States entered into for the formation of the United State of Kathiawar was an act of Sovereign Rulers. By the Covenant the Rulers united and integrated their territories in one State with a common executive, legislature and judiciary, by the name of the United State of Kathiawar and they resolved to entrust the framing of the Constitution to a Constituent Assembly of elected representatives of the people; and it was thus that the United States of Kathiawar came into existence. There can be no question therefore that the Covenant was an act of State. It is thereupon urged by the learned Advocate General that as the claim, which is the subject of the present dispute, is based on Art XVI of the Covenant, the dispute arises out of the Covenant and is not justiciable by the municipal Courts.

(4) Now the question of the exclusion of the municipal Courts' jurisdiction was considered as far back as 1859 in the case of 'Secy. of State v. Kamachee Boye Sahaba', 7 Moo Ind App 476. The Privy Council there held that the Municipal Court had no jurisdiction to enquire into the propriety of the act of the East India Company seizing the State of Tanjore as the delegate of the British Government and their Lordships observed:

> "Transactions of Independent sovereign States between each other are governed by other laws than those which Municipal Courts administer: Such Courts have neither the means of deciding what is right nor the power of enforcing any decision which they may make."

Their Lordships cited with approval the cases of 'Nabab of Arcot v. East India Co.', 1793-4 Bro cc 180 in the Ct. of Chancery in the year 1793, and 'East India Co. v. Syed Ali', 1827-7 Moo Ind App 555 before the Privy Council in 1827, for the proposition that acts done in the execution of sovereign powers were not subject to the control of the Municipal Courts of either India or Great Britain. Their Lordships then distinguished between an act of State and one which is not an Act of State and observed:

"The next question is, what is the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain, of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of Municipal Law? Or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Rajah of Tanjore, in trust for those who, by Law, might be entitled to it on the death of the last possessor? If it were the latter, the defence set up, of course, has no foundation."

(5) The following observations in Halsbury's Laws of England Vol. 26 (Second Edition) Paragraph 558 at p. 249 are pertinent and may be quoted with advantage.

"But the municipal Courts have jurisdiction to decide whether an act relied on as a defence was or was not an act of State, and may inquire into matters involving the construction of treaties; and the seizure of land in virtue or under colour of a legal title is not an act of State, and the Courts have jurisdiction to adjudicate upon such a matter. The test is the real character of the seizure; no action can be brought in respect of arbitrary exercise of power by one state upon the dominions of another, but if it is wholly or partly a taking of possession by the Crown under colour of legal title an action may lie."

(6) In his judgment in 'Salaman v. Secy of State for India', (1906) 1 K B 613 at p. 639, Lord Justice Fletcher Moulton has dealt with the subject of what is an act of State and what the limitations to the municipal Courts' jurisdiction are, and the importance of the judgment justifies a substantial excerpt. His Lordship observed:

"An act of State is essentially an exercise of the Sovereign's power and cannot be challenged, controlled or interfered with by Municipal Courts. Its sanction is not that of law but of sovereign power, and whatever it may be, Courts must accept it without question. But it may be, and often must be, part of their duty to take cognisance of it. For instance, if an act is relied on as being an Act of State and thus affording an answer to claims made by a subject, the Courts must decide whether it was in truth an Act of State, and its nature and extent. An example of this is to be found in 'Forester v. Secretary of State', (1872-IA Sup Vol. 10), but in such an inquiry the Court must confine itself to ascertaining what the Act of State in fact was, and not what in its opinion it ought to have been. In like manner Municipal Courts may have to consider the results of Acts of State, i.e., their effects on individuals and even on the Government itself. Acts of State are not all of one kind: their nature and consequences may differ in an infinite variety of ways and these differences may profoundly affect the position of municipal Courts regarding them. For instance, Acts of State may fix the relations between two States, each of which continues to possess an independent existence."

"The consequences of such an Act of State are entirely beyond the cognisance of Municipal Courts because they do not administer Treaty obligations between two States; but the object and effect of an act of State are not necessarily of this kind. Its intention and effect may be to modify and create rights as between the Government and individuals who are about to become British subjects. In such cases the rights accruing therefrom have to be adjudicated upon by Municipal Courts. Let me take a simple example: Let us suppose that a Government annexes a neighbouring State and formally takes over all the property and liabilities of the former ruler, and that a part of such property consists of debts due to him. The Government is not bound to collect such debts vi-et armis. It may avail itself of the assistance of the Courts of Law for the purpose, in the same way as though the debts had accrued due to it otherwise than by an Act of State. But in deciding such a claim the Courts must loyally accept the Act of State as effective. Evidence that the debt was due to the former ruler would therefore become evidence of its being due to the existing Government and I see no reason why in such a case a claim of a converse character might not equally be entertained by Municipal Courts."

(7) In 'Jehengir v. Secretary of State', 6 Bom L R 131, it was observed at p. 140 as follows:

"The test whether an act is or is not an Act of State excluding the jurisdiction of the Courts, is not whether it is capable of being legally performed only by persons specially empowered in that behalf as authorised by the law to perform specific acts of Government; but whether it is an Act of State in those external relations, which Municipal or positive law addressed by political superiors to political inferiors does not profess to regulate .....An Act of State in respect of which the jurisdiction of the Courts is barred must be an act which does not purport to be done under colour of a legal title at all, and which could neither assert or violate any right conferrable by law, but which must rest for its jurisdiction on considerations of external politics and interstatal duties and rights."

(8) In 'Srinibash Prosad Singh v. Kesho Prosad Singh', 38 Cal 754, dealing with the objection that the Municipal Court had no jurisdiction to investigate the validity of the guarantee, because it was an act of State, it was observed:

"It is not easy to follow how, when the Secretary of State for India in Council chooses to give a guarantee for the due performance of a decree obtained by one private individual. A against another private individual B, the act can be appropriately designated as a Sovereign act. As Lord Justice Fletcher Moulton observed in 'Salaman v. Secretary of State for India', (1906) 1 K B 612, an act of State is essentially an exercise of Sovereign power, and because it is an exercise of Sovereign power it cannot be challenged, controlled or interfered with by Municipal Courts; but if an act is relied on as being an act of State and as thus affording an answer to claims made by a subject, the Courts must decide whether it was in truth an act of State and what was its nature and extent. The true view of an act of State appears, observed the same learned Judge, to be that it is a catastrophic change constituting a new departure. Municipal law has nothing to do with the act of change by which this new departure is effected. But although this be so, the principles of interpretation applicable to an Act of State are not necessarily the same as those which apply to other acts. For instance, if an act of State be expressed in a document purporting to confer benefits upon an individual, it by no means necessarily follows that there is any intention to create a contract, or that the document should be construed by the same canons of interpretation as would be adopted in the case of a contract between two individuals. If this be the true view of the nature of an act of State, it is not easy to appreciate how the offer of a guarantee by the Secretary of State for India in

Council can be appreciately designated as an act of Sovereign power. But if that were its true character, and if for that reason the Municipal Courts were deprived of all jurisdiction in respect of the matter, the decree-holder respondent would be justly entitled to maintain the position that a guarantee of the character ought not to be accepted for purposes of stay of execution. In my opinion, the true view of the situation is that when the Secretary of State for India in Council offers a guarantee for the due performance by the appellant of a decree that might be made against them and in favour of the decree-holder respondent, the Municipal Courts have not only jurisdiction, but it is their duty to determine, when invited by the party against whom an order for stay is sought, to do so, whether the guarantee is valid and would be enforceable if the occasion arose for its enforcement."

(9) The next case that may be referred to is 'Secy. of State v. Bai Rajbai', AIR (2) 1915 PC 59. In that case the village of Chordi, in the Viramgam Taluka of the Bombay Presidency, was the subject of cession to the British Government and the dispute had arisen in regard to the continued possession management and enjoyment of that village by the respondent Rajbai. It was held that where a territory is ceded by a native sovereign to the British Government, the relation in which the land-holders in that territory stood to their native Sovereigns before the cession, and the legal rights they enjoyed under them, are, save in one respect entirely irrelevant matters. They could not carry in under the new regime the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have as against their new Sovereign were those, and only those, which that new Sovereign by agreement expressed or implied or by legislation, chose to confer upon them. Of course this implied agreement might be proved by circumstantial evidence such as the mode of dealing with them which the new Sovereign, adopted, his recognition of their old rights, and express or implied election to respect them and be bound by them, and it is only for the purpose of determining whether and to what extent the new sovereign has recognised these ante-cession rights of the Kasbatis, and has elected or agreed to be bound by them, that the consideration of the existence, nature, or extent of these rights become relevant subjects for inquiry in this case. Continuing their Lordships observed:

"The Kasbatis may have been absolute owners of their villages, as the respondent contends, and yet the consideration of their ante-cession rights is beside the point, save so far as it can be shown that the Bombay Government consented to their continuing to enjoy those rights under its own regime."

(10) The next case is 'Vajesingji v. Secretary of State', AIR (11) 1924 P C 216. There the lands in dispute were situated in the Panch Mahal which was originally in the domain of Scindia of Gwalior and this territory was ceded by the Scindia to the British Government by a treaty in December 1860. These Nayaks brought the suit against the Secretary of State for a declaration that they were the proprietors of the whole lands in the Taluka as belonging to them and they were not bound to accept a lease of the same in terms offered to them by the Government in 1907. It was held:

"When a territory is acquired by a sovereign state for the first time that is an act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can only — make good in the municipal Courts established by the new sovereign such rights as that sovereign has, — through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights that does not give a title to these inhabitants to enforce these stipulations in the municipal Courts. The right to enforce remains only with the high contracting parties."

(11) In 'Eshugbayi Eleko v. Officer Administering the Govt. of Nigeria', AIR (18) 1931 P. C. 248, dealing with the phrase act of State their Lordships observed:

"This phrase is capable of being misunderstood. As applied to an act of the sovereign power directed against another sovereign power or the subjects of another — sovereign power not owing temporary allegiance, in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad, it may give rise to no legal remedy. But as applied to acts of the executive directed to subjects within the territorial jurisdiction it has no special meaning and can give no immunity from the jurisdiction of the Court to inquire into the legality of the Court."

(12) The next case that may be referred to is 'Secretary of State v. Rustam Khan', AIR (28) 1941 PC 64. There, by an agreement of of 1903 between the khan of Kalat and the Agent to the Governor-General in Baluchistan the Khan of Kalat granted to the British Government a perpetual lease of the Nasirabad Niabat, a part of the Kalat territory, at a quit rent and ceded, in perpetuity the entire management thereof absolutely and with all the rights and previleges State or personal, as well as full and exclusive revenue, Civil and Criminal jurisdiction and all other forms of administration. The predecessors of the plaintiffs held certain proprietary rights over part of the land, comprised in the agreement, from the Khan of Kalat prior to 1903, and they brought this suit claiming that the Government had no title to the lands. It was held that the agreement of 1903 gave the British Government full sovereign rights over the territory and they had a right to recognise or not to recognise the existing titles to the land. The act of the British Government in not recognising the title of the plaintiffs to the suit lands was an act of State for which the plaintiffs could have no recourse against the Government in Municipal Courts.

(13) There is another decision of the Privy Council in the same volume, 'Hoani Te Henhen Tukino v. Aotea District Maori land Board', AIR (28) 1941 PC 109. The ruling in 'Nayak Vajesingji's case', AIR (11) 1924 PC 216, was there relied upon, and it was held:

"It is well settled that any rights purporting to be conferred by a treaty of a complete cession of all the rights and powers of sovereignty by the ceding State on the sovereign or individuals cannot be enforced in the Courts except in so far as they have been incorporated in the municipal law."

(14) The last ruling that may be referred to is 'P. V. Rao v. Khushaldas S. Advani', AIR (36) 1949 Bom 277. There the Province of Bombay sought to justify its requisition order under the Bombay Land Requisition Ordinance which was a municipal law, and it was held therefore that it cannot claim as a sovereign authority to be exempt from a municipal Court and cannot claim immunity from

having to justify its act in a municipal Court. Dealing with the question what is an act of State, the learned Chief Justice, Chagla C. J. observed:

"An act of State is different fundamentally from an act of a Sovereign authority. An act of State operates extra-territorially. Its legal title is not any municipal law but the overriding sovereignty of the State. It does not deal with the subjects of the State but deals with aliens or foreigners who cannot seek the protection of the municipal law. It is difficult to conceive of an act of State as between a sovereign and his subjects. If Government justifies its act under colour of title and that title arises from a municipal law, that act can never be an act of State. Its legality and validity must be tested by the municipal law and in Municipal Courts."

(15) Now the United State of Kathiawar has, by Art. XVI of the Covenant, guaranteed that the permanent members of the public services of the covenanting States shall either be continued in service or shall be paid reasonable compensation and this guarantee has been recognised by the Saurashtra State. By S. 4 of Ordinance No. IV of 1948, among other things, all servants of the covenanting States shall be deemed to be Officers duly appointed by the Government of Saurashtra and they shall, unless otherwise directed by the Government of Saurashtra, continue to exercise all the powers and jurisdiction and discharge all the functions and duties which they were exercising before the date of the making over of the administration, so that the respondent was deemed to be an officer appointed by the Government of Saurashtra. In reply to his application dated 23rd November 1948 the respondent was asked by the Government by its letter dated 2nd December 1948 to contact the collector in respect of his claim for the compensation. In fact the Government had already issued orders to pay compensation to all the servants who were selected for release on their completing 55 years by its orders dated 4th October 1948 and these orders were made applicable to the respondent; and in accordance with them the respondent was paid the compensation in the shape of three months salary and a compensation pension. In reply to his application dated 3rd January 1949 the respondent was informed that the orders of 4th October 1948 had been passed after full and careful consideration and they embodied the decision of Government as to what was considered a reasonable compensation within the meaning of Art. XVI of the Covenant and that under the circumstances the claim made by him was untenable. The position therefore is that the respondent's right to reasonable compensation has been recognised by the Saurashtra State. Now apart from the fact whether the respondent's claim would be justiciable by reason of the right conferred by the covenant alone or otherwise, in the present case as that right has been recognised by the new State it becomes justiciable as laid down in 'Vajesingji v. Secretary of State', AIR (11) 1924 PC 216, and the municipal Courts have jurisdiction to entertain the claim arising out of the breach of such an obligation. This contention of the learned Advocate General cannot therefore be accepted.

(16) The next contention made by the Advocate General is that the suit is barred under Art. 363 of the Constitution. By the said Article,

"notwithstanding anything contained in the Constitution neither the Supreme Court nor any other Court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, 'sanad' or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of the Constitution relating to any such treaty, agreement, covenant, engagement etc."

It is contended that the dispute regarding the respondent's claim for compensation arises out of the Covenant which has been entered into by the Rulers of the Kathiawar States before the commencement of the Constitution and that the Government of India is a party to the said Covenant in as much as it has guaranteed the provisions of the Covenant and that therefore the Court has no jurisdiction to decide the dispute. In my opinion, the bar to the jurisdiction of the Court contained in Art. 363 applies to the case of disputes which arise out of the provisions of the Covenant etc., and between the parties to the Covenant etc., and not to cases where a third party claims a benefit from the provisions of the Covenant etc. Article 362 guarantees the rights, privileges and dignities of the Ruler of an Indian State and reading the two Articles together in the context in which they occur, it seems that disputes arising out of a treaty agreement, covenant etc., and to which Rulers of an Indian State are parties are made non-justiciable. The purpose was to exempt the Rulers of an Indian States from being amenable to the jurisdiction of Courts in such disputes and this becomes amply clear from the proviso to Art. 131 of the Constitution. The prime consideration was to confer certain privileges on the Rulers of the Indian States. The following observations of Patanjali Sastri J. in 'State of Seraikella v. Union of India', AIR (38) 1951 SC 253 at p. 261, are pertinent in this connection.

"But as the States specified in part B of the First Schedule had a semi-sovereign status before the Constitution, agreements with them were in the nature of international treaties and covenants, and disputes arising out of them would not lie in municipal Courts. That principle is given effect to, so far as the Supreme Court's original jurisdiction is concerned, by the proviso to Art. 131 which defines such jurisdiction and, in regard to all Courts and in respect of all proceedings, by Art. 363(1)."

(17) Paragraph 240 of the white paper on Indian States indicates that the intention of excluding the jurisdiction of Courts in certain matters arising out of the treaties, covenants etc., was to preserve the rights, dignities and privileges of the Rulers which had been guaranteed. It says:

"Article 363 has therefore been embodied in the Constitution which excludes specifically the agreements of Merger and the Covenants from the jurisdiction of Courts except in cases which may be referred to the Supreme Court by the President."

Where however the Rulers of the Indian States are themselves not parties to the dispute, the dispute does not become non-justiciable evidently because such a proceeding does not touch the rights privileges and dignities of the Rulers. The emphasis in Art. 363 is on the parties to the proceedings before the Court, and if the Ruler of an Indian State is not a party to such a proceeding, then the jurisdiction of the Court will not be excluded under Art. 363. In this view it is unnecessary to consider the other requirements of Art. 363 which go to bar the Court's jurisdiction.

Since no Ruler of the covenanting States is a party to the present suit, the suit is not barred under Art. 363 of the Constitution and this contention of the appellant is untenable.

(18) Turning to the merits, the respondent's case is that his services were terminated by the Saurashtra State in breach of the guarantee contained in Art. XVI of the Covenant by which the United State of Kathiawar guaranteed either the continuance in service of the permanent members of the public services of each of the Covenanting States on conditions which were not less advantageous than those on which they were serving before the date on which the administration of that State was made over to the Raj Pramukh or the payment of reasonable compensation. Under the said Article, it was open to the appellant State either to continue the servants of the Covenanting States on conditions which were not less advantageous, or not to take them over and, in that event, to pay them reasonable compensation. It was for the appellant to decide whether a certain servant of a Covenanting State should be continued or otherwise and since a large number of such servants were to be considered for that purpose, the appellant obviously did take some time for making its final decision. The respondent, like several others, was one of the unabsorbed personnel and it is a misnomer to say that his services were terminated by the appellant State. It is a case of non-absorption in the service of the Saurashtra State and under the very terms of Article XVI the respondent could at best claim reasonable compensation. Therefore if the appellant decided not to absorb or, to use the expression of Art. XVI, not to continue him in service, that of itself did not amount to a breach of the obligation under Art. XVI. The State had the right of election either to continue him or not to continue him, and the decision not to continue him cannot therefore amount to a wrongful termination of the services. The State's only liability was to pay reasonable compensation in that event, and it is material to note that the respondent himself claims compensation only.

(19) The learned Advocate General has however contended that the respondent really sues for damages for wrongful termination of service, which, he argues, is the same as wrongful dismissal or wrongful removal from service; and he further contends that a servant wrongfully removed from service, cannot claim damages because service is always during the pleasure of the Government and the only remedy open to such a servant is a declaration that the dismissal was wrongful. In our opinion, the first part of this contention is not well founded. In Paragraph 6 of the plaint the respondent avers that the State has ordered his retirement in breach of its obligation to continue him in service until the completion of 60 years. In Paragraph 7 he says that thereby the Government wrongfully terminated his services and he relies upon Art. XVI for reasonable compensation and claims it under that Article. In Paragraph 13 he claims compensation for wrongful termination of services. No doubt the plaint is not happily worded but reading these clauses together it seems plain that the respondent mistakenly calls his non-absorption in service as wrongful termination. However the respondent's grievance is against his non-absorption or non-continuance in service and this is manifest from the fact that he claims compensation, and not damages, and that again on the strength of Art. XVI of the Covenant.

(20) The Advocate General then said that the respondent was taken up in service and was continued for three months and his services were thereafter terminated on the ground that he had reached the age of superannuation, which in the opinion of the Government was 55. The Advocate General therefore urged that the respondent having been taken over by the State he became a servant of the State and that he filled that capacity at time he was made to retire and therefore it is a case of respondent's services being terminated, and he further argued that if such termination, was wrongful, as the respondent himself called it, the suit is clearly one for damages and is therefore incompetent. This entire contention is falacious, because the respondent was not really taken over in the service of the appellant State. He remained on the unabsorbed list and was continued in service pending a final decision of the Government regarding the absorption of the large mass of servants of the Covenanting States. That was both a strenuous and difficult task and the State would take a reasonable time to reach a final decision as to which of the servants of the old covenant in States were to be continued in service. The continuance of the respondent from 16th March 1948 to 29th June 1948 during the transition period therefore did not amount to his absorption in the State service. That being so, the contention of the learned Advocate General that the suit should be treated as one for damages, and for that reason as incompetent is itself unsustainable. In this view it is unnecessary to refer to the various decisions cited on both sides regarding the maintainability or otherwise of a suit for damages brought by a dismissed servant.

(21) The appellant not having continued the respondent in a service its liability to pay reasonable compensation arises and this liability has in fact been accepted by the appellant. By a letter dated 18th March 1949, in reply to the respondent's representation the Additional Secretary of the Home Department of the State stated that Government's Orders dated 4th October 1948 had been passed after full and careful consideration and embodied the decision of the Government as to what it considered reasonable compensation within the meaning of Art. XVI of the Covenant, and that under the circumstances the claim of the respondent for compensation for premature retirement was untenable. The said orders of the 4th October 1948 related to the integration and absorption of the staff of the covenanting States and prescribed, among other things, concessions admissible to persons who voluntarily retired or were selected for release. In accordance therewith the respondent was given three months leave salary and a monthly pension of Rs. 40-13-0, and the question is whether this is reasonable compensation. The respondent's contention is that under the pension and gratuity Rules contained in the 'Dhara' promulgated by the Ruler of the Wadhwan State by 'Tharav' (Resolution No. 29 of Samvat 2004) the age of superannuation for the servants of the Wadhwan State was fixed at 60 years, and that under the said rule he would have continued in service till the age of 60 years and thereby earned salary for five more years and a higher pension. It is admitted that there were no service rules whatever in the Wadhwan State until the above-said Resolution No. 29 of Samvat 2004. It is contended for the appellant that the said Resolution and the Rules made thereunder were in respect of pension and gratuity only, and that they did not prescribe the age of superannuation, but this contention is not correct because R. 5 relates to retirement and says that servants falling under the categories therein mentioned were liable to compulsory retirement on payment of gratuity or pension, and one of these categories is of servants who have completed 60 years of age. Evidently there-

fore the age of superannuation was fixed at 60 years and if these rules were valid then it was a condition of service by which the respondent was governed. It is common ground that this 'Dhara' was a piece of legislation and had the force of law, and if the Ruler of the Wadhwan State had the legislative competence to enact the same then the rules made thereunder will be the conditions of service obtaining at the time when the administration of the Wadhwan State was handed over to the Raj Pramukh.

(22) However the question is whether the Ruler of the Wadhwan State had such legislative competence. Under Art. VI of the Covenant, the Ruler of each covenanting State was to make over the administration of his State to the Raj Pramukh as soon as practicable and in any event not later than the 15th April 1948 and thereupon all rights, authority and jurisdiction belonging to the Ruler were to vest in the United State of Kathiawar and were thereafter exercisable only as provided by the Covenant or by the Constitution to be framed thereunder. The administration of the Wadhwan State was made over to the Raj Pramukh on the 16th March 1948 and it is therefore contended for the respondent that till that date the Ruler of the Wadhwan State had all rights, authority and jurisdiction and it was competent to him to enact the 'Dhara' relating to the service rules, which he did on 3rd February 1948 prior to the making over of the administration. Reliance was also placed on Art. VIII of the Covenant which provides that subject to the provisions of the Covenant and of the Constitution to be framed thereunder, the executive authority of the United State shall be exercised by the Raj Pramukh either directly or through officers subordinate to him, and it was urged that the Raj Pramukh's executive authority in relation to the former Wadhwan State would commence from the 16th March 1948 and not earlier. However the 'Dhara' in question has been enacted in the exercise of the legislative authority of the Ruler of Wadhwan, and Art. VIII therefore becomes irrelevant. The relevant Article is Article IX and the said Article is not subject to the Provisions of the Covenant. Clause (1) therefore provides that a Kathiawar Constituent Assembly in the manner indicated in Sch. II shall be formed as soon as may be practicable. Clause (2) says that it shall be the duty of the said Assembly to frame a Constitution for the United State within the framework of the Covenant and the Constitution of India and providing for a Government responsible to the legislature. Clause (3), which is material, lays down that until a constitution so framed comes into operation after receiving the assent of the Raj Pramukh, the legislative authority of the United State shall vest in the Raj Pramukh, who may make and promulgate Ordinances for the peace and good Government of the State or any part thereof, and any Ordinance so made shall have the like force of law as an Act passed by the legislature of the State. Therefore, until the framing of such a constitution all the legislative powers vested in the Raj Pramukh and it was he alone who had the legislative competence to make the laws for the State by promulgating Ordinances. On the signing of the Covenant, the covenanting States did form part of the United State of Kathiawar and so far as the legislative powers were concerned, these vested in the Raj Pramukh as from 1st February 1948, the date on which he entered upon the duties of his office. The making over of the administration of the various States did naturally take some time but during that time the Rulers of the States were merely in the position of caretakers and were to run the day to day administration till the actual handing over of the administration to the Raj Pramukh. In any event they had no legislative powers to enact any laws, the said power having vested in the Raj Pramukh from the date he entered upon the duties of his office. Therefore as the 'Dhara' in question is promulgated by the Ruler of the Wadhwan State without legislative competence it is altogether invalid. It follows that the conditions of service therein prescribed will not bind the appellant State, and the result therefore is that there was no rule regarding the age of superannuation in the Wadhwan State at or before the time the administration of that State was handed over to the Raj Pramukh. The respondent had therefore no right to be continued in service till the completion of 60 years or for any specified age limit; and even if the appellant State had elected to continue him in service, he could not have insisted on remaining in service till the completion of 60 years. His claim for compensation on the footing that he is entitled to continue in service till the age of 60 and thereby to earn a salary for five years more and a pension on that basis is therefore entirely unsustainable.

(23) It is in the light of these facts that the reasonableness or otherwise of the compensation paid by the appellant to the respondent is to be judged. The learned Judge below has awarded — to the respondent compensation on the footing of the retiring age being 60 years, but as already shown, the respondent could not claim that as the retiring age, and this by itself is a complete answer to the claim for compensation on account of loss of salary.

(24) The learned Judge holds that to give three months salary to servants who were liable to retire at the age of 55 and the same to servants who were liable to retire at the age of 60 was unreasonable, and he further holds that in addition to the three months salary a reasonable compensation ought to have been given to servants who were liable to retire at 60 years. Assuming that this was so, it is impossible to see how this reasonable compensation could have been a sum equivalent to the entire loss of salary caused by retirement before the age of 60 years, and there the learned Judge has erred completely. He has awarded the entire salary on the strength of the decision 'Sundaram v. Chokalingam', AIR (25) 1938 Mad 672, but that was a case of a contract of service for a fixed period and was governed by entirely different considerations. The respondent has here been given three months salary and has been awarded a compensation pension at the rate of Rs. 40-13-0 per month calculated at one fifth of his average pay during the last three years prior to retirement in accordance with Appendix II of Government Resolution No. F. D. 53/48 dated 4th October 1948. Under Art. XVI of the Covenant in the event of his services not being continued the respondent is entitled to reasonable compensation but obviously that did not mean that he was entitled to a full salary for the unexpired period of service taking 60 years as the age of superannuation, nor the pension calculated on that footing, for if the intention had been to compensate for whatever loss a servant of a covenanting State was likely to suffer on account of the non-continuance of his services, then there was no need to provide for payment of 'reasonable' compensation. Assuming for the purpose of discussion, that the rules regarding pension and gratuity made by the Ruler of the Wadhwan State were valid and the respondent could claim the benefits thereof, the Ruler of the Wadhwan State had at all times a right to retire him earlier because the service of all the State servants was during the pleasure

of the Ruler, and the respondent could not have insisted on remaining in service till the age of 60. That right to retire the respondent before the age of 60 was also available to the Saurashtra State, and there is nothing in Article XVI of the Covenant to take away this general right of the State, which always exists. Therefore, there is no point in the contention that the respondent expected to continue in service till the age of 60 and the compensation should be awarded having regard to that consideration. In the event of the Wadhwan State retiring the respondent in June 1948, he having put in twelve years service, he was not eligible for pension and might have received gratuity equivalent to twelve months salary calculated on an average of the last three years salary. The said average comes to Rs. 204-1-0 per month and he would have received Rs. 2,448-12-0 in all by way of gratuity. What the Saurashtra State has granted to him is, in comparison, most liberal and far in excess of what he would have received from the Wadhwan State.

(25) The pension granted to the respondent is reasonable also from another point of view. A permanent servant of the Saurashtra State, whether recruited by the State or absorbed from the Covenanting States, retiring after a service of twelve years like the respondent, is eligible for pension at the same rate at which it has been awarded to the respondent under the pension rules of the Saurashtra Government contained in Government Finance Department Resolution No. 121/48, dated 19th October 1949. The compensation in the shape of three months salary and the compensation pension given to the respondent by the Saurashtra State is thus reasonable compensation. The lower Court's decree awarding the salary for the remaining period of five years, less the three months salary already paid, is thus clearly unsustainable and must be set aside. The respondent is also not entitled to any sum by way of dearness allowance and that part of the claim is even otherwise untenable. Equally untenable is the claim for pension according to the Wadhwan State Pension Rules on the basis of service put in at the retiring age of 60. All the same, we may observe that in calculating the claim for pension, and in assessing it at Rs. 12,600/- at the rate of Rs. 70/- per month on the expectation of a life of fifteen years, after retirement at 60, the respondent has ignored the fact that he has been given pension at rate of Rs. 40-13-0 per month on retirement at the age of 55 years, and properly speaking the respondent should have given credit for the sum which he might have earned as pension at the said rate for twenty years, taking the same expectation of life. The claim for pension, if any, could therefore have been only for the balance. However this is not material in the view we are taking. For the above said reasons, we uphold the lower Court's order rejecting the plaintiff's claim for dearness allowance and pension.

(26) In the result therefore we allow this appeal, set aside the decree of the lower Court and dismiss the suit with costs throughout. The cross-objections fail and are dismissed with costs.

(27) CHHATPAR, J.: I agree.

(28) BAXI, J.: I agree.

R.G.D. *Appeal allowed.*

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(FULL BENCH)

SHAH, C.J.; CHHATPAR AND BAXI, JJ.

Dr. Bhanushanker, L. Joshi, Applicant v. State and another, Opponents.

Criminal Miscellaneous Application No. 53 of 1951, D/- 22-11-1951.

✣*Press (Emergency Powers) Act (1931), S. 7 (1) — Section, if void under Art. 13 (1) of Constitution —Constitution of India, Arts. 13 (1) and 19 (1) (a).*

Section 7 (1) does not lay down any condition within the ambit of which the District Magistrate may exercise the power to require security to be furnished. This power is consequently an unlimited restriction on the fundamental rights. The section is, therefore, repugnant to Art 19 (1) (a) of the Constitution and has become void under Art. 13 (1) after coming into force of the Constitution. (*Paras 7 and 8*)

Anno: Press (Emergency Powers Act), S. 7, N. 1.

T. U. Mehta, for Applicant; C. N. Shah, for Opponents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('50) AIR (37) 1950 S C 124: (51 Cri L J 1514) (Prs 4, 6)

('50) AIR (37) 1950 S C 129: (51 Cri L J 1525) (Pr 4)

BAXI, J.: The petitioner filed a declaration before the District Magistrate, Madhya Saurashtra, as the printer and publisher of a weekly newspaper "Poornima" under S. 5 of the Press & Registration of Books Act (XXV (25) of 1867). The declaration was filed on 7-5-1951. On 10-5-1951 the District Magistrate served an order under S. 7 (1) of the Press (Emergency Powers) Act (XXXIII (33) of 1931) directing the petitioner, who is also a printer and publisher of daily newspaper "Fariad", to deposit security in a sum of Rs. 1,000/- either in cash or in equivalent Central Government securities within 10 days of the order. The order mentions the following grounds viz. (1) that the petitioner had been utilising his daily newspaper "Fariad" for threatening respectable persons by publishing matters against them, (2) that the writings appearing in his newspaper were likely to cause and promote enmity or hatred amongst different classes of the public, (3) that proceedings were instituted against him for contempt of the Court and lastly (4) that the District Magistrate was of the opinion that the petitioner had abused the right of conducting fair journalism. Against this order the petitioner has filed the present petition for a writ declaring that S. 7 (1) of the Press (Emergency Powers) Act had become void under Art. 13 (1) of the Constitution of India as it was inconsistent with the fundamental right of freedom of speech and expression guaranteed to him by Art. 19 (1) (a) of the Constitution. He also prayed for a direction to the opponents not to enforce the order. It was contended on behalf of the opponents that the provisions of the impugned Sub-section imposed only reasonable restrictions on the right and were therefore saved by Art. 19 (2) of the Constitution.

(2) The Press (Emergency Powers) Act, which will hereafter be referred to as "the Act" was enacted to provide for the 'better control' of the press. Under Sub-section (1) of S. 7 the publisher of every newspaper who is required to make a declaration under S. 5 of the Press & Registration

of Books Act, 1867 may be required by the District Magistrate before whom the declaration is made for reasons to be recorded in writing to deposit within ten days of the making of the declaration security to such an amount not exceeding Rs. 1,000/- either in cash or in equivalent securities of the Central Government. Sub-section (2) enacts that if no order is made by the Government forfeiting the security or any portion thereof for three months from the date of the declaration in respect of such newspaper the security is to be refunded to the publisher on his application. By S. 11 (1), it is provided that whoever publishes a newspaper without making the deposit as required by the Magistrate shall on conviction be liable to the penalty to which he would be liable if he had failed to make a declaration under S. 5 of the Press & Registration of Books Act, i.e., a fine not exceeding Rs. 2,000/- or imprisonment of either description which may extend to six months or with both. It is contended that these provisions impose unreasonable restrictions on the petitioner's fundamental right under Art. 19 (1) (a) of the Constitution.

(3) Art. 19 is in the following terms:

"(1) All citizens shall have the right (a) to freedom of speech and expression.

* * *

(2) Nothing in Sub-clause (a) of Clause (1) shall affect the operation of any existing law in so far as it relates to, or prevents the State from making any law relating to, libel, slander, defamation, contempt of Court or any matter which offends against decency or morality of which undermines the security of, or tends to overthrow, the State."

This Sub-clause was substituted by the following Sub-clause by the Constitution (First Amendment) Act of 1951:

"(2) Nothing in Sub-clause (a) of Clause (1) shall affect the operation of any existing law or prevent the State from making any law in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said Sub-clause in the interest of the security of the State, friendly-relations with foreign State, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence."

(4) The order of the District Magistrate is made on 7-5-1951, i.e., before the amendment but it is nevertheless governed by the substituted Sub-clause (2) because S. 3 (1) of the Amendment Act enacts that the said Sub-clause shall be deemed always to have been enacted. The amendment has therefore been given effect from the date of coming into force of the Constitution and must be deemed to be in force from that date. The present petition has therefore to be decided with reference to the newly substituted Sub-clause (2). Assuming however that it is governed by the Sub-clause as it stood before the amendment, it makes no difference in the decision.

(5) The right to publish a newspaper is an essential part of the fundamental right of a citizen to freedom of speech and expression. In 'Romesh Thapper v. State of Madras', AIR (37) 1950 S C 124, Patanjali Sastri, J., observed as follows:

"There can be no doubt that the freedom of speech and expression includes freedom of propagation of ideas, and that freedom is secured by freedom of circulation."

Similarly in 'Brij Bhushan v. State of Delhi', AIR (37) 1950 S C 129, Patanjali Sastri, J., delivering the majority judgment quoted the following passage from Blackstone's Commentaries, Vol. IV, pp. 151-152:

"The liberty of the press consists in laying no previous restraint upon publication and not a freedom from censure for criminal matters when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press."

The petitioner has therefore the undoubted right to freedom of publication of the newspaper free from any restraint. S. 7 (1) of the Act, by empowering the District Magistrate to require the publisher to deposit security, imposes a restraint upon this right because unless the security is furnished the publisher cannot publish his paper on pain of imprisonment and fine. This Sub-section can therefore be upheld only if the restrictions imposed by it are within the legislative limits prescribed by Sub-clause (2) of Art. 19. If the impugned sub-section transgresses these limits, there is no doubt that it must be declared void under Art. 13 (1).

(6) The main argument against the constitutional validity of S. 7 (1) of the Act was that it did not restrict the District Magistrate's power to the objects enumerated in Sub-clause (2) of Art. 19 of the Constitution. The impugned section itself contained no indication for what reasons the Magistrate could require security to be furnished and he could, without breach of its provision, make an order for purposes totally alien to Sub-clause (2) of Art. 19. The Sub-section therefore operates to impose an unreasonable restriction on the petitioner's freedom and consequently after coming into force of the Constitution it could not be upheld. We think that this objection must prevail. The true test of the validity of the provisions of the sub-section is whether it enables the District Magistrate to impose restrictions for purposes not authorised by Art. 19 (2). If it does the provisions are not saved by the Sub-clause. Now the sub-section merely requires that there must be some reasons which in the opinion of the District Magistrate call for an order against the publisher. These reasons need not relate to the purposes mentioned in Art. 19 (2). They may well spring from considerations of policy which may have nothing to do with these purposes. The sub-section is therefore not directed solely against those purposes and enables the District Magistrate to impose restrictions on the publisher which are not authorised by Art. 19 (2). In this connection the following remarks of the Supreme Court in 'Romesh Thapper v. State of Madras', AIR (37) 1950 S C 124, at p. 129 of the report may be quoted:

"(13) Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void. In other words, Cl. (2) of Art. 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to public security is involved, an enactment, which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent."

Section 7 (1) of the Act under consideration does not lay down any condition within the ambit of which the District Magistrate may exercise the power to require security to be furnished. This power is consequently an unlimited restriction on the fundamental rights.

(7) The learned Advocate-General however drew our attention to the provisions of Section 7 (3) of the Act empowering the Government to require the publisher to deposit security. According to the learned Advocate-General, the power of the Government to require security was limited to cases where the newspaper contained matters of the nature described in Section 4 (1) of the Act. He argued that this Section gave an indication of the limits and conditions within which the District Magistrate has to exercise his powers under Section 7 (1), but, in our opinion, the two Sections appear to be quite independent of each other in this respect and the District Magistrate is not necessarily bound to pass orders under Section 7 (1) in those cases only which satisfy the conditions laid down in Section 7 (3).

(8) We therefore hold that Section 7 (1) is repugnant to Art. 19 (1) (a) of the Constitution and has become void under Art. 13 (1) after coming into force of the Constitution. The opponents accordingly are directed not to enforce the order. The opponents shall pay the petitioner the cost of the petition.

(9) SHAH, C. J.: I agree.

(10) CHHATPAR, J.: I agree.

V.R.B. *Order accordingly.*

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SPECIAL BENCH

SHAH, C. J. CHHATPAR AND BAXI, JJ.

Jayantilal Laxmishanker, Applicant v. The State of Saurashtra and another, Opponents.

Civil Misc. Appln. No. 18 of 1951, D/- 22-1-52.

† (a) Tenancy Laws—Saurashtra Gharkhed, Tenancy Settlement and Agricultural Lands Ordinance (XLI (41) of 1949), S. 35 — Section 35 is unconstitutional and void — Constitution of India, Art. 13(1), 19(1) (f), (g) and (5), 31A.

Section 35 of the Saurashtra Gharkhed Tenancy Settlement and Agricultural Lands Ordinance, 1949, contravenes the fundamental right of a citizen to hold property and to practice the occupation or business of a land-holder guaranteed by Article 19(1)(f) and (g) of the Constitution of India, inasmuch as under it a holder of a land can be deprived of its management and incidentally of his occupation and business of an agriculturist. It does not come within the permissive legislation under Article 19 (5) of the Constitution and therefore is declared void under Article 13 (1) of the Constitution. AIR 1950 S C 211, Applied. Case law discussed. (Paras 8, 10, 15)

The impugned legislation does not come within Article 31A of the Constitution and is not saved by that Article. (Para 14)

The Ordinance does not define what is 'full and efficient use of the land for agriculture. No standard has been laid down in any part of the ordinance nor does the Ordinance prescribe the pre-existing circumstances of necessity compelling the exercise of the power of taking over management. The land-holder may be making a reasonable, fair and efficient use of his land according to his means and circumstances in which he is placed. Yet he can be deprived of the enjoyment of his land for years, if the executive thinks it necessary to ensure the full and efficient use of the land for agriculture. The degree of full and efficient use may vary according to the circumstances of each case and even the fullest and most efficient use of the land according to the ordinary notions may still be capable of fuller and more efficient use from a higher standard and it is left entirely to the executive officer of the government to decide the necessity of ensuring the full and efficient use of land for agriculture. (Para 10)

It is in the interests of the general public that the citizen should have reasonable security to hold his property, so that he may develop it and make it profitable for himself and the society in general. Any legislation which denies him such security would neither be reasonable nor in the interests of the general public. (Para 11)

No circumstances have been laid down in the impugned legislation from which a compelling necessity of depriving a person of his property can be spelled out. The law under which the executive can encroach upon the fundamental rights guaranteed by the Constitution so easily and for a purpose so vague and indefinite without laying down the circumstances of compelling necessity cannot be considered either as reasonable or in the interests of the general public. (Para 11)

There is no provision in the Ordinance of giving a land-holder whose estate is to be taken under management any opportunity of being heard. The notification is declared to be conclusive. There is no provision for appeal over the action of the Government nor is there any remedy in a civil Court to challenge the order, as the jurisdiction of civil Courts is expressly barred by Section 76 of the Ordinance. In short, by a stroke of the pen of the executive stating that it is necessary for the full and efficient use of the land for agriculture, whatever it may mean in practice, and without any prerequisite of an inquiry or any opportunity of being heard, land-holder can be deprived of his valuable fundamental right to hold property conferred by the Constitution. (Para 12)

(b) Constitution of India, Art. 19(5) — Law giving authority to executive to encroach on fundamental right — Test of reasonableness — Procedural part of law.

It cannot be laid down as an inflexible rule that every law which gives authority to the executive to encroach on a fundamental right must necessarily give an opportunity to the person concerned to be heard before any order is made to his prejudice. The question will depend on the nature of the legislation and the extent to which the fundamental right is contravened. A legislation providing for an emergency like a sudden outburst of an epidemic or a natural calamity like an earthquake or a flood may defeat its purpose if it lays down an elaborate enquiry with opportunity of being heard as a pre-requisite to taking action in the interests of the general public. On the other hand where there is no compelling necessity to act urgently, the legislation should ordinarily pre-

cribe a procedure observing the principles of natural justice which require that a person should not be condemned or deprived of his rights without an opportunity of being heard. AIR 1950 S C 222; AIR 1951 Mad 419; AIR 1951 Orissa 86 and AIR 1951 Bom 337, Ref.

(Para 13)

H. B. Shukla and M. D. Vyas, for Applicant; C. N. Shah, Advocate-General and A. R. Baxi, Advocate-General with B. R. Joshi, Assistant Government Pleader, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('50) AIR 1950 S C 222: (1950 S C R 621) (Pr 12)

('50) 1950 S C R 759: (AIR 1951 S C 118) (Pr 11)

('50) AIR 1950 S C 211: (52 Cri L J 550 S C) (Pr 10)

('51) 53 Bom L R 499: (AIR 1951 S C 41) (Pr 11)

('51) 53 Bom L R 142: (AIR 1951 Bom 337: 52 Cri L J 897) (Pr 12)

('51) AIR 1951 Cal 85: (55 Cal W N 433) (Pr 11)

('51) AIR 1951 Mad 419: (ILR (1951) Mad 571) (Pr 12)

('51) AIR 1951 Orissa 86: (16 Cut L T 209) (Pr 12)

('50) AIR 1950 Pat 322: (52 Cri L J 610 F B) (Prs 10, 11)

CHHATPAR, J. (On behalf of himself and Shah, C.J.:) This is an application under Article 226 of the Constitution of India for certain writs. The applicant claims to be the Ijardar of certain lands in the village known as Juvanpur, formerly under Kalavad Taluka in Nawanagar State, now in Halar District of the State of Saurashtra under a Lekh dated 4th of June 1936, executed in favour of his father Laxmishanker Ochavji by His Highness the Jam Saheb of the former State of Nawanagar. The said Ijara was for a period of thirty years commencing from Samvat year 1992. Apart from the land covered by the Ijara, the applicant possessed by purchase other pieces of land in the same village of Juvanpur. It appears from the Lekh that the lands covered by it were in an undeveloped condition at the time; the applicant claims that through his incessant efforts and considerable investment he made the lands fertile and the village prosperous.

(2) In about the beginning of the year 1948, the Rulers of the major States of Kathiawar entered into a Covenant for the formation of the United State of Kathiawar, now known as the State of Saurashtra under the present Constitution of India integrating their territories and administrations, the minor States known as Talukas, Estates, Thanas, etc., similarly their territories and administrations into the United State of Kathiawar. Under the terms of the Covenant the new State took over the assets and liabilities of the Covenanting States. Clause 1 (c) of Article VI of the Covenant runs as under:

"All the assets and liabilities of the Covenanting State shall be the assets and liabilities of the United State of Kathiawar."

One of the States which joined in the formation of the United State of Kathiawar was the Nawanagar State and it is claimed that the rights and liabilities under the aforesaid Lekh dated 4th June 1936 became the rights and liabilities of the United State of Kathiwar and now of the State of Saurashtra.

(3) It is alleged that the Government of Saurashtra and their Officers interfered with the applicant's rights over the village of Juvanpur inasmuch as the applicant was restrained from exercising his rights as Ijardar under the Lekh as also in respect of his other lands to collect his crop share from his sub-lessees, cultivators as per terms and conditions agreed between him and the sub-lessees and cultivators. It appears that in exercise of powers under Ordinance No. XXVI of 1948, which was promulgated for the settlement of disputes about rent between jamindars and tenants, the Revenue authorities interfered and took possession of the crops grown on the lands of the applicant and for this purpose a manager was appointed.

(4) The applicant alleges that such orders of the appointment of a Manager and taking over the crops were issued orally and all objections raised by the applicant were brushed aside. So that virtually his rights over his lands were, as he states, de facto confiscated.

(5) Thereafter the Saurashtra Government Ordinance No. XLI of 1949 popularly now known as the Gharkhed Ordinance intended to provide for settlement of disputes between landholders and their tenants and other matters. Section 2 of this Ordinance defines a landholder in the following terms:

"'Landholder' means a Zamindar, Jagirdar, Girasdar, Talukdar, Bhayat, Bhagdar, Mulgirasia, Barkhalidar, Inamdar, Jiwaidar or any person who is a holder of land or who is interested in land and whom the Government has declared on account of the extent and value of the land or his interests therein to be a landholder for the purposes of this Ordinance."

Section 35 of the Ordinance which is the most important piece of legislation to be considered in the present case reads as under:

"Notwithstanding any law for the time being in force, usage or custom or the terms of contract or grant, when the Government is satisfied that on account of the neglect of a landholder or disputes between him or his tenants, the cultivation of his estate has seriously suffered, or when it appears to the Government that it is necessary for the purpose of improving the economic and social condition of peasants or ensuring the full and efficient use of the land for agriculture to assume management of any landholder's estate, a notification announcing such intention shall be published in the official gazette and the Collector shall cause notice of the substance of such notification to be given at convenient place in the locality where the estate is situated. Such notification shall be conclusive."

The next section provides for the publication of the Notification under Section 35 and says that the estate in respect of which the Notification has been published shall, so long as the management continues, vest in the Government. It also provides for the appointment of a Manager to be in charge of the estate taken under management. The next Section 37 lays down the consequences of the publication of the Notification and 'inter alia' disable the holder of the estate taken under management from entering into any contract involving the estate in pecuniary liability, from mortgaging, charging, leasing or alienating the property under the management or any part thereof and collecting rents and profits arising therefrom. The Section declares that so long as the management continues, no person other than the Manager shall be competent to mortgage, charge, lease or alienate such estate or any part thereof. The

succeeding Sections 38 to 51 lay down the powers of the Manager, and provide for costs of management, inviting of claims against the estate and determination of debts and liabilities with power to rank debts and fix interest and formation of schemes for liquidation, etc. Section 52 states that the Government, when it is of opinion that it is not necessary to continue the management of the estate, may by order published in the Official Gazette, direct that the said management shall be terminated. On the termination of the said management, the estate is to be delivered into the possession of the holder, or if he is dead, to any person entitled to the said estate together with any balances which may be due to the credit of the said holder. All acts done or purporting to be done by the Manager during the continuance of the management of the estate are binding on the holder or any person to whom the possession of the estate is delivered. In short this Chapter of the Gharkhed Ordinance permits Government to take over the management of the estate of any landholder who either falls within the description specifically mentioned in the Ordinance or who is declared by the Government to be a landholder by an appropriate order under the powers reserved in the Act. The effect of the order of management is to deprive the landholder for the time being practically of all rights as an owner of the property. The Act makes no provision of giving any opportunity to the landholder of showing cause why his estate should not be taken under management, nor does an appeal from the decision of the Government lie to any Judicial or quasi-judicial tribunal. Further the ordinance specifically bars the jurisdiction of Civil Courts.

(6) In pursuance of powers vested in the preceding discussed provisions of the Gharkhed Ordinance the Government by two notifications, dated 7th of August 1950, declared the present applicant to be a landholder for the purposes of the Ordinance and issued an order of its intention to assume the management of the said village of Juvanpur and ordered that the management then subsisting over the village, which was presumably the management relating to the taking over of the crops under Ordinance No. XXVI of 1948, was to be continued with effect from the date of the notifications. These two notifications are reproduced below:

1. "Rajkot, 4th August 1950. No. RD/IV/6 WHEREAS the village Juvanpur in Kalawad Taluka is with Shri Jayantilal Laxmishanker Joshi as Ijardar under Lekh, dated 4th June 1936, passed by the former Nawanagar State and whereas it is expedient to regulate his status in his relations with the tenants of the village: NOW, THEREFORE, in exercise of the powers conferred by the Clause (1) of Section 2 of the Saurashtra Gharkhed Tenancy Settlement and Agricultural Lands Ordinance 1949 (XLI of 1949), the Government of Saurashtra is pleased to declare the said Ijardar Shri Jayantilal Laxmishanker Joshi, on account of the extent and value of the lands comprised in the said village, to be a 'landholder' for the purposes of the said Ordinance."

* * * *

2. "No. RD/IV/6, WHEREAS, under Government Notification in the Revenue Department No. RD/IV/6, dated 4th August 1950, Shri Jayantilal Laxmishanker Joshi, Ijardar of village Juvanpur under the Kalavad Taluka, has been declared to be a landholder (hereinafter referred to as the 'said landholder');
AND WHEREAS, it appears to the Government that it is necessary for ensuring the full and efficient use of the land in the village Juvanpur to assume management of the village Juvanpur: NOW THEREFORE, in pursuance of Section 35 of the Saurashtra Gharkhed Tenancy Settlement and Agricultural Lands Ordinance, 1949 (XLI of 1949), the Government of Saurashtra is pleased to announce its intention to assume management of the said village and to order that the management as present subsisting over the village shall with effect from the date of this notification continue under Section 35 ibid.'

By order, etc.,
(Sd) T. L. SHAH,
Secy. to Govt., of Saurashtra,
Revenue Department."

On 26th of January 1950, the Union of India was formed into which was merged the State of Saurashtra. Part III of the Constitution of India lays down fundamental rights. Article 13, Clause (1) of this Part states:

"All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the exent of such inconsistency, be void."

Article 19, Clause (1) (f) confers on the citizens of India the fundamental right to acquire, hold and dispose of property and Clause (g) the right to practice any profession or to carry on any occupation, trade or business. The fundamental rights can, however, be curtailed by any law imposing reasonable restrictions in the interest of the general public as laid down by Clauses 5 and 6 of Article 19.

(7) The applicant claims that the provisions of the Gharkhed Ordinance, under which his estate has been taken under management by the two notifications reproduced above, are void 'inter alia' on the following grounds:

(a) That the Ordinance in question is bad for want of the assent of the President of India;

(b) That the relevant portions of the Ordinance and consequently the Notifications issued thereunder are in violation of the fundamental rights of the citizens guaranteed by the Constitution of India and they do not come within the permissible legislation providing reasonable restrictions in the interest of the general public;

(c) That the same are contrary to the terms of the Covenant entered into by the Rulers of the former States of Kathiawar for the formation of the State of Saurashtra which terms, the applicant alleges, are guaranteed by the Government under the Covenant and also recognised under the Constitution of India;

(d) That the legislation in question is discriminatory and contravenes Article 14 of the Constitution.

The applicant further contends that the definition of the word "landholder" gives power to the executive authorities to declare a person owning land a landholder and this power is in the nature of legislative (function (?)) delegation of which to the executive is illegal. He also contends that the action of the Government in taking over management amounts to acquisition under Article 31 (2) of the Constitution, as the applicant is deprived practically of all the rights of ownership over his estate Such legislation without making any provision of compensation is void. The above in substance are the grounds of the application; the applicant prays for a declaration that the relevant portions of the Gharkhed Ordinance and the Notifications issued thereunder are void and

for the consequent writs to the opponents restraining them from interfering with his fundamental rights over his property, etc.

(8) We have heard the learned Advocate for the applicant as also the learned Advocate-General at length on all the aspects of the case and considered the elaborate arguments advanced before us. We are of the opinion that the particular portion of the Gharkhed Ordinance under which management has been assumed, is in violation of the fundamental rights guaranteed by the Constitution and does not come within the permissible legislation restricting the exercise of the fundamental rights. We do not think it necessary to consider other grounds of objections which are urged before us.

(9) The Government have purported to act under that portion of Section 35 of the Gharkhed Ordinance which may be stated as under:

> "Notwithstanding any law for the time being in force, usage or custom or the terms of contract or grant ..... when it appears to the Government that it is necessary for ..... ensuring the full and efficient use of the land for agriculture to assume management of any landholder's estate, a notification announcing such intention shall be published, etc."

We will confine our decision as to the validity of this portion of Section 35 reproduced above under which the notification of the assumption of managements has been issued.

(10) Now there is no doubt that the above provision of law is a violation of the fundamental right to hold property and to practice the occupation or business of a landholder inasmuch as under it a holder of a land can be deprived of its management and incidentally of his occupation and business as an agriculturist. We have, however, to consider whether this law comes within Clauses 5 and 6 of Article 19 of the Constitution of India as prescribing reasonable restrictions in the interest of the general public. This question may be considered from two aspects firstly from the intrinsic or the substantive nature of the law and secondly whether the law imposing the restriction prescribes a procedure according to the natural principles of justice. The latter aspect has been laid down as a relevant consideration, more than once by the High Courts of India following the decision of the Supreme Court in the case of 'DR. N. B. KHARE v. THE STATE OF DELHI', AIR (37) 1950 S C 211, wherein Kania, C. J., observed:

> "Clause (5) of Article 19 must be given its full meaning. The question which the Court has to consider is whether the restrictions put by the impugned legislation on the exercise of the right are reasonable or not.....The law providing reasonable restrictions on the exercise of the right conferred by Article 19 may contain substantive provision as well as procedural provisions. While the reasonableness of the restrictions has to be considered with regard to the exercise of the right, it does not necessarily exclude from the consideration of the Court the question of reasonableness of the procedural part of the law."

As regards the first aspect, whether this piece of legislation could or could not be considered as reasonable restriction, I may refer to the case of 'BRAJNANDAN SHARMA v. THE STATE OF BIHAR', AIR (37) 1950 Pat 322, where a Full Bench of the Patna High Court held:

> "The Courts do not apply any subjective test. There can be an objective test of reasonableness, and that is what the Courts apply. They do not ask themselves, whether they as individuals, feel satisfied that the restrictions are reasonable. But, would that ficitious individual, "the reasonable man", that is to say, the normal average man, regard them as reasonable? That is a well-recognised legal means of examining the question of reasonableness and it is essentially an objective test."

Bearing these two principles in mind as regards the interpretation of the provision of law under consideration both from its substantive and procedural aspects, let me scrutinize what it purports to lay down. It says that when it appears to the Government that it is necessary for ensuring the full and efficient use of the land for agriculture to assume management of any landholder's estate, a notification announcing such intention shall be published and such notification shall be conclusive and shall have the effects which are summarised above. The Ordinance does not define what is 'full and efficient use' of the land for agriculture. No standard has been laid down in any part of the ordinance nor does the Ordinance prescribe the pre-existing circumstances of necessity compelling the exercise of the power of taking over management. A landholder may according to the ordinary notion be making full and efficient use of his land, nevertheless if it appears to the executive officer of the Government invested with powers in this behalf that it is necessary for ensuring full and efficient use of the land for agriculture, the landholder may be deprived of the management of the land and may be reduced to the position of a mere spectator as regards his property. The entire management devolves upon the manager and the landholder is disabled from entering into any contract in relation to his property or recovering rents and profits thereof. Further the law does not prescribe as a preliminary to assumption of management any inquiry whether the landholder has in fact failed to make the full and efficient use of his land or whether agriculture has suffered to any extent by any neglect on his part. The landholder may be making a reasonable, fair and efficient use of his land according to his means and circumstances in which he is placed. Yet he can be deprived of the enjoyment of his land for years, if the executive thinks it necessary to ensure the full and efficient use of the land for agriculture. The degree of full and efficient use may vary according to the circumstances of each case and even the fullest and most efficient use of the land according to the ordinary notions may still be capable of fuller and more efficient use from a higher standard and it is left entirely to the executive officer of the Government to decide the necessity of ensuring the full and efficient use of land for agriculture.

(11) Now I have to judge whether this piece of legislation should be considered as reasonable and in the interests of the public. In this connection, I may refer to the following remarks of Banerjee, J., in the case of 'SUBODH GOPAL v. BEHARI LAL', AIR (38) 1951 Cal 85 at p. 87:

> "The right acquired by the subject of a Government under existing laws is sacred. The supreme duty of the Government is to protect it. Any needless interference with the right is a positive evil and injury .....
>
> "The Legislature must have power to make such changes in the law as social or political condition requires. Any denial of such power would reduce us to a state of stagnation and immobility. Yet unless there is a compelling necessity, the Legislature cannot make any law mischievously affecting the rights acquired by the subjects. If the Legislature at its sweet will and pleasure could interfere with such right, people would have no incentive to acquire property or work

for it. For, if a man cannot keep what he has rightly acquired, what should he work for, what should he strive for? Any needless act on the part of the Legislature produces a general sense of insecurity and consequent inactivity in individuals who compose the nation, leading ultimately to its degradation. The Government therefore must be very cautious in passing a law which takes away vested rights. If there is a compelling necessity, the Legislature can pass such law, but then it must be for doing the greatest good to the greatest number."

It is in the interest of the general public that the citizen should have reasonable security to hold his property, so that he may develop it and make it profitable for himself and the society in general. Any legislation which denies him such security would neither be reasonable nor in the interests of the general public. The Supreme Court in the case of 'CHARANJITLAL v. THE UNION OF INDIA', 53 Bom L R 499, cited before us considered the validity of an enactment to take over the administration of a Spinning and Weaving Mill belonging to a limited company qua the rights of a shareholder of the Company. Mukherjea, J., in delivering the judgment at page 518 of the Report observed:

"I do not think that there has been any restriction on the rights of a shareholder to hold, acquire or dispose of its share by reason of the impugned enactment and consequently Art. 19 (1) (f) of the Constitution is of no assistance to the petitioner. In this view, the other point does not arise for consideration, but I may state here that even if it is conceded for argument's sake that the disabilities imposed by the impugned legislation amount to restrictions on proprietary rights, they may very well be supported as reasonable restraints imposed in the interests of general public, viz., to secure the supply of a commodity essential to the community and to prevent a serious unemployment amongst a section of the people. They are, therefore, protected completely by Cl. (5) of Art. 19."

In the case of 'CHINTAMANRAO v. THE STATE OF MADHYA PRADESH', 1950 SCR 759, the Supreme Court had occasion to consider the validity of the Central Provinces and Berar Regulation of Manufacture of Bidis (Agricultural Purposes) Act, 1948, which authorised the Deputy Commissioner by notification to fix a period to be an agricultural season with respect to such villages as may be specified by him and by an order prohibit the manufacture of bidis during the agricultural season within the limits of such villages. The Act provided that no person residing in a village specified in such order should during the agricultural season engage himself in the manufacture of bidis, and no manufacturer should during the said season employ any person for the manufacture of bidis. Mahajan J., in delivering the judgment observed:

"The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, that is, the choice of course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Art. 19(1)(g) and the social control permitted by Cl. (6) of Art. 19, it must be held to be wanting in that quality."

It was argued on behalf of the Government of Madhya Pradesh in that case that the proper judge of the reasonableness of the restrictions imposed by the statute, was the Legislature and that Legislature alone knew the conditions prevailing in the State; it alone could say what kind of legislation could effectively achieve the end in view and would help in the grow more food campaign and would help for bringing in fallow land under the plough and that the Supreme Court could not judge by its own yardstick of reason whether the restrictions imposed in the circumstances of the case were reasonable or not. Repelling this argument, Mahajan J., observed:

"This argument runs counter to the clear provisions of the Constitution. The determination by the legislature of what constitutes a reasonable restriction is not final or conclusive; it is subject to the supervision by this Court. In the matter of fundamental rights, the Supreme Court watches and guards the rights guaranteed by the Constitution and in exercising its functions it has the power to set aside an Act of the Legislature if it is in violation of the freedoms guaranteed by the Constitution. We are therefore of opinion that the impugned statute does not stand the test of reasonableness and is therefore void."

In the present legislation under consideration, no circumstances have been laid down from which a compelling necessity of depriving a person of his property can be spelled out. The law under which the executive can encroach upon the fundamental rights guaranteed by the Constitution so easily and for a purpose so vague and indefinite without laying down the circumstances of compelling necessity cannot be considered either as reasonable or in the interests of the general public. I may also refer to the case of 'BRAJNANDAN SHARMA v. THE STATE OF BIHAR', AIR (37) 1950 Pat 322 (FB), wherein Meredith C. J., observed as under:

"Turning now to the question of fact whether the impugned provision imposes only reasonable restrictions, the answer must, I think, be in the negative, for the power of restriction contained in the provision is based, not on any reasonable grounds, but upon the satisfaction of some individual who, so far as the wording of the Act is concerned, is completely amorphous; and the provision is in such terms that it is not open to the Court to examine the reasonableness or otherwise of orders passed. Upon the terms of the Act, all that the Court can inquire into is the existence of the satisfaction. Quite clearly, such a provision might conceivably be used merely to exclude political opponents, or as is suggested in the present case, (I do not mean to say I accept the suggestion. I am not considering it) to favour one of two rival Trade Unions and suppress the other. A law which enables such things to be done is not, in my judgment, a reasonable law. There can be no presumption that an executive official will always act reasonably. There may be presumption that he will act bona fide; but that is a different thing. The test is, in my opinion, not what is actually done under the law, but what the law enables to be done. If the law enables orders to be passed which are unreasonable, and yet are consistent with its terms, then that cannot be called a law operating to impose only reasonable restrictions. I use the word 'only' advisedly because it appears to me that if the law enables unreasonable action in any case, then it cannot be saved by Art. 19(5). In my opinion, a law to satisfy the criterion imposed by Art. 19(5) must be so framed as to leave it open to the Courts to apply the objective test of reasonableness to its operation. This law is not so framed."

(12) Considering the procedural aspect of the law, there is no provision in the Ordinance of giving a landholder whose estate is to be taken under management any opportunity of being heard. The notification is declared to be conclusive. There is no provision for appeal over the action of the Government nor is there any remedy in a civil Court to challenge the order, as the jurisdiction of civil Courts is expressly barred by S. 76 of the Ordinance. In short, by a stroke of the pen of the executive stating that it is necessary for the full and efficient use of the land for agriculture, whatever it may mean in practice, and without any pre-requisite of an inquiry or any opportunity of being heard, a landholder can be deprived of his valuable fundamental right to hold property conferred by the Constitution. I, however, refrain from giving a definite decision on this aspect of the question whether by reason of the absence of any provision for inquiry or giving the land-holder any right of being heard before assumption of management or after, the law under consideration is bad. The procedural aspect would lead me to the consideration whether in dealing with property rights of the citizen to his prejudice the Legislature should provide some sort of an inquiry whether administrative, judicial or quasi-judicial as a reasonable safeguard of the abuse of the power by the executive. The question is not entirely free from controversy. The Bombay High Court in 'In re: SHANTABAI RANI BENOOR', 53 Bom. L R 142, held that as S. 9 (1) of the Bombay Prevention of Prostitution Act, 1923, failed to provide for a reasonable opportunity being given to the person affected by it to be heard in his or her defence, it was void as it imposed an unreasonable restriction upon the fundamental rights of the citizen. The Madras High Court in 'EBRAHIM SAHEB v. REGIONAL TRANSPORT AUTHORITY, TANJORE', AIR 1951 Mad 419, at p. 421 observed:

"Though it may be difficult to define exactly the principles of natural justice it is now firmly established that any order passed against a person that is to say to his detriment, by any quasi-judicial body contravenes the canons of natural justice if it was passed without notice to him."

while the Orissa High Court in the case of 'ISMAIL v. STATE OF ORISSA', AIR 1951 Orissa 86 held:

"In considering the reasonableness of restrictions contemplated by Art. 19(5) of the Constitution, a Court has to consider whether the fundamental principles of natural justice, which require that no party ought to be condemned or to have a decision given against him unless he has been given a reasonable opportunity of putting forward his case before an impartial tribunal, have been contravened."

In that case Ray C. J., observed:

"The essentials of procedure, in the minimum, are essentials of notice, opportunities to be heard and a tribunal. Essential of notice requires to apprise the victim of the cause against him in order to afford him sufficient opportunity to prepare and to make his answer. Opportunity to be heard is the second essential of procedure established by law. To condemn without hearing is repugnant to natural justice. Any procedure which does not guard against this requirement is no procedure by law. The essentials of such opportunities do not, however, consist in any particular form or method of hearing. All that is required is a reasonable opportunity to be heard. The opportunity does not guarantee a person a right to an appeal. One hearing is all that is required. Tribunal as the third essential of procedure, does not necessarily mean a judicial tribunal. Any impartial will meet the requirement."

The Supreme Court in the case of the 'PROVINCE OF BOMBAY v. KHUSHALDAS S. ADVANI', AIR (37) 1950 SC 222, considered the powers of the High Court to issue a writ of certiorari and dealt with an order of requisition of land for a public purpose under the Bombay Land Requisition Ordinance of 1947 and held:

"Because an executive authority has to determine certain objective facts as a preliminary step to the discharge of an executive function, it does not follow that it must determine those facts judicially. When the executive authority has to form an opinion about an objective matter as a preliminary step to the exercise of a certain power conferred on it, the determination of the objective fact and the exercise of the power based thereon are alike matters of an administrative character and are not amenable to the writ of certiorari."

A distinction was drawn in that case between administrative or ministerial orders on the one hand and judicial or quasi-judicial functions on the other. But the question of the validity of the Land Requisition Ordinance was not considered on the ground whether the law did or did not contain a procedure affording an opportunity to the person whose rights were prejudiced, to be heard.

(13) It is not necessary for me, however, to give a decision on this aspect of the case, as I hold that the substantive nature of the impugned law imposing restriction on the fundamental rights cannot be considered reasonable or in the interests of the general public. I, however, venture to express my opinion that it cannot be laid down as an inflexible rule that every law which gives authority to the executive to encroach on a fundamental right must necessarily give an opportunity to the person concerned to be heard before any order is made to his prejudice. The question will depend on the nature of the legislation and the extent to which the fundamental right is contravened. A legislation providing for an emergency like a sudden outburst of an epidemic or a natural calamity like an earthquake or a flood may defeat its purpose if it lays down an elaborate enquiry with opportunity of being heard as a pre-requisite to taking action in the interests of the general public. On the other hand where there is no compelling necessity to act urgently, the legislation should ordinarily prescribe a procedure observing the principles of natural justice which require that a person should not be condemned or deprived of his rights without an opportunity of being heard.

(14) There is one further point to which I may refer. During the pendency of the application, the Constitution of India was amended by insertion of Art. 31(A) and other Articles and such amendments have been given retrospective effect from the date of the coming into force of the Constitution. The applicant consequently craved leave to amend his petition not only challenging the validity of the amendments but also on the ground that the present impugned legislation did not come within the purview of Art. 31(A), which reads as under:

"31A.: 'Saving of laws providing for acquisition of Estate, etc.' (1) Notwithstanding anything in the foregoing provisions of this Part, no law providing for the acquistion by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes

away or abridges any of the rights conferred by, any provisions of this Part:

Provided that where such law is a law made by the Legislature of a State, the Provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

(2) In this Article,

(a) the expression 'estate' shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any 'jagir, inam or muafi' or other similar grant;

(b) the expression 'rights', in relation to an estate shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder or other intermediary and any rights or privileges in respect of land revenue.'

We did not pass any orders on this amendment application, but we did call upon the Advocate General to make his submission as to what he had to say. We heard both parties on the question. The learned Advocate General has frankly admitted that the impugned legislation does not come within the purview of Art. 31(A) of the Constitution of India. Consequently, we have refrained from considering this question.

(15) In conclusion, holding as I do that the impugned law, which is part of S. 35 of the Gharkhed Ordinance, contravenes the fundamental right of property guaranteed by the Constitution and does not come within the permissive legislation under Cl. (5) of Art. 19 of the Constitution, I declare this provision of law to be void under Art. 13(1) of the Constitution of India and issue a direction to the opponents prohibiting them and their officers from taking any action for enforcement of any order under that law and a further direction to restore management of the estate to the applicant. The applicant will have his costs of this application from the opponents, who will bear their own cost.

(16) BAXI J.: I agree.

K.S. Application allowed.

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SHAH, C. J. AND CHHATPAR, J.

Maganlal Motiram, Applicant v. Jamnagar Borough Municipality and another, Opponents.

Civil Misc. Appln. No. 26 of 1951, D/- 28-8-51.

(a) Municipalities — Bombay Municipal Boroughs Act (18 of 1925) (as applied to Saurashtra), Ss. 35 (12), 58 — Rules under S. 58, R. 25 — Appointment to office carrying salary of more than Rs. 150/- P. M. — Applicant not recommended by Public Service Commission—Resolution by Municipality appointing applicant on probation—Later resolution confirming appointment before expiry of probationary period — Meeting attended by less than requisite number — Resolution confirming appointment is illegal.

The applicant was appointed on probation to an office in a Municipality carrying a salary exceeding Rs. 150 p. m. by a resolution of the Municipality. The appointment was confirmed before the expiry of the period of probation by a resolution of the Municipality passed at a meeting at which only 14 out of 35 councillors were present. It was admitted that the applicant was not a person recommended by the Public Service Commission:

Held (i) that in view of the mandatory provisions of Rule 25 of the rules framed under Section 58 (f), the confirmation of the applicant on a permanent basis was illegal. (Para 6)

(ii) That the modification of the resolution appointing the applicant on probation, by a later resolution putting an end to the probationary period was illegal, in view of Section 35 (12), as only 14 councillors were present. (Para 7)

(b) Municipalities — Bombay Municipal Boroughs Act (18 of 1925) (as applied to Saurashtra), S. 34 (5) (b) — Appointment on probation — Applicability.

The words "no such officer shall be removeable from office, reduced or suspended" in Cl. (b) of sub-section (5) of Section 34 apply to an officer whose appointment is made unconditionally, although such appointment may be on temporary or permanent basis. A temporary appointment stands on a different footing from an appointment on probation. In the first case, the appointment is simply terminable by lapse of time, while in the other the appointment is not complete but subject to the condition as to the applicant's satisfying the appointing authority as to his worth and competency. The provision therefore will not apply in the case of an appointment on probation. (Para 9)

T. U. Mehta, for Applicant; C. N. Shah, for Opponents.

CHHATPAR J.: This is an application for a writ of Mandamus and other reliefs. The applicant was appointed Engineer of the Jamnagar Borough Municipality, constituted under the Bombay Municipal Boroughs Act, 1925, as adapted and applied to the State of Saurashtra, by a Resolution of the Municipality dated 10th July, 1950. The terms of his appointment were communicated to the applicant by a letter dated 11th July, 1950, wherein it was stated that the Municipality had decided to appoint him as Engineer on six months probation from the date he joined duties in the grade of Rs. 185-15-320 E. B. 20-460 on Rs. 360/- plus dearness allowance plus Rs. 60/- conveyance allowance. The applicant took charge of his office on 11th August 1950. It seems that at the time of his appointment the applicant was serving under the Madhya Pradesh Government as an Assistant Town Planning Officer under a contract for a period of five years, which was to expire on 19th April 1954. At the time of the passing of the resolution by the Jamnagar Borough Municipality he was on leave. It also appears that the Madhya Pradesh Government was not inclined to extend his leave. On 27-8-50, the applicant in order to make his service with the Jamnagar Municipality certain and permanent asked it to confirm his appointment putting an end to the period of probation much before its expiry or to discharge him. The question came before the Standing Committee, who passed a resolution on 29-8-50 recommending to the General Body for the applicant's confirmation and on the very next day the meeting of the General Body of the Municipality was convened and at this meeting the General Body purported to confirm the applicant. In view of this, it appears, the contract between the applicant and the Madhya Pradesh Government was cancelled by mutual consent. It would thus be seen that within a few days of his taking charge, the Managing Committee as also the General Body of the Municipality rushed through their resolutions con-

firming the applicant curtailing the period of probation. The total strength of the Municipality is 35 councillors. At the meeting of 30-8-50, 14 councillors were present when the resolution confirming the applicant was passed.

(2) It appears that some time after these proceedings, the propriety of the applicant's confirmation was questioned and the matter came before the General Body on 16-2-51. 20 councillors of the Municipality were present at this meeting. It was resolved that the confirmation of the applicant by the earlier resolution of the Municipality dated 30-8-50 was illegal. At a later meeting of the General Body held on 16-3-51, when 18 councillors were present, it was unanimously resolved that the services of the applicant be terminated. The applicant was at that time on leave at Nagpur. He was informed by a registered letter dated 17th March, 1951 and when he challenged the orders of the Municipality terminating his services and offered to join, he was not permitted to resume duty.

(3) The applicant has filed the present application in which he claims the following reliefs:

"(a) That all the relevant papers regarding the removal of the petitioner from his services be sent for from the opponents.

(b) That the writ of Mandamus or any other appropriate writ may be given considering the petitioner on duty and to order to opponents to allow the petitioner to join and continue in his services as the Municipal Engineer of the Jamnagar Borough Municipality and not to obstruct him in due discharge of his services.

(c) Any other appropriate orders may be passed looking to the nature of the case.

(4) Mr. C. N. Shah, who appears for the opponents, has raised various pleas in the written statements filed on behalf of the opponents; but we propose to deal with only one objection, which appears to us to dis-entitle the applicant to any relief in the present proceedings for a writ. The objection is that the resolution of the Municipality dated 30-8-50 confirming the applicant was illegal on two grounds. Firstly, according to the rules of the Municipality then existing, the Municipality could not make a permanent appointment to an office carrying a salary exceeding Rs. 150/- per month except from amongst the candidates recommended by the Public Service Commission of the Saurashtra Government. The second ground urged is based upon sub-s. (12) of S. 35 of the Act, which lays down that no resolution of a Municipality shall be modified or cancelled within three months after the passing thereof, except by a resolution supported by not less than one-half of the whole number of councillors and passed at a general meeting whereof notice shall have been given fulfilling the requirements of sub-s. (3) and setting forth fully the resolution which it is proposed to modify or cancel at such meeting and the motion or proposition for the modification or cancellation of such resolution.

(5) It is admitted by Mr. Mehta, the learned Advocate for the applicant, that the applicant was not a person recommended by the Public Service Commission; as a matter of fact, the question had not been referred to the Public Service Commission at all. It is also admitted that at the meeting of the General Body of 30-8-50, only 14 councillors were present and hence requirement of sub-s. (12) of S. 35 was not complied with.

(6) Section 58 of the Act enjoins the Municipality to make rules with respect to certain subjects and Cl. (f) provides for making rules determining subject to the limitations imposed by Ss. 33, 34(5) and 34(A), the mode and conditions of appointing, punishing or dismissing any officer or servant; and delegating to officers designated in the rules the power to appoint, fine, reduce, suspend or dismiss any officer or servant. The Municipality had accordingly framed rules; Cls. 'x' and 'r' of R. 25 require that the Municipality shall make an appointment to an office carrying a salary of more than Rs. 150/- per month only from amongst the candidates recommended by the Public Service Commission of the Saurashtra Government; the procedure for making such appointments by inviting applications by public advertisements etc. is also laid. This rule was in force at the time when the Municipality passed the resolution on 30-8-50 confirming the applicant. We are of the opinion that in view of this mandatory rule, the Municipality could not make the appointment of the applicant unless the procedure laid down by Cls. 'x' and 'r' of R. 25 of the rules framed by the Municipality under S. 58(1) of the Act was gone into. The confirmation of the applicant on a permanent basis was consequently illegal.

(7) The second ground of the objection as to the resolution on 30-8-50 appears to us also well-founded. The first resolution dated 10th July 1950 appointing the applicant on probation for a period of six months could not be modified in the manner it was done except by the requisite number of councillors required by sub-s. (12) of S. 35 at a meeting of which a special notice as laid down by the sub-section was given. It is admitted that neither such a notice was given nor was the requisite number of councillors present at the meeting of 30-8-50. The councillors present were only 14, the total strength of the Municipality being 35 members. Hence the modification of the resolution of 10th July, 1950, by the resolution of 30-8-50 putting to an end to the period of probation was illegal. We therefore hold that on both the grounds discussed above, the resolution of 30-8-1950 was illegal.

(8) Mr. Mehta, however, contends that the applicant's service has not been validly terminated. He has challenged the factum of the resolution of the Municipality passed at the meeting of 16th February, 1951, declaring the prior resolution of 30-8-50 as illegal. In support of his contention, he has brought on record copies of certain letters of protest by some of the councillors who have questioned the proceedings at this meeting. But it appears from the minutes of the meeting, which were confirmed on 3-3-51, that some of the councillors, probably those who were in favour of the applicant, left the meeting whereafter the resolution declaring the resolution dated 30-8-50 as illegal was passed. In any case, no objection has been raised to the resolution passed at the meeting of 16-3-51, when the Municipality by the unanimous vote of 18 councillors present at that meeting resolved to terminate the services of the applicant. It may be kept in mind that the probationary period of six months began from 11-8-50, the date when the applicant took charge of his office and it was to end on 10-2-51. The Municipality would be entitled to reasonable time to make up its mind to confirm the applicant or not, and we are of the opinion that the resolution of 16-3-51 could not be considered as not having been passed within such reasonable time.

(9) Mr. Mehta has further raised a technical objection based upon the provisions of sub-s. (5)(b) of S. 34 of the Act. Sub-s. (5)(a) empowers the Municipality to appoint a Health Officer and an Engineer whether temporarily or permanently, and Cl. (b) of sub-s. (5) requires that no such officer shall be removeable from office, reduced or suspended unless by the assent of at least two-thirds

of the whole number of councillors. He contends that the applicant could not be removed from office except by the assent of at least two-thirds of the whole number of the councillors. It was admitted on behalf of the opponents that only 18 councillors were present at the meeting of 16-3-51 which terminated the services of the applicant and this number is less than two-thirds of the total number of the councillors, which, as stated above, is 35. We have considered this objection carefully and are of the opinion that sub-s. 5(b) of S. 34 of the Act does not apply in the circumstances of the present case. Admittedly the applicant was appointed on probation, that is, the appointment of the applicant was not absolute, but subject to the condition, which is implied in every appointment made on probation that the appointment could be terminated at any time during the period of probation and until formal confirmation. Mr. Mehta has laid stress on the words 'removeable from office' in Cl. (b) of sub-s. (5) of S. 34 and urged that even terminating a probationary appointment amounts to removing from office within the meaning of this clause. But we are of the opinion that this argument is fallacious. The applicant's holding of the office was itself conditional being on a probationary basis. It was inchoate and could not be considered as complete till the Municipality formally confirmed it. It is clear to us that the words "no such officer shall be removeable from office, reduced or suspended" in Cl. (b) of sub-s. (5) of S. 34 apply to an officer whose appointment is made unconditionally, although such appointment may be on temporary or permanent basis. A temporary appointment stands on a different footing from an appointment on probation. In the first case, the appointment is simply terminable by lapse of time, while in the other the appointment is not complete but subject to the condition as to the applicant's satisfying the appointing authority as to his worth and competency. We are, therefore, of the opinion that this objection also fails. We consequently hold that the resolution of the municipality passed at the meeting of 16-3-51 validly terminated the services of the applicant.

(10) Under the circumstances, the petition of the applicant fails and is dismissed with costs.

(11) SHAH C. J.: I agree.

V.B.B. Petition dismissed.

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SHAH, C. J. AND BAXI, J.

State v. Vipra Khimji Gangaram, Opponent.

Criminal Ref. No. 31 of 1951, D/- 23-10-51.

(a) Criminal P. C. (1898), S. 195 (1) (b) — Offence disclosed under Section 211, Penal Code — Conversion to lesser offence under S. 182, Penal Code — Legality.

Where the graver offence under Section 211, Penal Code, is disclosed from the facts stated in a complaint, the condition laid down under Section 195 (1) (b), Criminal P. C. for taking cognisance of such a case cannot be evaded by electing to name the offence under another section (Section 182, Penal Code) which is more general and less grave. AIR 1946 Bom 7, Foll. (Para 2)

Anno: Criminal P. C., S. 195 N. 9.

(b) Criminal P C. (1898), Ss. 195 (1) (b), 154, 173 — Complaint to police — Report forwarded to Magistrate under Section 173 — Order passed by Magistrate is judicial and not merely administrative order of Court.

Where information relating to the commission of a cognisable offence is given to an officer in charge of a police station under S. 154, Criminal P. C. and is followed by investigation by him, he is bound under Section 173 (1) to forward his final report to a Magistrate empowered to take cognisance of the offence on a police report. An order passed by the Magistrate on such report would dispose of the complaint made to the police. That order is not merely an administrative order but a judicial order of the Court. Therefore if the complaint is held to be false and a B summary is issued, the offence under Section 211, I. P. C. will have to be alleged to have been committed by the complainant in relation to the proceedings in the Magistrate's Court which ended in an issue of the B summary. The Magistrate passing an order on a final report of the police sent after the investigation under Section 173, Criminal P. C. should be deemed to be a Court passing a judicial order disposing of the information given to the police. Therefore the Sub-Divisional Magistrate is required to file a complaint in respect of the offence under Section 211, I. P. C. and in the absence of such a complaint the proceedings launched against the opponent are without jurisdiction. AIR 1946 Bom 7, Foll. (Para 2)

Anno: Criminal P. C., S. 195 N. 9, 17.

C. N. Shah, Advocate-General with B. R. Joshi, Assistant Government Pleader, for the State; P. L. Chokshi, for Opponent.

Case referred to:

('46) AIR 1946 Bom 7: (47 Cri L J 321) (Pr 2)

SHAH, C. J.: This reference arises from the following facts. The opponent Khimji Gangaram lodged information at the Police station of Visavadar against one Mohanlal Durlabhji charging him with an offence under S. 447 Indian Penal Code. The complaint was investigated by the police who found it to be false, and so on a report made under S. 173 Criminal P. C., the Sub-Divisional Magistrate granted a 'B' summary, and the Head Constable of the Visavadar Police Station then filed a complaint in the Court of the First Class Magistrate, Visavadar, charging the opponent with offences under Ss. 182 and 465 I.P.C. The opponent contended before the Magistrate that the offence, if any, fell under S. 211 and not under S. 182 I.P.C. (apart from the offence under S. 465 I.P.C.) and that he could be prosecuted only on a complaint of the Sub-Divisional Magistrate and not at the instance of the police. The learned Magistrate upheld this contention and discharged the opponent, and the learned Sessions Judge, Sorath, has made this reference asking us to set aside the order of the Visavadar Magistrate.

(2) Now in our opinion the order passed by the learned Magistrate is correct. The opponent is alleged to have falsely charged Mohanlal Durlabhji with an offence knowing that there was no just or lawful ground for such charge and the offence obviously is covered by S. 211 I. P. C. It may be that it may as well fall under S. 182 I. P. C., but it is a well established principle that a prosecution for a lesser offence should not be launched when the facts alleged constitute a graver offence. Dealing with a similar point, it was held in 'BAJAJI APPAJI v. EMPEROR', AIR 1946 Bom 7, that where the graver offence under S. 211, Penal Code, is disclosed from the facts stated in a complaint, the condition laid down under S. 195(1)(b), Criminal

P. C., for taking cognisance of such a case cannot be evaded by electing to name the offence under another Section which is more general, and less grave. We are in agreement with this view and hold that it is not proper to defeat the provisions of S. 195 Criminal P. C. by charging the opponent with a lesser offence. The opponent should therefore properly have been charged under S. 211 I. P. C. and in that event the complaint had to be filed by the Sub-Divisional Magistrate, and it was not competent to the police officer to prosecute the opponent. This question too has been dealt with in the Bombay case cited above. It was held that where information relating to the commission of a cognisable offence is given to an officer in charge of a police station under S. 154, Criminal P. C., and is followed by investigation by him, he is bound under S. 173 (1) to forward his final report to a Magistrate empowered to take cognisance of the offence on a police report. An order passed by the Magistrate on such report would dispose of the complaint made to the police. That order is not merely an administrative order but a judicial order of the Court. Therefore, if the complaint is held to be false and a B summary is issued, the offence under S. 211, I. P. C. will have to be alleged to have been committed by the complainant in relation to the proceedings in the Magistrate's Court which ended in an issue of the B summary. The Magistrate passing an order on a final report of the police sent after the investigation under S. 173, Criminal P. C., should be deemed to be a Court passing a judicial order disposing of the information given to the police. Therefore the Sub-Divisional Magistrate is required to file a complaint in respect of the offence under S. 211 I. P. C. and in the absence of such a complaint the proceedings launched against the opponent before the Visavadar Magistrate are without jurisdiction. The learned Magistrate was therefore right in discharging the opponent. The learned Advocate General also agrees with this view and has not supported the reference.

(3) Mr. Chokshi for the opponent has also urged that the information originally given by the opponent against Mohanlal Durlabhji was lodged with the Sub-Inspector of the Visavadar Police Station and that therefore the opponent could be prosecuted only on a complaint made by the Sub-Inspector and not by the Head Constable of that Police Station, the Head Constable being the Subordinate of the Sub-Inspector. The record before us does not show whether the information had been given by the opponent to the Sub-Inspector or not and in the absence of any material we do not propose to consider this objection; but if the allegation is true, then it is clear that the complaint against the opponent could not have been filed by the Head Constable.

(4) In the result we reject this reference.

V.B.B. Reference rejected.

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CHHATPAR, J.

Adlja Ranchhodlal, Applicant v. Oza Mukundlal Savailal and others, Opponents.

Civil Revn. Appln. No. 40 of 1950, D/- 20-4-1951.

Civil P. C. (1908), O. 21, R. 58 — Scope of inquiry under — Court deciding question of title — Held, exceeded its jurisdiction and order was revisable — Civil P. C. (1908), Section 115.

It is well settled that what the Court has to consider in an application under Order 21, R. 58 is the question of possession and incidentally, in certain cases the question of title may be gone into; but it is not open to the Court to concentrate on the question of title.

The claimant is not expected in such an inquiry to adduce full evidence as to title. Ordinarily, it will be enough for him to show that the property is not in the possession of the judgment-debtor or if it is in possession of the judgment-debtor or in possession of any third party it is on his account and in support of his possession it is permissible to rely upon his apparent title to the property as opposed to the real nature of the title.

If instead of determining the question of possession, the Court deals into the question of title and disposes of the application on the question of title, the order is open to revision under Section 115 of the C. P. Code. Case law discussed:

Held that the Court had gone elaborately into the question of title and adjudicated upon the validity of a deed executed which on the face of it showed valid and genuine transaction for a consideration which was stated therein to be to have been paid for the discharge of a prior mortgage also created by a duly registered deed, and that, it was a fit case in which the High Court could interfere under Section 115, C. P. Code. **(Para 5)**

Anno: Civil P. C., O. 21, R. 58 N. 20.

C. N. Shah, for Applicant; C. C. Shah, for Opponent No. 1.

Cases referred to:

(Arranged in order of Courts and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases)

('39) AIR 1939 All 117: (180 Ind Cas 349) (Pr 4)
('87) 14 Cal 617 (Prs 4, 5)
('88) 15 Cal 521: (15 Ind App 123 P C) (Prs 3, 4, 5)
('91) 18 Cal 290 (Prs 4, 5)
('97) 1 Cal W N 617 (Pr 5)
('24) AIR 1924 Cal 744: (51 Cal 548) (Pr 5)
('37) AIR 1937 Cal 639: (172 Ind Cas 151) (Pr 4)
('48) 52 Cal W N 56 (Pr 4)
('50) AIR 1950 Cal 342: (54 Cal W N 372) (Pr 4)
('31) AIR 1931 Lah 666: (132 Ind Cas 666) (Pr 4)
('25) AIR 1925 Mad 588: (87 Ind Cas 189) (Pr 4)
('46) AIR 1946 Mad 174: (225 Ind Cas 36) (Pr 5)
('29) AIR 1929 Nag 66: (115 Ind Cas 167) (Pr 4)
('27) AIR 1927 Pat 316: (103 Ind Cas 32) (Pr 4)
('41) AIR 1941 Pat 394: (194 Ind Cas 45) (Pr 4)
('44) AIR 1944 Pat 242: (23 Pat 365) (Pr 4)
('23) AIR 1923 Rang 195: (1 Rang 276) (Pr 4)
('29) AIR 1929 Rang 152: (7 Rang 132) (Pr 4)
('34) Maung Ba Han v. S. M. A. R. M. Firm, AIR 1934 Rang 230 (Pr 4)

ORDER: This is a revision application from an order of the Civil Judge, Senior Division, Surendranagar dismissing an aplication under O. 21, R. 58, Civil P. C., of the present applicant for raising

attachment on an immoveable property situate at Chuda in Jhalawad District attached in execution of an award decree against the opponent No. 2 Bhuralal alias Parmananddas, son of Kasturchand. One Oza Mukundlal Savailal got the decree dated 21-5-45 on an award against the opponent No. 2 for Rs. 6000/- and interest. This decree was assigned to one Amulakhrai Hiralal opponent No. 1, who filed an execution application on 23-4-46 for attachment of the property in question, which was attached on the allegation that the property belonged to the judgment-debtor, whereupon the present applicant filed an application under O. 21, R. 58 on 27-8-46 for raising the attachment on the ground that the property was sold by Kasturchand, the father of the judgment-debtor, to whom it originally belonged to the applicant, for a consideration of Rs. 5,000/- by a deed dated 11-6-31 which was duly registered on 17-7-31. It was further alleged by the applicant that the property was in the possession of his tenant who happened to be the judgment debtor's mother Rambai. She had executed a rent note dated 17-3-42. Both the conveyance deed as well as the rent note were produced in evidence. The conveyance deed recites that this property was mortgaged by Kasturchand, the father of the judgment debtor, with one Laxmichand Bhagwanji of Jalgaonwala to secure a loan of Rs. 6000/- and this mortgage was created by a regular registered deed dated 30-7-28. The conveyance also recites that the sale proceeds of the property were paid to the mortgagee and the mortgage was duly discharged. It appears that in the State of Chuda, in addition to the stamp and registration charges a 'Chauth' that is, a kind of duty was payable to the State which was assessed on a percentage of the value of the property; it also appears that no transaction could be entered into without the sanction of the State authorities. The conveyance deed consequently contains a statement to the effect that the property was assessed by the "Panchkyas" at a valuation of Rs. 6776/- which was fixed in 1928 when the mortgage in favour of Laxmichand Bhagwanji was created and that the same valuation was taken to be correct at the date of the transaction of sale and a 'Chauth' assessed thereon. The amount of the 'Chauth' having been paid is also recited in the deed and there is also a further statement in the deed that the sanction of the State authorities was duly obtained for the transaction. The document also recited that the Lekh of the property that is, the document of title from the State was duly delivered to the purchaser. So that apparently this document of sale executed some 14 years before the award decree of the decree-holder seemed to be a perfectly genuine document for a consideration which was paid to a mortgagee who held a registered deed of mortgage in his favour. There is also no evidence that the mortgagee had since the date of his mortgage i.e. 30-7-28 instituted any proceedings for its enforcement, so that it may be prima facie assumed that the mortgage was satisfied long ago. After the date of the sale, it is common ground, that the property remained in the possession of Kasturchand, the seller and the father of the judgment-debtor. The applicant alleged that he was permitted to continue in possession as a tenant. Kasturchand, it appears, died somewhere in 1939-40, whereafter the property continued in possession of his widow Rambai, who has been examined in the case. She has admitted the execution of the rent note dated 13-3-42. It is also in evidence that prior to this rent note, two other rent notes were executed by her which are however not on the record of the present case, as it is alleged that they were produced in prior execution proceedings against the judgment-debtor. Rambai further states that the judgment-debtor ceased to reside in this property after the death of Kasturchand though she admits that both the father and son were members of a joint Hindu family. The judgment-debtor, it seems, was doing business in partnership with a stranger during the life time of his father who was also doing business. There is no evidence one way or the other whether this partnership business was a joint family concern. There is no presumption in law that it was. The son, that is the judgment-debtor, had incurred certain debts and before the award decree in the present case was obtained, the judgment-creditor had filed several suits against him in the Bhavnagar and Chuda Courts in the year 1939, 1941 and 1942. These claims were consolidated in the award decree. These are the circumstances which were proved or admitted on the record of the case. The decree-holder did not adduce any evidence to show that the judgment-debtor himself was residing in the property, so that there is only the evidence of the applicant and his witnesses particularly Rambai that the property at the date of the attachment was in the latter's possession under the rent note executed in favour of the present applicant.

(2) So far as the transaction of the sale is concerned, the applicant's case is that Kasturchand's daughter, i.e., the sister of the judgment-debtor was married to his brother Karsandas. Kasturchand was in need of money as he wanted to pay off the mortgage debt in favour of Laxmichand Bhagwanji. Kasturchand came to the applicant's father Manekchand who was an Executive Engineer at Ahmedabad and requested him for help and it was agreed that the propery be sold by Kasturchand. The amount of Rs. 5,000/- was paid by the applicant's father Manekchand, although the conveyance was made in the name of the applicant and as Kasturchand was a 'Vevai' of Manekchand, he was permitted to remain in the property as a tenant on payment of rent of Rs. 6/- and after his death his widow was continued as tenant on the same terms. The learned Civil Judge went elaborately into the question of the validity of the transaction of sale in favour of the applicant and came to the conclusion that this transaction was sham and fraudulent and without consideration. Consequently since the property descended to the judgment-debtor either as heir of his father Kasturchand or as survivor of the joint family and since his own mother was residing in the property, the property should be considered to be in his possession and liable to attachment in execution of the decree. The learned Civil Judge also came to the conclusion that under the circumstances the rent note executed by Rambai was bogus and sham and that Rambai should be considered as to be in possession on behalf of the judgment-debtor. The Civil Judge relied upon various factors in coming to the conclusion that this transaction was fradulent and bogus made with the intention to screen the property from the creditors of Kasturchand. He states that no Lekh was obtained by the applicant from the State authorities after his purchase. But the document itself says that the original Lekh was transferred to the purchaser and since the State had given its sanction to the transaction, it does not seem material whether a fresh Lekh from the State was necessary. In all probability, the mutation of name must have followed the sanction of the transaction and the registration of the deed after the payment of the State dues in the form of 'Chauth.' There is no evidence however whether the property has or has not been transferred in the name of the applicant. The

learned Judge has also stated that the sale-deed was not got registered by the applicant himself; but it is in evidence that his younger brother Karsondas came to Chuda from Ahmedabad to get the sale registered and one of the attesting witnesses who was also the writer of the deed, named Trambaklal, has been examined and he has deposed to the due registration of the deed as also the execution of the rent note by Rambai. Both these documents were prepared by him. The learned Judge has also stated both the applicant and Kasturchand were merchants and no account book has been produced in the case to show any entries of payment. The learned Judge has also stated that the applicant himself has not paid the purchase price, but the payment by his father would be quite sufficient and good consideration. The learned Judge has also relied upon the fact that 'Hathoda Vero' i.e., some kind of tax was paid in respect of the property by Rambai; but again it is in evidence that Rambai paid the amount in the name of the applicant. So that all the circumstances that the learned Judge has taken into consideration for the proof that the deed was sham and fraudulent are clearly capable of being satisfactorily explained. The learned Advocate for the opponent decree-holder has further advanced an argument that because the original mortgage-deed has not been produced nor has the mortgagee been examined, it should be assumed that there was no proof of the existence of the mortgage which he has contended was itself a sham and bogus transaction, though created by a registered deed as far back as on 30-7-1928 and many years before the judgment-creditor obtained his decree. He has also pointed out some minor contradictions in evidence of the claimant and other witnesses and has strongly urged that consideration and bone fide nature of transaction have not been satisfactorily proved in the case; but his strongest argument has been that in a revision application it is not open to this Court to disturb the finding of the Lower Court especially as a remedy by way of a suit is available to the applicant.

(3) Mr. C. N. Shah, the learned Advocate for the applicant on the other hand has urged that the learned Civil Judge has gone very much beyond the scope of the inquiry contemplated under O. 21, Rr. 58 to 61 and has decided the question of title and the validity of a solemn deed of conveyance executed with all the formalities prescribed by law and with the sanction of the State authorities and which was executed by the father of the judgment-debtor many years before the judgment-debtor incurred his debts which ultimately resulted in the award decree. An inquiry in pursuance of O. 21, R. 58, contemplated by the Civil Procedure Code is for the purpose of determining whether the property was at the date of the attachment in possession of the judgment-debtor or of some person in trust for him or in the occupancy of a tenant or the person paying rent to him or that being in the possession of the judgment-debtor at such time, it was so in his possession not on his own account or as his own property but on account of or in trust for some other person, or partly on his own account and partly on account of some other person. The Court is not entitled to go elaborately into the question of title and adjudicate upon the validity of a deed executed which on the fact of it shows a valid and genuine transaction for a consideration which is stated therein to be to have been paid for the discharge of a prior mortgage also created by a duly registered deed. The Court has come to the conclusion as a result of the finding as to the validity of this transaction that the property should be deemed to be in possession of the judgment-debtor although the judgment-debtor was not residing in the property, and it was actually in the possession of his mother, who had executed the rent note in favour of the applicant. A number of rulings have been cited by both sides both on the question as to the scope of inquiry under O. 21, Rs. 58 to 61 and on the question as to when the High Court would interfere in exercise of its powers of revision under Section 115, C. P. Code. Mulla in his commentary on the Civil Procedure Code (11th Edition) at page 840, quotes a ruling of the Privy Council in the case of 'SARDHARILAL v. AMBIKA PERSHAD', 15 Cal 521, wherein their Lordships of the Privy Council say:

> "The Code does not prescribe the extent to which the investigation should go; and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Court at the time, leaving the aggrieved party to bring the suit which the law allows to him."

The learned commentator further observes that rules 58 to 63 provide for a summary inquiry into possession as distinct from a thorough trial of the ultimate right. It is however impossible to separate altogether the quetsion of possession and of title. Thus if the judgment-debtor was in possession, he may have been in possession as agent or trustee for another, and this has to be inquired into. To that extent the title may be part of the inquiry in a claim case, but no ultimate questions of title are intended to be thrashed out. The learned commentator quotes several cases that the Court should refrain from going into the questions of title, e.g., whether the transaction in question was a benami transaction or whether the judgment-debtor was holding the property in trust. He observes that the property must in such cases be released from attachment and the question of benami, trust of wakf should be the subject-matter of a suit as the Court has no power under these rules to decide whether the deed of transfer, trust or wakf is valid. If instead of determining the question of possession, the Court deals into the question of title and disposes of the application on the question of title, the order is open to revision under Section 115 of the C. P. Code.

(4) I may refer to a few rulings on the point which in substance bear out the above commentary of Mulla. The Calcutta High Court has consistently held that it is outside the scope of inquiry in such proceedings for the Court to go into the questions of title and a reference may be made to the cases of 'HAMID BAKHUT MOZUMDAR v. BUKTEAR CHAND', 14 Cal 617; 'SHEORAJ NANDAN SINGH v. GOPAL SURAN NARAIN SINGH', 18 Cal 290; 'BUTTO KRISTO PAUL & CO. v. HARENDRA NATH', AIR 1937 Cal 639, and the latest ruling in the case of 'RELIANCE DEVELOPMENT AND ENGINEERING LTD. v. BHABANI CHARAN', AIR 1950 Cal 342, where in a revision application, the Court set aside the order of the Subordinate Judge who held that a certain transaction was benami. The Court observed:

> "It is true that the words of O. 21, R. 58, would suggest that the Court could go into a question such as benami. But as I have said the authorities of this and other Courts forbid the investigating Court so to do. The very same question came before me in the case of 'PROTIVA SUN-

DARI v. RELIANCE BANK LTD.', 52 Cal W N 56, in which I had to hold that the Judge in that case could not go into the question of the benami nature of a transaction. In the judgment I have cited certain cases of the Patna High Court and of this Court and it is quite clear that this Court has over a considerable length of time consistently held that in a claim case the Judge cannot go into the question of benami. The learned Subordinate Judge in this case did go into this question and decided that the company was a mere benamidar and that they did not hold the bricks on their own account of the true owner, the defendant."

The Allahabad High Court in a well considered judgment in the case of 'BACHULAL v. RAMDIN', AIR 1939 All 117, held:

"Rules 58 and 60 when read together make it perfectly clear that the Courts duty in dealing with an objection under Order 21, Rule 58, is to concentrate on the question of possession and to decide whether the judgment-debtor is in possession of the property on his own account or on account of or in trust for some other person. If the Court finds that the property is in actual possession of some person other than the judgment-debtor, then it has to decide whether the possession is in trust on behalf of the judgment-debtor. The Court is not concerned with the question of title to the property and is, in fact, incompetent to consider and decide that question. The order of release or otherwise must be passed entirely on the finding on the question of possession."

It was further held in that case:

"Where a Court while entertaining an application under O. 21, R. 58, C. P. Code, enters into the question as to title instead of concentrating itself on the question of possession, and disposes of the application with a finding on the former question, the Court acts with material irregularity and the decision can be interfered with by the High Court. Its power to interfere is not precluded by the fact that a remedy by way of a suit is open to the applicant under Order 21, Rule 63, Civil P.C."

To the same effect is the decision of the Madras High Court in the case of 'CYRIL GILL v. MOHAMED NAWAZ KHAN', AIR (33) 1946 Mad 174, wherein it was held:

"In proceedings under Order 21, Rule 58, Civil P.C., the Executing Court is concerned only with the question of the possession of the property and it should not and cannot embark upon enquiries involving a decision as to the real, as opposed to the apparent title of the property. The evidence therefore to establish that the transfer in favour of the claimant is fraudulent is inadmissible in these proceedings and if the judgment-creditor has reason to believe that the transfer is for any reason ineffective, inoperative or void against the creditors the proper course to follow is by way of suit under O. 21, R. 63, Civil Procedure Code."

An earlier decision of the same High Court is to be found in the case of 'APPASWAMY CHETTIAR v. N. BALKRISHNA PILLAI', AIR (12) 1925 Mad 588, wherein the High Court interfered under Section 115, where the lower Court Judge dismissed an application under O. 21, R. 58, holding that he was not satisfied with the bona fides of the claimant or of the sale in his favour. The Lahore High Court in the case of 'IMAMDIN v. MATHRA-DAS', AIR (18) 1931 Lah 666, observed that in proceedings under O. 21, Rule 58, the Court should decide the question of possession and its nature. The question of title or the intention of the judgment-debtor in transferring the property to the objector did not directly arise. The High Court interfered in revision where the lower Court had dismissed the objection of the claimant on the ground that the sale had taken place after the institution of the suit in which the decree was passed and therefore the sale was to defraud the decree-holder. The Patna High Court in the recent case of 'SM. CHUNNI DEBI v. SM. ANNA-PURNA DAI', AIR (31) 1944 Pat 242 while referring to its earlier decisions as also to some decisions of the Calcutta High Court held:

"In a proceeding under O. 21, Rr. 58 to 61, in order to determine whether the claimant is in possession of the property on his own account or on account of the judgment-debtor, it may be necessary to go incidentally to the basis of the claim put forward by the claimant. The basis of the claim may be alleged by the other side to be a benami transaction. But the Courts are expected to decide the question of possession upon a fair review of the oral and documentary evidence in the case, and they should consider the question of title only incidentally in order to assist them in weighing the contradictory evidence of possession which is adduced in the case on behaff of the parties. In every case real attempt should be made to decide upon the question of possession having in view all the attendant circumstances and the decision should not be arrived at in such a way as to leave the aggrieved party with the impression that the Court has dealt with the question of possession in a perfunctory manner being carried away by mere surmises and conjectures."

I may, however, refer to an earlier case of 'ANAND PRASAD v. GOPAL DAS', AIR (14) 1927 Pat 316 of the same Court strongly relied upon by the claimant's Advocate wherein it was held:

"The High Court will not interfere ordinarily in revision in a case where there is another remedy provided by statute but where it is quite clear that although purporting to deal with the question of possession the Court has really been considering the questions of benami, joint family and transfer in fraud of creditors or rather has been materially influenced by suspicions relating thereto, it is right that the High Court should interfere."

The Rangoon High Court in the case of 'MAUNG BA HAN v. S. M. A. R. M. FIRM', observes that the High Court will not exercise its revisional powers where an application under O. 21, R. 58 is dismissed, there being an alternative remedy by way of suit. But in this very same ruling are quoted two cases of the same High Court (1) 'PHOMON SINGH v. A. J. WELLS', AIR (10) 1923 Rang 195 and (2) 'SOMASUNDARAM CHETTYAR v. MA SHEW THIT', AIR (16) 1929 Rang 152, wherein the High Court did in fact interfere where the lower Court had gone beyond the scope of inquiry under O. 21, Rr. 58 to 61. The Nagpur High Court in the case of 'SHEIKH MAHOMAD v. PANDURANG', AIR 1929 Nag 66, relied upon by the Advocate of the decree-holder, refused to entertain a revision application where there was a definite finding of fact as to possession in an inquiry under O. 21, R. 58, although the Court observed that it should not go into the question of title as a finding as to title in a summary inquiry is not binding on a Court in a regular suit brought by the aggrieved party. In that case, however, the claimant claimed exemption from attachment of the property by reason of a partition and sale-deeds, which were effected only a few months before the decree was passed. The Court held that the property continued to be in the

possession of the judgment-debtors. The learned Advocate for the decree-holder has also relied upon the case of 'RAM BEHARI v. BINDA PRASAD', AIR 1941 Pat 394, wherein the High Court refused to interfere in revision with a decision of the lower Court that the gift deed was a colourable transaction and was never intended to be acted upon and therefore the objector was in possession without any title. It was observed on the facts found that the deed of gift which was executed in July 1938 was a colourable transaction, and that the judgment-debtor after the gift-deed continued to be in possession of the property so long as he was alive and that this transaction was entered into in order to put obstacles in the way of the decree-holders or to defraud them. In that case the execution proceedings were started on 27/8/1938, i.e., just about the time of the alleged deed of gift.

(5) From the study of the above case law, it appears to me to be well settled that what the Court has to consider in an application under O. 21, R. 58, is the question of possession and incidentally, in certain cases the question of title may be gone into; but it is not open to the Court to concentrate on the question of title and as a result of the decision thereon come to the conclusion about possession as has been done in the present case. The claimant is not expected in such an inquiry to adduce full evidence as to title. Ordinarily, it will be enough for him to show that the property is not in the possession of the judgment-debtor or if it is in possession of the judgment-debtor or in possession of any third party it is on his account and in support of his possession it is permissible to rely upon his apparent title to the property as opposed to the real nature of the title. In this connection, I may refer to the remarks of the Madras High Court in the case of 'DECCAN COMMERCIAL BANK LTD. v. MOHMED NAWAZ KHAN', AIR 1946 Mad 174, above referred to, wherein it was observed:

> "In such proceedings, the Executing Court is concerned only with the question of the possession of the property and should not and cannot embark upon enquiries involving a decision as to the real, as opposed to the apparent title to the property."

I am also in full agreement with the following observation of Rankin, J., in the case of 'NIJIMUNNESSA BIBI v. NACHARADDIN', AIR (11) 1924 Cal 744 at p. 747:

> "Now, Rr. 58 and 62 of O. 21, are directed to give a means by which execution proceedings may be made effective and not too closely entangled with disputes between third parties and the debtor. Provision is made for investigation of claims in a limited fashion. The scope of the enquiry being confined, the investigation will not always be at all elaborate, and the Privy Council in the case already cited 15 Cal 521, have pointed out that some times that investigation may well be very slight indeed. Rules 60 and 61 provide for a summary investigation into possession and distinct from a through trial of ultimate right. It is impossible to separate altogether the question of possession and of title. Thus, if the judgment-debtor was in possession, he may have been in possession, as agent or trustee for another and this has to be enquired into. See the cases of 'BHAGWAN RAMANUJ DAS v. KHETAR MONI DASSI', 1 C W N 617; 'HAMID BAKHAT v. BUKTEAR CHAND', 14 Cal 617 & SHEORAJ NANDAN SINGH v. GOPAL SURAIN NARAIN SINGH', 18 Cal 290. To that extent, the title may be part of the enquiry in a claim case, but no ultimate questions of trust are intended to be thrashed out."

In the present case, the claimant has in his favour the rent note executed by Bai Rambai, who is in actual possession of the property. The property was transferred by her husband to the claimant as far back as in the year 1931. The apparent title is vested in the applicant. The judgment-debtor himself is not in actual possession of the property. Under the circumstances, it was beyond the powers of the Subordinate Judge to adjudicate upon the real nature of the title of the applicant under the deed of conveyance and deciding that question against the applicant come to the conclusion that Rambai should be considered to be in possession of the property on behalf of the judgment-debtor, and therefore the property was liable to attachment. The approach to the question by the learned Judge was quite wrong when the apparent title along with the possession under the rent note was proved in favour of the applicant; the Court should not have entered into a lengthy inquiry and come to the conclusion as to the real nature of the transaction observing that the claimant had not adduced certain other pieces of evidence, which were available to him in support of his title. The claimant may very well say that he was not expected to do so, that this was a summary proceeding and it was enough for him to show his apparent title coupled with the fact of his possession held under the rent note by the person is actual physical possession of the property. Giving my anxious consideration to the case, I think this is a fit case in which I should interfere under Section 115, C. P. Code, as the Court has exceeded its jurisdiction in going beyond the scope of inquiry contemplated under law.

(6) I accordingly accept this revision application and set aside the order of dismissal of the application of the applicant under O. 21, R. 58, C. P. Code. I grant this application and order that the property be released from attachment. The applicant will have his costs from the decree-holder, the opponent No. 1, in this Court and in the lower Court.

D.R.R. *Application allowed.*

A. I. R. 1952 Saurashtra 72

CHHATPAR J.

Jeychand Kamalshi, Appellant v. Mang Keshavji Jina, Respondent.

Second Appeal No. 75 of 1951, D/- 19-12-1951.

T. P. Act (1882), S. 55(4)(b) — Suit to recover property sold — Decree — Form of — Declaration of statutory charge.

A Court while passing a decree in favour of the plaintiff to recover possession of the property sold to him can also declare the statutory charge in favour of the vendors for the unpaid purchase money and also further order that the plaintiff should pay such amount within a particular period and in default, the vendor could on payment of Court fees on the amount of the consideration money, recover the amount by sale of the property in suit. AIR (19) 1932 Bom 247 Foll. 34 Mad 543 Not foll. (Paras 1 and 5)

Anno: T. P. Act, S. 55 N. 12 Pts. 6 to 8.

M P. Thakker, for Appellant; T. U. Mehta, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('29) AIR (16) 1929 All 85(2): (111 Ind Cas 761) (Pr 3)
('45) AIR (32) 1945 All 139: (ILR (1945) All 183) (Pr 3)
('32) AIR (19) 1932 Bom 247: (56 Bom 556) (Pr 1)
('13) 17 Cal W N 1161: (20 Ind Cas 325) (Pr 3)
('11) 34 Mad 543: (8 Ind Cas 364) (Pr 1)
('20) 43 Mad 712: (AIR (7) 1920 Mad 164) (Pr 3)
('47) AIR (34) 1947 Mad 92: (ILR (1947) Mad 397) (Pr 3)
('39) AIR (26) 1939 Nag 210: (ILR (1939) Nag 636) (Pr 4)
('33) AIR (23) 1933 Rang 401: (147 Ind Cas 742) (Pr 3)
('37) AIR (24) 1937 Sind 198: (170 Ind Cas 791) (Pr 4)

JUDGMENT.: This second appeal arises out of a suit for possession of a house situate at Ranpur, Sorath District, sold to the plaintiff by the defendant for the sum of Rs. 700/- by a regular deed of conveyance, dated 7-5-1948. The defendant-respondent admitted the execution of the sale-deed but denied receipt of consideration, which according to his version was to be paid afterwards and pleaded that such consideration had not been paid by the plaintiff. In the pleadings the defendant had also contended that the sale-deed was obtained from him by fraud. But the plea merely amounted to this that the consideration promised to be paid had not been paid. The trial Court gave a decree to the plaintiff on the basis of the conveyance deed and without deciding the issue about the consideration remarking that if the defendant wanted he could file a separate suit for the money. The learned Judge of the trial Court relied upon a ruling of the Madras High Court given in the case of 'VELAYUTHA CHETTY v. GOVINDASWAMI', 34 Mad 543, wherein it was held that the provisions of the Transfer of Property Act that the vendee after conveyance was entitled to possession and that the vendor had a statutory charge on the property for unpaid price money were clear and it was not competent to the Court in a suit for possession by the vendee, to pass a decree for possession conditional on the vendee paying the balance of the purchase money. Against this decision the defendant filed an appeal and the District Court went into the question of consideration and held that such consideration had in fact not passed. The learned District Judge relied upon a decision of the Bombay High Court given in the case of 'BASALINGAVA v. CHINNAVA', AIR (19) 1932 Bom 247, wherein the Court while passing a decree in favour of the plaintiff to recover possession of the property sold to him also declared the statutory charge in favour of the vendors for the unpaid purchase money and also further ordered that the plaintiff should pay such amount within a particular period and in default, the defendant-vendors could on payment of Court-fees on the amount of the consideration money, recover the amount by sale of the property in suit. Following this form of the decree given in the 'Bombay Case', the learned District Judge similarly passed a decree in favour of the plaintiff, at the same time declaring a charge in favour of the defendant and virtually passing a decree in his favour for the amount of Rs. 7,00/-, which could be recovered on payment of the necessary Court-fees by sale of the property. Against this decision the plaintiff has come in second appeal to the High Court.

(2) I have heard Mr. Thakker the learned Advocate for the appellant at length. So far as the question of consideration is concerned, I have been led through the evidence on the point. There are, no doubt, circumstances in favour of each of the parties for and against the decision on this point. The learned Judge has considered the evidence and come to the conclusion that consideration had not passed; the parties are nearly related, the plaintiff being the son-in-law of the defendant. There is no 'Satakhat' or a preliminary contract for the sale, but the defendant had executed the conveyance deed straight off transferring title to the plaintiff. The learned Judge specially relied upon the evidence of a Vakil who had drafted the deed and according to his evidence, it was agreed that the consideration was to be paid after the sale-deed was executed and after possession was handed over. The learned Judge came to the conclusion that in fact no consideration had passed from the plaintiff to the defendant, although such recital was made in the conveyance deed. This is a finding of fact, which is binding on me in Second Appeal.

(3) As regards the form of the decree in such cases, there is difference of opinion between the Madras High Court, and other High Courts which is mentioned in the commentary of Mulla's Transfer of Property Act, Third Edition, at page 327. The Madras High Court has held that if the vendee sues to recover possession after the execution of conveyance but before payment of price, the Court has no power to put him on equitable terms as to payment of price. In addition to the decision relied upon by the trial Court, two more decisions have been cited before me (1) the case of 'YELLA KRISHNAMMA v. KOTTIPALLI MALI', 43 Mad 712 and (2) 'R. T. RAMAYYA SERVAI v. R. SAMA AYYAR', AIR (34) 1947 Mad 92. These decisions have followed the earlier decision of the Madras High Court. The Calcutta, Allahabad and Rangoon High Courts have, on the other hand, held that in such cases the Court should pass a decree for possession conditional on payment of the purchase price and fix the time within which such purchase price should be paid and in default the suit of the plaintiff should be dismissed. These decisions are reported in 'NIL MADHAB v. HARAN PROSAD', 17 Cal W N 1161; 'PRAN DEI v. SAT DEO', AIR (16) 1929 All 85.(2); 'PEAREY LAL v. HUB LAL', AIR (32) 1945 All 139 and 'U TI v. M. P. M. S. CHETTYAR FIRM', AIR (20) 1933 Rang 401.

(4) The Bombay High Court has laid down a 'via media' in the case cited by the learned District Judge and referred to above. In effect the decision amounts to passing a decree both in favour of the plaintiff as also in favour of the defendant, as Barlee, J., remarks in that case at page 252 of the report:

> "Strictly speaking, this is not justified by the Code. They should file a separate suit. But as Baker, J., points out, the questions in dispute have all been decided in this suit and the filing of a separate plaint and the starting of a fresh litigation would cause unnecessary trouble and expense to both parties. I agree, then, that we are justified in acting on the fiction that they have filed a suit which has been consolidated with the present."

The Bombay-form of the decree has been followed by the Sind Court in the case of 'SAHIBKHAN GHULAM HUSSAIN v. KHUSHALDAS DEWANDAS', AIR (24) 1937 Sind 198, as also by the Nagpur High Court in the case of 'SHOBHALAL

SHYAMLAL v. SIDHELAL HALKELAL', AIR (26) 1939 Nag 210.

(5) I prefer to follow the Bombay High Court decision and would therefore confirm the decree of the District Judge only with this modification that the period of four months mentioned therein should begin from the date of this decree. Considering the fact that the parties are nearly related and there is conflict of decisions of different High Courts, I make no order as to costs of this appeal, which is dismissed subject to the modification mentioned above.

V.R.B. *Decree modified.*

A. I R. 1952 Saurashtra 74
SHAH C. J. AND BAXI J.

Popatlal Mayaram, Appellant v. Bai Lakhu Jetha, Respondent.

First Appeal No. 42 of 1951, D/- 14-12-1951.

Workmen's Compensation Act (1923), S. 2 (1) (n), and Sch. 2, Cls. (XVI) and (X) — Agriculturist employing person to excavate old well to increase water supply — Such employee killed by fall of pipe which was being put up while working inside well — Employee held "Workman" — Case held governed by Cl. (XVI) and also Cl. (X) of Sch. 2.

In order to exclude a person from the category of a workman, it must be shown that his employment was of a casual nature and further that he was employed otherwise than for the purpose of the employer's trade or business.

Where an agriculturist engages a person to excavate an old well to make it deeper so that it may give sufficient water for irrigation, the person so engaged though a casual worker is employed for the purposes of the employer's business and is a workman within the meaning of the Workmen's Compensation Act.

If while such a person is working actually inside the well which is more than 20 feet deep a pipe which was being put up falls and the worker is killed, the case is covered by Cl. XVI and also X of Sch. 2 of the Act.

The expression 'pipe-line' in Cl. (X) need not necessarily be confined to surface pipe-line, like water or gas mains or oil pipe-lines; it may as well cover pipes sunk in the earth.

(Prs 2a, 3)

Anno: Workmen's Compensation Act, S. 2 (1) (n), N. 3; Sch. 2, Cl. (X) N. 1.

M. P. Thakkar proxi, for M. U. Shah, for Appellant; A. R. Baxi, amicus curiae, for Respondent.

Case referred to:

('35) 58 Mad 804: (AIR 1935 Mad 721) (Pr 2a)

SHAH, C. J.: This is an appeal from an order of the Commissioner for Workmen's Compensation. The facts found are that the appellant Popatlal Mayaram has a 'wadi' which he cultivates and in which he raises irrigated crops and that the old well in the wadi did not have a sufficient water supply and so boring operations were being carried on in the well by the appellant for which Khima Parbat, the deceased husband of the respondent, was employed by him as a labourer. While the operations were in progress and Khima was actually working inside the well, a pipe fell on him from above as a result of which he died within two or three hours. In reply to his widow's claim for compensation, the appellant raised several contentions before the Commissioner, who rejected all of them and awarded Rs. 605/- as compensation.

(2-a) On appeal the only contention urged by Mr. Thakkar for the appellant is that the deceased was not a workman as defined in Section 2 (1) (n) of the Workmen's Compensation Act because his employment was of a casual nature, and he was not employed for the purpose of the appellant's trade or business. Under the definition both the qualifications are required to be fulfilled in order to exclude the person from the category of a workman, and it must be shown that his employment was of a casual nature and further that he was employed otherwise than for the purpose of the employer's trade or business. This is in accord with precedent. In 'PERIYAKKAL v. AGENT, SOUTH INDIAN RAILWAY CO. LTD.', 58 Mad 804, it was held as follows:

> "A person to be excluded from the definition, must not only be one 'whose employment is of a casual nature' but also one 'who is employed otherwise than for the purposes of the employer's trade or business.' Both these qualifications must be present together. The mere fact relied upon by the Commissioner, therefore, that the injured men had been employed only for a few days at a time will not of itself remove them from the category of 'workmen'."

(2-b) The deceased was employed for the first time on the day of the incident, and his employment was to last till water was struck, which was a matter of not more than two day's work. He was therefore a casual employee. As for the second condition, Mr. Thakkar has urged that the appellant is an agriculturist who cultivates the land and that the sinking of the well or carrying on of the boring operation to strike water is not part of the appellant's trade or business. The contention is not correct because admittedly the appellant is raising irrigated crops on the land and had already a well for the purpose, and it was because the supply of water was inadequate that he started this boring operation. An adequate supply of water was a vital need for the purpose of his agriculture. He needed the water for irrigating his crops so that he might realise a greater yield of crop and thereby earn greater profit. Therefore the work on which the deceased was employed must be held to be for the purpose of the appellant's business and the deceased must be deemed to be a workman.

(3) The deceased was employed in a capacity specified in Schedule II, Clause (xvi), viz., in the making an excavation. The bottom of the well was admittedly more than twenty feet deep, but it is contended for the appellant that the depth contemplated in Clause (xvi) is the depth of the actual excavation, and that the depth of the well which was already in existence cannot be taken into account for the purpose. On the other hand, Mr. Baxi, who appeared amicus curiae for the respondent, has urged that having regard to the words "employed in the making of any excavation", the entire depth from the surface of the earth to the lowest point should be reckoned. As the point is not material for our decision, we do not propose to decide it, and it is sufficient to note that even if the twenty feet were to be counted from the bottom of the well, two pipes had already been sunk in the ground and the third pipe was in the process of sinking when this incident occurred. Obviously the depth of these pipes was more than twenty feet and the requirements of Clause (xvi) are therefore complied with. Clause (x) of Schedule II also applies because the deceased was employed in the construction of a pipe-line. The expression 'pipe-line' need not necessarily be con-

fined to surface pipe-line, like water or gas mains or oil pipe-lines and it may as well cover pipes sunk in the earth. The deceased was therefore properly held to be a workman under Section 2 (1) (n) of the Act. We, therefore, confirm the Commissioner's order and dismiss this appeal with costs.

(4) BAXI, J.: I agree.

Appeal dismissed.

R.G.D.

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SHAH C. J. AND BAXI J.

State v. J. B. Solanki, Opponent.

Criminal Ref. No. 34 of 1951, D/- 11-12-1951.

(a) Factories Act (1948), S. 106 — Inspector of factories filing complaint of an offence under S. 79 on receipt of an information from a workman — Complaint dismissed for absence of complainant — Second complaint on same facts filed more than three months after date of previous complaint is barred under S. 106 as the complainant must be regarded to have knowledge of the commission of the offence when he filed the first complaint. (Para 5)

(b) Criminal P. C. (1898), S. 403 — Acquittal — Offence under S. 75 (1), Factories Act — Order of discharge for absence of complainant amounts to acquittal.

An offence under S. 79, Fatcories Act, 1948, being punishable with three months imprisonment is triable as a summons case. Hence where a Magistrate discharges the accused against whom a complaint in respect of an offence under S. 79, Factories Act has been filed, for absence of the complainant, the order of discharge even if passed under S. 259, Criminal P. C. amounts to an acquittal and therefore a second complaint on the same facts is barred under S. 403, Criminal P. C. (Para 6)

Anno: Criminal P. C., S. 403, N. 8.

A. R. Bakshi, Advocate-General with B. R. Joshi, Assist. Government-Pleader, for The State.

BAXI, J.: This is a reference from the Sessions Judge, Central Saurashtra, recommending that the order of the First Class Magistrate, Rajkot, refusing the opponent's application for dismissing the complaint against him be set aside. The Inspector of Factories, Madhya Saurashtra, received a complaint from a workman employed in the factory in which the opponent is the Manager to the effect that he was discharged from service on 23-10-50 after one month's notice. This workman was employed from 13-10-49. He was discharged without having been paid the annual leave wages due to him under S. 79(1) and (7) of the Factories Act 1948. The Inspector preferred a complaint against the opponent for contravening the provisions of S. 79(1) of the Act. This complaint was registered as Criminal case No. 95 of 1951 in the learned Magistrate's Court. The complaint was filed on 25-1-51. The case was fixed for hearing on 13-4-51 but the complainant did not appear on this day and the learned Magistrate passed the order purporting to discharge the opponent under S. 259, Criminal P. C.

(2) The Inspector filed a fresh complaint before the Magistrate for the same offence on the same facts. This complaint was filed on 17th May 1951. Along with his complaint the Inspector addressed a letter to the learned Magistrate wherein reference was made to the previous case No. 95 of 1951 against the opponent. The Inspecor stated therein that the previous case was dismissed on account of some misunderstanding and requested the learned Magistrate to readmit the complaint which was sent along with the latter. The opponent raised objections against the Court's jurisdiction to take cognizance of this second complaint. He submitted that the second complaint was not competent under S. 106 of the Factories Act as it was filed more than three months after the date on which the commission of the offence came to the Inspector's knowledge. The opponent further submitted that the order of the Magistrate in the Criminal Case No. 95 of 1951 discharging him on the ground of the complainant's absence amounted to an acquittal and therefore the Court had no jurisdiction to take cognizance of the second complaint on the same facts.

(3) The learned Magistrate overruled the opponent's objection that the complaint was made beyond the time prescribed by S. 106 of the Act.

(4) The opponent moved the learned Sessions Judge to make a reference to this Court against the learned Magistrate's order and this reference has accordingly been made to us by the learned Judge. He recommends that the order of the learned Magistrate should be set aside.

(5) We agree with the learned Judge's recommendation. The Inspector had knowledge of the commission of the offence on 25th January 1951 when the first complaint was filed. The learned Magistrate observes that the Inspector was not in possession of the full particulars from which he could conclude that the offence was committed. The opponent had not supplied the particulars which the Inspector was demanding. In the absence of these particulars the Inspector could not in the opinion of the Magistrate be deemed to have decided that an offence was committed. The learned Magistrate also argued that the Inspector could not be deemed to have knowledge of the commission of the offence merely because he preferred the complaint on a previous occasion on receipt of information from a workman. We do not agree with this reasoning. The Inspector must be regarded as having knowledge of the commission of the offence latest by 25-1-51 when he filed the complaint against the opponent. The Inspector himself requested the First Class Magistrate to admit the complaint on the ground that the former complaint was dismissed on account of some misunderstanding. It was never his case that he had no knowledge of the commission of the offence when he filed the first complaint. If indeed he were to make out such a case, he would lay himself open to the charge of having filed a complaint without proper information. He might go on making inquiries but that does not affect the main fact that he came to know of the commission of the offence on 25-1-51, when he filed the first complaint. We therefore hold that the second complaint was filed more than three months after the complainant came to know of the commission of the offence and therefore under S. 106 of the Factories Act the learned Magistrate had no jurisdiction to entertain the same.

(6) The offence under S. 79(1) of the Factories Act is a summons case. The punishment prescribed for contravening the provisions of that Section is three months imprisonment and a fine. The order of the learned Magistrate discharging the opponent on the ground of the complainant's absence therefore amounted to an acquittal under S. 247, Criminal P. C., even though the Magistrate may purport to describe his order as an order of discharge under S. 259. The previous order of the Magistrate therefore operated as an acquittal and was a bar to the fresh prosecution of the opponent on the same facts under S. 403,

Criminal P.C. The learned Magistrate had therefore no jurisdiction to take cognizance of the second compalint on this ground also.

(7) The reference is accepted. The order of the learned Magistrate is set aside and the complaint is ordered to be dismissed.

(8) SHAH, C. J.: I agree.

K.S. Reference accepted.

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SHAH C. J. AND BAXI J.

State v. Sukhlal Kunverji and others, Accused-Respondents.

Criminal Appeal No. 95 of 1951, D/- 31-1-52.

(a) Bombay Prevention of Gambling Act (IV (4) of 1887), Ss. 6 & 7 — Issue of special warrant — Grounds for — Warrant issued merely on the ground that gambling was going on in certain house — Warrant is defective.

Section 6 of the Act must be construed strictly because S. 7 gives to an arrest and seizure under it an operation different from that of the general presumption of innocence in criminal cases. The complaint envisaged by the proviso to S. 6 is a complaint that the house, room or place to be entered into is used as a common gaming-house, and the Magistrate has to be satisfied that there are good grounds to suspect that it is so. Where the complainant did not complain, nor was the Magistrate who issued the special warrant satisfied that there were good grounds to suspect that the house of accused was used as a common gaming-house, and the only satisfaction he had being that gambling was being carried on in the said house, the warrant is defective. In such a case no presumption under S. 7 can arise and it will be for the prosecution to establish by evidence in the ordinary way that on the facts proved the accused were guilty of the offences charged. (Para 2)

(b) Criminal P. C. (1898), S. 242 — Whether non-compliance with section is irregularity or illegality (Quaere).

(Quaere): Whether omission to ask the accused if he has any cause to show why he should not be convicted, amounts to an irregularity or an illegality and if the former whether a retrial should be ordered on that ground. (Para 4)

Anno: Cr P. C., S. 242 N. 8.

A. R. Baxi, Advocate-General with B. R. Joshi, Assistant Government-Pleader, for the State; H. I. Bhatt, for Respondents.

Case referred to:

('07) 9 Bom L R 695: (6 Cri L J 60) (Pr 2)

SHAH, C. J.: This is an appeal against the acquittal of the respondents, of whom respondent No. 1 was charged under Sections 4 and 5 of the Bombay Prevention of Gambling Act, and the remaining respondents were charged under Section 5 of the said Act. The Police Sub-Inspector of Surendranagar obtained a special warrant under Section 6 of the Act from the First Class Magistrate, Surendranagar, and on the strength thereof he entered the house of accused No. 1 on the night between the 9th and 10th September 1950. All the accused were found in a room on the first floor of the house squatting on the ground in a circle with three cards lying in front of most of them, and with loose coins lying on the floor. On the search of their persons they were found to have moneys with them. The accused were arrested and were subsequently prosecuted for the above said offences. The learned Magistrate held that the cards and the moneys were instruments of gaming, that they were seized under a legal warrant under Section 6 and that a presumption arose under Section 7 of the Act that the house was a common gaming-house and that the accused were present there for the purpose of gaming. He, however, held that the presumption was sufficiently rebutted by the accused by showing that a 'Mela' (fair) was being held on Shravan Vad 11, 12 and 13 at Joravarnagar, and that gambling was customary on those days. The learned Magistrate also found that the house of accused No. 1 was opposite the Police Chowki in the Bazar and that a policeman always used to sleep on a bench near the 'deli' of the said accused and therefore the probability was that all the accused were playing an innocent game of cards with stakes, and in this view the learned Magistrate acquitted all the accused.

(2) The first question for consideration in this appeal is whether the warrant on the authority of which the Police Sub-Inspector entered the house of accused No. 1 was a legal warrant because the presumption under Section 7 will arise only if the entry was on the authority of a legal warrant. The proviso to Section 6 says that no officer shall be authorised by special warrant unless the Magistrate concerned is satisfied, upon any complaint made before him on oath and upon making such inquiry as he may think necessary, that there are good reasons for suspecting the said house, room or place, to be used as a common gaming-house. Now the complaint, Exhibit 4, made by the Sub-Inspector to the First Class Magistrate of Surendranagar says that gambling was being carried on in the house stated in the margin and that a search warrant be therefore issued. The statement on oath made by the Sub-Inspector merely says that what is stated in his report was true and the order of the Magistrate is that having regard to the Sub-Inspector's statement on oath, he considered that it was proper to issue the warrant and therefore he ordered that the warrant be issued. The complaint envisaged by the proviso to Section 6 is a complaint that the house, room or place to be entered into is used as a common gaming-house, and the Magistrate has to be satisfied that there are good grounds to suspect that it is so. Now here the Sub-Inspector himself did not complain that the house of accused No. 1 was used as a common gaming-house. His complaint merely was that gambling was going on in the house, which does not necessarily mean that the house was being used as a common gaming-house; nor does the Magistrate's order indicate that he had reasons to suspect that the house was being used as a common gaming-house. The Gujarati rendering of the words 'common gaming-house' is 'Jugarkhana', and that is also the expression used in the warrant Exhibit 2 itself. It is one thing to say that in a particular house gambling is going on and it is another thing to say that the said house is a common gaming-house. There is a world of difference between the two and if the Sub-Inspector wanted to arm himself with a special warrant, it was quite necessary that he should have complained in a precise manner; at any rate, it was essential that the Magistrate should have been satisfied that there were grounds to suspect that the said house was being used as a common gaming-house and not merely that the gambling was being carried on in the said house.

Section 6 of the Act must be construed strictly because Section 7 gives to an arrest and seizure under it an operation different from that of the

general presumption of innocence in criminal cases ('EMPEROR v. KAITAN', 9 Bom L R 695.) It raises a presumption in favour of the prosecution, viz., that the house, room or place is used as a common gaming-house and that the persons found therein were then present for the purpose of gaming, although they may not be seen gaming actually and it casts the onus on the accused to prove the contrary. The warrant here is defective inasmuch as the Sub-Inspector did not complain, nor was the Magistrate satisfied that there were good grounds to suspect that the house of accused No. 1 was used as a common gaming-house, the only satisfaction he had being that gambling was being carried on in the said house. In the circumstances no presumption under Section 7 can arise and it will be for the prosecution to establish by evidence in the ordinary way that on the facts proved the accused were guilty of the offences charged, viz., that accused No. 1 was keeping a common gaming-house and that he and the remaining accused were found gaming in a common gaming-house. There is no evidence that the house of the accused was a common gaming-house and the mere find of playing cards or loose coins lying on the floor or even of moneys in the pockets of the accused will not necessarily imply that they were gaming in a common gaming-house. That fact has to be proved by positive evidence which is lacking in the case. The accused were therefore entitled to be acquitted on this ground.

(3) The Advocate-General has urged that in case the presumption arose under Section 7, and the onus lay on the accused to prove that they were not gaming in a common gaming-house or were not there for the purpose of gaming, then the same has not been discharged by the accused. In the view we are taking, the question is merely academic, but we must observe that the learned Magistrate's appreciation of the evidence on this point is erroneous. It is true that Sravan Vad 11, 12 and 13 are Jain Holidays and that a fair is held at Joravarnagar on these days, and it may even be true that these fairs are similar to those held in Wadhwan City on Sravan Vad 8, 9 and 10, but there is nothing in the evidence of defence witness Dr. Shantilal Nagardas, on whose evidence the learned Magistrate has principally based his finding, to say that gambling is customary at Joravarnagar on Sravan Vad 11, 12 and 13 and that Jains and others indulge in it. In the absence of such evidence, the learned Magistrate was not right in treating it as a circumstance rebutting the presumption.

(4) There is another procedural defect in this case to which we must refer. The case was triable as a summons case and under S. 242, Criminal Procedure Code, when the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused are to be stated to him, and he is to be asked if he has any cause to show why he should not be convicted, though it is not necessary to frame a formal charge. If he admits that he has committed the offence of which he is accused, his admission is to be recorded as nearly as possible in his words, and if he shows no sufficient cause why he should not be convicted, the Magistrate may convict him. It is only when the Magistrate does not convict the accused or if the accused does not make an admission, the trial is to be proceeded with. The learned Magistrate has here not asked any of the accused at the beginning of the trial, and there is thus a serious lacuna in the procedure. However in the view we are taking on the other aspects of the case we need not consider whether this amounts to an irregularity or an illegality and if the former whether a re-trial should be ordered on that ground.

(5) For the reasons stated in paragraph two above, we confirm the order of acquittal and dismiss this appeal.

(6) BAXI, J.: I agree.

G.M.J. *Appeal dismissed.*

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SHAH, C. J. AND BAXI, J.

Bhagat Sure and others, Applicants v. State.

Criminal Misc. Appln. No. 61 of 1951, D/- 21-1-1952.

Cattle Trespass Act (1871) (as adopted in Saurashtra), S. 12A — Order under. without giving opportunity to owners of cattle of being heard — Order is without jurisdiction.

The section requires the satisfaction of the Mamlatdar or the Mahalkari as to the likely damage of crops or disobedience of order as a condition precedent to making an order of removal of the cattle or imposing a fine for disobedience of the order. This satisfaction can only arise if the Mamlatdar or the Mahalkari gives the owner of the cattle an opportunity of being heard before making the order. Orders passed under the section ex parte against the owners of the cattle are without jurisdiction and cannot be sustained. **(Para 4)**

V. G. Hathi, for Applicants; A. R. Bakshi, Advocate-General with B. R. Joshi, Assistant Government Pleader, for the State.

BAXI, J.: The applicants have prayed for a declaration that Section 12-A of the Cattle Trespass Act (1 of 1871), as adapted in Saurashtra was void and 'ultra vires' of the Constitution. They furher prayed that the order of the Mamlatdar, Kundla Mahal, imposing a fine on them under that section was null & void and without jurisdiction.

(2) The applicants Nos. 1 to 5 are shepherds and the applicant No. 6 is a Rabari. All of them reside in Kundla and own cattle or sheep. Two orders have been passed against them by the Mamlatdar under Section 12-A of the Cattle Trespass Act. The first order is dated 21-8-1950, directing the applicants and other persons named therein to go away with their cattle beyond 20 miles from Kundla. They were further informed that in case of disobedience of the order, they would be liable to a fine not exceeding Rs. 1,000/-. The applicants did not remove the cattle as directed by this order and the Mamlatdar issued a second order dated 28-9-1950/10-10-1950. (Ex. 3.) This order recites that many cultivators of Kundla had applied to the Mamlatdar to make proper arrangements to prevent the shepherds of the village from damaging their crops. Upon receipt of that application they were ordered to go away with their cattle beyond 20 miles from Kundla under Section 12-A (1) of the Cattle Trespass Act. The shepherds had not obeyed the orders and consequently the people of the village gave another application, dated 18-8-1950. Orders were passed against the applicants and others which have already been referred to above (Ex. 2). The applicants had again neglected to carry out the orders contained in Ex. 2 and were damaging valuable crops of the cultivators. Each of them was therefore fined Rs. 300/-. They were further informed that if they did not remove their cattle within 8 days, they would be forcibly removed with the aid of the Police. The applicants preferred an appeal to the Collector against this order. The Collector con-

firmed the Mamlatdar's order directing them to remove the cattle but reduced the fine to Rs. 200/-. They preferred a second appeal against the Collector's order to the Revenue Commissioner who confirmed the order and dismissed the appeal. The present petition is against the Mamlatdar's order as modified and confirmed by the Collector and Revenue Commissioner.

(3) The Indian Cattle Trespass Act of 1871 has been applied with certain amendments to Saurashtra by the Saurashtra Ordinance LXI of 1948. Section 12-A has been added to the original enactment by this Ordinance. The learned Advocate for the applicants urged a number of objections against the legality of the section itself. For instance, he urged that the applicants were permanent residents of Kundla and had a fundamental right to live there and carry on the profession of graziers of cattle, sheep and goats in Kundla. It was submitted on their behalf that the section imposed an unreasonable restriction on this fundamental right by empowering the Mamlatdar to order them to remove their cattle from Kundla. The learned Advocate-General contended that the applicants had no fundamental right to graze the cattle on Government land and if any such fundamental right existed, the enactment imposed a reasonable restriction on the exercise of that right in the interests of the general public. The section was therefore saved by Article 19 (5) and (6) of the Constitution.

(4) We think that it is not necessary to go into the question of the constitutional validity of the impugned section because in our opinion the order of the Mamlatdar cannot be sustained on another ground. Section 12-A of the Act empowers the Mamlatdar to order certain persons to remove or cause to be removed their cattle to a specified place or places and prescribes the consequences of disobedience of the order and the manner in which the order would be enforced in case of disobedience. The relevant portion of Section 12-A (1) is set out below:

> "12-A (1) If a Mamlatdar or Mahalkari is satisfied that the cattle of any person whether a resident of the Taluka or Mahal under his jurisdiction or not, possessing more than twenty heads of cattle are likely to damage the standing crops or grass on any agricultural land or grazing ground, as the case may be, he may by a special or general order direct that the owner of such cattle shall within a period specified in the order remove or cause to be removed all or any of his cattle to such place or places within or outside the State as may be specified in the order."

Sub-section (2) authorises the Mamlatdar to enforce obedience of the order by directing a Police Officer not below the rank of a head constable to remove the cattle. By Sub-section (3) the Mamlatdar or the Mahalkari is empowered to impose a fine upto Rs. 1,000/- if he is satisfied that the order issued by him is contravened by any owner or keeper of the cattle. These provisions contain penal provisions of a drastic nature involving loss of property and forcible removal of the applicant's cattle involving them to great hardship and pecuniary loss. It is, therefore, very essential that the Mamlatdar or the Mahalkari should observe the rules of natural justice before making orders under this section. Sub-section (1) requires that the Mamlatdar or the Mahalkari should be "satisfied" that the cattle are likely to cause damage. Similarly Sub-section (3) which authorises him to impose a fine also requires that the Mamlatdar or Mahalkari should be "satisfied" that his order has been contravened. The section therefore requires the satisfaction of the Mamlatdar or the Mahalkari as a condition precedent to making an order of removal of the cattle or imposing a fine for disobedience of the order. This satisfaction can only arise if the Mamlatdar or the Mahalkari gives the shepherds an opportunity of being heard before making the order. The Mamlatdar does not appear to have given that opportunity to them. It appears that the Mamlatdar at first received an application from the cultivators against the owners of the cattle generally whereupon he made a general order addressed to all Rabaries, shepherds and other owners of cattle informing them that he had received an application from the cultivators complaining that their cattle were damaging crops and directed them to take their cattle into hills within 8 days. They were further informed that in case of disobedience of the order the persons disobeying it will be liable to pay a fine upto Rs. 1,000/- under Section 12-A of the Cattle Trespass Act. This order is dated 27-7-1950, and was passed by the Mamlatdar without hearing any one. Against this order however certain shepherds gave an application dated 31-7-1950 by which they denied that their cattle caused any damage to the crops, undertook to obey the Government's instructions with regard to the keeping of their animals and requested the Mamlatdar to withdraw his order. The Mamlatdar referred this application to the Talati for necessary action by his endorsement dated 23-8-1950. We do not know what action the Talati took on this application. But we find that the cultivators gave another application, dated 18-8-1950, upon which the Mamlatdar passed his order dated 21-8-1950, Ex. 2.

The learned Advocate-General argued that by accepting the representation from the shepherds against the first order the Mamlatdar had given them an opportunity to make a representation against the order. This argument cannot be accepted. The Mamlatdar merely transmitted the papers to his subordinate and did not apply his mind to the shepherds' representation nor did he enquire whether the complaint against them was well-founded. When the cultivators made the second application dated 18-8-1950, reminding the Mamlatdar of their previous application and his orders thereon, he promptly issued the order (Ex. 2) directing the applicants and some others to remove their cattle on pain of being fined for disobedience of the order. The second application made specific allegations against certain persons by name and it was his duty to give them an opportunity to refute the allegations if they so wished. But he did not do so. This was wrong, particularly because in the previous application the shepherds had specifically denied the allegations of damage and that application was yet awaiting disposal by the Mamlatdar. We are satisfied under the circumstances that in making 'ex parte' orders against the applicants for the removal of their cattle and imposing a fine upon them the Mamlatdar acted without jurisdiction and his orders cannot be sustained as his proceedings were entirely opposed to the rules of natural justice. We therefore allow the present petition and declare that the order of the Mamlatdar (Ex. 2) directing the applicants to remove their cattle and imposing fines upon them (Ex. 3) are without jurisdiction and direct the opponents, not to execute these orders. The opponents shall pay the applicants' costs of this petition.

(5) SHAH, C. J.: I agree.

Petition allowed.

G.M.J.

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CHHATPAR J.

Mahendrasinhji, Appellant v. Abdul Vali, Respondent.

Second Appeal No. 34 of 1951, D/- 30-11-1951.

Contract Act (1872), S. 25 (3) — Agreement to pay time-barred debt in consideration of further loan, is not void.

A mere acknowledgment of liability in respect of a time-barred debt signed by a debtor without a promise to pay is not sufficient for the purpose of S. 25 (3) of the Contract Act. AIR 1949 Nag 229, Ref.

An agreement which is made for consideration does not come within the purview of the principle of S. 25. Thus an agreement to pay a time-barred debt for consideration (such as a further loan) which need not be adequate, would be perfectly valid and would amount to a contract under S. 2 of the Contract Act and enforceable at law. Such an agreement does not fall under S. 25. AIR 1943 All 63, Ref. (Para 2)

Anno: Contract Act, S. 25 N. 10.

J. J. Trivedi, for Appellant; K. M. Chhaya, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('10) 5 Ind Cas 418 (All) (Pr 2)
('23) 21 All L J 446: (AIR 1923 All 590) (Pr 2)
('29) 1929 All W N 1279 (Pr 2)
('32) 53 All 963: (AIR 1932 All 199) (Pr 2)
('35) 57 All 434: (AIR 1935 All 129) (Pr 2)
('36) 58 All 382: (AIR 1936 All 160) (Pr 2)
('43) AIR 1943 All 63: (ILR (1943) All 171) (Pr 2)
('49) AIR 1949 Nag 229: (ILR (1948) Nag 639) (Pr 2)
('21) 6 Pat LJ 121: (AIR 1921 Pat 29) (Pr 2)

JUDGMENT: This Second Appeal arises out of a suit filed by the appellant for recovery of Rs. 476/- due on a Khata executed by the defendant respondent along with an amount of Rs. 5-7-0 as notice charges making the total of Rs. 481-7-0. The translation of the Khata is as under:

"Account of Pinjara Abdul Vali for Samvat 2002 Karatak Sudi, 10th Wednesday, dated 14-11-1945.

Credit.	Debit.
Rs. 312-8-0 Chaitra Vadi, St. 2002. 312-12-0 including Vera admitted before Panachand Raichand Shah.	Rs. 478/ In words rupees four hundred seventy eight are former balance payable which rupees are without interest. They are to my Khata, the balance of which Khata is drawn today and signed by me below. It is binding on my heirs and successors. Rs 300/- In words rupees three hundred taken today in cash for the purpose of the marriage expenses of my son on interest at one per cent. The amount with interest will be paid by me in the current year's season. No default will be made in this. For the former balance drawn and for the amount taken today in cash, I have signed below and which is done in full senses and voluntarily. Sd. Pinjara Abdul Vali in his own handwriting.
Total Rs. 312-12-0 In words Rupees three hundred and twelve and annas twelve only have been received. Sd. Abdul Vali in his own handwriting. Sd. Witness Panachand Raichand in his own handwriting at the instance and in the presence of the executant.	Sd. Witness Shivlal Ratanshi at the instance of the executant. Sd. Witness Thakker Dinmahmad Alibhai at the instance of the executant. Rs. 10 12-0 Interest on Rs. 300/- upto Chaitra Vad 4th St. 2002. Total Rs. 788-12-0 In words, rupees seven hundred eighty eight and annas twelve are payable. Dated 20th April, 1946, Kherali. Sd. Abdul Vali in his own handwriting. Witness. Sd. Shah Panachand Raichand in his own handwriting at the instance and in the presence of the executant."

The defendant admitted that he had only taken Rs. 300/- on interest from the plaintiff and he had paid that amount with interest due and nothing remained due to the plaintiff. He did not admit the execution of the Khata and pleaded that the plaintiff had fraudulently included the entry of Rs. 478/- in the Khata. He further admitted that he had knowingly signed the Khata only relating to the entry of Rs. 300/-. He also further pleaded that whatever amount was due on the previous account was time barred and was as a matter of fact written off. He further raised the plea that in any case the debit entry of Rs. 478/- was time barred and there being no express promise to pay, the amount could not be recovered being a transaction void under S. 25 of the Contract Act. The trial Court disallowed the pleas of the defendant and passed a decree for Rs. 478/- with costs and interest from the date of the suit till payment. Against this decree the defendant filed an appeal to the District Court. The learned District Judge set aside the decree of the trial Court and dismissed the suit, holding that so far as this entry of Rs. 478/- was concerned, it was the balance of an account the recovery of which was barred at the time the Khata was executed i.e. on 14-11-45, and that as the entry did not embody any express promise to pay the amount the case did not fall within the purview of S. 25(3) of the Indian Contract Act and therefore the transaction was void being without consideration. The District Judge however held that there was no fraud perpetrated on the defendant and that the amount of Rs. 478/- was not previously written off as contended by the defendant.

(2) The sole ground on which the learned District Judge disallowed the claim of the plaintiff was that the entry of Rs. 478/- as contained in the Khata and signed by the defendant did not contain a promise to pay. It was merely an acknowledgment of liability in respect of a time barred debt and therefore it did not come within the purview of Cl. (3) of S. 25 of the Indian Contract Act. The learned Judge cited good many rulings to the effect that a mere acknowledgment of liability in respect of a time-barred debt was not sufficient but that there should be an express promise to pay. The latest case on the point cited before me is that of 'TULSIRAM v. ZABOO', of the Nagpur High Court, AIR (36) 1949 Nag 229, wherein the law on the point has been exhaustively dealt with and the rulings of the various High Courts are discussed. The majority of the High Courts are of the view that a mere acknowledgment of liability in respect of a time-barred debt signed by a debtor without a promise to pay is not sufficient for the purpose of S. 25(3) of the Contract Act. With this view I entirely concur. But the present case stands on a different footing. S. 25 deals with

an agreement made without consideration and it states that such an agreement would be void unless it is a promise made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part, a debt of which the creditor might have enforced payment but for the law for the limitation of suits. An agreement which is made with consideration does not come within the purview of this principle. The Second Explanation to S. 25 makes it further clear that an agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate. In short, an agreement to pay a time-barred debt for consideration, which need not be adequate, would be perfectly valid and would amount to a contract under S. 2 of the Contract Act and enforceable at law. Bearing these principles in mind, let us examine the facts of the present case. The District Judge has held that but for the defendant agreeing to execute the Khata in respect of the time barred balance of Rs. 478/- the plaintiff would not have advanced in cash on 14-11-45 the sum of Rs. 300/- admitted by the defendant. The District Judge observes:

"It is to be noted that admittedly the plaintiff has advanced a loan of Rs. 300/- on that day i.e. when Ex. 5 (Khata) was executed by the defendant. So Ex. 5 is not without consideration. Part consideration is there and from Ex. 5 it appears that the plaintiff was induced to give a loan of Rs. 300/- as the defendant executed a Khata for Rs. 478/- plus Rs. 300/-. It is very doubtful whether the plaintiff would have advanced Rs. 300/- if the defendant had not executed the Khata of Rs. 478/-."

So that in the present case there is the finding of fact that the consideration for execution of the Khata in suit including the time barred item of Rs. 478 was the cash loan of Rs. 300 and indeed this is borned out by the last debit entry of Rs. 788-12-0 which was executed by the defendant in the presence of a witness on 20-4-1946. This entry comprises the two items of Rs. 478/- and Rs. 300/- plus interest accrued due till then. This entry in any case cannot be considered as being without consideration. Admittedly it included Rs. 300/- which were within time and enforceable at law.

Assuming that this entry of Rs. 788-12-0, dated 20-4-1946 did not contain a promise to pay, it was nevertheless with consideration and did not fall within the purview of Section 25 of the Contract Act as a transaction without consideration. In this view of mine, I am supported by a recent ruling of the Allahabad High Court given in the case of 'DEBI PRASAD v. BHAGWATI PRASAD', AIR (30) 1943 All 63, which appears to be on all fours with the present case. In that case a sum of Rs. 1,244/- was due on an old account which was time-barred and a fresh advance of Rs. 56/- only was made; a Khata was executed by the debtor for Rs. 1,300/- in the following term:

"Rupees 1,300, date Posh sudi sixth. Received rupees thirteen hundred; took on 8 annas per cent.

Signature of Bhagwati Prasad in autograph."

Dar, J., who delivered the judgment was pleased to observe as under:

"It is not disputed that at the time of loan a fresh advance of Rs. 56/- was made and Rs. 1,244 were due on old account which had become barred by time. In order to secure a fresh advance the debtor agreed to pay a time-barred debt and but for this agreement the fresh advance might not have been made. The consideration therefore for the promise to pay Rs. 1,300 was in part a fresh advance and in part the time-barred debt. It is therefore obvious that the contract cannot be regarded as one wholly without consideration, though a question may arise whether the consideration was adequate and this may be a ground for relief or for avoidance of contract in a proper case. Section 25, Contract Act, only applies to contracts which are wholly without consideration and not to contract which may be for inadequate consideration. Indeed, under Expl. (2) of S. 25 inadequacy of consideration is not relevant unless it affects the question of free consent to contract. It is true that under S. 25 (3), Contract Act, an agreement to pay a time-barred debt, is regarded as one without consideration, but this Sub-section only applies when a wholly gratuitous promise is made to pay a time-barred debt and not to those cases when a promise to pay a time-barred debt is made for some consideration though the consideration might be inadequate.

"Mr. Pandey contends that if a person borrows Rs. 100 from another person on a promise to pay Rs. 200/- at the end of one month, such a promise to the extent of Rs. 100/- is without consideration and the creditor can recover on such a loan only Rs. 100/- and its reasonable interest. On the same analogy, Mr. Pandey "contends that if a person borrows Rs. 56 and promises to pay Rs. 1,300 at a time when Rs. 1,244 included in Rs. 1,300 were not legally recoverable to the extent of Rs. 1,244 no consideration really passes between the parties. In our opinion, the principles underlying Mr. Pandey's contention have no application to the present case. It is always open to a debtor to pay a time-barred debt and if after the actual payment of a time-barred debt a fresh advance is made to the debtor including the amount received for the time-barred debt, such an advance would be a new debt legally recoverable and could be open to no objection on the ground of want of consideration. Law makes no difference if instead of an actual payment between a debtor and a creditor a notional payment takes place and by agreement a time-barred debt is treated as paid off and a fresh advance is made which includes also a previous time-barred debt: See 'MUHAMMAD ABID v. BHAGWAN DAS', 5 Ind Cas 418 (All) BINDESHRI PRASAD v. SARJU SINGH', 21 All L J 446 and 'RAM BAHADUR v. DAMODAR PRASAD', 6 Pat L J 121.

"It is also well settled that when a new contract is made for a fresh consideration superseding the previous contract which had become barred by time but including it as a part consideration in the new contract, an action could be founded upon the new contract and it can be enforced in its terms without raising any question about the acknowledgment of a time-barred debt: See 'NATH SAH v. DURGA SAH', 58 All 382 at p. 385; 'ABDUL RAFIQ v. BHAJAN', 53 All 963 at pp. 980, 982 and 983, 1929 All L W 1279 at pp. 1284 and 1285 and 'GHULAM MURTAZA v. FASIUNNISSA BIBI', 57 All 434 at p. 438. In our opinion, the sarkhat executed by Bhagwati Prasad embodied a new contract for a fresh consideration and an action could be founded upon it and the entire amount due thereunder could be recovered from its executant, defendant 1."

The learned District Judge has entirely missed this aspect of the case, although he has held that the Khata was not without consideration. In my opinion the case falls within the principles laid

down by the Allahabad High Court and the plaintiff is entitled to succeed.

(3) I accordingly set aside the decree of the District Court and restore that of the trial Court. The plaintiff will have his costs throughout.

R.G.D. *Appeal allowed.*

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SHAH C. J. AND BAXI, J.

State v. Durlabhji Anadji and others, Respondents.

Criminal Appeal No. 49 of 1951, D/- 28-12-51.

Bombay Prevention of Gambling Act (IV (4) of 1887), Ss. 7, 6 — There must be warrant under Section 6 at time of raid, to enable Court to raise presumption under S. 7 — In the absence of provision in the Act in this behalf provisions in Criminal P. C. apply (Criminal P. C. (1898), Ss. 102 (1) and 80(1)).

One of the conditions which must be fulfilled before the Court is entitled to raise any presumption under Section 7 is that the Police Officer must have entered the room "under Section 6" which means that his entry must be authorised by a special warrant issued to him under Section 6. If the Police Officer, to whom a special warrant has been properly issued under Section 6 of the Act, omits to keep it with him when entering the house, his entry cannot be said to be "an entry under S. 6" so as to entitle the Court to raise the presumption under Sec. 7. His entry without the warrant is illegal and the Court is not entitled to raise any presumption under Section 7. The warrant entitles the Police Officer both to enter and search the house and also to arrest persons found therein. It is therefore a warrant which is both a search warrant and a warrant of arrest. Though the Bombay Prevention of Gambling Act does not make it clear whether the Police Officer should carry the warrant with him when in execution of the warrant he enters a house or arrests persons found there, the Criminal P. C. contains provisions on this point. Both in the case of search warrants and warrants of arrest under Ss. 102 (1) and 80 (1) of the Cr. P. C. the officer executing the warrant is required to keep the warrants with him. If he fails to do so, his entry in the premises or the arrest is illegal. The fact that no one may have demanded to see the warrant and tamely submitted to the search or arrest does not make these proceedings legal. In the absence of any provisions in the Gambling Act, the above provisions should govern the searches and arrests under S. 6 and presumption under Section 7 can only be made if the Police Officer had the warrant in his possession at the time of entering the premises. **(Para 4)**

A. R. Bakshi, Advocate-General with B. R. Joshi, Assistant Government Pleader, for the State; H. P. Mankad, for Respondents Nos. 1 to 6.

BAXI, J.: This is an appeal against the order of the First Class Magistrate, Rajkot, acquitting the respondents of offences under Sections 4 and 5 of the Bombay Prevention of Gambling Act 1867 (1887?) The Sub-Inspector of Police, "B" Division, Rajkot, having received information that the respondent No. 1 was keeping a common gaming-house and that persons were gaming in his house obtained a warrant from the District Superintendent of Police, Central Saurashtra Division under Section 6 (2) of the Bombay Prevention of Gambling Act and raided the respondent No. 1's house on 1-11-1949 at 11 P. M. The complainant Sub-Inspector and the Panchas who accompanied him went up the staircase and saw the respondents Nos. 2 to 5 playing cards in a room through a window though the doors of the room were closed. They were made to open the room and a search of the room as well as of the persons of the respondents was made and a Panchnama prepared. The respondent No. 1 was not at home when the Sub-Inspector entered the house but he turned up while the Panchnama was being written. 52 cards and a Joker were found lying near the quilt on which the respondents had been sitting. Another pack was found below the quilt. The respondents' persons were searched and currency notes and loose coins were found on their persons. The Sub-Inspector thereafter filed a complaint in the Court of the First Class Magistrate against all the respondents under Sections 4 and 5 of the Act. The respondent No. 1 was charged with keeping a common gaming house under Section 4 and the rest of the respondents were charged with having been found in a common gaming house for the purpose of gaming under Section 5.

(2) The learned Magistrate refused to raise the presumptions under Section 7 of the Act and held on the merits that the prosecution had failed to prove the charges against the respondents. Consequently he acquitted them all.

(3) The first question to be considered in this case is whether the learned Magistrate should have raised the presumptions under Section 7 of the Act. That section enacts that when an instrument of gaming has been seized in any house, room, etc., entered under Section 6 or about the person of any one found therein and in the case of any other thing so seized if the Court is satisfied that the Police Officer who entered the said house, etc., had reasonable grounds for suspecting that the thing seized was instrument of gaming the seizure of such instrument or thing shall be evidence until contrary is proved that such house, etc., is used as a common gaming-house and the persons found therein were then present for the purpose of gaming though no gaming was actually seen by the Magistrate or the Police Officer or by any one acting under the authority of either of them.

(4) One of the conditions which must therefore be fulfilled before the Court is entitled to raise any presumption is that the Police Officer must have entered the room "under Section 6" which means that his entry must be authorised by a special warrant issued to him under Section 6. The learned Magistrate held that it was not satisfactorily established that the warrant was in existence when the house was raided. He seems to have thought that the Sub-Inspector entered the house without the warrant which must have been issued subsequent to the raid and consequently he refused to raise the presumption. One thing stands out very clear from evidence, viz., that the Sub-Inspector could not have the warrant with him when he entered the house. He states that before he raided the house he had shown the warrant to the Panchas. The Panchnama (Ex. 11), also mentions that fact but the panch witness (Ex. 32) clearly proves that the warrant was not shown to him and therefore it could not have been with the Sub-Inspector. A further circumstance which rendered improbable that the Sub-Inspector had the warrant with him was that the number (8) of the warrant and its date (23) have been obviously filled up after the raid in the blanks which were

left in the Panchnama. This means that the Sub-Inspector could not have the warrant in his possession during the raid otherwise no blanks would have been left in the Panchnama. We are satisfied that the Sub-Inspector did not possess the warrant at the time of the raid. This is a very serious thing, particularly because attempts have been made to conceal this irregularity by subsequently filling the blanks in the Panchnama and introducing a false recital therein that the warrant was shown to the Panchas. But we cannot suppose from the evidence of the blanks in the Panchnama that the District Superintendent of Police or his office issued the warrant after the raid and ante-dated it. The true explanation of these blanks appears to be that the warrant was duly issued on 23-10-1949, which is the date it bears, but the Sub-Inspector omitted to keep it with him when he raided the house.

The question that has therefore to be decided is whether if the Police Officer, to whom a special warrant has been properly issued under Section 6 of the Act, omits to keep it with him when entering the house, his entry could be said to be "an entry under Section 6" so as to entitle the Court to raise the presumptions under Section 7. In our opinion his entry without the warrant is illegal and this Court is not entitled to raise any presumptions against the respondents. The warrant entitles the Police Officer both to enter and search the house and also to arrest persons found therein. It is, therefore, a warrant which is both a search warrant and a warrant of arrest. The Bombay Prevention of Gambling Act does not make it clear whether the Police Officer should carry the warrant with him when in execution of the warrant he enters a house or arrests persons found there. But the Criminal P.C., contains provisions on this point. Section 102 (1) provides that if any place liable to search or inspection is closed, any person residing in or being in charge of such place shall, on demand of the officer executing the warrant on production of the warrant allow him ingress thereto and afford all reasonable facilities for a search therein. In the case of a warrant of arrest the Police Officer or other person executing the warrant is required by Section 80 (1) to show it to the persons to be arrested if the latter so desires. Therefore both in the case of search warrants and warrants of arrest under Criminal P.C., the officer executing the warrant is required to keep the warrants with him. If he fails to do so, his entry in the premises or the arrest is illegal. The fact that no one may have demanded to see the warrant and tamely submitted to the search or arrest does not make these proceedings legal. In the absence of any provisions in the Gambling Act, the above provisions should govern the searches and arrest under Section 6 and presumptions under Section 7 can only be made if the Police Officer had the warrant in his possession at the time of entering the premises. As the Police Sub-Inspector has failed to keep the warrant with him, no presumption can be raised against the respondents.

(5) The next question is whether independently of any presumption the evidence tendered by prosecution proves that the respondents committed the offences charged. The evidence against them is the evidence of the Sub-Inspector and the Panch witnesses who state that they saw through the window that the respondents were "gambling." This means that they saw the respondents playing cards. The presence of the cards near and below the quilt supports their statement. The respondents had money in their pockets. They were found at night in the house of the respondent No. 1 during his absence and lastly their explanations to the learned Magistrate for being there are not satisfactory. These circumstances raise a strong suspicion against the respondents but they are not sufficient for conviction. These circumstances are not incompatible with their innocence or with an innocent game of cards. The appeal therefore fails and is ordered to be dismissed.

(6) SHAH, C. J.: I agree.

R.G.D. Appeal dismissed.

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SHAH C. J. AND BAXI J.

State v. Koli Nagji Mansang, Accused-Respondent.

Criminal Appeal No. 94 of 1951, D/- 31-1-1952.

(a) Arms Act (1878), S. 29 — Absence of sanction — Effect.

The sanction under S. 29, Arms Act, is an essential prerequisite to the institution of proceedings and proceedings taken in the absence of such a sanction are a complete nullity. The question is not of a technical defect which can be remedied by a sanction subsequently obtained, but the failure to get the sanction before instituting the proceedings renders the proceedings altogether null and void. AIR 1945 FC 16, Rel. on. (Para 2)

Anno: Arms Act, S. 29 N. 1.

(b) Arms Act (1878), S. 29 — Proceedings — When can be said to be instituted within S. 29.

The proceedings contemplated in S. 29 are legal proceedings in a criminal Court and they can be said to be instituted within the meaning of S. 29, only when under S. 190, Criminal P. C. the Magistrate takes cognizance of the offence. (Paras 4, 7)

Under S. 173, Criminal P. C., on completion of the investigation the Police Officer is to send to the Magistrate empowered to take cognizance of the offence the report in a prescribed form, namely the charge-sheet, and it is only after such charge-sheet is received by the Magistrate that he takes cognizance of the offence, apart from his powers to take cognizance under S. 190 (1) (a) and (c) of the Code. It is on the Magistrate's taking cognizance on the receipt of the charge-sheet that the proceedings can be said to be initiated. Hence a sanction obtained under S. 29 prior to the sending of the charge-sheet to the Magistrate would be perfectly legal. AIR 1927 Cal 721; AIR 1928 Pat 146; AIR 1925 All 434; AIR 1948 Cal 128; AIR 1950 Pat 243, Rel. on; AIR 1946 Pat 160, Diss. from. (Para 4)

Anno: Arms Act, S. 29 N. 2.

A. R. Baxi, Advocate-General with B. R. Joshi, Asst. Government Pleader, for the State; B. M. Dhedhi, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras.

('45) AIR 1945 FC 16: (46 Cri LJ 510) 2
('25) AIR 1925 All 434: (26 Cri LJ 1112) 5
('27) AIR 1927 Cal 721: (28 Cri LJ 817) 4, 6
('48) AIR 1948 Cal 128: (48 Cri LJ 668) 5
('28) AIR 1928 Pat 146: (29 Cri LJ 301) 5
('43) AIR 1943 Pat 245: (45 Cri LJ 177 SB) 6
('46) AIR 1946 Pat 160: (47 Cri LJ 927) 2, 3, 6
('50) AIR 1950 Pat 243: (51 Cri LJ 977) 6

SHAH, C. J.: This is an appeal by the State against the acquittal of the respondent Nagji Mansang of an offence under S. 19 (f) of the Indian Arms Act. On 6th October 1950, the Deputy Superintendent of Police, Bhavnagar, and two Police Officers were proceeding to Talaja for the investigation of an offence and as they reached within about two miles of Talaja they saw two persons coming on camel back from the opposite direction. One of them was the respondent, and as the respondent was known to the Police Officers as trading in illicit liquor, the Police Officers stopped the respondent and took a search and they found a muzzle loading gun tied in the saddle of the camel. As the respondent had no licence for the gun, he was prosecuted for the abovesaid offence. His defence was that as he and his companion Laxman were going to village Piparia they saw some Vaghris carrying a rifle and so they pursued the Vaghris, but the Vaghris ran away dropping the rifle. He picked up the rifle & was going to hand it over to the Chawkidar of Piparia, but was seized by the Police Officers on the way. The learned Magistrate disbelieved the defence and convicted and sentenced the accused to three months rigorous imprisonment. On appeal by the respondent, the Sessions Judge also disbelieved the defence and accepted the trial Magistrate's finding on facts. However, he held that the proceedings were null and void because the sanction of the District Magistrate, requisite under S. 29 of the Indian Arms Act, had not been obtained in sufficient time, and in this view, he set aside the conviction and the sentence and acquitted the accused.

(2) For a proper appreciation of the question at issue, it is necessary to mention the material dates. The offence was committed on 6th October 1950 and the accused was arrested on the same day. He was released by the Police on the next day, 7th October 1950 on his executing a bond. The sanction of the District Magistrate was applied for on 27th October and was obtained on 27th November 1950, and thereafter charge sheet was sent to the District Magistrate on 11th December 1950. Section 29 of the Indian Arms Act provides that where an offence punishable under S. 19, Cl. (f), has been committed no proceedings shall be instituted against any person in respect of such offence without the previous sanction of the Magistrate of the district or, in a presidency town, of the Commissioner of Police. This sanction is an essential prerequisite to the institution of proceedings and proceedings taken in the absence of such a sanction are a complete nullity. The question is not of a technical defect which can be remedied by a sanction subsequently obtained, but the failure to get the sanction before instituting the proceedings renders the proceedings altogether null and void: 'BASDEO AGARWALLA v. EMPEROR', AIR 1945 FC 16. But the real question is when are proceedings said to be instituted within the meaning of S. 29 of the Act. The Sessions Judge has taken the view that the proceedings were instituted on the date on which the accused was sent to the Magistrate and was released on bail by the Magistrate which, according to the learned Judge, took place on 27th October 1950. The learned Judge has, however, fallen into a twofold error, first that the date, viz., 27th October is wrong and the correct date is 7th October and second that the accused was not sent up to the Magistrate and was not released by the Magistrate, but was released by the Police themselves on his executing a bond on 7th October. In holding that the material date was the date on which the accused was sent to the Magistrate and was enlarged on bail by the Magistrate the learned Judge has relied on the decision of the Federal Court above referred to and on a decision of the Patna High Court in 'GIRJA SURI v. EMPEROR', AIR 1946 Pat 160.

In the case before the Federal Court, the appellant was charged with contravening the provisions of Cls. 9(a) and 13(b) of the Drugs Control Order 1943. He was produced before the Chief Presidency Magistrate on 2nd May 1944 and a challan under Rr. 81(4) and 121, Defence of India Rules, was filed on that day, which is equivalent to sending a chargesheet under S. 173, Criminal P. C. Later, on the same day, the appellant was brought before the Magistrate, who adjourned the case to 16th May 1944, for evidence and released the appellant on bail. On the 16th May it was noted that the sanction had not been received. Nevertheless the Magistrate adjourned the case to 24th May for evidence, and it appears that the sanction was filed on the next adjourned date, viz., the 24th May and the case ultimately ended in the conviction of the appellant. Clearly therefore from 2nd May onwards the prosecution had been put in motion and various steps had been taken by the Magistrate between then and 24th May 1944, and on the facts therefore it was clearly a case where the proceedings could be deemed to have been instituted on 2nd May. In fact the challan itself was sent to the Magistrate on that date, and the Magistrate had taken cognizance of the case; and there can be no quarrel with this view.

(3) 'GIRJA SURI v. EMPEROR', AIR 1946 Pat 160 which follows the above Federal Court's decision, was a case under S. 19(f) of the Indian Arms Act. On 25th June 1944, six persons including the petitioner Girja Suri were received by the Magistrate who ordered them to be remanded in Magisterial custody till 9th July 1944. The accused persons were later enlarged on bail on 29th June. The charge sheet had not been sent by the Police till the 9th July, which was the date fixed, but was sent on the next day, viz., the 10th July. The District Magistrate's sanction was obtained on 16th August which means that the sanction was obtained subsequent to the sending up of the charge sheet. The learned Judges took the view that the proceedings started against the petitioner on 25th June when he was produced before the Magistrate and were continued thereafter and that the sanction was received subsequent to the institution of the proceedings, and following the above Federal Court's decision they held that the whole proceedings were null and void. However their Lordships have gone further than the Federal Court inasmuch as they have held that the proceedings were started on the date the petitioner was produced before the Magistrate. In the Federal Court case the challan was sent and the accused was produced before the Magistrate simultaneously and on the filing of the challan the Magistrate did take cognizance of the case and the proceedings were therefore naturally treated as having commenced from that day. In our view, the decision of the Patna High Court in 'GIRJA SURI'S CASE', is not correct as we shall show presently.

(4) Now the arrest of the accused and the investigation of the offence by the Police are administrative acts falling within the sphere of the police and they are obviously not proceedings before the Court; and we do not think there can be any quarrel with this position. As for proceedings for bail although they are in a sense judicial proceedings, they are still separate judicial proceedings and are quite apart from the actual prosecution of the accused for the offence. Under S. 173, Criminal P. C. on completion of the investigation the Police Officer is to send to the Magistrate empowered to take cognizance of the offence the report in a pres-

cribed form, namely the charge-sheet, and it is only after such charge-sheet is received by the Magistrate that he takes cognizance of the offence, apart from his powers to take cognizance under S. 190(1) (a) and (c) of the Code. It is on the Magistrate's taking cognizance on the receipt of the charge-sheet that the proceedings can be said to be initiated. The proceedings contemplated in S. 29 are legal proceedings in a criminal Court and they can be said to be instituted within the meaning of S. 29, only when under S. 190, Criminal P. C., the Magistrate takes cognizance of the offence. This view finds support from several decisions of the other High Courts and a later decision of the Patna High Court itself. In 'ISMAIL KHAN v. EMPEROR', AIR 1927 Cal 721, the accused was arrested on 6th September and the charge was entered in the crime sheet on the same day. Sanction was secured on the next day, the 7th September, and on the accused being prosecuted a contention was made for the defence that entering the case in the case book and making out a charge amounted to institution of proceedings under S. 29, and therefore, the absence of a proper sanction previous to the entry in the Thana Book vitiated the entire trial. The plea amounted to saying that no action can be taken by any police officer in the matter without a previous sanction of the Commissioner of Police and it was observed:

"It is difficult to see what the arresting inspector was expected to do in the circumstances of this case; but it is suggested that he might, if the offence was a cognizable one, have taken the accused into custody and, without entering a charge in the diary book, asked for the sanction of the Commissioner of Police and on receipt of it made the necessary entries in the station books. We feel no hesitation in saying that this argument is far-fetched and that it has never been the intention of the legislature to lay down such an awkward procedure and make the prosecution open to the charge that no entry equivalent to a first information was made immediately after the arrest."

Their Lordships also said that by entering the charge in the office diary or preparing the charge sheet no criminal proceedings are instituted, the acts being really routine and administrative, and that the proceedings really start when the accused is placed before the Court.

(5) In 'EMPEROR v. GHULAM NABI', AIR 1928 Pat 146, the sanction was obtained on 17th August 1925 and on the facts of the case it was held that it was obtained prior to the Magistrate assuming jurisdiction over the accused in question. It was held that "proceedings" in S. 29 mean legal proceedings in Court and not searches or arrests or investigations made by the police in exercise of the powers conferred upon them by the Criminal P. C. or any other law. In 'EMPEROR v. KUTROO', AIR 1925 All 434 also the opinion was expressed that proceedings instituted in Ss. 29 and 30 meant legal proceedings taken in Court. The next case is 'EMPEROR v. PRITAM SINGH', AIR 1948 Cal 128. There the question no doubt related to the validity of the fresh prosecution of the accused by reason of S. 403, Criminal P. C., but the answer to the question turned on as to when proceedings can be said to be instituted in a Court. It was held that proceedings are instituted in a Court when a police report of the facts is received by the Court. If at the time when such a report is received, there is already in existence a valid sanction, the proceedings are then instituted and are good as from the date of the receipt of the report.

(6) The question has been considered in some detail by the Patna High Court in 'MOHAN LAHIRI v. THE KING', AIR 1950 Pat 243. One of the accused persons named Mohan Lahiri was there arrested on 12th July 1948 and was enlarged on bail by the Magistrate on 26th July 1948. The sanction was obtained on 25th August and a charge-sheet was sent to the Magistrate on 17th September. The second accused Tulsi was arrested on 30th August 1948 and the sanction in his case was obtained on 14th November 1948 and a charge-sheet was sent up on the 25th November. 'GIRJA SURI v. EMPEROR', AIR 1946 Pat 160 was distinguished on the ground that then the sanction had not been obtained until after the charge sheet had been submitted and cognizance had been taken. 'ISMAIL KHAN v. EMPEROR', AIR 1927 Cal 721, was referred to and followed as also an earlier decision of the Patna High Court in 'GOPAL v. EMPEROR', AIR 1943 Pat 245. In this last mentioned case it was held that a judicial proceeding against an accused person only commences after the Magistrate has taken cognizance of the case and made the accused person a party to the proceedings by taking some action against him, such as, a summons. In accordance with this view it was held in 'MOHAN LAHIRI'S CASE', that judicial proceedings could not be said to have been started until after the charge sheet was submitted and the Magistrate took cognizance of the offence.

(7) In accordance with these decisions, with which we agree, we hold that proceedings are "instituted" within the meaning of S. 29 of the Indian Arms Act only when under S. 190, Criminal P. C. a Magistrate takes cognizance of the offence. In the present case that took place on 11th December 1950 but prior to that the sanction of the District Magistrate had been obtained on 27th November 1950. Therefore the proceedings were instituted after obtaining the requisite sanction under S. 29 and they were perfectly valid. The respondent's acquittal on this ground is therefore unsustainable. On the merits, there is a finding of both the lower Courts that the accused was found in possession of the gun without a licence, and that finding is even otherwise unassailable. We therefore set aside the order of acquittal passed by the Sessions Judge and convict the respondent Koli Nagji Mansang under S. 19(f) of the Indian Arms Act and sentence him to three months rigorous imprisonment, less the period of imprisonment which he might have already undergone.

(8) BAXI, J.: I agree.

K.S. Order accordingly.

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CHHATPAR J.

Sanghvi Maganlal, Defendant-Appellant v. Shah Nathubhai, Plaintiff-Respondent.

Second Appeal No. 106 of 1951, D/- 22-3-1952.

(a) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (LVII (57) of of 1947), S. 13 (2) — Necessity of issue regarding hardship — Duty of Court.

The fact that the lower Courts have considered the case of comparative hardship and taking into consideration the other accommodation available to the tenant, came to the conclusion that the tenant has failed to prove greater hardship in case a decree for eviction is made is not adequate. It is necessary that at the very inception this question should be brought before the Court in the form of a separate issue to enable the parties to lead full evidence of

circumstances to be considered under Cl. (2) of S. 13. It would be difficult to determine to what extent prejudice is caused to the parties for want of such an issue. Section 13 requires the Court to be satisfied as to the circumstances mentioned in Cl. (2) before passing a decree although the plea of hardship was not raised by the tenant and in the lower appellate Court the tenant had not raised any objection in his memo of appeal whether the decision of the trial Court was bad for want of a specific issue. Case law Rel. on. (Para 3)

(b) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (LVII (57) of 1947), S. 13 (2) — Trial Court held had not acted illegally in relying upon the notes of its inspection as apart from such notes there was the evidence on the plaintiff's side that the defendant had alternative accommodation. (Para 4)

(c) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (LVII (57) of 1947), S. 13 — Penal provision in decree for eviction that if tenant does not vacate portion within certain period he should vacate whole.

Under the ordinary law, the Court may have power to impose conditions as to the performance of a decree, but looking to the spirit of S. 13 which requires the Court to take into consideration the requirements of both the landlord and the tenant and in certain cases even to split up a tenancy after assessing their respective requirements, it is improper for the Court to pass a Penal decree that if the defendant failed to vacate within 15 days part of the premises the plaintiff would be entitled to a decree for eviction of the whole premises. If once the Court comes to the conclusion that the landlord's requirement would be satisfied if only a portion of the premises is made available to him, it is improper for the Court to impose on the tenant a condition that if he failed to vacate that part within a certain time, he should vacate the whole of the premises. (Para 5)

A. R. Baxi, for Appellant; T. U. Mehta, for Respondent.

REFERENCES: Courtwar/ Chronological/ Paras.
('49) Civil Revn. Appln. No. 28 of 1949 (Sau) 3
('51) 4 Sau LR 208 3
('51) Civil Revn. Appln. No. 126 of 1951 (Sau) 3
('51) Second Appeal No. 96 of 1951 (Sau) 3

JUDGMENT: This appeal arises out of a suit filed by the respondent for eviction of the appellant from premises situate at Jamnagar. The premises consist of one room 'Osari' and a godown on the ground floor and one room and 'Osari' on the first floor. The trial Court came to the conclusion that the plaintiff wanted the premises bona fide for his use and occupation but that his requirements will be satisfied if the ground floor alone was vacated. It consequently passed a decree in the plaintiff's favour ordering the defendant to vacate this part of the premises; but added a penal clause that if the defendant failed to vacate within 15 days the plaintiff would be entitled to a decree for eviction of the whole premises. Being aggrieved by this decree, the tenant filed an appeal which was dismissed and he has now come to this Court in second appeal.

(2) Mr. A. R. Baxi, the learned Advocate for the appellant, has raised three points: (1) That the trial Court has not raised any issue based upon Cl. (2) of S. 13 of Rent Act i.e., whether taking into consideration all the circumstances of the case including the question whether other reasonable accommodation is available for the landlord or the tenant greater hardship would be caused by passing a decree than by refusing to pass it; (2) that the trial Court has acted on its notes of inspection as substantial evidence; and (3) as to the form of the decree requiring the defendant to vacate the whole of the premises, in case he did not vacate a part thereof within 15 days.

(3) Now it is true that the trial Court has not raised any specific issue as regards comparative hardship to be considered under Cl. (2) of S. 13, although it appears that some evidence was led by the parties with respect to it which led to the inference that some other accommodation was available to the tenant. Both the lower Courts have given their decision on this question and come to the conclusion against the tenant. There is also a concurrent finding of fact by the two lower Courts that the plaintiff required the premises reasonably and bona fide for his occupation. But this Court has, in a series of cases, laid down the necessity of framing an issue on the question of circumstance of (sic) under S. 13(2) in addition to the issue whether the landlord required the premises reasonably and bona fide for his occupation.

In the case of 'KHATRI DEVKARAN DAYAL v. SHAH BHOGILAL MULCHAND', 4 Sau L R 208, Shah C. J., relying upon a prior decision of Shukla, J. in 'Civ. Rev. Appn. No. 28 of 1949' held that although the plea of hardship was not raised by the tenant, it was incumbent upon the Court to be satisfied before a decree for eviction was passed that having regard to all the circumstances of the case including the question whether reasonable accommodation was available for the landlord and the tenant, greater hardship would be caused by passing a decree than by refusing to pass it, and he enjoined the necessity of framing an issue in this connection, so that the parties may realise the need and have the opportunity of adducing evidence with that object. This decision was followed by me in the case of 'THAKKAR GANGJI KURJI v. BHATIA PRABHUDAS PARSHOTTAM', Civ Revn. Appln. No. 126 of 1951 & in the case of 'THAKKAR MANJI PRAGJI v. THAKKAR PARSHOTTAM BHANJI', Civil Second Appeal No. 96 of 1951, wherein I observed that it would be difficult to determine to what extent prejudice is caused to the parties for want of such an issue.

In the present case no doubt both the Courts have considered the case of comparative hardship and taking into consideration the other accommodation available to the tenant, come to the conclusion that the tenant has failed to prove greater hardship in case a decree for eviction is made; but this is not adequate in view of the policy and trend of the decisions of this Court in dealing with cases of eviction. It is necessary that at the very inception this question should be brought before the Court in the form of a separate issue to enable the parties to lead full evidence of circumstances to be considered under Cl. (2) of S. 13. This may be taking a technical and strict view of the matter, but I am not prepared to depart from the earlier decisions and hold in the present case that as both the Courts have, in fact, dealt with the subject, the want of a specific issue has not prejudiced any of the parties. The amount of prejudice as pointed out in my earlier decision, is difficult to assess.

Mr. Mehta, the learned Advocate for the respondent, has pointed out that in the lower appellate Court the tenant had not raised any objection in his memo of appeal whether the decision of the trial Court was bad for want of a specific issue; but S 13 requires the Court to be satisfied as to the circumstances mentioned in Cl. (2) before passing a decree, and in fact evidence as to such circumstances and the finding were objected to in the memo of appeal.

(4) As regards the second contention, I am satisfied that the trial Court had not acted illegally in relying upon the notes of its inspection as apart from such notes there was the evidence on the plaintiff's side that the defendant had alternative accommodation. I consequently reject this contention.

(5) The third contention raised by the learned Advocate for the appellant has considerable force. Under the ordinary law, the Court may have power to impose conditions as to the performance of a decree, but looking to the spirit of S. 13 of the Rent Act, which requires the Court to take into consideration the requirements of both the landlord and the tenant and in certain cases even to split up a tenancy after assessing their respective requirements, it seems to me improper for the Court to pass a penal decree of the nature passed in the present case. If once the Court comes to the conclusion that the landlord's requirement would be satisfied if only a portion of the premises is made available to him, it is improper for the Court to impose on the tenant a condition that if he failed to vacate that part within a certain time, he should vacate the whole of the premises. I therefore hold that this form of the decree in the present case was improper.

(6) The result is that I set aside the decrees of the two lower Courts and remand the case to the trial Court to raise a specific issue based upon S. 13(2) and to dispose of the case in accordance with law bearing in mind my remarks as to the form of the decree. The Court should give priority to this case and dispose of it as early as possible. Costs to abide by the result of the case.

D.H. Appeal allowed.

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CHHATPAR J.

Jayantilal Sukhlal and another, Plaintiffs-Appellants v. B. K. Shani and others, Defendants-Respondents.

Second Appeals Nos. 91 to 94 of 1951, D/-14-2-52.

(a) Civil P. C. (1908), S. 100 — Question of law.

The proper legal effect of a proved fact is essentially a question of law. AIR 1918 PC 92, Ref. (Para 3)

Anno: C. P. C., S. 100 N. 28 Pt. 8.

(b) Houses and Rents—Bhavnagar Rent Act, S. 13(1)(j) — "Reasonably and 'bona fide' required."

As a result of a partition among the brothers, 'J', one of the brothers, had to shift from the house which he was occupying. He therefore purchased a house and brought a suit for eviction of the tenants occupying that house. 'J' was living, by leave and licence, in his brother's house where his position was precarious as, being a mere licensee, he was liable to be ejected at any moment without any notice and could not claim the protection of the Rent Act in defending his present occupation:

Held that 'J' did require the premises reasonably and 'bona fide' for his use and occupation. AIR 1950 Cal 249 and AIR 1921 Bom 34, Rel. on. (Para 4)

(c) Houses and Rents—Bhavnagar Rent Act, S. 13(2) — House occupied by more than one tenant — Option of Court to decide which tenant should be evicted.

Where a house is occupied by more tenants than one and the question is which of the tenants should be evicted, it is for the Court, and not the landlord, to decide against which of the tenants eviction should be decreed, bearing in mind also as one of the circumstances the wishes and the convenience of the landlord. AIR 1946 Bom 212, Disting. (Para 5)

C. N. Shah, for Appellants; G. B. Joshi, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras.

('21) 45 Bom 1236: (AIR 1921 Bom 34) 3
('46) AIR 1946 Bom 212: (ILR (1945) Bom 1038) 5
('19) 46 Cal 189: (AIR 1918 PC 92) 3
('50) AIR 1950 Cal 249: (54 Cal WN 20) 3

JUDGMENT.: These four second appeals are being dealt with together, as the questions of law and fact involved in them are similar. The District Judge from whose decisions the four appeals have been filed has discussed the case in only one appeal, while others have been dismissed for the reasons stated in that appeal. The relevant facts are that the two appellants Jayantilal Sukhlal and Chimanlal Sukhlal, who are brothers, along with their father and two other brothers named Trambaklal and Dhirajlal constituted a joint Hindu family. Chimanlal first separated from the family in 'Samvat' year 2003 and the rest continued as joint. Thereafter in 1947 A. D., there was a complete partition between the members of the family. Before the partition, the family had two buildings of their ownership. In one of the buildings Jayantilal one of the appellants was living. The whole building was occupied by him and his family; the other building was occupied by his brother Dhirajlal. The father was living with Dhirajlal.

In accordance with the partition, the building occupied by Dhirajlal exclusively went to his share and the building occupied by Jayantilal went to the share of his elder brother Trambaklal. Jayantilal had consequently to vacate the building which was a Bungalow and hand over the possession to Trambaklal, as Trambaklal was then living in a separate rented house at Bhavnagar. The appellant Chimanlal who first separated from the family was staying at Bombay. Before the partition even the two buildings which belonged to the family were not satisfying the requirements of the family and some of them had to live in rented buildings. Since Jayantilal had to vacate the building formerly occupied by him, he requested his brother Dhirajlal to permit him to occupy a portion of his building and which the latter was good enough to do. Jayantilal lived in the upper floor of the building of Dhirajlal not as a tenant paying rent but by leave and licence of Dhirajlal and temporarily till Jayantilal was able to shift elsewhere.

Jayantilal was consequently on the look out for a building. Chimanlal, the brother who used to live at Bombay, was similarly in search of a building at Bhavnagar, which is the native place of the

family. Both the two brothers, that is, the present appellants ultimately found a building known as 'Sidi Sadan' in Taktcshwar Plot, Bhavnagar, and purchased it by deed, dated 19-10-1948 for Rs. 76,000/- for their residential purposes. In addition, the brother spent about Rs. 4,000/- on registration and other charges for completing the transaction of purchase; so that in all they spent about Rs. 80,000/- for this building. The Rent Act of Bhavnagar State was then in force and the rents were consequently regulated by this Act. This building comprised four blocks which were in occupation of the four tenants, who are the respondents in the present four appeals. Soon after the purchase of the building the tenants were given notice to quit on 19-11-1948; as the tenants failed to hand over possession, the appellants filed four suits against them on 22-3-1949, basing the cause of action on their reasonable and 'bona fide' requirement for their occupation.

Both the lower Courts held that the appellant Chimanlal was living and carrying on his business at Bombay and that the case of reasonable and 'bona fide' requirement for him was not made out. As regards Jayantilal, both the Courts also held that no such case was made out, relying on the fact that he was living in his brother's house without even payment of rent. In consequence of this finding, the lower Courts did not go into the question of comparative hardship under Section 13 (2) of the Rent Act except that the trial Court in one of the cases made a passing reference to this question. Being aggrieved by these decisions the appellants have now come in Second Appeals.

(2) The question before me is whether the lower Courts have committed any error of law justifying interference in second appeal. Mr. C. N. Shah, the learned Advocate for the appellants has not seriously challenged the finding of the lower Courts so far as the alleged requirement of the appellant Chimanlal is concerned; so that I have to confine my decision to the claim of Jayantilal. Now the facts as above stated are not disputed. Both the lower Courts have non-suited the plaintiffs on the ground that the yield of the rent from the four tenants who are the respondents in the present four appeals was not commensurate with the investment made by the appellants and therefore they wanted their eviction; there was no requirement by Chimanlal as he was residing at Bombay and so far as Jayantilal is concerned, he was already living in his brother's house without even payment of rent. Under the circumstances, both the lower Courts held that the case of 'bona fide' and reasonable requirement was not proved by the appellants.

(3) Now the proper legal effect of a proved fact is essentially a question of law. In this connection, I may refer to the Privy Council case of 'NAFAR CHANDRA v. SHUKUR SHEIKH', 46 Cal 189. In the present case, there is not the slightest doubt that the building in question was purchased by the brothers not for the purpose of making profit or as an investment but for the purpose of their residence. The evidence of the estate broker Jivraj on the point has been completely ignored by the lower Courts. He clearly states that the brothers wanted to purchase a building for their residence. This evidence and the circumstances of the residence of the members of the family before and after the partition about which there is no dispute conclusively prove that the building was purchased by the two brothers for their residence.

Then the question arises as to what is the meaning of the words 'reasonably and 'bona fide' required' in Section 13 (1) (J) of the Rent Act. Since Mr. Shah, the learned Advocate for the appellants, has not pressed the case so far as the requirement of Chimanlal is concerned, I am confining my judgment to Jayantilal's case. The proved facts are that he was obliged to shift from the building which he was occupying, as a result of the partition and is now residing by leave and licence in his brother's house. He is liable to be ejected at any moment. He is certainly not a statutory tenant within the definition of Section 5 of the Act. So that he cannot claim the protection of the Rent Act, in case he is required to shift. Does the Rent Act contemplate a landlord to be practically on the streets before he can make out a case of reasonable and 'bona fide' requirement for his occupation of his own premises? The answer can be found in the recent case of 'BASANT LAL v. P. C. CHAKARVARTY', AIR 1950 Cal 249, wherein Mukharji, J., while construing the word 'require' observed as under:

> "Mere wish or convenience or whim or fancy of the landlord will not in my view be enough to show that the landlord requires the premises. The landlord must show certain circumstance or facts proving some need or some necessity for the landlord. At the same time the statute does not say that it must be an absolute need or an absolute requirement in the sense that the landlord will not have any accommodation of any description and that he must actually be in the streets before he can demand his own house for his own occupation. This in my opinion will be taking the most unreasonable and impossible view of the statute and I do not consider such was its intention."

Meeting the argument of the counsel for the tenant in that case that the landlord with his wife had already got an accommodation elsewnere where they were living with their family, the learned Judge observed:

> "In my judgment the landlord is not bound to continue his residence at rented premises with all the uncertainties of that tenure. Although he may have a rented and tenanted accommodation, such accommodation, in my view of the construction of the Statute, does not prevent the owner of a house from requiring his own house for his own occupation. The fact that the landlord owing to the refusal of the tenant to give up possession has to live in other premises temporarily or in a precarious condition of tenure at some place at the time of hearing is no reason in my view for holding that the landlord does not require the dwelling house for himself."

The learned Judge thereafter refers to the case of 'RUSTAMJI DINSHAW v. DOSIBAI RUSTAMJI', 45 Bom 1236, wherein Norman MacLeod, the Chief Justice of the Bombay High Court, observed that the landlord was not bound to accept such precarious existence and the fact that he had such precarious accommodation did not mean that he could not require his own house for his own occupation. The landlord was not bound to continue residing in the rented premises and his demand of his own house for his own occupation where he could live would be considered to be 'reasonable' within the meaning of the Statute. Considering the implication of the word 'bona fide', the learned Judge observed:

> "As to what is 'bona fide' under the Statute it is always in my opinion a question of fact. The Court in this context and with a view to find out whether the requirement of the landlord is 'bona fide', is entitled to look to every relevant fact or circumstance affecting the landlord and his position. The nature and character of the landlord's temporary accommodation at the time when he

is asking for the decree for possession, the insecurity or otherwise of the tenure that he might be holding at the time, the fact that he himself is under a notice to quit, the scope, size and character of his requirement are all relevant factors that the Court might consider in this context."

(4) Keeping in view the above principles, it is not possible to come to any conclusion other than that Jayantilal did require a premises reasonably and 'bona fide' for his use and occupation. He is at present living by leave and licence in his brother's house where his position must needs be precarious, as being a mere licensee, he is liable to be ejected at any moment without notice. He cannot claim the protection of the Rent Act in defending his present occupation apart from the question that he may reasonably and 'bona fide' require to live in his own house purchased at such a considerable cost. Under the circumstances, both the lower Courts have misconstrued the legal effect of the words 'reasonably and 'bona fide' required' contained in the Rent Act and I am clearly of the opinion that Jayantilal has proved his case of reasonable and 'bona fide' requirement of a premises under the circumstances of the present case. I consequently set aside the judgments of the two lower Courts.

(5) The consequence is that the cases will have to be remanded to the trial Court for decision on the other issue of comparative hardship under Section 13 (2) of the Rent Act. As the four cases have been consolidated, I direct the trial Court to assess in the first instance the extent of the requirement of Jayantilal and then to go into the question of comparative hardship as between Jayantilal and each of the four tenants. In case Jayantilal succeeds on this issue against any of the tenants, the Court should give decrees against only such of the tenants, keeping in view the requirement of Jayantilal, where the hardship against the tenant or tenants is comparatively less considering also the convenience and wishes of Jayantilal. I think this is the proper method of disposal giving the Court the option to decide against which of tenants eviction should be decreed. My attention has been drawn to the case of the 'RADIO TECHNOLOGY INSTITUTE v. PANDURANG BABURAO', AIR 1946 Bom 212, where the Bombay High Court considered a case under Section 11 of the Bombay Rent Restriction Act of 1939 and held as under:

"In a suit for eviction from four blocks on the second floor of a building, the Judge was of the opinion that the plaintiff reasonably required the use of three blocks and not four and gave him the choice of selecting the three blocks of which he wanted possession. It was contended that it was for the Court to decide, after taking into consideration the wants, not only of the plaintiff but also of the defendants, as to which of the blocks should be given to the plaintiff and that in not so deciding the Court acted without jurisdiction and with material irregularity.

Held, that it was the plaintiff's choice and the Court could not compel him to continue the suit against the tenant whom he did not desire to evict."

In that case the choice was left to the plaintiff to decide which of the tenants should be ejected, but the Bombay Rent Restriction Act of 1939 did not contain a provision corresponding to Clause (2) of Section 13 of the present Act which requires the Court to go into the question of comparative hardship taking into consideration all the circumstances of the case. I think in view of this provision it would be equitable that the question should be left to the Court to decide which of the tenants should be evicted, bearing in mind also as one of the circumstances the wishes and the convenience of the landlord. With these directions I remand the four cases to the trial Court for disposal in accordance with law. The costs of these second appeals will abide by the result of the cases.

V.R.B. Cases remanded.

A. I. R. 1952 Saurashtra 88
CHHATPAR J.

Dhirajlal Amratlal, Plaintiff-Appellant v. Bai Ullasmati Kanaiyalal and another, Defendants-Respondents.

Second Appeal No. 1 of 1951, D/- 26-2-52.

Contract Act (1872), Ss. 55 and 74 — Sale of land — Breach — Deposit — Forfeiture.

In contracts for the sale of land, equity has established the rule that unless expressly made so by the terms of the contract or by special circumstances, time is not essential. Under the law, equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. Specific performance of a contract of that nature will be granted, although there has been a failure to keep the dates assigned by it, if justice can be done between the parties, and if nothing in the express stipulation of the parties, the nature of the property or the surrounding circumstance make it inequitable to grant the relief. An intention to make time of the essence of the contract must be expressed in unmistakable language.

The defendants contracted to sell their property to the plaintiff by an agreement dated 10-1-49 for Rs. 19601/-. It was stipulated in the agreement that the conveyance of the property would be executed within 60 days and vacant possession of the portion in occupation of the defendants would be handed over to the plaintiff, and so far as the portion of the property was in occupation of the tenants, the defendants would get their attornment; it was further provided that in case the sellers failed to convey the property within the stipulated period, they would be liable to pay Rs. 3000/- as damages. The plaintiff paid Rs. 1500/- as earnest money at the time of the contract. The contract was on a printed form used by the brokers in such transaction and the stipulation by way of penalty was a part of this printed matter; only the blank as to the amount had been filled by the figure of Rs. 3000/-. The last of the expiry of 60 days stipulated in the agreement fell on 11-3-49, as the month of February had only 28 days. The plaintiff however relying on the period to be two months, on 10-3-49 sent a telegraphic notice alleging breach of contract on the part of the defendants and claiming return of the earnest money and Rs. 3000/- as damages.

Held that time was not of the essence of the contract and breach of the contract was on the part of the plaintiff in repudiating the contract on 10-3-49 apart from the contention that 60 days had not even expired on that day. The plaintiff had wrongfully repudiated the contract on 10-3-49 and under the circumstances he was not entitled to the return of the earnest money. AIR 1935 Lah 92; AIR 1952 Cal 93, Rel. on. (Paras 3, 4)

Anno: Contract Act, S. 55 N. 5; S. 74 N. 12.

H. C. Shah, for Appellant; K. V. Dave, proxy. for M. G. Dave, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('52) AIR 1952 Cal 93: (55 Cal WN 765) 4

('35) AIR 1935 Lah 192: (155 Ind Cas 728) 4

JUDGMENT.: The second appeal arises out of a suit filed by the appellant for recovery of Rs 4,500/- against the respondents. The two respondents are sisters, who have inherited a property situated at Bhavnager from their father. They contracted to sell this property to the appellant by an agreement, dated 10-1-1949 for Rs. 19,601/-. It was stipulated in the agreement that the conveyance of the property would be executed within 60 days and vacant possession of the portion in occupation of the respondents would be handed over to the appellant, and so far as the portion of the property was in occupation of the tenants, the respondents would get their attornment; it was further provided that in case the sellers failed to convey the property within the stipulated period, they would be liable to pay Rs. 3,000/- as damages. The purchaser, i.e., the present appellant paid Rs 1,500/- as earnest money at the time of the contract.

On the next day after their agreement was made, it appears, Krishnaprasad, the husband of the second respondent, filed an application for appointment of a guardian of the property of his minor sons to which the second respondent was a party. He claimed that the second respondent had no right to sell this property and he moved the Court for an injunction in this guardianship proceeding, restraining the second respondent from selling this property agreed to be sold to the appellant. The last day of the expiry of 60 days stipulated in the agreement fell on 11-3-1949, as the month of February had only 28 days. The appellant, however, relying on the period to be two months, on 10-3-1949 sent a telegraphic notice to the respondents in the following terms:

"Ulasmati Kanaiylal,
Near Lalgarbave Math,
Bhavnagar.

Yau & your sister Uchharangmati contracted to sell your house for Rs. 19,601/-. You have to give vacant possession and your tenant by rent note. In spite of repeated demands to clear titles and put the house for Choth and registration you have not attempted to carry out contract and committed breach of contract. Date expires to day. Rs. 1,500/- given as deposit and due to default liable for Rs. 3,000/- damage stipulated pay Rs 4,500/- within two days else will proceed legally at your costs and consequences.

Vakil Gulabrai Hargovindas Sanghvi,
Pleader for Dhirajlal Amtralal."

It also appears that a creditor of the first respondent had attached this very same property for payment of a debt of about Rs. 6,000/-. In reply to the telegraphic notice, the respondents stated that steps would be taken to have the ex parte injunction removed and the sale would be completed within a very short time .This reply was sent on 13-3-1949 and as regards the attachment of the creditor of the first respondent the evidence of Amulakhrai, the broker, in the transaction shows that he was deputed to the appellant and stated that this attachment would also be raised and in any case out of the sale proceeds the amount of the attachment might be deposited in the Court and the transaction completed. In fact, this offer was made on 17-3-1949, on which date the injunction issued in the guardianship proceedings was discharged by the Court. The appellant, however, refused to complete the transaction and claimed back the return of his earnest money and Rs. 3,000/- as damages mentioned in the agreement. He says he purchased another property for his residence on 23-5-1949 and filed the present suit for recovery of his earnest money and damages on 14-6-1949.

The attachment effected by the creditor of the first respondent continued upto 6-10-1949. These are the admitted or proved facts in the present case. The trial Court decreed the plaintiff's suit to the extent of Rs. 3,000/- only i.e., Rs. 1,500/- being the earnest money and Rs. 1,500/- as damages. On appeal by the present respondents the District Court reversed the decision of the trial Court holding that a breach of the contract was on the part of the present appellant and dismissed the suit with costs throughout. The plaintiff has now filed the present appeal from the decision of the District Court.

(2) Mr. H. C. Shah, the learned Advocate for the appellant has argued that on the construction of the contract and the surrounding circumstances, time was of the essence of the contract and that the plaintiff was justified in repudiating the contract by telegram, dated 10-3-1949 and claiming the return of his earnest money and damages. This is the main dispute in the present case. Apart from the technical objection that the plaintiff had prematurely repudiated the contract by one day as stated above, it appears to me that time was not of the essence of the contract, and I consequently hold that the learned District Judge was right in holding that the plaintiff was guilty of the breach of the contract. Now in contracts for the sale of land, equity has established the rule that unless expressly made so by the terms of the contract or by special circumstances, time is not essential. Under the law, equity, which govern the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time.

Specific performance of a contract of that nature will be granted, although there has been a failure to keep the dates assigned by it, if justice can be done between the parties, and if nothing in the express stipulation of the parties, the nature of the property or the surrounding circumstance make it inequitable to grant the relief. An intention to make time of the essence of the contract must be expressed in unmistakable language. See in this connection the commentary of Pollock and Mulla on the Indian Contract and Specific Relief Acts, Seventh Edition, at pages 301 and 302. This rule of equity under the law of England has been held to apply to India as well, and the learned commentators quote a series of cases where this principle has been applied.

Mr. Shah, the learned Advocate for the Appellant contends that although there is no express term in the contract itself making time essential, the

stipulation prescribing penalty in case of non-performance of the contract on the part of the seller and the fact that the seller had to give vacant possession and the purchaser was in need of a house for his residence are by themselves sufficient circumstances to hold that the time was agreed to be of the essence of the contract.

(3) Now this is a question of fact. The contract is on a printed form used by the brokers in this transaction and the stipulation by way of penalty is a part of this printed matter; only the blank as to the amount has been filled by the figure of Rs. 3,000/-. Ordinarily time is not of the essence of a contract of sale of land and it is difficult to believe that the brokers, in adopting a uniform printed form of transactions brought about by their intervention, intended to depart from the usual course and make time of the essence of their contracts. If such was their intention they would surely have incorporated a specific term in the printed form. The learned District Judge has given a finding to the effect that the plaintiff wanted to back out of the transaction and that the sellers had offered on 17-3-1949, i.e., within about seven days of the stipulated time to perform their part of the contract. They had got the injunction, vacated and sent word to the plaintiff that out of the sale proceeds the amount of the attachment might be deposited in Court. So that there was no undue delay or want of bona fide on the part of the sellers in performing their part of the contract. Taking all the circumstances into consideration, I agree with the learned District Judge that time was not of the essence of the contract and breach of the contract was on the part of the plaintiff in repudiating the contract on 10-3-1949 apart from the contention that 60 days had not even expired on that day.

(4) Mr. H. C. Shah, the learned Advocate for the appellant, has in any case claimed the return of the earnest money on the ground that the defendants were not ready to perform the contract on their part on the stipulated date; but the plaintiff had wrongfully repudiated the contract on 10-3-1949 and under the circumstances he is not entitled to the return of the earnest money. I may refer in this connection to a ruling of the Lahore High Court in the case of 'RAMCHAND v. CENTRAL FLOUR MILLS OF KASUR', AIR 1935 Lah 192 and a very recent ruling of the Calcutta High Court reported in 'NARESH CHANDRA v. RAM CHANDRA', AIR 1952 Cal 93.

(5) The result is that the appeal fails and is dismissed with costs.

B/D.H. Appeal dismissed.

A. I. R. 1952 SAURASHTRA 90

(FULL BENCH)

SHAH C. J., CHHATPAR AND BAXI JJ.

Dwarkadas Jethabhai, Defendant-Appellant v. Gokaldas Naranji, Plaintiff-Respondent.

First Appeal No. 71 of 1950, D/- 27-2-1952.

Civil P. C. (1908), S. 43 — Decree passed by Bombay High Court — Transfer for execution to Nawanagar — Merger of Nawanagar State in Saurashtra State — Application for execution filed before S. 43 was made applicable to Saurashtra — Competency of application — (Constitution of India, Art. 261 (3)).

A decree-holder who obtained a decree in 1927 in the High Court of Bombay got it transferred for execution to a Court in Nawanagar in 1950. According to the law of the Nawanagar State which prevailed upto 11-9-1950 on which date Ordinance XXVII (27) of 1950 made S. 43 of the Civil P. C. applicable to the Saurashtra State in which the Nawanagar State merged, the decree being a decree of a foreign Court could only be enforced in the Nawanagar State territories by means of a suit, the period of limitation for such suit, being six years. The application for execution was filed in the Nawanagar Court in June 1950 i.e., before the Ordinance XXVII (27) was promulgated.

Held (1) that the application for execution was incompetent, as when it was filed the decree was not directly executable by means of an application for execution, the decree-holders' remedy at that time being a suit on the judgment which however was barred by limitation. (Para 4)

(2) that under Art. 261 (3) of the Constitution the decree no doubt became executable in the territory of the Saurashtra State, but it could be executed only according to the law of that State and if that law provided a certain procedure for enforcing the decree, it was the duty of the decree-holder to obtain enforcement by adopting that procedure and not otherwise. (Para 5)

(3) that in the circumstances of the case it was not fit to exercise the discretionary power of the Court to take notice of subsequent legislative changes in Saurashtra State whereby the decree became executable directly by means of an application, as at the date of the original application the Court had no jurisdiction to entertain it. (Para 7)

Anno: C. P. C., S. 43 N. 2.

G. B. Joshi, for Appellant; A. R. Baxi, for Respondent.

BAXI, J.: The respondent is the assignee of a decree passed by the Bombay High Court on its original side against the appellant. The appellant was a minor when the decree was passed against him. It appears that applications for execution of the decree were made to the Bombay High Court at various intervals. The respondent got the decree transferred to the Court of the District Judge, Halar Division, who forwarded it to the Civil Judge, Senior Division by his endorsement dated 24th June 1950. On the same day the respondent filed an application for execution of the decree in the Court of the Civil Judge. The appellant is a resident of Jamkhambhalia under the former Nawanagar State and the decree is sought to be executed by attachment and sale of certain immovable property situated in Jamkhambhalia. The appellant objects against the competence of the respondent's application. His case is that the decree was a foreign judgment 'qua' the Nawanagar State and could only be enforced by a suit on the judgment before the merger of that State into Saurashtra. That suit was barred by limitation long before the merger.

His other ground was that the period of limitation for the execution of a decree according to the Nawanagar State law was five years and as no application was however made to execute the decree in the Nawanagar State Court its execution was barred. The learned Civil Judge disallowed the objections holding that after coming into force of the Constitution the decree had ceased to be a foreign decree and could be directly executed by an application. He further held that the decree was capable of execution in the Bombay High Court be-

cause it was revived within the meaning of Art. 183 by orders of Bombay High Court in execution proceedings in that Court, and that as the present application should be governed by the law applicable to the Bombay High Court, execution was not barred by limitation in Saurashtra also. The appellant has appealed against this order.

(2) It was suggested during the arguments that the decree was an 'ex parte' decree against a non-resident foreigner and the subject of the Nawanagar State and was therefore a nullity. In the memo of appeal the appellant has stated that he had not submitted to the jurisdiction of the Bombay High Court. The original title of the decree Ex. 5 however describes the appellant as

> "a minor residing at 45 Hanuman Lane, without the Fort, by his guardian 'ad litem' Bai Jamnabai, widow of Jethabhoy Meghji, residing at old Hanuman Lane, without the Fort."

An endorsement on the back of the copy of the decree received by the District Court shows that a certified copy of the decree was served upon Bai Jamnabai on 28-11-1927 at the old Hanuman Lane. It therefore appears that though the decree was an 'ex parte' decree, the appellant was residing in Bombay with his mother when the suit was instituted and also when the decree was passed and the decree cannot be described as a decree against a 'non-resident' foreigner. Its execution in the Nawanagar State Courts could not have been resisted on the ground that the decree was without jurisdiction as having been passed 'ex parte' against a non-resident foreigner. This point however does not really arise in this appeal because the execution application having been made in June 1950 after the coming into force of the Constitution, it ceased to be the decree of a foreign Court and all impediments which existed against its execution on the ground that it was a foreign decree have disappeared.

(3) In order to appreciate the question involved in this appeal it will be convenient to state the law relating to the execution of the decree of the Bombay High Court in force in the Nawanagar State before its merger when the decree was passed and to trace the history of that law after the merger of that State in the Saurashtra to the present day. According to the Nawanagar State law the decree being a decree of a foreign Court could only be enforced in the Nawanagar State territories by means of a suit, the period of limitation for such suit being six years. The present decree was passed in 1927 and the suit became barred by limitation in 1933. From thencetorward till the merger of the Nawanagar State into Saurashtra i.e. from 1933 to April 1948 the law continued unchanged and there was no other remedy by which the decree could be executed in these territories.

After the formation of the United State of Saurashtra, later on called the Saurashtra State, Ordinance No. IV(4) of 1948 was promulgated under which the laws in force in the respective Covenanting States were continued until repealed. Under this Ordinance therefore the law governing the execution of the decree continued to be the same as before & a suit on the decree was the only mode of enforcing it and that suit was time barred. Thereafter Ordinance No. XXV (25) of 1948 applied the Central Civil P. C. with certain modifications to the State of Saurashtra repealing at the same time the former law. Section 43 of the Code under which the decree of the Bombay High Court could have become directly executable by the Courts of Saurashtra State was however omitted from the Code as applied by the Ordinance and consequently the law relating to the execution of the decrees of the Bombay State under the Saurashtra Civil P. C. continued to be the same as before and the decree could only be enforced by a suit based on it.

Ordinance XXV (25) of 1948 was amended by Ordinance XXVII (27) of 1950 and S. 43 of the Code was applied to the Saurashtra State on 11-9-50 by the amending Ordinance and decrees of the Bombay High Court became directly executable for the first time in Saurashtra from that date. The Civil P. C. as applied and amended by these Ordinances was repealed and the Central Civil P. C. was applied to the whole of India, to Saurashtra and to other part B States by Act II(2) of 1951. Section 43 is a part of the Code applied by this Act.

(4) Mr. G. B. Joshi, the learned Advocate for the appellant, argued that the present application was filed in June 1950 before the introduction in the Saurashtra Civil P. C. of S. 43. The respondent's application was misconceived and not in accordance with the law in force in the Saurashtra State when the decree was transferred for execution to the District Court. The learned Civil Judge had therefore no jurisdiction on that date to execute the decree or entertain on (sic) the application particularly because the suit on the decree was barred by limitation long before the Saurashtra State had come into existence.

We think that the appropriate remedy for enforcement of the decree when the respondent gave his application was a suit on the judgment. It is clear however that if he had adopted that procedure he would have been immediately out of Court because his suit was barred by limitation. He elected to have recourse to the speedier expedient viz., the present application for execution. But that application was incompetent. The respondent's learned Advocate did not dispute the proposition that when the execution application was filed the decree was not directly executable by means of an application for execution, that the respondent's proper remedy was a suit on the judgment and that the decree became directly executable by an application subsequently after the enactment of the Saurashtra Ordinance XXVII(27) of 1950. But he contended that the application was filed after the Constitution came into force and under the provision of Art. 261(3) the decree became directly executable by the Courts of the Saurashtra State by means of an application for execution.

(5) Article 261(3) is in the following terms:

> "Final judgments or orders delivered or passed by civil Courts in any part or territory of India shall be capable of execution anywhere within that territory according to law."

Under this Article decrees of the Bombay High Court became no doubt executable in the territory of the Saurashtra State but they could be executed only according to the law of the Saurashtra State. If that law provides a certain procedure for enforcing it, it is the duty of the decree-holder to obtain enforcement by adopting that procedure and not otherwise. He cannot insist that his decree should be executed by means of an application, if under the law it is not the appropriate remedy. Secondly if the suit on the judgment, which was the only remedy open to the decree-holder when the application was made, had become already time barred it was not open to him to circumvent the operation of the Limitation Law by preferring an application for execution.

(6) The learned Advocate for the respondent appreciated the force of this argument and contended that the Court should take notice of the subsequent legislative changes in Saurashtra whereby the

decree became executable directly by means of an application. According to this submission the initial incompetence of the application was cured by subsequent changes in law.

(7) Now this is a discretionary power of the Court to take notice of subsequent events and mould the nature of the relief accordingly; but in the circumstances of the present case, we do not think it fit to exercise this power, as at the date of the original application the Court had no jurisdiction to entertain it. The appropriate remedy would be to file a fresh application wherein all objections as to the executability of the decree can be taken. When the Civil P. C. was adapted and applied by Ordinance XXV(25) of 1948, the Ordinance contained a saving clause in S. 9 which reads as under:

"'9. Saving and transitory provisions.'

1. Nothing in this Ordinance shall affect the previous operation of or anything duly done or suffered under, any law in force in the State or any part thereof before the commencement of this Ordinance or any right, privilege, obligation or liability already acquired, approved or incurred under any such law, or any penalty, forfeiture or punishment incurred in respect of any offence already committed under any such law.

2. All criminal actions, suits and other proceedings instituted under, processes issued, directions given, sentences passed or fines imposed under any law in force immediately before the passing of this Ordinance shall be deemed to have been instituted, issued, given, passed or imposed under the provisions of the corresponding law if any as applied to the State by this Ordinance.

3. All laws in force in Covenanting States, Estates or Talukas similar to those adopted by this Ordinance shall stand repealed from the date from which corresponding Act comes into force."

And thereafter when by the subsequent Ordinance XXVII(27) of 1950, S. 43 was introduced in the Civil P. C., the operation of this section would also be limited by the above saving provision. We do not wish to express any remarks as to how far this saving clause would be a good defence to a fresh application filed after the introduction of S. 43 of the Civil P C. nor what would be the effect of the application of the Civil P. C. by the Union Government by Act 2(II) of 1951 which also contains a saving clause in S. 20. These questions will have to be gone into if and when a fresh execution application is filed by the judgment creditor. In the present appeal, we confine our decision to the effect that on the date when the application for execution was filed in the lower Court, the Court had no jurisdiction to entertain it and therefore the application was liable to be dismissed.

(8) We accordingly allow this appeal and dismiss the execution application of the judgment-creditor with costs throughout.

(9) SHAH, C. J.: I agree.

(10) CHHATPAR J.: I agree.

A/V.R.B. Appeal allowed.

A. I. R. 1952 SAURASHTRA 92

CHHATPAR J.

Daya Devji, Defendant-Appellant v. Damji Devji, Plaintiff-Respondent.

Second Appeal No. 110 of 1951, D/- 7-3-52.

Civil P. C. (1908), O. 23, R. 3 — Award consented to by parties — Award can be recorded under Rule.

When an award is consented to by the parties, it tantamounts to a compromise between the parties which can be recorded by the Court under O. 23, R. 3. AIR 1926 Mad 1211; AIR 1930 Lah 860 and AIR 1937 Rang 287, Foll. (Para 3)

Where there were no regular arbitration proceedings, but the parties to the suit sought the intervention of certain 'Panchas' who there and then gave their decision which was signed by certain witnesses in addition to the Panchas:

Held that under the circumstances the award was clearly in the nature of a settlement arrived at by the parties and the question of its admissibility as an award for want of stamp and registration did not arise and therefore it could be pleaded as an adjustment of the suit. (Para 3)

Anno: C. P. C., O. 23, R. 3 N. 9 Pt. 14.

G. B. Joshi, for Appellant; P. G. Oza, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('30) AIR 1930 Lah 860: (127 Ind Cas 705) 3
('26) AIR 1926 Mad 1211: (97 Ind Cas 465) 3
('37) AIR 1937 Rang 287: (14 Rang 766) 3

JUDGMENT.: The facts leading to this appeal are as under: The respondent filed a suit against the appellant for recovery of possession of some land on the allegation that he had entrusted it to the defendant, as he was leaving for Africa, and on return the defendant had refused to surrender back the land. The defendant on the other hand contended that the plaintiff had relinquished the land to the State and the State had granted the land to the defendant. The suit was filed on 18-10-1949; on 6-2-1950, the plaintiff filed an application for amendment of the plaint, whereby he sought to include in the claim in addition to the land some houses which were appurtenent to it. On 18-2-1950, the parties entered into an informal reference submitting their disputes out of Court to arbitration of some Panchas. On the very same day an award was given by the Panchas, which is endorsed under the reference.

This award directed the defendant to hand over possession of the land along with the houses to the plaintiff on payment of Rs. 150/-. This award was signed by certain witnesses in addition to the arbitrator and also signed by the parties to the suit in token of their consent. The award recites as if the amount had been paid and possession handed over, but this was not so in fact. The plaintiff filed an application under Order 23, Rule 3, C. P. Code praying that the Court would be pleased to record the adjustment arrived at between the parties in the shape of the award consented to by the parties and pass a decree.

This application was contested by the defendant. The plaintiff alleged that he had already paid Rs. 150/- to the defendant, while the defendant denied this and further contended that the award went beyond the subject-matter of the suit and that he had never agreed to give possession of the houses. He also contended that the mention of the houses in the award was the subsequent addition to the original award agreed to by him. The trial Court on going through the evidence held that the plaintiff had failed to prove that Rs. 150/- had been paid by him to the defendant. The trial Court also held that the compromise was not beyond the subject-matter of the suit as in the reference mention was made of both the land and the houses and the amendment application was actually pending at the date of the reference and the award

which was in fact granted by an order of the Court,dated 17-4-1950.

Consequently the Court passed a decree for possession in favour of the plaintiff of the land and the houses conditional on his payment of Rs. 150/- to the defendant. Against this decree the defendant filed an appeal and the plaintiff also filed cross-objections challenging the decision about the payment of Rs. 150. The lower appellate Court dismissed both the appeal and the cross-objections. The defendant has now filed the present appeal from the decision of the learned Assistant Judge, Gondal, who heard the appeal in the lower Court.

(2) Mr. G. B. Joshi, the learned Advocate for the appellant has raised two contentions: (1) That the reference and the award could not be pleaded as an adjustment of the suit and (2) that the adjustment went beyond the subject-matter of the suit and therefore could not be recorded. He has incidentally raised the question that the award was inadmissible for want of stamp registration. The question of the payment of Rs. 150/- has not been raised before me; besides there is a concurrent finding of the two Courts in this connection. There is also a concurrent finding as to the contention of the defendant that the reference to the houses in the award was subsequently made. Both Courts have held that it formed part of the award.

(3) As regards the first point, there is diversion of opinion amongst High Courts whether a reference and an award made without the intervention of the Court and relating to the subject-matter of a pending suit can be pleaded as an adjustment in the suit. But there is clear authority that when an award is consented to by the parties, it tantamounts to a compromise between the parties which can be recorded by the Court under Order 23, Rule 3, C. P. Code. Reference is invited to the cases of 'VIRABHADRA GOWDA v. GANGAMMA', AIR 1926 Mad 1211; 'NIHALSINGH v. ASHTABAKAR', AIR 1930 Lah 860 and 'ALAGAPPA CHETTYAR v. A. K. R M. M. K. CHETTYAR FIRM', AIR 1937 Rang 287. In the present case the parties have consented to the award, which is not disputed. In fact, it seems to me that there were no regular arbitration proceedings. The parties had sought the intervention of certain 'Panchas', who there and then gave their decision which was accepted by the parties. Under such circumstances, the award itself is clearly in the nature of a settlement arrived at by the parties. Hence the question of its admissibility as an award for want of stamp and registration does not arise. The signature of the witnesses to the document lends support to this construction. Hence the first contention raised by the learned Advocate for the appellant fails.

(4) As regards the second contention, no doubt the original plaint comprised only the land, but before the reference to arbitration was made, an application for amendment was made to include the houses in the suit. This application was actually granted. The amendment takes effect from the date of the suit or at any rate from the date of the application. Hence the subject-matter of the suit did comprise not only the land but the houses as well. The parties were fully aware of this and they have mentioned both the land as well as the houses in the reference to the arbitration. Consequently it cannot be said that the award which is being construed as a compromise goes beyond the subject-matter of the suit. This contention therefore also fails.

(5) The result is that the appeal fails and is dismissed with costs.

B/V.R.B. Appeal dismissed.

A. I. R. 1952 SAURASHTRA 93

CHHATPAR J.

Jamiyatram Kapoorchand and others, Defendants-Appellants v. Damji Raghavji, Plaintiff-Respondent.

Second Appeal No. 37 of 1951, D/- 15-1-52.

Saurashtra (Application of Central and Bombay Acts) Ordinance (XXV (25) of 1948), S. 9 — Repeal — Effect — (Houses and Rents) — Rajkot State Bhadut Sanrakshan Act of (1947), Ss. 4, 5 (2) and 6 — (Contract Act (1872), S. 65) — (Trusts Act (1882), S. 84).

When an Act is repealed it must be considered, except as to transactions past and closed, as if it had never existed. Of course a repealing Act can save the rights and liabilities that have already acquired, accrued or incurred. The effect of clause (3) of Section 9 was to repeal the Rajkot State law relating to rent from the date the Bombay Rent Act was applied to the State of Saurashtra. Reading the three Sections i. e., 4, 5 (2) and 6 together what is made illegal is the recovery of rent in excess of that fixed by the Samiti and not the entire rent. The provisions of clause (2) of Section 5 should be considered in the nature of a pious direction to the landlord not to recover the rent till the rent has been fixed. In the case of a payment of rent by a tenant under a contract the payment 'ipso facto' cannot be considered as illegal nor can a contract to pay can be considered illegal 'ab initio'. It becomes illegal only to the extent of excess rent when standard rent is fixed by the Samiti as clearly laid down by S. 6. Where that contingency has not occurred and cannot happen by virtue of the repeal of the enactment, the right of refund given by S. 6 remains in an inchoate condition. In other words the tenant does not acquire any right of refund nor has the landlord incurred any liability to refund under the Rajkot State Law which can be considered to have been saved by clause (1) of S. 9 of the Ordinance. It cannot also be said that either the contract or the receipt of the rent voluntarily paid by the tenant was void and which obliged the landlord to return the payments made under S. 65 of the Contract Act or S. 84 of the Trusts Act.

(Paras 6, 7, 9)

Anno: Contract Act, S. 65 N. 4; Trusts Act, S. 84 N. 2.

A. R. Bakshi, for Appellants; C. N. Chinoy with D. U. Shah, for Respondent.

JUDGMENT.: This Second Appeal arises out of a suit filed by the respondent for recovery of Rs. 1,440/- against the present appellants on account of refund of excess rent paid for twelve months, beginning with Kartak Sudi 1, Samvat 2004. The appellants are an association styled Seeds Oil & Bullion Merchants Association of Rajkot. They have a building in Rajkot. In the building, a cabin was constructed which was rented to the respondent for running a Pan shop at a rent of Rs. 150/- per month, commencing from Kartak Sudi 1, Samvat 2004. The respondent paid Rs. 1,800/- for the twelve months ending Asu Vadi Amas, Samvat 2004 — 1st December 1948 A. D. Thereafter since the Bombay Rent Act was adapted and applied to the State of Saurashtra from 20th December 1948, the respondent filed an application to the Civil Court at Rajkot for fixation of standard

rent. The trial Court fixed the standard rent at Rs. 30/- per month, which was confirmed in appeal on 31st December 1949. The respondent filed the present suit on 14th June 1950 for recovery of the excess rent of Rs. 1,440/-.

(2) Before the Bombay Rent Act was applied, the Rajkot State Bhadut Sanrakshan Act of 1947 was in force in Rajkot, which was enacted on 18th September 1947 to give relief to tenants. This Act laid down certain provisions as to what rent a landlord was entitled to recover from a tenant, and for the fixation of such standard rent by a Bhada Niyaman Samiti whose decision was subject to appeal. There was a provision in the Act for refund of excess rent paid over the rent fixed. It appears neither the landlord nor the tenant in the present case got the standard rent fixed under this Act. The tenant went on paying the rent at the agreed rate of Rs. 150/- per month. It is after this Act ceased to be in operation and was superseded by the Bombay Rent Act as adapted and applied to the State of Saurashtra, that the tenant approached the Court for fixation of the standard rent under the latter Act.

The trial Court dismissed the suit of the plaintiff-respondent, principally on the ground that as the standard rent was not fixed under the Rajkot State Law, it was not possible to determine what was the excess rent. From this decision, the respondent preferred an appeal to the District Court and the latter reversed the decision, allowing the claim and holding that the plaintiff was entitled to refund on the basis of Rs. 30/- being the standard rent fixed under the Act, observing that under the Rajkot State Law, recovery of any rent by the landlord without getting the rent fixed by the Bhada Niyaman Samiti was prohibited. Against this decision the original defendants have filed the present second appeal.

(3) Mr. A. R. Bakshi, the learned Advocate for the appellants contends that the plaintiff's suit cannot possibly come within the purview of the present Rent Act in force because it was admittedly time-barred, the period of six months provided both by Section 18 and Section 20 having expired when the suit was filed on 14th June 1950, the alleged excess rent being for the period of twelve months preceding 1st December 1948. And so far as the claim under the Rajkot State Law is concerned, the same has lapsed owing to repeal of the enactment. The right to refund has not matured by reason of the standard rent not having been fixed thereunder. His further contention is that under the Rajkot State Law any agreement in contravention of the provisions thereunder, that is, an agreement to pay rent in excess of the standard rent, was illegal; the plaintiff being in 'pari delicto' the Court was justified in refusing any relief to him.

(4) Mr Chenoy for the respondent concedes that the plaintiff's caim for refund cannot be based upon the present Act; but he claims that in repealing the Rajkot State Law, the rights and liabilities acquired, accrued or incurred thereunder continued in force by virtue of a saving clause in the repealing enactment. He further argues that under the Rajkot State Law, it was only illegal for the landlord to recover rent without fixation of the standard rent by the Bhada Niyaman Samiti and not illegal for the tenant to pay the rent. Therefore the doctrine of the parties being in pari delicto does not apply. He argues that both under Section 65 of the Contract Act as also under Section 84 of the Indian Trusts Act, the plaintiff is entitled to recover the amount of rent paid.

(5) I have considered the contentions of the learned advocates who have argued the case fully before me. It will be necessary to refer to some provisions of the Rajkot State Law which have a bearing upon the question in issue. Before I do so, I may state that it is admitted by the learned advocates that the standard rent and the principle of fixing it under the Rajkot State Law, were different from those under the Rent Act now in force. There is no machinery provided under the present law for fixing of the Standard rent under the Rajkot State Law, as the present Act makes no provision for setting up any tribunal in place of the Bhada Niyaman Samiti, where the fixation of the standard rent under the Rajkot State Law becomes a matter in issue.

Now Section 3 of the Rajkot State Law lays down that the rent recoverable in respect of any premises shall not be more than the average rent paid in Samvat 1999 plus ten percent. Section 4 makes provision for premises which were not let in Samvat 1999 or before and states that the landlord of the premises let for the first time in and after Samvat 1999 and in respect of new premises built thereafter, shall recover only such rent as is fixed by the Bhada Niyaman Samiti. Section 5, Clause (2) says that the landlord shall get the rent fixed of the premises referred to in Section 4 before 1st December 1947, and till this is done the landlord shall not recover any rent. The next relevant section which is important to consider is Section 6 which states that any agreement contrary to the rent fixed in accordance with the foregoing Sections 3, 4 and 5 shall be considered to that extent illegal and void and the tenant shall be entitled to refund of any excess rent or advantage recovered by the landlord after 1st May 1947.

(6) The Saurashtra Government promulgated an Ordinance No. 25 of 1948, whereby it adapted and applied certain Central and Bombay Acts to the State of Saurashtra. In the schedule of this Ordinance were mentioned such Central and Bombay Acts. This schedule from time to time was amended by inclusion of further Central and Bombay Acts. The Bombay Rent Act came to be adapted and applied to Saurashtra in the shape of amendment of the schedule. Section 9 of the Ordinance lays down as under:

"9. SAVING AND TRANSITORY PROVISIONS.

1. Nothing in this Ordinance shall affect the previous operation of or anything duly done or suffered under, any law in force in the State or any part thereof before the commencement of this Ordinance or any right, privilege, application (? obligation) or liability already acquired, accrued, or incurred under any such Law, or any penalty, forfeiture or punishment incurred in respect of any offence already committed under any such law.
2. All criminal actions, suits and other proceedings instituted under, processes issued, directions given, sentences passed or fines imposed under any law in force immediately before the passing of this Ordinance, shall be deemed to have been instituted, issued, given, passed or imposed under the provisions of the corresponding law, if any, as applied to the State by this Ordinance.
3. All laws in force in Covenanting States, Estates or Talukas, similar to those adapted by this Ordinance, shall stand repealed from the date from which corresponding Act comes into force."

The effect of Cl. (3) of S. 9 is to repeal the Rajkot State law relating to rent from the date the Bombay Rent Act was applied to the State of Sau-

rashtra. Now it is an established canon of interpretation that when an Act is repealed it must be considered, except as to transactions past and closed, as if it had never existed. The effect of repealing a statute is to obliterate it as completely as if it had never been passed and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted and concluded while it was an existing law. In order to decide whether any particular transaction is affected by the repeal of an Act, it is necessary to ascertain whether the transaction in question was completed or incomplete at the time the Act was repealed. Thus if an Act gives a right to do anything, the thing to be done, if only commenced but not completed before the Act is repealed, must upon the repeal of the Act, be left in status quo. See Craies on Statute Law, 4th Edition, at page 350.

To the same effect are to be found remarks in Maxwell's Interpretation of Statute, 9th edition at page 404, and Halsbury's Laws of England, Volume 31, pages 560-61, para. 758. Of course a repealing Act can save the rights and liabilities that have already acquired, accrued or incurred as we find in S. 9 of the Ordinance No. XXV of 1948 above reproduced. A similar saving provision is contained in S. 6 of the Saurashtra General Clauses Act which came into force on 15th November 1949. We have however to see whether the plaintiff in the present case had acquired any right or the defendants, the present appellants, had incurred any liability under the Rajkot State Law which was saved by S. 9 of the Ordinance.

(7) Mr. Chinoy, the learned Advocate for the respondent contends that under the Rajkot State Law, the landlord could not recover any rent unless and until he had got the rent fixed by the Bhada Niyaman Samiti, and if any voluntary payment was made by the tenant, it should be considered as a payment under a contract which was or had become void under S. 65 of the Indian Contract Act and was in any case, money paid for an illegal purpose receipt of which created an obligation in the nature of a trust coming within the purview of S. 84 of the Indian Trusts Act. For this purpose he relies upon Cl. 2 of S. 5 of the Rajkot State Law which requires the landlord to get the rent fixed before 1st December 1947, and until this is done, forbids him from recovering the rent. He secondly relies upon S. 6 which gives the tenant the right of refund in respect of excess rent paid. Now S. 5, Cl. (2) can hardly apply to the facts of the present case, as the premises were let for the first time on 10th of December 1947 when its construction was probably completed. The rent could not have been fixed in advance of a premises not in existence on 1st December 1947.

But assuming that this Section lays down a general prohibition restraining the landlord from recovering any rent till the standard rent has been fixed by the Samiti, this provision of law has got to be read in conjunction with S. 4 and S. 6. Section 4 says that the landlord shall be entitled to recover only such rent as is fixed by the Samiti and S. 6 makes illegal any contract to pay rent in excess of that fixed by the Samiti. Reading the three Sections, i. e., 4, 5 Cl. (2) and 6 together, it seems that what is made illegal is the recovery of rent in excess of that fixed by the Samiti and not the entire rent. The provisions of Cl. (2) of S. 5 should be considered in the nature of a pious direction to the landlord not to recover the rent till the rent has been fixed. This is clear from the right given to the tenant of refund which applies only in cases where the rent has been fixed by the Samiti. If the tenant voluntarily pays rent and the Samiti does not fix the standard rent, what happens? Is the tenant entitled to recover the entire rent? According to S. 6 his right of refund is confined only to the excess over that fixed by the Samiti. So that in the case of a payment of rent by a tenant under a contract the payment ipso facto cannot be considered as illegal nor can a contract to pay can be considered illegal ab initio. It becomes illegal only to the extent of excess rent when standard rent is fixed by the Samiti as clearly laid down by S. 6.

In the present case that contingency has not occurred and cannot happen now by virtue of the repeal of the enactment. Hence, the right of refund given by S. 6 remains in an inchoate condition and to quote the above passage from Craies on Statute Law:

> "The thing to be done, if only commenced but not completed before the Act is repealed, must upon the repeal of the Act be left in status quo."

In other words the tenant had not acquired any right of refund which is the basis of the suit nor had the landlord incurred any liability to refund under the Rajkot State Law which could be considered to have been saved by Cl. (1) of S. 9 of the Ordinance XXV above cited. Under the circumstances, the inchoate right of the tenant to refund has lapsed by the repeal of the former law. Besides it cannot be assumed that the rent which would have been fixed by the Samiti under the old law could not be necessarily the rent contracted to be paid from the mere fact that under the present law the standard rent has been fixed at a figure very much less than the contractual rate. It is admitted that the basis of the standard rent and the manner of fixation under the two laws are different.

(8) I am therefore of the opinion that the learned District Judge has misconceived the position in decreeing refund of Rs. 1440 on the basis that it was paid in excess of the standard rent. In view of this, I do not think it necessary to give my decision on the point raised whether the doctrine of pari delicto applied. If the plaintiff chose to pay the contractual rent without demur and did not take himself the advantage of the Rajkot State Law and get the rent fixed, he has to thank himself. The Rajkot State Law did not prevent him from approaching the Samiti to fix the standard rent.

(9) Further the contract of letting itself could not be considered as void or illegal. What is deemed illegal and void by S. 6 of the Rajkot State Law is the agreement to pay the rent in excess of the standard rent fixed. This is clear from the words "to that extent" in the Section. Such rent not having been fixed, it cannot be said that either the contract or the receipt of the rent voluntarily paid by the tenant was void and which obliged the landlord to return the payments made under S. 65 of the Contract Act or S. 84 of the Indian Trusts Act. Under the circumstances, I allow this appeal and set aside the order of the District Judge. I restore the decree of the trial Court that the suit of the plaintiff be dismissed. The appellants will have their costs from the respondent throughout in the three Courts.

B/D.H. Appeal allowed.

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CHHATPAR J.

Union of India, representing the Saurashtra Rly., Appellant v. Gulamhussain Meherallybhai, Respondent.

Second Appeal No. 87 of 1951, D/- 23-4-1952.

(a) Railways Act (1890), S. 47(1)(f) — Rules under — R. 5 — Goods of perishable

nature — Consignor's address not known — Consignment booked to self — No representative of consignor coming to take delivery — In circumstances held it was not practicable to send notice of arrival. (Para 4)

Anno: Railways Act, S. 47 N. 3.

(b) Railways Act (1890), Ss. 55 and 56 — Distinction.

Section 56 is independent of S. 55 and makes provision for sale of unclaimed goods, while S. 55 provides for realisation of the dues to the railway administration by exercise of their lien over the goods in their possession. (Para 5)

Anno: Railways Act, S. 55 N. 1 S. 56, N. 1.

(c) Railways Act (1890) S. 55(2) — Perishability of goods — On what depends.

The question whether the goods are perishable or not does not depend upon whether freight in respect of them has been prepaid or not. The question depends upon the nature of the goods themselves. (Para 6)

Anno: Railways Act, S. 55 N. 1.

K. B. Vyas, for Appellant; H. A. Mehta, for Respondent.

REFERENCE Para

('48) AIR 1948 Pat 378: (26 Pat 516) 6

JUDGMENT: This appeal arises out of the following facts: The respondent booked a consignment of 150 bags of onions, weighing 280 maunds on 9-6-46 from Mahuva on the then Bhavnagar State railway for delivery at Ratangarh Station on the then Bikaner State Railway. The goods were consigned to self with a note that freight was to be paid at the station of destination. The consignment was booked at a reduced rate in view of the condition of the goods and the respondent executed two risk notes as also a goods consignment note, declaring the condition of the goods in them to be 'bagging old, re-sewn, wet by rain'; the consignment reached Ratangarh on 25-6-46 or 26-6-46 i.e. after about 17 days.

The goods were sold by auction by the Railway on 28-6-46, as it was alleged that nobody came to take delivery and the goods were of a perishable nature. Admittedly no notice of the arrival of the goods was given by the railway authorities nor was any notice given demanding the freight payable at the destination nor notice of the auction to the consignor. The respondent filed a suit for recovery of Rs. 800/- on the basis of non-delivery of the goods, the amount being claimed as damages. The defendant Railway administration inter alia contended as under:—

"The statement in plaint para 2 is not admitted. The suit consignment was forwarded from Mahuva in Wagon No. 15399 on 9-6-46, it was made over to B.B. & C.I. Rly. at Wadhwan Jn. on 18-6-46 in the same wagon which left on 19-6-46. It was made over to the Jodhpur Railway at Marwar Junction on 23-6-46 in the same wagon which left from there on 23-6-46, and was made over to the Bikaner Railway on 26-6-46 at Sujangarh. The consignment reached destination, Ratangarh, where the consignee did not come up for delivery nor for the payment of the freight, as this consignment was booked to 'self' with a R/R 'to pay'. Looking to the perishable nature it was sent to Bikaner where it was auctioned publicly for Rs. 135/- which amount was credited towards the part clearance of the freight, as the due freight to be paid at destination was Rs. 411-6-0. Hence this railway is not liable for the consequent claim."

This para contains in substance the defence on the merits. From the evidence of Akbarali, the representative of the plaintiff, it appears that the goods were sent to one Hasan Ruda for sale and the railway receipt along with a Hundi drawn on Hasan Ruda in favour of Devkaran Nanji Banking Co., Ltd., Bhavnagar, was handed over to the Bank for realisation of the amount of the Hundi and delivery of the railway receipt to Hasan Ruda on payment of the Hundi. The endorsement on the railway receipt as also on the Hundi show that the Devkaran Nanji Banking Co., Ltd., Bhavnagar, forwarded them to the Jawal Pargana Co-operative Bank; but it seems the Hundi was not honoured and both the Hundi as well as the railway receipt were returned to the consignor with a forwarding letter stating that they are returned as being "un-delivered."

Akbarali in his cross-examination admitted that Hasan Ruda had not written any letter to the plaintiff. He stated that the wagon containing the goods did not reach Ratangarh, therefore nobody took delivery; but he added in the same breath that he was unable to state whether the goods reached Ratangarh or not and whether the Railway administration sold the goods as nobody came to take delivery at Ratangarh. That the goods did reach Ratangarh and they were actually sold by public auction, as nobody came to take delivery is clear from the evidence of the Railway Goods Clerk Umraochand, who has been examined in the case.

The trial Court gave a decree to the plaintiff for Rs. 600/- which was confirmed by the lower appellate Court. The main ground of the decision of the two lower Courts was that the goods were sold without notice to the consignor. There is also reference in the judgments of the two lower Courts to the effect that the goods were not of a perishable nature, under Sections 55 and 56 of the Indian Railways Act, it was incumbent on the Railway administration to send a notice to the consignor demanding freight and it is only when such freight is not paid that the Railway could sell the goods. No such notice was admittedly given.

(2) I have heard Mr. Vyas, the learned Advocate for the Railway administration; he has first attacked the observations of the two lower Courts that the goods were not of a perishable nature. Both the Courts have made absolutely no reference to the declaration made by the consignor in the two risk notes and in the goods consignment note which is also contained in the railway receipt itself, that the goods were contained in old baggings, which were resewn and were wet by rain. The goods are onions and they were despatched in the month of June. The Railway servant who has been examined states that the goods were of a perishable nature.

Now dry onions may not ordinarily be perishable but they were wet by rain and contained in old baggings which were re-sewn and it was mid-summer; it is difficult to understand the observations of the learned Judges of the lower Courts that the goods were not of a perishable nature as it is common knowledge that wet onions perish in no time. The consignment had already taken 17 days to reach the station of destination. There was evidently some delay in reaching, but the Railway administration are protected under the contract of carriage for such delay. It may also be mentioned that the

route by which the goods were to be sent was selected by the consignor himself and it is stated in the goods consignment note. There is no allegation that the goods were lost or damaged by any act or default of the Railway administration or their servants.

(3) The sole question therefore to be considered in the present case is whether on the interpretation of Sections 55 and 56, the Railway administration were entitled to sell the goods without notice to the consignor. It is not disputed that the goods were sold by public auction. There is the evidence of the Railway Goods Clerk, which stands unrefuted. Section 56 states that when any goods have come into the possession of the Railway administration for carriage and are not claimed by the owner or other person appearing to the Railway administration to be entitled thereto, the railway authorities shall, if such owner or person is known, cause a notice to be served upon him, requiring him to remove the goods. If such owner or person is not known, or the notice cannot be served upon him, or he does not comply with the requisition in the notice, the Railway administration may, within a reasonable time, sell the goods as early as may be under the provisions of S. 55.

Section 55 provides for the lien for freight and other charges and it states that if a person fails to pay on demand by the Railway administration any such charges, the Railway administration may detain the goods and when any such goods have been detained, the Railway administration may sell by public auction in the case of perishable goods at once and in the case of other goods on the expiration of at least 15 days' notice of the intended auction published in one or more of the local newspapers or where there are no such newspapers, in such manner as the Central Government may prescribe, and out of the sale proceeds the Railway administration is entitled to retain a sum equal to the charges due to them and pay the balance to the person entitled thereto.

In the present case I hold that the goods were of a perishable nature in view of the circumstances and the admission of the plaintiff contained in the contract of carriage itself. Indeed it would not be open to the plaintiff to contend otherwise in view of S. 92 of the Indian Evidence Act. Cl. (2) of S. 55 permits the Railway administration to sell by public auction any perishable goods at once, but in case of other goods, 15 days' notice of the intended auction is required to be given. The relevant section applicable is S. 56 which authorises the Railway administration to dispose of unclaimed goods on a railway. The section requires a notice to be served upon the owner or other person appearing to the Railway administration to be entitled to the goods, if such owner or person is known to the Railway administration. Cl. (2) of the section says that if such owner or person is not known or the notice cannot be served upon him, the Railway administration may sell the goods in accordance with the provisions of the foregoing S. 55, which in the present case would mean a sale of perishable goods at once by public auction without giving 15 days' notice of the public auction.

In the present case what the Railway administration are presumed to have in their possession is only a copy of the railway receipt, the risk notes and the goods consignment note which show the bare name of the consignor at Mahuva; his address is not shown in the documents. The goods were consigned to self and it is not shown that the consignor had a well-known place of business or residence at Ratangarh. The evidence of the plaintiff's representative shows that they had sent the goods to one Hasan Ruda for disposal and presumably it was Hasan Ruda who was supposed in ordinary course to have honoured the Hundi drawn upon, got possession of the railway receipt and presented himself to the railway station with the railway receipt for taking delivery. There is no evidence that this was ever done. Hasan Ruda has not been examined. Under the circumstances, the Railway administration were justified to assume that the notice required by S. 56(1) could not be served upon the owner or a person entitled to the goods, and consequently they would be entitled to sell the goods at once the goods being of a perishable nature.

(4) Mr. Mehta, the learned Advocate for the plaintiff-respondent has contended that it was incumbent on the Railway to serve a notice of the arrival of the goods on the consignor whose name must be in possession of the Railway administration, as either a copy or a duplicate of the railway receipt must accompany the goods. The Indian law contained in the Railways Act does not oblige the railway administration to give a notice of arrival of the goods. The English law appears to be different. This distinction is pointed out in P. Hari Rao's Indian Railways Act, 1949 Edition, at p. 270. My attention has however been drawn to rule 5 of the rules made under S. 47 (1) (f) of the Railways Act, which says:

> "Subject to the provisions of S. 56 of the Indian Railways Act, notice of arrival will be sent when practicable, but the Railway administration will accept no responsibility for non-receipt thereof."

Now in the present case it was obviously not practicable to send a notice of arrival, because the goods were of a perishable nature and even the consignor's address was not known, the railway receipt and other documents merely mentioned the name of the consignor. The consignment was booked to self, which has the implication that a representative of the consignor will take delivery at the station of destination, pay the freight and obtain delivery of the goods. No such person came to take delivery and there is no allegation whatever that the Railway administration were apprised of the name and the address of the person who was to take delivery at the station of destination.

(5) Mr. Mehta next argued that under S. 55 the Railway administration are bound to give notice demanding the freight payable before they can exercise their lien and sell the goods. But the sale in the present case has taken place under S. 56, as the property was unclaimed and the notice could not be served. Section 56 is independent of S. 55 and makes provision for sale of unclaimed goods, while S. 55 provides for realisation of the dues to the Railway administration by exercise of their lien over the goods in their possession. I consequently hold that the Railway administration were entitled to sell the goods at once without notice as unclaimed property under S. 56 of the Act. Nothing serious has been said about the sale by auction except that the Railway servant examined in the case has not produced all the documents in connection with the auction sale. He has produced only the authority of the superior officer sanctioning the sale. There is nothing to doubt the bona fides of the public auction from the evidence of Umraochand, the Goods Clerk, who

deposes that he was present and 10 or 12 merchants came to bid at the auction.

(6) Mr. Mehta then argued that perishable goods are never booked with freight to pay at the station of destination and the fact that in the present case freight was payable at the station of destination shows that the goods were not treated as perishable by the Railway administration and in support of his argument he has referred me to rule 29 of Coaching Tariff Rules which states that parcels containing perishables must be prepaid. But these rules, as Mr. Vyas the learned Advocate for the Railway administration points out, relate to the carriage of goods when such goods are carried by passengers with them. The present case does not come within the purview of these rules, as these goods were not carried along with a passenger. He points out that the case is governed by rule 10 of the Goods Tariff General Rules, which says:

"Except in the case of dangerous and other goods specially provided for in this Tariff or in Exception Lists for which prepayment of freight is compulsory, all charges must be paid either when goods are presented for dispatch or at the time of delivery."

There is no provision in this general rule that perishable goods must be prepaid. But whatever the rules provide, the question whether the goods are perishable or not does not depend upon whether freight in respect of them has been prepaid or not. The question depends upon the nature of the goods themselves. In the present case I have no doubt that the goods were perishable from the description given in the railway receipt and in this respect I may refer to a recent ruling of the Patna High Court in the case of 'JUGESHWAR MAHTON v. M. & S. M. Rly.', AIR 1948 Pat 378, the facts of which case seem to be very much like those of the present case. In that case garlic was held to be goods of a perishable nature and the Railway administration were held entitled to sell the goods as unclaimed. At page 380, it was observed:

"Whether the goods are perishable or not depends on the nature and character of the goods, and perishability may be one of degree; some goods may perish very soon and others may take a little longer time, though perishable by its nature means subject to speedy decay. The nature of the goods does not depend on the time the railway company took in disposing them of. For example fresh fruits like mangoes and lichis are undoubtedly perishable goods. The nature does not undergo a change merely because the railway company does not sell them at once or within 24 hours. For these reasons, I am of the view that the learned Additional District Judge has rightly found that the goods in question were perishable goods."

Das J., thereafter examined the provisions of Sections 55 and 56 of the Railways Act and observed :

"In respect of perishable goods S. 55 allows the Railway administration to sell them by public auction at once. No notice either to the owner or to the consignee is necessary in respect of perishable goods; nor is it necessary to publish a notice of the intended auction in any local newspaper. Sub-section (2) of S. 55 says in clear terms that when the goods detained under that section are perishable goods, the railway administration may sell at once. In the case before us the railway company did not sell the goods at once; they tried to find out the address of the consignor and the consignee and they also waited for sometime to see if anybody turned up to take delivery of the goods. When the railway company found that nobody was claiming the goods and the goods were already suffering damage and deterioration and were likely to perish completely, they took steps to get them sold by public auction. Before doing so, a notice of the intended auction was circulated to all local merchants."

In the present case a notice before the auction must have been circulated, as we have from the evidence of Umraochand, who was present, that 10 or 12 persons had attended the auction.

(7) Under the circumstances, I cannot help coming to the conclusion that both the lower Courts have seriously erred in passing a decree in favour of the plaintiff and holding the Railway administration liable for damages. I consequently allow this appeal and dismiss the suit of the plaintiff with costs throughout.

B/V.R.B. Appeal allowed.

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SPECIAL BENCH

SHAH C. J., CHHATPAR AND BAXI JJ.

Abu Mohmed Memon, Applicant v. The Chief Secretary, Government of Saurashtra and another, Opponents.

Civil Misc. Appln. No. 60 of 1951, D/- 22-3-1952.

Influx from West Pakistan (Control) Ordinance (17 (XVII) of 1948), S. 6 — Person overstaying period mentioned in permit — Subsequent legislation making overstay ground for removal of such person from India — Liability to removal — (Influx from West Pakistan (Control) Ordinance (17 (XVII) of 1948)—Rules under, R. 12)—(Influx from West Pakistan (Control Ordinance (34 (XXXIV) of 1948), S. 7) — (Influx from West Pakistan (Control) Act (23 (XXIII) of 1949), S. 7) — (Constitution of India, Art. 20).

Where the petitioner entered India under a temporary permit entitling him to remain in India for one month, but he overstayed the period mentioned in the permit and apprehending that the Government would remove him from India he applied for a writ restraining the Government from removing him from India and contended that he having once lawfully entered India and as on the date of the expiry of the permit there was no law which rendered him liable to removal from India, subsequent legislation making overstay penal and a ground for removal of the person overstaying could not affect him:

Held that the act of the petitioner's overstay was a continuous offence and could be dealt with under the Ordinance XXXIV (34) of 1948 and the Rules and notifications issued thereunder though such overstay could not in view of Art. 20 of the Constitution have been punished or made a ground of removal under the Ordinance 17 (XVII) of 1948. (Para 5)

K. L. Hathi and K. M. Chhaya, for Applicant; A. R. Bakshi Advocate General with B. R. Joshi Assistant Govt. Pleader, for the State.

REFERENCE..... Para.
('49) 1949-2 Sau LR 212 5

BAXI J.: The petitioner entered India under a temporary permit issued by the High Commissioner for India in Pakistan, entitling him to remain in India for one month. The purpose and the place of the petitioner's visit to India have been mentioned in the permit as "for business to Dharwad". The permit entitled him to stay in India from 26-7-48 to 25-8-48. After coming to India the petitioner addressed a letter to the High Commissioner stating that he was an inhabitant of Dhuvav (Jamnagar) and was doing business in the Konkan District. He had gone to Karachi (Pakistan) from Bombay for the purpose of business for four to five months. His family had always been in India and he did not propose to go back to Karachi and therefore he returned the permit to the High Commissioner. This letter is dated 12th August 1948. He was however directed by the High Commissioner, by his letter dated 31-8-48 to approach the District authorities concerned.

According to the petitioner, the Government of Saurashtra was also approached by him by an application dated 11th August 1948 for the issue of a permanent permit but no such permit has been issued to him. The petitioner however did not go back to Pakistan and overstayed the period mentioned in his permit. He was prosecuted in the Court of the First Class Magistrate, Jamnagar, under the Influx from West Pakistan (Control) Ordinance XVII (17) of 1948 for overstaying in India and was convicted under S. 4 read with S. 3 of the Ordinance. The petitioner has now applied for a writ restraining the opponents from removing him from India alleging that he apprehends that the District Superintendent of Police, Jamnagar acting under the instructions of the Government of Saurashtra and the Central Government intended to remove him from India.

His main contention was that when he entered India in July 1948 the only law controlling influx from West Pakistan was the Ordinance No. XVII (17) of 1948. No rules were framed at that time by the Government under the Ordinance. The Ordinance authorised the removal from India of only those persons who had entered India without a permit but did not empower the Central Government to remove those who having lawfully entered India under a permit committed a breach of its condition or committed a breach of the rules made under the ordinances. The authority to remove such persons from India was conferred upon the Government by subsequent legislation and it was contended that the petitioner having once lawfully entered India and as on the date of the expiry of the permit there was no law which rendered him liable to removal from India, subsequent legislation making overstay penal and a ground for removal of the person overstaying could not affect him.

The learned Advocate referred to Article 20 of the Constitution in support of his argument. The learned Advocate General argued that the petitioner's overstay made him liable to removal at least after the subsequent legislation. He further argued that as the petitioner had entered India on the express representation that he intended to visit India temporarily on business only, he cannot now be permitted to continue to stay in India unless he obtained a fresh permit for resettlement under the rules framed by the Government for the purpose.

(2) Entry into India from West Pakistan was controlled for the first time by the Ordinance No. XVII (17) of 1948 published in the Central Government Gazette on 6-8-48. Section 3 prohibited entry of a person into India from any place in West Pakistan unless such person was in possession of a permit or of a passport or was exempted from being in possession of a permit under the rules made by the Government. Sub-section (2) empowered the Government to make the rules. Section 4 prescribed penalty for contravention of the provisions of S. 3 or of any rule made thereunder. Section 5 authorised certain police and customs officers to arrest without a warrant a person who contravened or who was reasonably suspected to have contravened the provisions of S. 3 or any rule made thereunder and required the officer making the arrest to take or send the person arrested to the Magistrate having jurisdiction. Finally S. 6 empowered the Central Government by a general or special order to direct the removal from India of any person who has entered India in contravention of the provisions of S. 3.

Under this Ordinance therefore entry into India without a permit or breach of any rule made by the Government was made punishable but the Central Government's power to direct removal was restricted to persons who entered India in contravention of the provisions of S. 3 and the Ordinance did not empower the Government to remove a person who having lawfully entered India under S. 3 subsequently committed a breach of the conditions of the permit or of the rules made under the Ordinance. Rules called the Permit System Rules 1948 were thereafter framed under the Ordinance and were published on 1-10-48 in the Saurashtra Government Gazette 1948 at page 670.

Rule 12 enacts that a person holding a temporary permit shall not stay in India after the date of the expiry of such permit. When these rules were enacted the petitioner was in India and his permit had already expired. After the issue of the Permit System Rules the Government issued general instructions to police officers by Notification No. II (48) (55)-48-GENL dated the 14th September 1949 not to permit persons having entered India under a temporary permit to overstay their period and reminded them that such persons were liable to prosecution under S. 3 of the Influx from West Pakistan (Control)Ordinance 1948.

(3) Ordinance XVII (17) was followed by Ordinance XXXIV (34) of 1948 which was published in Saurashtra Government Gazette of 1948 dated 10-11-48. By this Ordinance, Ordinance XVII (17) was repealed. Section 3 of Ordinance XVII (17) was amplified into two sections viz., sections 3 and 4. By S. 3 of the new Ordinance entry into India from any place in West Pakistan without a permit or a passport was prohibited unless the person entering India was exempted from being required to be in possession of the permit in accordance with the rules made under the Ordinance. Section 4 invested the Government with powers to make rules. Section 5 (1) enacted that a person entering India in contravention of provisions of S. 3 or having entered India contravened the rules made under S. 4 or committed the breach of any condition of the permit shall be punished with imprisonment or fine or both. By sub-section (2) a person making a statement in pursuance of any provisions of the Ordinance or any rule made thereunder or furnishing any information which is false and which he either knows or believes to be false

or does not believe to be true touching any point material to the object for which the statement is made or used is rendered liable to be punished with imprisonment or fine or both. Section 6 authorised certain police and customs officers to arrest persons without a warrant who have committed or against whom a reasonable suspicion exists that they have committed the offence under the Ordinance and finally by S. 7 the Central Government was invested with jurisdiction to direct the removal from India of any person who committed or against whom a reasonable suspicion exists that he has committed offence under this Ordinance.

It will be noted how the authority of the Central Government to remove persons from India was extended under the new Ordinance. While S. 6 of the previous Ordinance (XVII (17) of 1948) empowered the Central Government to direct the removal of only those persons who entered India without a permit or a passport this power was extended by the new Ordinance to persons who not only entered India in contravention of provisions of S. 3 but who after having entered India contravened the provisions of the Rules under the Ordinance or who committed a breach of any of the conditions of the permit and the power extended against persons against whom even a reasonable suspicion that they committed any of the above acts existed.

By the Notification No. II (55-E)-49 dated 8-2-49 published at page 411 of the Saurashtra Government Gazette issued under this Ordinance, the Central Government directed the removal from India of every person who entered India from West Pakistan in contravention of Section 3 of the Ordinance or who having lawfully entered India contravened the provisions of any rule made under S. 4 of the Ordinance or committed a breach of any of the conditions of the permit or who had obtained his permit on the strength of a statement made by him which is false or which he knew or believed to be false or did not believe to be true. The Ordinance No. XXXIV (34) of 1948 was repealed and replaced by the Influx from West Pakistan (Control) Act XXIII (23) of 1949 and Rules have been made thereunder.

(4) The petitioner had undoubtedly overstayed in India and thereby committed a breach of the Rule 12 of Permit System Rules, 1948. He also committed a breach of the conditions of the permit. Therefore there is a complete case for his removal under Ordinance XXXIV (34) of 1948 and Act 23 (XXIII) of 1949.

(5) It is however argued on behalf of the petitioner that he entered India under a valid permit. He had overstayed the period of his permit when there were no rules prohibiting such overstay and the Government had no authority to remove him on the ground of overstay. And he could not be removed because rules prohibiting overstay were subsequently framed and because subsequent legislation rendered persons overstaying in India in contravention of the rules or the conditions of the permit liable to removal from India. The learned Advocate relied upon Article 20 of the Constitution which states that no person shall be convicted of an offence except for violation of law in force at the time of the commission of the act charged as an offence nor shall he be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

It is possible that the petitioner's overstay during the period when the Government could not remove a person on that ground cannot by subsequent legislation be made a ground of removal. But from the date on which the new Ordinance viz., Ordinance XXXIV (34) of 1948 came into force the petitioner's stay in India in breach of the conditions of the permit and in breach of the Permit System Rules became an offence and the Central Government became entitled to direct his removal. We may here refer to the decision of this Court in the 'UNITED STATE OF SAURASHTRA v. KHATRI OSMAN MAMAD', 2 Sau LR 212 which completely covers the point. In that case overstay after the expiry of a permit was held punishable under the Permit System Rules even though the permit had expired before the Rules were framed. The act of the petitioner's overstay is a continuous offence and can be dealt with under the Ordinance XXXIV (34) of 1948 and the Rules and notifications issued thereunder though such overstay could not have been punished or made a ground of removal under the Ordinance XVII (17) of 1948.

We may add that the petitioner had obtained the temporary permit on the allegation that his visit to India was to be a temporary visit and entered India on the strength of that permit. It is therefore not open to him to contend that his original intention was to stay permanently in India. His present overstay is subject to the incidents and penalties attached to his present permit. If he intends to return to India permanently it is open to him to do so after obtaining a permit for resettlement from the proper authorities. The present petition is without substance and is ordered to be dismissed with costs.

(6) SHAH C. J.: I agree.

(7) CHHATPAR J.: I agree. I would however add a recommendation to the authorities concerned to consider the application of the petitioner for permanent resettlement in India sympathetically if the facts stated in his application are correct and his loyalty to the Indian Union unquestionable and if he has acquired no interest in Pakistan.

A/V.R.B. Petition dismissed.

A. I. R. 1952 SAURASHTRA 100

CHHATPAR J.

Sindhav Karman Mansang and another, Judgment-debtors-Appellants v. Shah Ratilal Kasalchand, Judgment-creditor-Respondent.

Second Appeals Nos. 81 and 82 of 1951, D/- 31-3-1952.

Limitation Act (1908), S. 15 — "Order" — Section does not necessarily contemplate order of Civil Court.

Section 15 does not contemplate necessarily the order of a Civil Court. It includes any order of any competent authority, and it would be going beyond the wording of the Section to import certain words in the Section which are not there: 16 W.I.S.A.L. Rep. 41, Rel. on. (Para 4)

Therefore, Notification 'Tharav' No. 60 of St. 1998, D/- 2-10-1942 of Wadhwan State which prohibits filing of an execution application as well as stays further execution proceedings comes within the purview of S. 15. (Para 3)

Anno: Lim. Act, S. 15 N. 6.

A. R. Baxi, for Appellants; C. N. Shah, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('33) AIR 1933 PC 52: (12 Pat 195)	4
('35) AIR 1935 PC 85: (57 All 242)	4
('39) AIR 1939 All 82: (ILR (1939) All 207)	4
('43) AIR 1943 All 291: (ILR (1943) All 569)	3
('47) AIR 1947 All 187: (ILR (1946) All 709)	3
('19) AIR 1919 Cal 706: (46 Cal 526)	3
('33) AIR 1933 Mad 418: (56 Mad 490 FB)	4
('47) AIR 1947 Oudh 157: (229 Ind Cas 62)	3
16 W. I. S. A. L. Rep. 41	4

JUDGMENT: The above two appeals are being dealt with together as the questions of fact and law involved are more or less similar. In Civil Second Appeal No. 81 of 1951 the respondent-judgment-creditor obtained a decree against the appellant on 8-7-32 for Rs. 676/- payable by instalments with a default clause. Execution applications were filed, first on 30-11-34, the second on 7-1-36, the third on 28-1-41, which was disposed of by an order dated on 22-2-41, the fourth on 8-4-48 which was disposed of on 27-6-49 and the fifth, which is the present application, on 29-4-50. In Civil Second Appeal No. 82 of 1950, the same respondent-judgment-creditor obtained a decree for Rs. 546-4-0 on 5-3-41 and an execution application was filed on 22-3-50, which is the one under consideration. Both the decrees were passed by the Civil Court of the former Wadhwan State.

It is admitted that the period of limitation for reviving a decree was five years instead of three years provided in the Limitation Act. It is also admitted that S. 15 of the Limitation Act was in operation in the State of Wadhwan since 1915. It will be observed that in the Civil Second Appeal No. 81 of 1951 there is a gap of more than five years between the date of the disposal of the third application i.e. 22-2-41 and 8-4-48 the date of the fourth execution application and in Civil Second Appeal No. 82 of 1951 the execution application was filed more than 5 years after the decree.

(2) The question involved in the two matters is the same; whether the execution applications were barred by limitation. The judgment-creditor relied upon a Notification 'Tharav' No. 60 of St. 1998 dated 2nd October 1942 A.D. of the Wadhwan State, which stayed until further orders the executions of decrees against certain classes of land-holders and agriculturists. The judgment-creditor therefore claimed exclusion of time under S. 15 of the Limitation Act. It is not disputed that if such exclusion is permitted, the present execution applications would be within time. Both the lower Courts have given a concurrent decision against the judgment-debtors holding that this 'Tharav' No. 60 of St. 1998 came within the purview of S. 15 of the Limitation Act and therefore the execution applications were within time and they accordingly ordered execution to issue.

(3) Mr. A. R. Baxi, the learned Advocate for the appellants contends that this 'Tharav' cannot come within S. 15 of the Limitation Act, as the Section contemplates an order of stay or injunction of a Court. He has further argued that this 'Tharav' does not prohibit the filing of an execution application and on the contrary contemplates execution applications to be filed, but it is admitted that the 'Tharav' does order the stay of execution proceedings. In amplifying this argument, he has argued that in similar previous 'Tharav' e.g. 'Tharav' No. 2 of St. 1995 and 'Tharav' No. 8 of 1996 etc., there is a specific clause that the period of suspension of the execution proceedings would be excluded in computing the period of limitation for filing an application for execution of decree, but that such a clause does not appear in the 'Tharav' No. 60 of St. 1998 under consideration.

The sum and substance of his arguments therefore is that although the 'Tharav' under consideration orders execution proceedings to be stayed, it nevertheless permits an execution application to be filed and it is therefore incumbent upon a decree-holder to file a formal execution application in order to keep the decree alive from time to time within the period of five years, although the only order that the Court can pass on such an application would be to either dismiss it or to pass an order of stay. In support of his argument that an order of stay or injunction contemplated by S. 15 is only one passed by a Court of law, he has referred to the Commentary of Chitaley and Rao on the Limitation Act (3rd Edition), wherein the learned Commentators observed under Note 6 at page 521:

> "The words 'stayed by injunction or order' have reference to orders of Courts and not to a disability to sue or to apply arising from other circumstances such as the declaration of war, etc."

The words 'of a Court' do not occur in the Section after the words 'injunction or order'. The learned Commentators have referred to the case of 'DEUTSCHE ASIATESCHE BANK v. HIRA LALL BURDHAN & SONS', AIR 1919 Cal 706, wherein the question whether Sec. 15 of the Limitation Act applied in the case of an alien enemy who was debarred from suing was considered and Woodroffe J. made a passing remark in the following short judgment:

> "The general rule is that when limitation has commenced to run it will continue to run. Has anything been shown to us which creates an exception to this general rule by reason of the suspension of rights due to the existence of the state of war? There is in my opinion none shown; nor does S. 15, Limitation Act, apply for the word 'Order' there clearly refers to orders of Civil Courts and not to the condition of things with which we have here to do. As the suit is admittedly barred unless the period mentioned in the plaint is excluded I am of opinion that this appeal should be dismissed with costs."

The question whether an order of any competent authority other than a court of law was not under consideration in that case and the remarks of the learned Judge cannot be considered as authority for importing the words "of a Court" in the Section which are not there. The learned Commentators Chitaley and Rao in fact under the same note refer to several cases of orders of stay coming within the purview of Section 15 passed by authorities other than Civil Courts. I may refer to the cases of 'HULAS SINGH v. DATA RAM', AIR 1943 All. 291, 'UMRAO v. BEHARI LAL', A.I.R. 1947 All. 187 and 'RADHE SHYAM v. IBNE HASAN', AIR 1947 Oudh 157 wherein orders by executive authorities passed in exercise of powers vested in them by statute were construed as falling within the scope of S. 15 of the Limitation Act. Therefore, in my opinion, there is no force in the argument that the Section requires an order of stay or an injunction of a Civil Court to attract its applica-

tion. Any order of a competent authority would suffice. In the present case it is not disputed that the 'Tharav' in question was passed by the Thakore Saheb of the Wadhwan State, who was both the executive head as well as the legislative authority in the State, and his order had consequently both the effect of law and of being a legal executive order. This order says (Original in Gujrathi: here omitted): These words imply stay of execution from instituting an execution application. Section 15 of the Limitation Act contemplates both the prevention of an institution of an execution application as also stay of execution proceedings of a decree and therefore there is no substance in the arguments of the learned Advocate for the appellants that it is necessary that an execution application should be filed as required by the ordinary law to which alone the 'Tharav' would apply. According to my construction of the 'Tharav' it prohibits the filing of an execution application as well as stays further execution proceedings in pursuance of any execution application pending or if filed. In the penultimate portion of the 'Tharav' provision is made that if any execution application is filed, it shall be stayed. This, in my opinion, is a mere surplusage and does not affect the legal position under consideration. It is apparently included for guidance of the Civil Courts how to deal with such execution applications in case they are filed.

(4) Mr. A. R. Baxi, the learned Advocate for the appellants, has referred to a number of rulings, e.g. 'MAQBUL AHMAD v. ONKAR PRATAP NARAIN SINGH', A.I.R. 1935 P.C. 85, 'TRIPURA SUNDARAMMA v. ABDUL KHADER', A.I.R. 1933 Mad. 418 (F.B.), 'LAKHMI CHAND v. BIBI KALSUMANNISA', A.I.R. 1939 ALL 82, 'KIRTYANAND SINGH v. PRITHICHAND LAL', A.I.R. 1933 P.C. 52, to the effect that equities in construing the specific provisions of the Limitation Act should be ruled out of consideration. I agree with the principles of these rulings but the same have no application to the facts of the present case. On the other hand, Mr. C. N. Shah the learned Advocate for the respondent has relied upon several rulings reported in the Kathiawar Law Reports and W.I.S.A.L. Reports, particularly the case of 'KHACHAR BHAN MULU v. JHAVERCHAND HIRACHAND', 16 W.I.S.A.L. Rep., 41, wherein the word 'order' referred to in S. 15 of the Limitation Act has been construed to include an order of a competent political authority. The learned Judge observes:

> "Section 15 of that law states that 'limitation should not apply where execution applications have been stayed by any order'. In British India, this has been interpreted to be any order of a Court. But this interpretation obviously cannot be accepted in the Western India States Agency. In British India such execution applications, so far as I am aware, can only be stayed by the order of a competent Court. That is not the case in this jurisdiction. The Resident acting in his political capacity has power to stay execution in the case of certain classes of litigants. Moreover it is a recognised usage that in times of famine other classes of execution applications may also be stayed by the administration. It is, I think, therefore clear that to adopt the narrow interpretation of the section which now finds favour in British India would frequently cause grave injustice."

The lower Courts have referred to a number of rulings reported in K. L. Reports from 1910 right upto 1940 which show that such orders staying executions in times of famine or scarcity passed by Political Authorities have been considered as good within Section 15 of the Limitation Act and entitle the decree-holders to exclusion of time. But in my opinion S. 15 of the Limitation Act does not contemplate necessarily the order of a Civil Court. As discussed above, it includes any order of any competent authority, and it would be going beyond the wording of the Section to import certain words in the Section which are not there.

(5) No other objection has been urged before me. Under the circumstances, the appeals are dismissed with costs.

(6) At the request of Mr. A. R. Baxi, certificate of fitness for appeal under Section 22(A) Clause (2) of the High Court Ordinance may issue.

B/V.R.B. Appeals dismissed

A. I. R. 1952 SAURASHTRA 102

SHAH C. J. AND BAXI J.

Baishri Baijiba, Applicant v. Vajesang Bapuji and others, Opponents.

Civil Revn. Appln. No. 196 of 1950, D/- 5-4-1952.

Saurashtra Adjudication of (Special Courts) Suits Ordinance (LXXII of 1949) S. 3 — Political suit properly instituted in Special Court without court-fee, transferred to Civil Court — Civil Court cannot order plaintiff to value plaint for jurisdiction and pay court-fees. — (Civil P.C. (1908) S. 26 O. 4 R. 1) — (Court-fees Act (1870) S. 19).

Where a political suit properly instituted in Special Court and governed by the provisions of Saurashtra Ordinance, LXXII of 1949, is transferred to the Court of the Civil Judge, the transferee court is required to dispose of the suit as if it was instituted before it and to proceed with the hearing from the stage at which it was pending in the Political Court. Where the Special Court had already examined certain witnesses, the civil court has to begin from that stage. It cannot ask the plaintiff to value his plaint for purposes of jurisdiction and pay court-fees thereon, when he was exempted from this under R. 17 of Western India States Agency Political Court Rules at the time when suit was filed in the Special Court. This is specially so, when the Political Court Rules were in force, when the suit was received by the Civil Court: AIR 1950 Bom. 234 Dist. (Para 5)

Anno: Court-fees Act S. 19 N. 1 Civil P.C. S. 26 N. 2.

P. G. Oza Proxy for A. R. Bakshi, for Applicant; V. G. Hathi, Proxy for U. S. Shah, for Opponents; B. R. Joshi, Asst. Govt. Pleader, for the State.

REFERENCE: Para
('50) AIR 1950 Bom 234: (52 Bom LR 135) 2, 6

BAXI J.: This revision arises out of the order of the Civil Judge, Sr. Dn., Surendranagar, ordering the applicant to value her suit for the purpose of Court-fees and pay ad valorem Court fees thereon.

(2) The applicant filed a political suit for maintenance against her own sons and her step son the present opponents in the Court

of the Deputy Special Officer, Mehsana in 1946. She claimed one-third share from the income of the giras in the hands of the opponents or in the alternative Rs. 3000/- per year by way of maintenance. She further prayed that the amount of maintenance should be made a charge upon the decree. The suit was instituted under the Western India States Agency Political Court Rules published in the Agency Gazette dated 2-8-1934, Rule 17 exempted Political Suits from payment of Court fees. and the plaintiff-applicant had paid no Court fee under this rule nor had she mentioned the valuation of the suit in the plaint for the purpose of court fees. After the formation of the Saurashtra State the suit was transferred for disposal to the Court of the Civil Judge, Sr. Dn., Surendranagar under the Saurashtra Adjudication of (Special Courts) Suits Ordinance No. LXXII of 1949. It was received by that Court on 5-7-1950. On 25-10-51 the defendant No. 1 gave an application to the learned Civil Judge stating that as the suit was transferred to the Civil Court, the plaintiff should be directed to pay court fee on her plaint. He submitted that the liability of the plaintiff to pay court fee in the Civil Judge's Court was not affected merely because no court fee was payable at the time of the institution of the suit in the Court of the Deputy Special Officer. The learned Civil Judge relied upon a decision of the Bombay High Court in 'RAGHUNATH GANESH v. VAMAN VASUDEV', AIR (37) 1950 Bom. 234 and accepted this contention and directed the plaintiff to put a valuation on her suit and pay ad valorem court fees thereon. The present revision is against this order.

(3) Before considering the question of the applicability of the decision upon which the learned Civil Judge relied, the provisions of Ordinance LXXII of 1949 under which the suit was transferred to the learned Civil Judge's Court may be discussed with advantage. Section 3 enacts that notwithstanding anything contained in any law or instrument for the time being in force but subject to the provisions of Section 4, all suits or proceedings whether civil or political which were triable by Special Courts shall be tried and disposed of by Civil Courts and the Government is authorised to transfer all such suits and proceedings which were pending in any Court to Civil Courts specified in the order and

> "such Courts shall dispose of such suits and proceedings as if they were instituted before them and they will proceed with hearing from the stage at which suits and proceedings are pending."

(4) The applicant's suit being a Political suit is governed by the provisions of this Ordinance and on its transfer to the Court of the Civil Judge, Sr. Dn., the Court is required to dispose of the suit as if it was instituted before it and to proceed with the hearing from the stage at which it was pending in the Political Court.

(5) Now a suit is instituted by the presentation of a plaint to the Judge or an Officer in this behalf. See Section 26 and Order 4, C.P.C. After the plaint is so presented, it is entered in the register of suits and goes through various stages of the trial until it is disposed of by one of the modes prescribed by the C.P.C. When a suit triable by a Special Court is transferred to a Civil Court, Section 3 of Ordinance No. LXXII of 1949 requires that it shall be deemed to have been instituted before the Court to which it is transferred and the Court shall proceed with the hearing from the stage at which the suit was pending. This means that if a plaint has been properly presented before a Political Court, its presentation is not to be questioned by the Civil Court to which the suit is transferred and the trial of the suit should proceed from the stage following such presentation. Similarly, if the suit had gone through further stages e.g., issue of summons, presentation of the written statement, framing of issues etc., the trial in the Civil Court has to be proceeded with from that stage.

In the present case two witnesses on behalf of the plaintiff-applicant and one witness on behalf of the opponents had already been examined by the Deputy Special Officer and it was obligatory on the learned Civil Judge to proceed further with the trial from that stage. He had no jurisdiction to refuse to try the suit until fresh court-fee was paid on the plaint which was properly filed or recorded in the Political Court and acted upon. If he were to do so, he would be contravening the mandatory provisions of the Ordinance. Moreover, when the suit was received by the learned Civil Judge on 8-7-1950 the Political Court Rules were in force by virtue of the provisions of Section 4 of Ordinance No. 1 of 1948. These rules were repealed by Act XXVI of 1950 which received the assent of His Highness the Rajpramukh on 30-10-1950. Therefore, on the date of its receipt by the learned Civil Judge the suit was exempt from the payment of court fees under the Political Courts Rules and the learned Civil Judge cannot demand court fees because subsequent to the receipt of the suit the Political Courts Rules have been abolished.

(6) In 'RAGHUNATH GANESH v. VAMAN VASUDEV', AIR (37) 1950 Bom. 234 refer(?) on which the learned Civil Judge relied, Shah J. held that on a transfer of a suit filed on the Original Side of the Bombay High Court to the Court of the Civil Judge, Sr. Dn., Poona, the plaintiff is liable to pay ad valorem court fee under Section 6 of the Court-fees Act on the ground that

> "the Court fee payable on a document has to be ascertained under the provisions of the Court-fees Act at the time when the document is required to be filed, exhibited or received in a Court; and if the document is not adequately stamped at the crucial date it has no validity."

(7) According to this decision, the relevant date for assessing the Court fees on the plaint on its transfer is the date on which it is received by the transferee Court and if the suit is governed by Section 6 of the Court-fees Act on the date of its receipt by that Court, the plaintiff becomes liable to pay ad valorem court fees under Section 6. In the case before us however on the date on which it was received by the Civil Judge, the suit was not subject to the Court-fees Act, because the Political Court Rules were in force when the suit was received by the learned Civil Judge and he had no jurisdiction to demand court fees under the Court-fees Act. The Court-fees Act is a general enactment and the Political Courts Rules are an exception to it and therefore the suit must be governed by the Political Courts Rules for the purpose of assessment of court-fees. For these reasons we hold that the ad valorem court-fees on the plaint cannot be demanded from the plaintiff

and consequently we allow the revision and set aside the learned Civil Judge's order. There will be no order as to costs.

(8) SHAH C. J.: I agree.

B/R.G.D. Order accordingly.

A. I. R. 1952 SAURASHTRA 104

SHAH C. J. AND BAXI J.

Ladhubhai Manekchand and Sons, Plaintiffs-Appellants v. New Dholera Steamship Ltd., Defendants-Respondents.

First Appeal No. 89 of 1950, D/- 31-1-1952.

(a) Carriage of Goods by Sea Act (1925), Schedule, Art. VII — Provisions of Act made part of bill of lading.

The provisions of the Act can be validly incorporated and made a part of the contract contained in the bill of lading. Where the bills of lading contain the condition that the contract contained therein was subject to the terms and conditions of the Carriage of Goods by Sea Act and the Schedule thereto, and that the Company are to be entitled to the benefits, privileges, rights and amenities contained in the Act and the Schedule as if same were substantially set out in the bills of lading, and further provide that in pursuance of Article 7 of the Schedule the liability of the carriers prior to the loading of and subsequent to the discharge from the ship shall be governed by the conditions and exceptions of the bill of lading the condition is valid condition and the rights of the parties would be governed by the provisions of the Act and the Schedule: AIR 1951 Sau 83; AIR 1951 Trav-C 1 and AIR 1932 Bom 330, Rel. on. (Para 4)

Anno: C. G. S. Act, Sch. Art. VII N. 1.

(b) Carriage of Goods by Sea Act (1925) Schedule, Art. III, Cl. (6) and Art. VII — Date of delivery of goods — Delivery to Port Commissioner.

Where the clause in the bill of lading was as under: "In all cases and under all circumstances the Company's liability shall absolutely cease when the goods are free of the steamer's tackle, and thereupon the goods shall be at the risk, for all purposes and in every respect of the shipper or consignee":

Held that under this clause the carrier's liability ceased absolutely as soon as the goods were transferred from the steamer to the Port Commissioner's barges. The period of one year under cl. 6 of Article III therefore began from the date of the delivery to the Port Commissioner: AIR 1917 Sind 58, Ref. (Para 8)

Anno: C. G. S. Act Sch. Art. III N. 1; Art. VII N. 1.

(c) Carriage of Goods by Sea Act (1925) Schedule, Art. III, Cl. (6) — Date of delivery — Delivery to Port Trust Authorities.

The Port Authorities hold the goods on behalf of the consignees. When the goods passed from the possession of the ship into the possession of the Port Trust they are held on account of the consignees and therefore the date of the delivery to the consignee within the meaning of Art. III, Cl. 6 of the Schedule is the date on which the ship sailed from the port after delivering the goods to the Port Trust: AIR 1937 Sind 11, Rel. on; AIR 1917 Sind 58, Disting. (Para 9)

Anno: C. G. S. Act Sch. Art. III N. 1.

(d) Carriage of Goods by Sea Act (1925) Schedule, Art. III, Cl. (6) — Date of delivery — Question of hardship to consignee.

The period of one year has been fixed by statute under which the date of the delivery to the Port Authorities is taken to be the date of delivery. The Act is the outcome of an international agreement and its provision cannot be departed from on the ground of the alleged hardship of individuals. (Para 10)

Anno: C. G. S. Act Sch., Art. III N. 1.

A. R. Bakshi, for Appellants; Bapubhai M. Buch and V. G. Hathi, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('32) AIR 1932 Bom 330: (138 Ind Cas 793) 4
('51) Civil Revn. Appln. No. 160 of 1950: (AIR 1951 Sau 83) 4
('17) AIR 1917 Sind 58: (11 Sind LR 29) 7, 9
('37) AIR 1937 Sind 11: (30 Sind LR 345) 9
('51) AIR 1951 Trav-C 1: (1950 Trav-C LR 339) 4

BAXI J.: The appellants sued the respondent Company in respect of short delivery of 59 packages shipped from Colombo to Bedi Port of Bedi Bunder by the respondent Company's steamer S. S. "Jaybrahma" under three bills of lading. The steamer arrived at Port Bedi on 5-1-48 and sailed away on 12-1-48. The goods were discharged into and brought to the wharf by the barges which belonged to the Port Authorities of the then Nawanagar State. The packages were delivered to appellants by the Port Authorities in different lots. It is not known when the last lot was delivered but the Port Commissioner addressed a letter dated 24-11-48 to the appellants advising them that the final outturn of the steamer had been forwarded to the Jamnagar Agents of the respondent Company and asking them to arrange to receive a certificate for their short-landed packages. Thereupon the appellants wrote to the respondent Company's Jamnagar Office a letter dated 25-12-48 requesting them to send the short-certificate to enable them to obtain their claims from the Company.

The appellants submitted their formal claim to the respondent Company by their bill dated 12-12-48 claiming Rs. 16571.32 for the value of the goods short-delivered plus Rs. 6628.68 representing the freight, insurance and customs charges on the goods, the total claim amounting to Rs. 23200.00. After some correspondence the respondent Company rejected the plaintiffs' claim by their letters dated 7-7-49 and 13-7-49 on the ground that it was barred under the terms of the Indian Carriage of Goods by Sea Act of 1925. The appellants thereafter filed the present suit in the Court of the Civil Judge, Senior Division, Jamnagar to recover the amount claimed by them. On behalf of the respondent Company, two objections were taken in the trial Court against the maintainability of the suit. It was contended that the suit was barred under the provisions of Article III, cl. 6 of the Schedule to the Indian Carriage of Goods by Sea Act, not having been filed within one year after the date of the delivery of the goods, and it was also contended that the respondent Company was exonerated from its liability under cl. 26 of the bills of lading as the appellants had not made the claim within a month of the arrival of the ship into the port.

The learned Civil Judge held that the suit was barred under Article III, cl. 6 of the Schedule and therefore dismissed the suit. On merits he held that the appellants had proved that the value of the goods short-landed and freight, insurance and customs charges were proved. The appellants preferred this appeal against the Civil Judge's decree on the same grounds.

(2) The learned Advocate for the appellants submitted before us that the provisions of the Indian Carriage of Goods by Sea Act could not apply to the contract of carriage represented by the bills of lading and even if they did, the goods must be deemed to have been delivered to the appellants on 24-11-48 when the Port Commissioner's letter was received by them. As regards cl. 26 of the bill of lading, it was argued that it was inoperative and in the alternative it was contended that the appellants made the claim within one month from the date of the receipt by them of the Port Commissioner's order and the suit was therefore not barred by that clause.

(3) The following points arise for determination :

(1) Whether the contract is governed by the provisions of the Indian Carriage of Goods by Sea Act.

(2) If so, whether the suit has not been barred by Article III, cl. 6 of the Schedule thereto.

(3) Whether the appellant firm filed their claim in accordance with cl. 26 of the bill of lading.

(4) If not, what is its effect on the suit.

(4) The bills of lading Exs. 14, 15 and 16 contain the condition printed in red ink that the contract contained therein was subject to the terms and conditions of the Indian Carriage of Goods by Sea Act and the Schedule thereto and that the Company are to be entitled to the benefits, privileges, rights and amenities contained in the Act and the Schedule as if same were substantially set out in the bills of lading. This condition further provides that in pursuance of Article 7 of the Schedule the liability of the carriers prior to the loading of and subsequent to the discharge from the ship shall be governed by the conditions and exceptions of the bill of lading. This means that the parties had agreed that the terms and conditions of the Act and the Schedule were to be part of the contract of the carriage and the respondent Company was to be entitled to all the benefits, privileges, rights and amenities contained in the Act and the Schedule thereto. Further the liability of the Company in respect of the goods subsequent to their discharge from the ship was to be governed by the conditions contained in the bill of lading. Mr. A. R. Bakshi for the appellant argued that the condition incorporating the terms and conditions of the Act and the Schedule thereto was void because it was oppressive and opposed to public policy. He further argued that so far as his clients were concerned, the Act was a foreign law not applicable either in Colombo or in Port Bedi and therefore on that account also the condition was void. He suggested that the Act had the effect of curtailing the appellants' rights to sue under the law of the Jamnagar State and the condition incorporating its provisions in the bill of lading was therefore void.

The question whether the provisions of the Act can be validly incorporated and made a part of the contract contained in the bill of lading has been covered by a decision of this High Court in the 'WESTERN INDIA PROSPECTING SYNDICATE LTD. v. THE BOMBAY STEAM NAVIGATION CO. LTD.', Civil Revn. Appl. No. 160 of 1950 (Sau.) in which, following the decision in the 'ORIENT SHIP SUPPLY CO. LTD. v. KALAMARSAND CO.', AIR 1951 Trav-C. 1, Shah C. J. held that the condition was a valid condition and the rights of the parties would be governed by the provisions of the said Act and the Schedule. We would also refer to the decision of the Bombay High Court in 'SHAKOOR GANY v. H.E. HINDE & CO. LTD.', AIR 1932 Bom. 330 in which the bill of lading incorporated all the terms and conditions of the English Carriage of Goods by Sea Act 1924. The High Court considered and gave effect to Article III, cl. 6 of the English Act the provisions of which are identical with the provisions of Article III, cl. 6 of the Indian Act. It was contended in that case that the clause was void under Section 28 of the Indian Contract Act as in restraint of legal proceedings. Blackwell J. negatived this contention and held that the effect of incorporating the provisions of the Act was that the plaintiff's rights were extinguished in respect of claims made after the delivery and there was no question of remedy being barred under Section 28.

These decisions furnish a reply to almost all the arguments addressed by Mr. Bakshi against giving effect to the terms of the Act and the Schedule in the bill of lading. We therefore hold that the plaintiffs-appellants' rights are governed by the provisions of the Indian Carriage of Goods by Sea Act and the Schedule thereto which have been incorporated in the bills of lading.

(5) The next question is whether this suit is barred by the provisions of cl. 6 of Article III. That Article is enacted in the following terms :

> "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless the suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

(6) Therefore, under this Article we have to determine the date on which delivery had been given to the appellants or the date when the goods should have been delivered to them. According to the learned Advocate for the appellants this date is the date when his client received the Port Commissioner's letter dated 24-11-48, Ex. 8. According to him the date of delivery is the date on which he received a notice of the short-landing. If this date is the starting point of the year, during which a suit should be instituted then the suit is within time. The respondent Company's Advocate's contention is that the goods must be deemed to have been delivered latest on 12-1-48 when the ship sailed from the Port. He also contended that even if the Port Authorities at Bedi delayed the actual delivery to the appellants, the goods must be deemed to have been delivered to the appellants on that day and therefore the suit was barred.

(7) Mr. Bakshi for the appellants argued that delivery to the Port Commissioner could not be regarded as delivery to the appellants for that Officer was not their agent and the respondents' liability continued until the goods were actually delivered either to the consignees

or their agents. The Port Commissioner was according to him the respondent Company's agent or bailee and therefore time would begin to run against the appellants only after the Port Commissioner gave them authentic notice that the goods were short-landed. He relied upon the decision of the Sind Court in 'BOMBAY CO. LTD. v. KARACHI PORT TRUST', AIR 1917 Sind 58.

(8) Clause 15 of the bill of lading is an effective answer to the appellants' argument that the Port Commissioner held the goods on behalf of the respondent Co. That clause reads as under:

"In all cases and under all circumstances the Company's liability shall absolutely cease when the goods are free of the steamer's tackle, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee."

We have already referred to the condition in the bill of lading in pursuance of Article 7 of the Schedule that the liability of the carriers subsequent to the discharge from the ship shall be governed by the conditions and exceptions, contained in the bill of lading. The liability of the respondent Company is therefore governed by this article after the goods were discharged into the Port Commissioner's barges. Under this clause the respondents Company's liability ceased absolutely as soon as the goods were transferred from the steamer to the barges and the goods were thereafter held at the appellants' risk for all purposes and in every respect. The goods were for all purposes finally delivered by the Company on 12-1-48 as they were no longer liable in respect thereof subsequent to the discharge of these goods from the steamer. The period of one year under cl. 6 of the Article therefore began from the date of the delivery to the Port Commissioner and this would be so irrespective of the question whether he was the appellants' agent or not.

(9) Even apart from this clause the Port Authorities have been held as holding the goods on behalf of the consignees. In 'HAJI SHAKOOR FIRM v. FIRM OF VOLKART BROTHERS', AIR 1937 Sind 11 the plaintiff claimed the value of the goods short-delivered from the appellants' agents. The ship sailed from the Port on 2nd May 1929 and a joint survey was held on 1st June 1929. The plaintiff claimed that the period of one year under cl. 6 of the Article should commence from the date of the joint survey. It was argued that as the delivery to the Port Trust was followed by a joint survey, it should be deemed to have been made to the plaintiff when the goods were surveyed and not when the goods were removed from the ship's possession into the possession of the Port Trust Authorities. The Court rejected this argument and held that when the goods passed from the possession of the ship into the possession of the Port Trust they were held on account of the consignees and therefore the date of the delivery to the consignee within the meaning of Article III, cl. 6 of the Schedule was the date on which the ship sailed from Karachi after delivering the goods to the Port Trust.

With reference to the case of 'BOMBAY CO. LTD. v. KARACHI PORT TRUST', AIR 1917 Sind 58 upon which the learned Advocate for the appellants relied, the learned Judicial Commissioner expressed the view that though the Port Trust might well be the agent of the shipowners for the limited purposes mentioned in that case, it could not be held that they were the agents of the shipowners to hold identified consignments indefinitely at the will of the consignee. It is therefore not possible to accept Mr. Bakshi's argument that the goods must be deemed to have been in the possession of the Port Commissioner for and on behalf of the respondent Company until the appellants received the Port Commissioner's letter Ex. 8. The learned Advocate sought to distinguish the later Sind case by pointing out that in Jamnagar there was nothing like a Port Trust nor rules governing the relations of the Port Trust Authorities with the shipowners and the consignees and therefore the above decision could not hold good there. This is not quite correct. Mr. Chunilal, the Port Commissioner admitted that though the Port of Bedi had no rules, there was some procedure in the Bedi Port by which they were governed.

The appellants could have amplified this statement by questioning the Port Commissioner on the details of the procedure and showed that the Port Commissioner was treated as the Shipowners' Agent. This was not done. In fact the plea that the Port Commissioner was the Company's Agent was taken up at a very late stage during the arguments in appeal before us. Moreover the Sind decision did not turn upon any special rule or procedure of the Karachi Port Trust but upon the construction of Article III cl. 6 of the Schedule and provides a valuable precedent for Saurashtra also. We are therefore of the opinion that the date of delivery within the meaning of Article III cl. 6 of the Schedule of the Act is 12-1-48 when the ship sailed from Bedi Port. The suit was instituted on 23-11-48 and is consequently barred under the provisions of the Article.

(10) The appellants' learned Advocate argued that as regards Jamnagar the decision that the Port Commissioner was the agent of the appellants and held the goods on their behalf would inflict great hardship on them because if the Port Commissioner who was a State servant and responsible to no one except the Ruler chose not to let them know the extent of the short-delivery for a year the appellants would not be able to ascertain the amount of the goods short-delivered and submit their claim and their remedy would be barred even before they could be aware of their rights. The answer to this argument is that the period of one year has been fixed by statute under which the date of the delivery to the Port Authorities is taken to be the date of delivery. The Act is the outcome of an international agreement and its provisions cannot be departed from on the ground of the alleged hardship of individuals. The appellants agreed to incorporate the Act and its Schedule in the contract of carriage and they cannot now urge that these provisions should not be applied to them. The present argument moreover has no more than academic interest in this case. The appellant admitted in his deposition that the delivery to him took 5 or 6 months (Ex. 9, para 9). Therefore even if the starting point is computed from the date on which the goods were actually delivered to him, time began to run from July 1948 and the suit should have been instituted in July 1949. It was instituted in November 1949 and was therefore barred.

(11) In the view that we take of the appellants' failure to file the suit within one year

of the sailing of the steamer from Port Bedi, the rest of the points do not survive for consideration. We confirm the decree of the learned Civil Judge and dismiss the appeal with costs.

(12) SHAH C. J.: I agree.

B/D.H. Appeal dismissed.

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CHHATPAR J.

Trivedi Pranshanker Shamji, Appellant v. Jayagauri Rughnath and another, Respondents.

Second Appeal No. 84 of 1951, D/- 28-1-1952.

(a) Civil P.C. (1908), S. 100 — Mixed question of law and fact — Whether property is moveable is partly a question of fact — Property admitted to be moveable in lower Courts and Court proceeding on that basis — Party will not be allowed to argue in second appeal on basis that property is not moveable. **(Para 4)**

Anno: C.P.C., Ss. 100-101, N. 37 and 61.

(b) Sale of Goods Act (1930) S. 2(7) — Machinery is moveable property within meaning of S. 2(7). **(Para 4)**

Anno: Sale of Goods Act S. 2 N. 3.

(c) T.P. Act (1882) S. 58 — Mortgage of moveable property (machinery) — Mortgagor in possession paying interest equal to rent — Transaction held hypothecation of moveable property and governed by equitable principles — Transferee of the property for value and without notice of charge — Claim of hypothecatee is defeated.

In the deed mortgaging machinery there was a recital that the mortgage was with possession. At the same time, it mentioned the property to be leased out to the mortgagor at Rs. 90/- per month, which would be paid by the mortgagor and appropriated by the mortgagee towards interest agreed to be paid under the mortgage deed. This interest was at 3 per cent per mensem which worked out exactly to the amount of the rent agreed per month. In fact the property had not changed hands and continued to be in possession of the mortgagor. No rent was ever paid. It was never the intention to create a pledge of the property, the essence of which is transfer of possession:

Held that the transaction was that of hypothecation of moveable property which could be done without transferring possession. The incidences of a transaction of hypothecation of moveable property without transferring possession, not being provided for either in the Contract Act or in the Transfer of Property Act were governed by equitable principles of the English Law. The claim of the hypothecatee or the mortgagee who permitted the property to remain in the possession of the mortgagor, was liable to be defeated by the property passing into the hands of a bona-fide purchaser for value without notice of the mortgagee's claim: Case law Ref. **(Para 5)**

Anno: T.P. Act S. 58 N. 11.

(d) Sale of Goods Act (1930) S. 30 — Sale by P to his brother L — Sale deed not reciting transfer of possession — P continuing in possession as ostensible owner and selling property to J — As between P and L principles of S. 30 would apply and those taking title under L would be bound by sale to J. (obiter). **(Para 6)**

Anno: Sale of Goods Act S. 30 N. 1.

A. R. Baxi, for Appellant; D. N. Vakil with K. K. Sevak, for Respondent No. 1.

REFERENCES: Courtwar/Chronological/ Paras

('19) 42 Mad 59: (AIR 1919 Mad 779(1)) 5
('27) 5 Rang 633: (AIR 1928 Rang 28) 5
('31) 9 Rang 182: (AIR 1931 Rang 201) 5
('33) AIR 1933 Sind 401: (27 Sind LR 249) 5
('40) AIR 1940 Sind 177: (190 Ind Cas 790) 5

JUDGMENT: This second appeal arises out of a suit for declaration filed by the present appellant that the flour mill in suit was liable to be attached in execution of the decree obtained by the appellant against the second respondent, Mehta Lalashanker Harilal. The facts are that Mehta Prabhulal Harilal the brother of the second respondent, agreed to purchase by a document dated 17th June 1945 a flour mill and accessories from one Mominkhan Khushalkhan along with the lease of the property on which the mill was situated, for a consideration of Rs. 5000/-. He paid Rs. 2000/- at the time of deed and obtained possession. The balance of Rs. 3000/- was paid subsequently by two instalments of Rs. 1000/- and Rs. 2000/- when a regular sale deed was executed. For the purchase of this mill, Mehta Prabhulal Harilal by a note dated the 18th June 1945 borrowed a sum of Rs. 5000/- from Tramba Darbar Shri Madarsinhji at interest of two per cent per mensem agreeing to re-pay the amount within three months and on failure to do so, to execute a mortgage deed in respect of the said mill. This note is Ext. 8 in the case and contains recitals that the loan was being taken for the purpose of purchase of the machinery and which Mehta Prabhulal agreed to mortgage by a registered deed in case the loan was not discharged within three months. On 26th June 1945, Mehta Prabhulal purported to sell this flour mill etc., to his brother, the second respondent Mehta Lalshanker for a consideration of Rs. 5000/- and executed a document which is Ex. 14 in the case. On the same date Mehta Lalshanker mortgaged the mill purchased by him from his brother with Trivedi Pranshanker, the present appellant, against an advance of Rs. 3000/- payable with interest at three per cent per mensem. This document which is Ex. 15 in the case, is attested by Mehta Prabhulal. These two brothers, i.e. Mehta Prabhulal and Lalshanker have a third brother named Jagdish who is married to the daughter of the first respondent Jayagauri Rughnath. On 13th July 1945 Mehta Prabhulal sold this very same flour mill to Jayagauri for Rs. 5000/-. The amount was paid by a cheque and it is in evidence that this amount went to discharge the loan of Rs. 5000/- taken by Mehta Prabhulal from Tramba Darbar Shri Madarsinhji. On 10-10-45 Mehta Prabhulal obtained an advance of Rs. 1500/- on the mortgage of this same mill from one Pathak Dayalal Lalji.

Thereafter it seems that both Mehta Prabhulal and Lalshanker disappeared and rival claims to the mill were made. The present appellant filed a suit against Mehta Lalshanker on the strength of the mortgage deed

and attached before judgment the mill. Jayagauri intervened by proceedings under Order 21, Rule 58, C. P. Code, and succeeded in getting the attachment raised as the property was in her possession and she claimed it under a document of sale. Thereupon Trivedi Pranshanker, the present appellant, filed the present suit claiming priority over Jayagauri and praying for a declaration that the property was liable to be attached and sold in execution of the decree that he obtained against Mehta Lalshanker.

(2) Now it is clear that Mehta Prabhulal had committed a fraud on various parties and it appears that his brother Mehta Lalshanker was his accomplice in it. The trial Court Judge held that the transaction of sale by Prabhulal in favour of Lalshanker was without consideration and a sham transaction. Consequently, the mortgage by Lalshanker was also bad. He also held that Trivedi Pranshanker the plaintiff, had failed to prove consideration for the mortgage in his favour. The District Court on appeal by the plaintiff held both these documents to be genuine and with consideration but held that as the plaintiff did not obtain possession of the mill and permitted Prabhulal to remain in possession which enabled the latter to sell it the property in question as she was a bona fide purchaser for value without notice of the prior encumbrance. The learned District Judge therefore dismissed the appeal, although he differed from the views of the lower Court as regards the validity of the mortgage transaction in favour of the appellant and the transaction of sale by Prabhulal in favour of his brother Lalshanker. Against this decision the plaintiff has filed the present appeal.

(3) Mr. A. R. Baxi, the learned advocate for the appellant, has raised two contentions. The first is that the property in question is not "goods" within the definition of the Sale of Goods Act. His second contention is that Section 30 of the Sale of Goods Act which has been relied upon by the lower Courts has no application as it applies to a transaction of sale of goods where the buyer permits the goods sold to remain in possession of the seller, who sells or pledges them to a bona fide purchaser with value, without notice of the prior sale. Mr. Baxi contends that the appellant was a mortgagee in possession of the property. According to the deed in the appellant's favour the possession was deemed to have been transferred to the appellant who by the same deed leased out the machinery to Mehta Lalshanker at a rental of Rs. 90/- per month. So that the possession of Mehta Lalshanker was not that of a seller but of a hirer.

(4) So far as the first point is concerned Mr. Baxi relies upon the definition of "goods" given in clause (7) of Section 2 which reads as under:

> "'Goods' mean every kind of moveable property other than actionable claims and money, and includes stock and shares growing crops, grass, and things attached to or forming part of the lands which are agreed to be severed before sale or under the contract of sale."

He argues that the machinery was attached to the earth and there is no proof that there was any agreement that it was to be severed before sale. Now this is a new point made out for the first time before me. In the lower Courts it was specifically admitted that the machinery was moveable property. Both the lower Courts had proceeded upon this admission which has also a bearing upon the question whether the documents of sale and mortgage were compulsorily registerable. It was admitted before the two lower Courts that the documents were not compulsorily registerable as the property affected by the deeds was moveable property and not immoveable property. I cannot permit this point to be raised for the first time in a second appeal as it is partly a question of fact. Even otherwise, I would have no hesitation to come to the conclusion that the machinery was moveable property and comes within first part of the clause (7) reproduced above. There is no proof before me that this machinery was permanently attached to and formed part of the land. As regards the second point I agree that Section 30 of the Sale of Goods Act has no application to the present case in view of discussion presently following. I shall first deal with the nature of the two transactions about which there is difference of view by the two lower Courts. In my opinion the document purported to have been executed by Mehta Prabhulal in favour of his brother Mehta Lalshanker has not been proved. Neither Prabhulal nor Lalshanker has been examined. The document appears extremely suspicious and it is not difficult to probe into the underlying purpose, which prompted Prabhulal to execute it in favour of Lalshanker. Both these brothers appear to be thoroughly unscrupulous persons and they were out to defraud third parties. (After discussing the evidence his Lordship continued). I therefore hold that the learned District Judge was not right in upsetting the decision of the trial Court that this alleged document between the two brothers was a sham transaction. The finding of the learned District Judge is based upon no evidence. Indeed there is hardly any discussion on this point beyond a line saying

> "Prabhulal has executed Ex. 14. There is admission of consideration. There is no reason to disbelieve it."

In another passage, the learned District Judge says

> "Under these circumstances, it is held that Pranshanker has actually advanced Rs. 3000/- on the pledge of the flour mill in question to Lalshanker and the amount is paid to Prabhulal. Exs. 14 and 15 are documents duly proved and it is held that they are executed for consideration."

As regards the validity of the deed in favour of the appellant Trivedi Pranshanker there is evidence to support it as the latter has been examined in the case and he has proved the document passed in his favour. I accept the finding of the learned District Judge in this respect.

The position therefore would be that in spite of the ostensible sale in favour of Lalshanker which I hold to be a sham transaction, Prabhulal continued to be the owner of the mill in question and it was he really who borrowed the sum of Rs. 3000/- from the plaintiff Trivedi Pranshanker. Prabhulal did not wish to execute the document of the mortgage in favour of Trivedi Pranshanker as he had already agreed to mortgage the mill to the Tramba-Darbar. The document executed by Lalshanker in favour of plaintiff Pranshanker is attested by Prabhulal. And it was Prabhulal who according to the finding of the learned Judge, received the amount of the loan. So

that in fact the rights of the parties are to be judged as if Prabhulal, the original owner of the property, purported to mortgage it with the plaintiff Trivedi Pranshanker. The subsequent conduct of these two brothers confirms me in this view. It is Prabhulal who again sells the mill to Jayagauri and takes a further loan from Pathak Dayalal and not Lalshanker.

(5) Next question is to consider the nature of the mortgage deed Ex. 15 in the case. There is recital in the deed that the mortgage is with possession; at the same time, it mentions the property to be leased out to the mortgagor at Rs. 90/- per month, which will be paid by the mortgagor and appropriated by the mortgagee Trivedi Pranshanker towards interest agreed to be paid under the mortgage deed. This interest is at 3 per cent. per mensem which works out exactly to the amount of the rent agreed per month. In fact the property had not changed hands and continued to be in possession of Prabhulal. It is admitted that no rent was ever paid. It was never the intention to create a pledge of the property, the essence of which is transfer of possession. In my opinion the transaction was that of hypothecation of moveable property which can be done without transferring possession. The incidences of a transaction of hypothecation are neither provided for in the Contract Act nor in the Transfer of Property Act; they are governed by equitable principles of the English Law. In this connection, I may refer to the following commentary in Mulla's Transfer of Property Act, 3rd Edition, 1949, at pages 386 to 387:

> "The Transfer of Property Act refers to mortgages of immoveable property and the Indian Contract Act refers to pledges of moveable property. But neither Act deals with mortgages of moveable property. A mortgagee of moveable property is entitled to a decree for sale just as much as a mortgagee of immoveable property. A mortgagee of moveable property, if in possession has a right to sell the property without the intervention of the Court, if after proper notice the mortgagor fails to repay the mortgage money. But delivery of possession is not necessary to constitute a mortgage of moveable property, and a hypothecation of moveable property though not accompanied with delivery of possession is valid, and recognised in Indian Law. As a transfer of moveable property is not complete without delivery of possession, such hypothecations have been described as creating an equitable charge. For the same reason a mortgage of moveables is liable to be defeated if the mortgagor in possession sells the goods to a bona fide purchaser without notice. On the same principle a mortgagee of moveables without possession has been postponed to a subsequent mortgagee with possession and without notice of the first mortgage. As between two mortgagees of moveables both without possession the mortgagee who came to Court first has been given priority on the principle 'qui prior est tempore potior est jure'. As between a mortgagee of moveables without possession and a judgment-creditor of the mortgagor it has been held that the judgment-creditor does not get priority over such a mortgagee merely by filing his application for attachment and that if the mortgagee takes possession before actual attachment, the judgment-creditor gets no prior rights. In some cases however, it has been held — it is submitted incorrectly— that the mortgage will prevail against a bona fide purchaser without notice. The preference given to the innocent purchaser is sometimes put on the ground of prevention of fraud and in 'NARASIAH v. VENKATARAMIAH' the Madras High Court said— 'When goods are left in the possession of the mortgagor, a wide door is left open for fraud, and when the equities between the innocent purchaser and the mortgagee have to be weighed the preponderance must be given to the purchaser, for the mortgagee has by his omission to secure possession of the goods facilitated the commission of the fraud."

The Madras High Court in the case of 'NARASIAH v. VENKATARAMIAH', 42 Mad 59 held that a bona fide purchaser without notice of the encumbrance of the goods hypothecated but left with the hypothecator is not affected by the encumbrance and takes them free of it. The Rangoon High Court has similarly held in the case of 'BACKER KHORASANEE v. AHMAD ESMAIL', 5 Rang 633 and reaffirmed the same principle in the later case of 'ABDUL HABIB v. MAUNG TUN KYAING', 9 Rang 182. The Sind Court in the case of 'DAYALJI PRAGJI v. KARACHI ELECTRIC SUPPLY CORPORATION', AIR 1940 Sind 177, held:

> "Where there is a mortgage of moveable property, and the moveable property is allowed by the mortgagee to remain in possession of the mortgagor as ostensible owner, and the property is again mortgaged to a third party and sold, the first mortgagee cannot recover from the second mortgagee unless he can show that the second mortgagee had notice of the prior mortgage."

In an earlier case of 'FIRM OF SAKARCHAND BHAGOOBHAI v. FIRM OF PREMJI MULJI', AIR 1933 Sind 401 the Sind Court followed the equitable principle that where one of the two innocent parties must suffer from the fraud of the third, the loss should be borne by him who has enabled the third party to commit the fraud, if he has neglected some duty owing to the other or has done something which has in fact misled the other. Following these decisions, it appears to me to be quite clear that the claim of the plaintiff, who permitted the property to remain in the possession of the mortgagor, was liable to be defeated by the property passing into the hands of a bona fide purchaser for value without notice of the plaintiff's claim. Both the lower Courts have held that Jayagauri was such a purchaser. Consideration paid by her has been conclusively proved as the amount was actually paid to Tramba Darbar in discharge of the loan taken by Prabhulal. That she obtained actual physical possession has also been proved. At the time of attachment the property was in her possession. Under the circumstances, the plaintiff-appellant cannot attach the property in her hands in execution of his claim against Mehta Lalshanker.

(6) Now let me examine the case on the basis of the sale by Prabhulal in favour of his brother Lalshanker being valid, as held by the District Judge. The document of sale Ex. 14 does not recite that possession was transferred to Lalshanker. Prabhulal continued in possession as ostensible owner as held by the two lower Courts and in fact sold the property to Jayagauri and thereafter took a further loan from Pathak Dayalal. As between Prabhulal and Lalshanker, the principles of Section 30 of the Sale of Goods Act will apply and Lalshanker

will be bound by the sale effected by Prabhulal and so would be Trivedi Pranshanker who took his title under Lalshanker. Hence in either case, Jayagauri will have a prior claim over Trivedi Pranshanker. But I am inclined to hold in favour of the first position discussed by me that the sale in favour of Lalshanker was a sham transaction, and never intended to pass property in the mill.

(7) The result is that this appeal fails and is dismissed with costs.

B/R.G.D. Appeal dismissed.

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CHHATPAR J.

Budhumal Gorelal and another, (Judgment-debtors) Appellants v. Ratilal Gulabchand, Judgment-creditor-Respondent.

Second Appeal No. 147 of 1951, D/- 21-3-1952.

Houses and Rents — Bombay Rents, Hotels and Lodging House Rates Control Act (LVII (57) of 1947), Ss. 12 (1) and 50 — Act applies to pending executions — Ejectment decree prior to Act — Adjustment in execution after Act came into force — Judgment-debtor agreeing not to claim protection of Act — Legality — Estoppel by res judicata in subsequent execution — Civil P. C. (1908), S. 11.

A obtained a compromise decree against his tenant, B, on 22-4-1943 whereby B was to give possession of the premises to A by November 1943 and till such possession was given was to pay rent at Rs. 25 per month. On failure to deliver possession, A applied for execution of the decree on 31-12-1949. On 25-3-1950 an adjustment of the decree was recorded. According to this adjustment B was to hand over possession on 1-1-1951 and also agreed not to raise any objection to the ejectment by claiming any protection under the Rent Law in force. He also agreed to pay the monthly rent till 1-1-51 and also the arrears of rent which amounted to Rs. 790. This rent was paid. On failure to deliver the premises A applied for execution of the adjusted decree on 9-1-1951. B contended that he was entitled to the benefit of S. 12 (1) of the Bombay Rent Act (LVII (57) of 1947) as adapted and applied to Saurashtra and was not liable to ejectment:

Held that the provisions of the Bombay Rent Act (LVII (57) of 1947) were retrospective and applicable to pending executions by virtue of S. 50 of that Act and, therefore, the tenant judgment-debtor was entitled to claim the benefit of S. 12(1) in the previous execution: AIR 1950 Bom 252; S. A. No. 88 of 1949 (Sau) and Civil Revn. Applns. Nos. 98 and 99 of 1949 (Sau), Rel. on. (Para 4)

(ii) But the judgment-debtor having entered into an adjustment with the landlord in the previous execution of 31-12-1949 he must be deemed to have abandoned any defence to the execution application based upon S. 12 (1) of the Act and would be barred from reagitating the same question by reason of estoppel by res judicata, even though the clause in the adjustment disabling the judgment-debtor to claim protection of the Rent Act was unlawful. (Para 4)

That the adjustment of 25-3-1950 did not create a fresh contract of tenancy till 1-1-1951 and therefore no question of claiming the benefit of the Rent Act under fresh tenancy could arise. (Para 5)

Anno: C. P. C., S. 11 N. 23, 114.

H. C. Shah, for Appellants; C. N. Shah, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('50) AIR 1950 Bom 252: (52 Bom LR 143) 4
('49) Second Appeal No. 88 of 1949 (Sau) 4
('49) Civil Revn. Appln. Nos. 98 and 99 of 1949 (Sau) 4

JUDGMENT: The facts leading to this appeal are that the respondent filed a suit against the appellants for ejectment from a shop premises and for arrears of rent in the year 1943 in the Court of the Civil Judge of Kathiawar at Civil Station Rajkot. On 22nd April 1943, a decree on compromise was passed whereby it was provided that the defendants had to give possession of the premises on Aso Vad 12th of Samvat year 1999 (November 1943), and if the defendants failed to give possession, the plaintiff was to get the same by execution of the decree. It was further provided that till such possession was given after this date the defendants were to pay rental of Rs. 25/- per month. The judgment-debtors did not vacate the premises and the judgment-creditor applied for execution by an application dated 31st December 1949 which was numbered 74 of 1949.

On 25th March 1950, the parties arrived at an adjustment of the decree which was recorded. According to this adjustment the judgment-debtors were ordered to hand over the possession of the shop on 1st January 1951 and they agreed not to raise any objection to the ejectment by claiming any protection under the Rent Law in force. It was also agreed that the judgment-debtors would continue to pay the monthly rental of Rs. 25/- till 1st January 1951. As the judgment-debtors failed to deliver possession on this date, the judgment-creditor filed an application for execution of the adjusted decree on 9th January 1951. This application was resisted by the judgment-debtors principally on two grounds; firstly, that the adjustment extinguished the original decree which could not consequently be executed and the remedy of the judgment-creditor was to file a separate suit and secondly, that the judgment-debtors were entitled to the protection of the Rent Act then in force in spite of their having agreed in the adjustment not to claim it. Both the lower Courts disallowed these objections and the judgment-debtors have now come in second appeal to this Court.

(2) Mr. H. C. Shah, the learned Advocate for the judgment-debtors has not pressed the first point that the decree is incapable of execution having been extinguished by the adjustment and that the only remedy is to enforce the adjustment by a separate suit. But he has very strongly pressed the second point that the judgment-debtors are entitled to the benefit of Section 12 (1) of the Rent Act and as the judgment-creditor has not made out a case of eviction under Section 12 or 13 of the Rent Act, the prayer for eviction should be refused.

(3) Now the Bombay Rent Act as adapted and applied to the State of Saurashtra was

brought in force on 20th December 1948 and its life was for two years which was extended by one year more. Thereafter, a new consolidated Act applicable to Saurashtra was enacted and brought into force in the month of July 1951; this is Act XXII of 1951. It may also be noted that at the time of the adjustment of the decree on 25th March 1950, it was agreed between the parties that the arrears of rent upto that date amounted to Rs. 790/- and a provision was made in the adjustment for payment thereof. This rent has been paid.

(4) The question in the present case is confined to that of eviction only. The learned Advocate for the appellants contends that at the time of the original decree i.e., on 22nd April 1943 the Rent Act was not in operation but the Bombay Rent Act as adapted and applied to the State of Saurashtra, was made applicable not only to pending suits but also to executions by the express provisions of Section 50 and consequently the execution application filed by the judgment-creditor on 9th January 1951 would be governed by the provisions of Section 12 (1) of the Bombay Rent Act, which lays down:

> "A landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy in so far as they are consistent with the provisions of this Act."

He further argues that the condition in the compromise debarring the judgment-debtors from seeking protection of the rent law was void as being unlawful being against the rent law. Now these two contentions in the abstract appear to be correct. Indeed, this High Court has in previous cases clearly held that the provisions of Section 50 of the Rent Act are retrospective and apply to execution proceedings as well. These are cases of 'THAKAR NARANDAS RAGHAVJI v. VITHALDAS ODHAVJI', Second Appeal No. 88 of 1949 and 'JINA JIVA v. ISMAIL GIGABHAI', Civil Revn. Appln. Nos. 98 and 99 of 1949.

In the first case a consent decree was passed on 14th December 1948 six days before the Rent Act was brought into force in Saurashtra and this consent decree directed the defendant to give vacant possession of the premises within three months of the date of the decree; possession not having been given, an execution application was filed and the judgment-debtor sought the benefit of Section 12 (1) of the Act and claimed that so long as he was ready and willing to pay the amount of the standard rent, he was not liable to be ejected in spite of the consent decree having been passed. This objection was upheld and the decision of the lower appellate Court to the contrary was set aside restoring the decision of the trial Court which held that the question whether the judgment-debtor was liable to be ejected under the provisions of the new Rent Act was to be gone into in execution proceedings.

The learned Advocate for the appellants has also drawn my attention to a very recent ruling of the Bombay High Court in the case of 'GURUPADAPPA SHIVLINGAPPA v. AKBAR SAYAD BUDAN KADRI', AIR 1950 Bom 252, where it was held that when in an ejectment suit a consent decree is passed creating a fresh contractual relation of landlord and tenant the defendant gets the rights and the privileges of a tenant under the Act and unless the protection of the Statute is properly and validly withdrawn, he would not be liable to deliver possession in spite of the terms of the decree and that the defendant will be entitled to the benefit of Section 12 (1) even after the expiry of the period of the tenancy. It was also further held that a term in a consent decree which requires the defendant to do a certain act on the assumption that he will not claim or that he will not be entitled to claim the benefit of a Statute is not 'lawful' within the meaning of Order 23, Rule 3, and the executing Court is not bound to execute that part of the decree contrary to the terms of the Statute.

In that case, a decree was passed on 11th June 1947 and the relationship between the parties at that time was governed by the Bombay Act VII of 1944; the period of the tenancy provided by the decree expired on 31st January 1948; in the meantime, Bombay Act LVII of 1947 came into force which gave additional benefit to tenants; the question was whether the judgment-debtor was entitled to the benefit of the latter Act. It was held that he was entitled and that the term of the consent decree that he could not claim the benefit of the Statute was not lawful within the meaning of Order 23, R. 3, Civil Procedure Code, and the executing Court was not bound to execute that part of the decree contrary to the terms of the Statute. In that case as also in the previous cases decided by this Court quoted above, the provisions of the Rent Act giving protection to the tenants came into force after the consent decrees were passed, and in view of the retrospective operation of Statute and its applicability to pending execution proceedings, it was held that the tenant was entitled to claim the protection of Section 12(1) of the Rent Act.

This State of law is not disputed by the learned Advocate for the judgment-creditor. His sole argument rests upon the fact that although at the time of the original consent decree, the Rent Act was not in force, on 31st December 1949 when the execution application No. 47 of 1949 was filed, the Act had been applied and it was then open to the judgment-debtors to plead the benefit of Section 12 (1) of the Act and for the judgment-creditor to make out a case for ejectment under Section 12 and Section 13. The judgment-debtors however did not raise any objection but consented to an adjustment on 25th March 1950, whereby they agreed to vacate the premises on 1st January 1951. This adjustment by consent had the effect of estoppel by res judicata and it was therefore not open to claim the benefit of Section 12 (1) of the Rent Act, when the present application under consideration was filed on 9th January 1951.

None of the cases referred to by the learned Advocate for the appellants touch this point, as in all those cases the question of estoppel or res judicata did not arise as there was change in the law between the date of the consent decree, and the date of the execution application. The lower Court has held that the judgment-debtors had ample opportunity to plead protection of Section 12 (1) of the Act and if they had done so, an inquiry would have been gone into in the execution proceedings whether in spite of the original consent decree the judgment-debtors were liable to be ejected; but they did not take advantage of the provisions of the Rent Act; on the contrary they

accepted a compromise, whereby they agreed to surrender possession on 1st January 1951, and therefore they were barred from raising the same contention over again on principles of res judicata. Mulla in his commentary on Section 11 of Civil Procedure Code, 11th Edition, pages 84-85 observes as under:

"The present section does not apply in terms to consent decrees: for it cannot be said in the case of such decrees that the matters in issue between the parties "have been heard and finally decided" within the meaning of this section. A consent decree, however, has to all intents and purposes the same effect as res judicata as a decree passed in invitum. It raises an estoppel as much as a decree passed in invitum. So long, therefore, as a consent decree stands, it is not open to either party thereto to give it the go-by even if it contains clauses that are bad in law. A consent decree, however, is a mere creature of the agreement on which it is founded, and it may be set aside on any ground which would invalidate an agreement between the parties."

I see no reason why these principles should not be applied to the present case. The judgment-debtors must be deemed to have abandoned any defences to the execution application based upon Section 12 (1) of the Rent Act; such defences were after all questions of fact. The Rent Act does not impose an obligation upon the Court to scrutinise every compromise arrived at between the parties and to find out whether the conditions for eviction laid by the Act have in fact been complied with. If such were the case, a suit for eviction could not be compromised, and the judgment-debtors in spite of a compromise could question the same in execution proceedings. The Rent Act gives certain benefits to the tenant to resist eviction, but it is equally certain that the tenant can forego such benefits and consent to a decree for eviction. The learned Advocate for the appellants has referred to the clause in the adjustment of 25th March 1950, which disables the judgment-debtors from seeking protection of the Rent Act and contends that such clause being unlawful, the judgment-debtor's right to claim the benefit at a subsequent stage when his eviction was being sought, was unimpaired; but this contention is easily met by the argument that assuming this clause was not there in the compromise (and it was obviously inserted for the benefit of the judgment-creditor), the judgment-debtors would be barred from re-agitating the same question of their claim for protection under Sec. 12 (1) of the Act by reason of estoppel by res judicata, having impliedly abandoned the same in arriving at the adjustment of 25th March 1950.

(5) The learned Advocate for the appellants has further contended relying on the Bombay case above cited that the adjustment of 25th March 1950 created a fresh contract of tenancy expiring on 1-1-51 and the judgment-debtors being tenants within the definition of the Rent Act even after 1-1-51 could not be evicted unless conditions under Sections 12 and 13 were satisfied. The compromise decree in the Bombay case contained the following clauses:

" (1) The defendant admits that he is the monthly tenant of the plaintiff. The defendant do deliver up possession of the suit property to the plaintiff before 31st January 1948.

(2) The defendant has paid the rent upto the end of March 1947 to the plaintiff. The defendant do forthwith pay the amount of rent remaining due up to this day and he do pay to the plaintiff rent of each month upto 31st January 1948, in advance on the 1st day of each of the several months."

In the present case, there is no such condition of a fresh tenancy by express terms. On a true interpretation of the adjustment which is in Gujarati, although the word 'Bhadun' is used, it appears to me that what the parties agreed to was that the judgment-debtors were given facility to continue in possession after (till ?) 1-1-51 i.e., the time of performance of the decree by the judgment-debtors was extended upto 1-1-51 and during that period they had to pay rent. This does not necessarily amount to creation of a fresh contract of tenancy. The word 'Bhadun' is equally capable of interpretation in popular parlance as compensation or mesne profits for use and occupation. This objection also fails.

(6) I consequently dismiss this appeal with costs.

B/K.S. Appeal dismissed.

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SHAH C. J. AND BAXI J.

Ratilal Abhechand and another, Applicants v. Custodian General of Evacuee Properties, New Delhi and another, Opponents.

Civil Misc. Appln. No. 10 of 1952, D/- 23-7-1952.

(a) Constitution of India (1950), S. 226 — Certiorari — Application for confirmation of sale by evacuees — Rejection by custodian on ground of lack of bona fide — Jurisdiction of Custodian General to dismiss appeal on ground of limitation — Power of High Court to consider correctness of decision. — (Saurashtra Administration of Evacuee Property Ordinance (43 of 1949) S. 25 — Evacuee Property Act (1950), S. 46).

The question about the maintainability of an application for confirmation of a sale by an evacuee is one which the Custodian General is bound to decide in an appeal against the order of refusal by the custodian and he has the exclusive jurisdiction to do that even though the custodian's order is based on merits. If in deciding that, he holds that the application was barred by limitation by applying the provisions of S. 6A of the Saurashtra State Evacuee (Administration of Property) Ordinance (8 of 1948) instead of the provisions of S. 25 of Ordinance 43 of 1949 which repealed the former Ordinance there is merely an error of law assuming that the latter Ordinance is applicable to the case. Further the order being final under Section 46, Evacuee Property Act (1950), the High Court not having the jurisdiction of an appellate Court in the proceedings for the issue of a writ of certiorari will not embark upon an enquiry about the correctness of the Custodian General's decision: Case law Ref. to. (Para 3)

Anno: Civil P. C. App. III, Const. of Ind. Art. 226 N. 13.

(b) Constitution of India (1950), Art. 226 — Certiorari — Objection to the impugned order not taken either before authority passing order or in appeal — Government not having had opportunity to meet objection — Applicant for writ will not be allowed to argue on objection in proceedings for writ. (Para 4)

Anno: Civ. P. C. App. III, Const. of Ind. Art. 226 N. 13.

T. U. Mehta, for Applicants; A. R. Bakshi, Advocate General (for No. 1) and A. R. Bakshi, Advocate General with B. R. Joshi, (for No. 2) for Opponents.

REFERENCES: Courtwar/Chronological/ Paras.

('52) AIR 1952 S C 192: (1952-1 Mad L J 806) 4
('52) AIR 1952 S C 179: (1952 S C R 519) 4
('46) AIR 1946 All 269: (ILR (1946) All 461) 3
Rulings of the Custodian General Vol. 1, p. 193 (Case No. 66) 3
Rulings of the Custodian General Vol. 1 (Case No. 53) 3

BAXI J.: The petitioners applied to the Custodian, Saurashtra, for confirmation of a certain sale made by certain evacuees. The transaction of sale was dated 19-5-1948 and the application was made on 25-9-49. The learned Custodian refused to confirm the sale on the ground that it was not made in good faith. In appeal from the learned Custodian's order, the learned Custodian General (opponent No. 2) held that as the application for confirmation was made more than a year after the date of the transaction, it was barred by time and on this ground he dismissed the appeal without entering into the question of the good faith of the transaction. The petitioners have applied for a writ of certiorari praying that the learned Custodian General's appellate order may be quashed.

(2) The sale was effected by a registered document dated 19-5-48. On this date, the Saurashtra State Evacuee (Administration of Property) Ordinance (Ordinance No. VIII of 1948) was already in force. Under Section 6A (1) of this Ordinance no transfer of property made by an evacuee or by any person in anticipation of becoming an evacuee or by his agent etc., was to be effective unless it was confirmed by the Custodian. Sub-section (3) required the Custodian to reject any application made after the 1st May 1948 or after the expiration of two months from the date of the transaction whichever was later. According to this provision, an application for confirmation of sale should have been made by the petitioners latest on 19-7-1948. The Ordinance No. VIII was repealed and replaced by Ordinance No. XLIII of 1949 and was published in the Saurashtra Gazette on 4-8-1949. Section 25 of this Ordinance provides that no transfer by or on behalf of an evacuee made after 15-8-1947 shall be effective unless it was confirmed by the Custodian. Under Sub-s. (2), the application for confirmation was to be made within two months from the date of the registration of the deed of transfer or within two months from the commencement of the Ordinance whichever was later. The petitioners' application for confirmation having been made on 25-9-49 after this Ordinance, came into force, is undoubtedly in time if it is to be governed by S. 25 of that Ordinance. The learned Custodian General however took the view that the transaction having been completed in May 1948 had already become ineffective not having been confirmed under the Ordinance No. VIII and the petitioners' application could not be entertained. The learned Custodian General meant by this order that as the petitioners' right to apply was already barred under the Ordinance No. VIII, their application could not be entertained simply because it was made within time under the second Ordinance.

(3) One of the grounds of the petitioners was that the opponent No. 1 acted illegally in dismissing the appeal on the ground that their application was barred by limitation inasmuch as he had no jurisdiction to reject the application as time barred the same having been heard on merits by the Custodian. This argument was developed more fully by the learned Advocate of the petitioner in Civil Misc. Application No. 16 of 1952 which was heard along with this application. We think that the Custodian General not only acted rightly in considering the question of limitation but it was his duty to do so though whether his decision is right or wrong is a different matter.

It was urged that when the petitioners made the application, the Ordinance No. XLIII of 1949 was in force and the petitioners' application should have been decided in the light of the provisions of that Ordinance or by the provisions of the Administration of Evacuees' Property Act XXXI of 1950 when the learned Custodian made his order and in holding that it could not be maintained because it was presented after the time prescribed by the Saurashtra Ordinance No. VIII of 1948, the learned Custodian General failed to exercise the jurisdiction vested in him by refusing to hear the appeal on merits and this amounted to an error of law on the face of the record. It was pointed out that the former Custodian General himself had taken a different view in the — 'Union of India v. Shri Tara Chand K. Gupta'. (Case No. 66) Rulings of the Custodian General Vol. 1, p. 193 by Bhawani Lal and Mital. A reply to this argument is provided by another decision of the Custodian General in — 'K. B. Irani etc., of Hyderabad v. The Custodian of Evacuees' Property, Hyderabad', (case No. 53) reported in the same book where the Custodian General took the same view as in this case. Therefore, the question whether Section 25 of the Ordinance No. XLIII revived the right of a transferee the transfer in whose favour had become ineffective and whose application would be already barred under the previous Ordinance was one which admitted both views.

The learned Advocate for the petitioners referred to — 'Benares Bank Ltd. v. Prakasha Bhagwan Das'. AIR 1946 All 269, which was a case under the Indian Companies Act. That decision merely proves that difference of opinion can exist on this question. Assuming that the learned Custodian General's decision was wrong, it was merely an error of law. The question about the maintainability of the application was one which he was bound to decide and he had exclusive jurisdiction to decide it. His decision moreover is final under S. 46 of the Evacuees' Property Act, No. XXXI of 1950. If we were to embark upon an enquiry about the correctness of his decision, we would be taking upon ourselves the functions of an appellate Court and we have no jurisdiction to do so.

(4) In — 'Parry and Co. Ltd. v. Commercial Employees Association, Madras', AIR 1952 S C 179 the question was whether a decision of the Labour Commissioner on certain issues could be revised by means of a writ. The Supreme Court held that his decision could not be re-

vised. The following observations of Mukherjee J. (p. 180) may be quoted:

"This decision may or may not be right, but it has not been and cannot be suggested that the Labour Commissioner acted without jurisdiction or in excess of his powers. Under S. 51 of the Madras Shops and Establishments Act, the Labour Commissioner is the only proper and competent authority to determine the questions referred to it in that section; and there is an express provision in it that the decision of the Labour Commissioner shall be final and not liable to be challenged in any Court of law. It was the respondent who took the matter before the Labour Commissioner in the present case and invited his decision upon the questions raised in the petition. The Commissioner was certainly bound to decide the questions and he did decide them. At the worst, he may have come to an erroneous conclusion, but the conclusion is in respect of a matter which lies entirely within the jurisdiction of the Labour Commissioner to decide and it does not relate to anything collateral, an erroneous decision upon which might affect his jurisdiction. The records of the case do not disclose any error apparent on the face of the proceeding or any irregularity in the procedure adopted by the Labour Commissioner which goes contrary to the principles of natural justice. Thus, there was absolutely no ground here which would justify a superior Court in issuing a writ of 'certiorari' for removal of an order or proceeding of an inferior tribunal vested with powers to exercise judicial or quasi-judicial functions,.....but no 'certiorari' is available to quash a decision passed with jurisdiction by an inferior tribunal on the mere ground that such decision is erroneous."

We might also quote the observations of Chandrasekhara Aiyar J. — in 'G. Veerappa v. Raman and Raman Ltd.', AIR 1952 S C 192, on the ambit and the scope of High Court's jurisdiction in interfering with the orders of an inferior Tribunal (p. 192):

"Such writs as are referred to in Article 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record, and such act, omission, error, or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decisions impugned and decide what is the proper view to be taken or the order to be made."

We have therefore no jurisdiction to correct the learned Custodian General's decision. It was mentioned during the arguments that the Custodian under Ordinance No. VIII was appointed on 17-5-1948 and the appointment appeared in the Gazette dated 20-5-1948. There was therefore no authority to whom an application for confirmation could have been made under the Ordinance for two months after its promulgation. This objection was not taken in the petition nor does the Custodian General's order show that it was taken before him. The Government have not been given an opportunity to meet this objection and we cannot permit the petitioners to take it in their arguments. Under the circumstances it is not possible to entertain the petition.

(5) The learned Advocate-General argued that S. 46 of the Act XXXI of 1950 made the decision of the Custodian General final and we had no jurisdiction to correct it. In the view that we take of the learned Custodian General's order, we do not think that it is necessary to express any opinion on this point. We decline to interfere with the learned Custodian General's order and dismiss the petition. There will be no order for costs.

(6) SHAH C. J.: I agree.

A/M.K.S. Petition dismissed.

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SPECIAL BENCH

SHAH C. J. and CHHATPAR AND BAXI JJ.

Kalikakumarsinhji Lagdhirji and others, Applicants v. Saurashtra State.

Civil Misc. Applns. Nos. 58, 62 and 64 of 1951, D/- 21-7-1952.

(a) Constitution of India, Art. 31 A — Absence of express provision for vesting of estate in State — Validity of Saurashtra Land Reforms Act, 1951 — (Tenancy Law — Saurashtra Land Reforms Act (25 of 1951):

For the purpose of Art. 31-A, it is not necessary that an Act for acquisition of estates, etc. must expressly state that the Estate or the rights therein acquired under the Act vest in the State. It is sufficient if the provisions of such an Act themselves show that the acquisition is by the State. The Saurashtra Land Reforms Act specifically provides for the extinguishment of the Girasdar's rights in their estate. And the combined effect of the provisions contained in Ss. 31, 36 and 39 is that the estate of the Girasdar is acquired by the State and that it vests in the Saurashtra State. Thus, as the Saurashtra Act fulfils the conditions of Art. 31-A, it falls within the scope of that article. (Para 9)

(b) Constitution of India, Art. 31-A — Gradual acquisition of Estate.

It is not necessary that the acquisition must take place immediately or not at all. There is nothing wrong in its happening gradually or at a later date or on the initiative of an intermediary person, such as a tenant, if the actual extinguishment of the rights in the estate takes place on payment of compensation made by the State. (Para 10)

(c) Constitution of India, Art. 31-A — Acquisition of estate contemplated by Saurashtra Land Reforms Act, 1951 — (Tenancy Law — Saurashtra Land Reforms Act (25 of 1951)).

The Act does provide for the acquisition of the estates, meaning the whole estate. By virtue of S. 28, the fact that only a part of the estate may be acquired on account of all the tenants not applying for occupancy rights does not affect the validity of the Act; for an Act must be judged by what it provides for and not by what might transpire in a few cases in practice. (Para 11)

(d) Constitution of India, Art. 31-A — Holding of Mulgirassia in Saurashtra is estate.

The holding of a Mulgirassia in Saurashtra is as much an estate as the holding of Bhayats and Talukdars, and the law relating to the acquisition of such a holding is therefore covered and saved under Article 31-A. (Para 12)

(e) Constitution of India, Arts. 31 (2) and 31-A — Acquisition of property not for public purpose — Effect.

It is inherent in Article 31 (2) that private property can be acquired for a public purpose only. A law covered by Article 31-A will not be saved if it dispenses with this inherent requirement namely, the acquisition should be for a public purpose. Thus, if the acquisition of property provided for in such a law is not for a public purpose, then the law can be declared to be unconstitutional or void and the question becomes justiciable by the Court. (Para 13)

(f) Constitution of India, Arts. 31 (2) and 31-A — Saurashtra Land Reforms Act, 1951, is for public purpose — (Tenancy Law — Saurashtra Land Reforms Act (25 of 1951)).

The object of the Saurashtra Land Reforms Act, 1951, as the preamble says, is the improvement of Land Revenue Administration and the ultimate doing away with the Girasdari system and making the tenants the occupants of the land held by them. Payment of compensation to the Girasdars for the extinguishment of their rights is contemplated for that purpose. The preamble makes it clear that the Act is for a public purpose and this inference is reinforced by the various provisions of the Act. AIR 1952 SC 252, Foll. (Paras 14, 17)

(g) Constitution of India, Art. 14 — Tenancy Law — Saurashtra Land Reforms Act (25 of 1951), Ss. 21, 22, 24 — Classification of Girasdars into A, B and C class — Allotment of Lands to them is not discriminatory.

The allotment of the lands to the Girasdars of the different classes on the varying scale laid down in Ss. 21, 22 and 26 of the Saurashtra Land Reforms Act, 1951 is not discriminatory but is on the contrary founded on reality, inasmuch as it is related to the total area of the agricultural land actually comprised in their estates. It is just and reasonable that the Girasdars who make larger contributions to the fulfilment of the public purpose underlying the Act should get larger areas of land for gharkhed than those whose contributions are less. (Para 19)

(h) Words and Phrases — "Girasdar" and 'Barkhalidar".

The generic term Garasia or Girasdar includes Talukdars, Bhagdars, Mulgarasias and Bhayats who can be generally classed as landholders with proprietary rights as distinguished from ordinary landholders included in the generic term Barkhalidars. The latter term includes Inamdars, Jiwaidars, Dharmada or kherati grantees and service tenure holders, such as chakariatas and pasaitas, who are merely entitled to the usufruct of the land granted to them. (Para 12)

P. L. Chudgar with M. O. Shah, for Applicants; A. R. Bakshi, Advocate General, with B. R. Joshi, Asst. Govt. Pleader, for the State.

REFERENCES: Courtwar/Chronological/ Paras
A. K. Gopalan v. State of Madras, (AIR 1950 SC 27: 51 Cri LJ 1383 SC) 17
Charanjit Lal v. Union of India, (AIR 1951 SC 41) 17

SHAH C. J.: These are three applications under Article 226 of the Constitution of India challenging the constitutionality of an Act known as the Saurashtra Land Reforms Act (No. XXV of 1951). The Saurashtra Land Reforms Bill No. XVII of 1951 having been passed by the Saurashtra State Legislative Assembly was reserved for the consideration of the President and it received the assent of the President on 23rd of July 1951. The applicant in application No. 58 of 1951 Maharajkumar Kalikakumarsinhji of Morvi is the younger brother of the present Maharaja of Morvi and the younger son of the ex-Maharaja, and is a Bhayat within the meaning of that expression in the Saurashtra Land Reforms Act. He has been granted the village of Khareda and lands known as Rawa Baug in the village of Tajpur in the Morvi Taluka, as his giras by the then Maharaja of Morvi by a lekh dated 15th July 1923, and he has duly received the Hak Patrak thereof. The applicant in application No. 62 of 1951 is a Mulgirasia of the old Nawanagar State and claims the status of a Mulgirasia under the Act. The applicant in application No. 64 of 1951 is the Talukdar of Mulia-Deri under the Lodhika Thana of the old Western Kathiawar Agency, and he claims to be a Talukdar under the Act.

(2) We had heard these applications but had reserved judgment in view of the appeals before the Supreme Court in which the constitutional validity of the Bihar Land Reforms Act, 1950, the Madhya Pradesh Abolition of Proprietary Rights Act, 1950, and the Uttar Pradesh Zamindari Abolition and Land Reforms Act 1950, was challenged. The Supreme Court having given its decision *, we have heard these applications again in the light of the said decision and we now proceed to record our judgment.

(3) Before dealing with the various grounds on which the Saurashtra Land Reforms Act, XXV of 1951, hereinafter called the Act, is challenged it will be useful to refer to the important provisions of the impugned Act and to examine the scheme of the Act. The Act is made in order to provide for certain measures of land reforms in Saurashtra and the preamble to the Act declares:

"Whereas for the improvement of land revenue administration and for ultimately putting an end to the Girasdari System, it is necessary to regulate the relationship between the Girasdars and their tenants, to enable the latter to become occupants of the land held by them and to provide for the payment of compensation to the Girasdars for the extinguishment of their rights, it is hereby enacted as follows:

Chapter II deals with land revenue and classification of Girasdars, and Section 4 thereof declares that all land of whatever description held by a Girasdar is and shall continue to be liable to the payment of land revenue to the State. Section 5 (1) classifies the Girasdars into three classes for certain purposes (viz., for making allotment of land under Chapter IV, or of payment of rehabilitation grant under Chapter VI, or of assessment of land revenue payable under Section 40), the Girasdars the

*See — 'State of Bihar v. Kameshwar Singh' AIR 1952 SC 252.

total area of agricultural land comprised in whose estate exceeds eight hundred acres being classed as A Class Girasdars, those whose agricultural land exceeds one hundred and twenty acres but does not exceed eight hundred acres being placed in class B and those whose agricultural land does not exceed one hundred and twenty acres being placed in Class C. Chapter III regulates the relationship of the Girasdars with the tenants. Section 7 thereof prohibits the Girasdar from recovering from the tenant rent exceeding an amount equal to one and a half times the assessment thereon, and Section 8 prohibits the Girasdar from levying or receiving from the tenants any cess, rate, hak or service of any description whatsoever. By Section 10 the Girasdar is liable to pay to the Government land revenue in respect of lands for which rent is payable to him by the tenant. Section 12 contains the restrictions against the termination of the tenancy, and Section 17 provides for the restoration of possession of certain lands which the Girasdar may have reserved for personal cultivation during the period between 1st January 1948 and 20th May 1950.

Chapter IV provides for the allotment of land to Girasdars for personal cultivation and under Section 19 thereof the Girasdar may within 90 days of the commencement of this Act apply to the Mamlatdar for the allotment of land for personal cultivation. After holding an inquiry the Mamlatdar is to issue an occupancy certificate to the Girasdar in respect of his Gharkhed and the land, if any, allotted to him. Section 21 provides that A Class Girasdars will be allotted land for personal cultivation to such an extent, as when added to the area of Gharkhed in his estate and of Khalsa land, if any, in his possession, would make up the total area of his holdings. The A class Girasdar is allowed three economic holdings. A graded scale is provided in the case of B Class Girasdars, the total economic holdings which they may hold ranging from one and a half economic holdings to two and a half economic holdings. Section 22 contains the principles and method of allotment of land to Girasdars of A and B Class. Section 24 awards to the C Class Girasdars one to one and a half economic holding and provides for the method of allotment. Chapter V deals with the acquisition of occupancy rights by tenants and Section 28 thereof lays down that subject to the provisions contained in Chapter IV, a tenant shall at any time be entitled to acquire occupancy rights in his holding on payment of such amount as shall be equal to six times the assessment payable in respect of the agricultural land included in such holding, and may apply to the Mamlatdar for acquiring such rights. After making an enquiry the Mamlatdar is to pass an order specifying the holding in respect of which the tenant is to be declared as an occupant, the assessment on such occupancy holding and the amount of compensation payable by the tenant to the Girasdar. At the end of the enquiry the Mamlatdar shall issue an occupancy certificate to the tenant in respect of such occupancy holding. On the issue of such a certificate, the tenant becomes an occupant holding directly from the State and he has all the rights and obligations of an occupant under the Act and under the Code, meaning the Bombay Land Revenue Code as adapted and applied to Saurashtra State, in respect of the holding. The main consequences of the issue of the occupancy certificate are these. He is to pay the assessment direct to the Government. All his relations and obligations as tenant, including the liability to pay rent to the Girasdar are to cease. He acquires his rights in the occupancy holding free from encumbrances made by the Girasdar. The right of reversion vests in the State. The Girasdar is to cease to have any right to collect or receive any rent from the occupant or exercise any other right in respect of the holding, and his liability in respect of land revenue is also to cease.

(4) Section 33 provides for payment of compensation. The Girasdar is to receive compensation which comprises of the compensation to be paid by the tenant (equivalent to six times the assessment on the holding) and an additional compensation to be paid by the Government, equivalent to the annual assessment of the holding, the same being payable every year for a period of fifteen years. Under Section 36, on the payment by the Government of the last instalment of the compensation in respect of an occupancy holding, all the remaining rights, title and interest of the Girasdar in that holding shall be deemed to have been extinguished. Under Section 39, on the issue of an occupancy certificate the Girasdar becomes an occupant in respect of his Gharkhed and the land allotted to him under Chapter IV as from the date of the issue of the occupancy certificate and the Girasdar becomes liable to pay assessment to the Government on such lands. In addition to the compensation payable to the Girasdar, the Government is to pay as rehabilitation grant to the Girasdars of the B and C Class, the amount of the grant payable to the former being three additional instalments, each equal to one assessment payable annually after and in continuation of the compensation payable under Section 33, and in the case of the latter six such additional instalments payable in the same manner. The Act contains other miscellaneous provisions which are not material for the present purpose. Schedule I to the Act prescribes the area of the culturable land of an economic holding in different Districts of the State. These are in the main the important provisions of the impugned Act.

(5) The first ground on which the Act is challenged is that its enactment was beyond the competence of the Saurashtra State, and for this purpose, Mr. Chudgar, learned Counsel for the applicants, has relied on Article 295 of the Constitution. Clause (1) (a) of the said Article says that as from the commencement of the Constitution, all property and assets which immediately before such commencement were vested in any Indian State corresponding to a State specified in Part B of the First Schedule shall vest in the Union, if the purposes for which such property and assets were held immediately before such commencement will thereafter be purposes of the Union relating to any of the matters enumerated in the Union List. Clause (1) (b) of the said Article makes a similar provision in respect of rights and liabilities and obligations of the Government of any Indian State devolving on the Government of India, both these being subject to any agreement entered into in that behalf by the Government of India with the Government of that State. Clause (2) of the Article, which is material for our purpose, provides for the succession of the property and assets and all rights, liabilities and obligations, of the Government of each State in Part B of the First Schedule and says that, subject as aforesaid, the Government of each State specified in Part B of the First Schedule shall, as from the

commencement of this Constitution, be the successor of the Government of the corresponding Indian State as regards all property and assets and all rights, liabilities and obligations, whether arising out of any contract or otherwise, other than those referred to in Clause (1).

Mr. Chudgar argued that the rights, liabilities and obligations of the United State of Saurashtra having devolved upon the Saurashtra State, the Saurashtra State cannot enact a law to repudiate the said liabilities and obligations, and to the extent that such law repudiates the liability and the obligations, it is void being contrary to the provisions of the Constitution. Now the Rulers of thirty former States of Kathiawar, of whom thirteen were Salute States and the remaining non-salute States, entered into a Covenant in January 1948 with the concurrence of the Government of India to unite and integrate their territories into a State called the United State of Kathiawar. Under Article VI of the said Covenant, the Ruler of each Covenanting State was to make over the administration of his State to the Raj Pramukh, and thereupon among other things, all the assets and liabilities of the Covenanting State were to be the assets and liabilities of the United State of Kathiawar. It is urged that the former Morvi State, which was one of the Covenanting States, was under an obligation to maintain intact the Bhayati Estate of the applicant, Shri Kalikakumarsinhji, and that the said liability devolved upon the United State of Kathiawar by virtue of the Covenant, and then on the Saurashtra State, under Article 295 (2) of the Constitution, and that the Saurashtra State could not therefore validly enact a law by which such a liability can be terminated. Mr. Chudgar contended that the Covenant was the foundation of the present Saurashtra State and that the Saurashtra State was bound to respect the obligations and the liabilities of the former Covenanting States, and cannot therefore acquire the Bhayati Estate of the applicant even for a public purpose and on payment of compensation. The case of applicant Habhubha in application No. 62 of 1951, who is a Mulgirasia, was placed on the same grounds.

(6) In respect of Khodubha Vajesang, applicant in application No. 64 of 1951, who is a Talukdar, it was urged that the Talukdars possessed sovereign rights over their Estates and that such Estates cannot therefore be resumed or acquired by the Government for a public or any other purpose. It is urged that these sovereign rights could not have been taken away by the British Parliament or by the Government of the Dominion of India by legislation. It is urged that with the departure of the British power, the paramountcy reverted to the Ruling Chiefs and Talukdars, and that they retained their sovereign status, and therefore their Estates can be acquired only by an Act of State and not by Municipal legislation. The Talukdars of Kathiawar also entered into an agreement by which they agreed to merge their Talukas or Estates in the United State of Kathiawar, and upon such merger all rights, authority and jurisdiction belonging to them vested in the United State of Kathiawar and the duties and obligations pertaining or incidental to the Government of the Taluka or the Estate devolved on the United State, and all the properties vesting in the Talukdars which had been used for the benefit of the public in the Taluka or Estate also vested in the United State. Clause (d) of the agreement which related to the other properties said that the Talukdar was entitled to the full ownership, use and enjoyment of these other properties vesting in him, including the superior proprietary rights in all lands, including the right to recover rent in cash or kind, according to law from tenants, subject, however, to the payment according to law of land revenue to the United State and to any tenancy laws that are in force or may hereafter be enacted by the United State. It is urged that by reason of this merger agreement full ownership of their lands in their estates has been guaranteed to the Talukdars and they cannot be deprived of the same by a process of acquisition by the State. Elaborate arguments were addressed to us on the question of the sovereign status of the Talukdars and the said status reverting to them on the lapse of paramountcy.

(7) Mr. Manilal Shah who appeared for the applicants at the resumed hearing, however, did not press this contention in view of the decision of the Supreme Court referred to above*. Dealing with a similar contention Patanjali Sastri C. J. observed in the Bihar case (See AIR 1952 SC 252, Para 24—Ed.) :

> "In some of the cases the estates sought to be acquired are situated in what was previously the territory of Indian States and belong to their former rulers. On the merger of those States in Madhya Pradesh or Uttar Pradesh, as the case may be, by virtue of the "covenant of merger" entered into between the rulers and the Government of India the properties in question were recognised to be the "private property" of the Rulers. In these cases, it was urged that the estates sought to be acquired formed part of the Rulers' "personal rights" guaranteed to them under the instrument of merger, and that neither the impugned statutes nor the notifications issued thereunder could deprive the Ruler of such properties in contravention of Art. 362. The Attorney-General had several answers to this argument including the bar under Art. 363 to interference by Courts in disputes arising out of agreements, covenants, etc. by Rulers of Indian States to which the Government of India was a party. But a short and obvious answer is that there was no contravention of any guarantee or assurance given by the Government under the Covenant of merger, as the estates in question are sought to be acquired only as the "private property" of the Rulers and not otherwise. The compensation provided for, such as it is, is in recognition of their private proprietorship, as in the case of any other owner. There is, therefore, no force in this objection."

That is an answer to the contention in this case too. However, as Mr. Shah has not pressed this point, we need not consider it any further.

(8) We now turn to Article 31A of the Constitution which is as follows :

> "Saving of laws providing for acquisition of Estates, etc.— (1) Notwithstanding anything in the foregoing provisions of this part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this Part :
>
> Provided that where such law is a law made by the Legislature of a State, the pro-

* 'State of Bihar v. Kameshwar Singh', AIR 1952 SC 252.

visions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received assent."

Sub-Clause (2) defines the expressions "estate" and "rights" in the Article.

(9) Mr. Shah's first contention is that the impugned Act does not fall within the scope of Article 31A because it does not provide for an acquisition by the State of any estate or of rights therein and that in any event it does not provide for the acquisition by the State. As to the first part of this contention, it is argued that the Act must provide expressly in some Section or the other for the vesting of the Estate or the rights therein in the State and that in as much as the impugned Act did not contain any express provision of this kind, the Act was bad. Reference was made to Section 5 of the Saurashtra Barkhali Abolition Act, 1951, (XXVI of 1951), which says that on the commencement of the said Act, all rights, title and interest of all the Barkhalidars in Barkhali lands shall cease and be vested in the State free from all encumbrances, subject to the provisions of this Act, and it was argued that the impugned Act does not contain a similar provision regarding vesting in the State. However the provision in the Barkhali Abolition Act was necessary because the Act itself provided for the abolition forthwith of the Barkhali tenure altogether. Quite apart from it, it is in our opinion, not necessary that the impugned Act must expressly state that the Estate or the rights therein acquired under the Act vest in the State, and it will be sufficient if the provisions of the Act themselves show that the acquisition was by the State. In so far as Article 31A speaks of the extinguishment of the rights, the Act does specifically provide for the extinguishment of the Girasdars' rights in their estate. Then under Section 31 with regard to the tenant's holding, on the issue of an occupancy certificate by the Mamlatdar, the tenant becomes an occupant holding directly from the State; he pays assessment direct to the Government; he acquires all the rights in the occupancy free from encumbrances, and in fact he gets all the rights in the holding and along with it the relations and the obligations of the tenant to the Girasdar cease, and in particular his liability to pay rent to the Girasdar ceases. Under Section 36 on the payment by the Government of the last instalment of compensation, all the remaining rights, title and interest of the Girasdar in the holding are extinguished. Under Section 39 on the issue of an occupancy certificate by the Mamlatdar, in respect of the Gharkhed comprised in the Girasdar's estate and the land allotted to him under Chapter IV, the Girasdar becomes an occupant in respect of his Gharkhed, and the land allotted to him as from the date of the issue of occupancy certificate, and he is liable to pay land revenue to the Government. The combined effect of these provisions obviously is that the estate of the Girasdar is acquired by the State and that it vests in the Saurashtra State.

(10) The next contention was that the State does not itself acquire the Girasdar's estate, as and when required or desired by the State, but that under Section 28 of the Act it was left to the volition of the tenant to acquire occupancy rights in his holding at any time he liked and that arbitrary powers were thus given to the tenants to bring about the acquisition and thereby the extinguishment of the Girasdar's rights. I do not think that makes any real difference. It is not necessary that the acquisition must take place immediately or not at all and there is nothing wrong in its happening gradually or at a later date or on the initiative of the tenant. Under Section 36 the actual extinguishment of the Girasdar's rights in the holding takes place on payment of the last instalment of compensation and this payment is made by the State, and the process of the extinction of the Girasdar's rights is thus completed by some thing done by the State. The Girasdar's rights in his holding comprising of the Gharkhed land and the land allotted to him under Chapter IV, to make up the holding or holdings, are extinguished and he is reduced to the position of an occupancy tenant, and the said rights become vested in the State. In respect of the other lands, which might be called the non-gharkhed lands, he ceases to have any rights whatever, and this extinguishment of his rights in the estate too is made by the State. The preamble to the Act itself declares in terms that the Act is intended for the extinguishment of the Girasdar's rights in his estate. These rights as I said, become vested in the State, and they constitute an acquisition by the State. The contention of the learned Advocate for the applicants that the acquisition or the extinguishment is not by the State must accordingly be rejected.

(11) Mr. Shah next urged that the acquisition should be of the estate meaning the whole estate and not a part of the estate and that inasmuch as it is left to the tenant to acquire occupancy rights cases can be conceived in which all the tenants may not apply for acquiring occupancy rights, in which event the acquisition will be of a part only. That may be so, and in given cases only a part of the estate may be acquired on account of the tenants not applying for occupancy rights. But the validity of the Act must be judged by what it provides for and not by what might transpire in a few cases in practice. The Act does provide for the acquisition of the estates, meaning the whole estate, and this contention too has therefore no force.

(12) Another contention made by Mr. Shah was that so far as the applicant in application No. 62 of 1951 is concerned, he is a Mulgirasia and his lands are not an "estate" and therefore a law providing for the acquisition of his property or for the extinguishment of his rights therein is outside the purview of Article 31A and is not saved by that Article. Now under clause (2) of Article 31A, the expression "estate" in relation to any local area, has the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and it also includes any jagir, inam or muafi or other similar grant. It is urged that the Mulgirasias are the original proprietors of lands, that they do not hold under any grant and that their holdings are not known as estates. It is argued that the expression "estate" is inappropriate to the holding of the Mulgirasias and that the Mulgirasia's holding has never been known as an "estate". Mr. Shah also urged that there was no equivalent of "estate" in so far as it applied to the holding of the Mulgirasias in the law relating to land tenures in Kathiawar, and he merely stated that it was known as a holding. Now the generic term Garasia or Garasdar includes Talukdars, Bhagdars, Mulgarasias and Bhayats who can be generally classed as landholders with proprietary rights

as distinguished from ordinary landholders included in the generic term Barkhalidars. The latter term includes Inamdars, Jiwaidars, dharmada or kherati grantees and service tenure holders, such as chakariatas and pasaitas, who are merely entitled to the usufruct of the land granted to them. The Mulgirasias are thus commonly included in the expression Girasias or Girasdars. The following passage from the Report of the Agrarian Reforms Commission, Saurashtra, p. 14, paragraph 29, explains the position of the Mulgarasias:

"Mulgarasias are descendants of the original proprietors of villages whose possession and ownership of land date prior to the establishment of the various States or Estates under which they were found. In the midst of the shifting fortunes of different dynasties in the pre-British days, some landholders preferred to relinquish a portion of their lands in favour of stronger powers while some were left by the latter in the enjoyment of portions of their lands. Whatever may be the case, the fact remains that only a part of their land remained with them, the rest having vested in the powers whose protection they sought. With the growth of the power of the Chiefs whose protection they sought, a fiction grew up that there was a commendation of the mulgarasias' holdings to the chiefs and that there was a rebestowal by the latter. This theory of commendation was used to support the escheat of a mulgarasia's land on the failure of his heirs and collaterals to his chief as the ultimate heir under the Hindu Law."

Reference may also be made to Webb's Political Practice, P. 46. In Agency Notification No. 59 of 1898 a Mulgirassia is defined as:

"The original proprietor or the descendant of the original proprietor of a village or villages or portion of a village or villages who has made over a village or villages or portion of ancient rights over a village or villages or a portion of a village or villages as Mulgirassias to a chief, relating to himself another or certain rights therein."

The status of the Mulgirassias is treated as similar to that of Girassias, and their rights were determined by the Rajasthanik Court and they were also given Hak Patraks by the Courts. As Webb observes at p. 52 of the volume:

"From a perusal of the various judgments and Government Resolution on this subject the general principle is found to be that the lapsed estate of a Mulgirassia cannot revert to a Darbar as long as collateral, however, distant can be found to succeed and Darbar's right to the Giras to escheat only arises on extinction of the whole family and all possible heirs under Hindu Law."

Thus the holding of a Mulgirassia has been known as an estate. It is also referred to as an estate in connection with the right of the widow to enjoy during her life time the Mulgiras of a deceased husband. The holding of a Mulgirassia is thus as much an estate as the holding of Bhayats and Talukdars, and the law relating to the acquisition of such a holding is therefore covered and is saved under Article 31A.

(13) The next question arising for consideration is whether the acquisition of the estate or the extinguishment of the rights therein under a law covered by Article 31A must be for a public purpose. In view of the majority decision of the Supreme Court in the Bihar, the Uttar Pradesh and the Madhya Pradesh cases, the provisions of sub-clause (2) of Article 31 made unjusticiable by clause (4) of Article 31 relate to the determination and payment of compensation and Article 31(4) does not bar the jurisdiction of the Court from enquiring whether the law relating to compulsory acquisition of property is not valid because the acquisition has not been made for a public purpose; in other words the question whether the acquisition of the property is for a public purpose or otherwise is justiciable. The Act in the present case is no doubt covered by Article 31A, but that does not make any difference in principle. What the said Article ensures is that the law shall not be deemed to be void on the ground that it takes away or abridges any of the fundamental rights conferred by Part III of the Constitution. Now it is inherent in Article 31(2) that private property can be acquired for a public purpose and what that Article provides for and makes it the fundamental right of the owner of the property is the payment of compensation to him. That is the majority view of the Supreme Court in the Bihar and other cases, so that if this fundamental right to compensation for the property acquired is taken away, or abridged, then under Article 31A, a law containing a provision to that effect shall not be deemed to be void. By the same process of reasoning it must be held that a law covered by Article 31A will not be saved if it dispenses with the inherent requirement that the acquisition should be for a public purpose, which in other words means that if the acquisition of property provided for in such a law is not for a public purpose, then the law can be declared to be unconstitutional or void and the question becomes justiciable by the Court. The learned Advocate General does not demur to this position in view of the Supreme Court decision.

(14) Turning therefore to the question whether the impugned Act provides for the acquisition of an estate for a public purpose or otherwise, it will be seen that the Act is enacted in order to provide for certain measures of land reforms in Saurashtra. The object of the Act, as the preamble says, is the improvement of Land Revenue Administration and the ultimate doing away with the Girasdari system and making the tenants the occupants of the land held by them. Payment of compensation to the Girasdars for the extinguishment of their rights is contemplated for that purpose. The preamble makes it clear that the Act is for a public purpose and this inference is reinforced by the various provisions of the Act. The purpose is to effect a land reform in order that the general conditions of the entire body of the tenants who form about 83 p.c. of the population of the State should be ameliorated. The object of the Act is to secure a fixity of tenure to the tenants and to fix an equitable assessment and thereby to achieve the development of agriculture in the State. At the same time the Girasdars are left with areas of land, for their personal cultivation, in proportion to their present holdings, and they have not been deprived altogether of their lands. They have also been given the benefit of the fixed tenure and of equitable assessment. The object of the State in enacting this measure is to secure to the maximum the personal cultivation of lands. The general interest of the agricultural community as a whole, as opposed to the particular interest of certain individuals, is obviously the

purpose of the Act. The cultivators were merely tenants at will formerly, liable to be evicted at the sweet will of the landholders. The change that took place on the establishment of the United State of Saurashtra in February 1948 has been well described in paragraph 83 of the Report of the Agrarian Reforms Commission, Saurashtra. The report says :

"On the establishment of the United State of Saurashtra in February 1948, cultivators of the covenanting States and a few Estates which accepted privy purse became occupants of Government, while the status of the tenants of the remaining Estates which had entered into the merger agreement with the Government of Saurashtra remained unaltered. As regards tenants of landholders such as mulgirasias, bhagdars, bhayats, barkhalidars, inamdars, jiwaidars, etc., the status quo continued under the new dispensation. Within a few days of the unification of Saurashtra, the Ministry of Saurashtra issued a manifesto of their policy in which it was declared, inter alia, that forced labour (veth) and lagas or cesses in addition to crop share or cash assessment shall be immediately abolished that the land system shall be brought on a level with that prevailing in the Bombay State and that the shares in kind would be lightened where necessary.

"This declaration of policy was followed by a proclamation on the 15th April 1948 — the day of the actual establishment of the United State of Saurashtra — conferring full occupancy rights upon the cultivators without any payment, introducing cash assessment system of land revenue and abolishing veth or forced labour. The proclamation thus did away at a stroke with the out-moded systems both of land tenure and land revenue assessment in the khalsa areas. It was indeed the magna charta of the Saurashtra cultivators, majority of whom were now for the first time assured of fixity of tenure and uniformity of rent.

"The reforms introduced in the khalsa areas could not but have their repurcussions on the cultivators in the alienated villages. They began to be more and more conscious of their rights and persisted in their demand for equal treatment in the matter of rent and tenure with tenants of khalsa villages, which meant a good-bye to the exactions by their landlords and substantial reduction in the latter's income compared with what they were getting till then. The landholders became restive and thought that the best thing they could do was to secure land as gharkhed (land reserved for personal cultivation) and thus avoid disputes with tenants over rent. This insistence on gharkhed naturally involved eviction of tenants and complicated the situation still further."

(15) In order to protect the tenants from eviction the Saurashtra State promulgated the Saurashtra Protection of Tenants Ordinance, No. XXII of 1948, and the Saurashtra Zamindars' and Tenants' Settlement of Rent Disputes Ordinance No. XXVI of 1948. There was naturally a discontent among the landholders on account of the restrictions imposed on them regarding the ejectment of tenants, and as a resul of negotiations that took place thereafter, the Saurashtra Protection of Tenants Ordinance No. XXXVI of 1948 was promulgated by the Government being based on a formula agreed to by representatives of both the parties. The Ordinance provided for the appointment of a joint committee of landholders and tenants for settlement of disputes relating to ejectment of tenants and recovery of rent, but this machinery did not bear any fruit. Later the Saurashtra Gharkhed Tenancy Settlement and Agricultural Lands Ordinance, No. XLI of 1949, known as the Gharkhed Ordinance, was promulgated, which repealed all the previous Ordinances and with some subsequent amendments was the law regulating the relations between landholders and the tenants prior to the enactment of the impugned Act. The history of the legislation on the subject of Land Reforms clearly shows that the State has adopted a cautious and progressive policy, and the Act itself bears evidence of this fact. The Act is not the result of the policy of the majority party in the State's Legislature as was at one stage urged. Its main object is to effect a radical change in the system of land tenures prevailing in the State and for effecting that policy the State has also taken care to reserve to Girasdars lands for their personal cultivation.

(16) Dealing with the question of public purpose His Lordship Mahajan J. has observed as follows in the Bihar case* :

"There can be no manner of doubt that acquisition of private property by legislation under Entries 33, 36 and 42 can only be made either for purposes of the Union or for purposes of the State or for a public purpose and that it is unnecessary to state in express terms in the statute itself the precise purpose for which property is being taken, provided from the whole tenor and intendment of the Act it could be gathered that the property was being acquired either for purposes of the State or for purposes of the public and that the intention was to benefit the community at large. It may be conceded that the present statute does not disclose the legislature's mind as to what it would ultimately do after the estates are vested in the State Government. Perhaps the State Government has not yet made up its mind, how and for what purposes the lands and the tenures acquired will be utilized. The statute provides in Section 34 for the establishment of a land commission whose function it will be to advise the Government as to its agrarian policy.

Be that as it may, it seems to me that in spite of the criticism levelled against the Act by the learned counsel, it cannot be said that the Act would fall because it fails to postulate a public purpose. The Act is intituled "The Bihar Land Reforms Act, 1950." The preamble of the Constitution says that India has been constituted into a Sovereign Democratic Republic to secure to all its citizens justice, social, economic and political. Article 39 of the Directive Principles of State Policy states as follows :

"The State shall, in particular, direct its policy towards securing, that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment."

"Now it is obvious that concentration of big blocks of land in the hands of a few individuals is contrary to the principle on which

* See AIR 1952 SC 252 (Para 52).

the Constitution of India is based. The purpose of the acquisition contemplated by the impugned Act therefore is to do away with the concentration of big blocks of land and means of production in the hands of a few individuals and to so distribute the ownership and control of the material resources which come in the hands of the State as to subserve the common good as best as possible. In other words, shortly put, the purpose behind the Act is to bring about a reform in the land distribution system of Bihar for the general benefit of the community as advised. The legislature is the best judge of what is good for the community, by whose suffrage it comes into existence and it is not possible for this Court to say that there was no public purpose behind the acquisition contemplated by the impugned statute. The purpose of the statute certainly is in accordance with the letter and spirit of the Constitution of India.

It is fallacious to contend that the object of the Act is to ruin five and a half million people in Bihar. All lands in khas possession of all these persons have not been made the subject-matter of acquisition. Their homesteads, their mineral wealth except mines not in operation have not been seriously touched by the provisions of the Act. Various other exemptions have also been made in their favour in the Act, apart from the provisions as to compensation which in the case of small zamindaris can by no means be said to be of an illusory character. It is difficult to hold in the present day conditions of the world that measures adopted for the welfare of the community and sought to be achieved by process of legislation so far as the carrying out of the policy of nationalization of land is concerned can fall on the ground of want of public purpose. The phrase "public purpose" has to be construed according to the spirit of the times in which particular legislation is enacted and so construed, the acquisition of the estates has to be held to have been made for a public purpose."

(17) The observations of His Lordship Das J. on this subject also may be quoted with advantage. His Lordship observes* :

"From what I have stated so far it follows that whatever furthers the general interests of the community as opposed to the particular interest of the individual must be regarded as a public purpose. With the onward march of civilization our notions as to the scope of the general interest of the community are fast changing and widening with the result that our old and narrower notions as to the sanctity of the private interest of the individual can no longer stem the forward flowing tide of time and must necessarily give way to the broader notions of the general interest of the community. The emphasis is unmistakably shifting from the individual to the community. This modern trend in the social and political philosophy is well reflected and given expression to in our Constitution.

Our Constitution, as I understand it, has not ignored the individual but has endeavoured to harmonise the individual interest with the paramount interest of the community. As I explained in — 'A. K. Gopalan v. State of Madras', (AIR 1950 SC 27) and again in — 'Charanjit Lal v. Union of India'. (AIR 1951 SC 41) our Constitution protects the freedom of the citizen by Article 19(1)(a) to (e) and (g) but empowers the State, even while those freedoms last, to impose reasonable restrictions on them in the interest of the State or of public order or morality or of the general public as mentioned in clauses (2) to (6). Further, the moment even this regulated freedom of the individual becomes incompatible with and threatens the freedom of the community the State is given power by Article 21, to deprive the individual of his life and personal liberty in accordance with procedure established by law, subject, of course, to the provisions of Article 22.

Likewise our Constitution gives protection to the right of private property by Article 19(1) (f) not absolutely but subject to reasonable restrictions to be imposed by law in the interest of the general public under clause (5) and, what is more important, as soon as the interest of the community so requires, the State may, under Article 31, deprive the owner of his property by authority of law subject to payment of compensation if the deprivation is by way of acquisition or requisition of the property by the State. It is thus quite clear that a fresh outlook which places the general interest of the community above the interest of the individual pervades our Constitution. Indeed, what sounded like idealistic slogans only in the recent past are now enshrined in the glorious preamble to our Constitution proclaiming the solemn resolve of the people of this country to secure to all citizens justice, social, economic and political, and equality of status and of opportunity. What were regarded only yesterday, so to say, as fantastic formulae have now been accepted as directive principles of State policy prominently set out in Part IV of the Constitution.

The ideal we have set before us in Article 38 is to evolve a State which must constantly strive to promote the welfare of the people by securing and making as effectively as it may a social order in which social, economic and political justice shall inform all the institutions of the national life. Under Article 39 the State is enjoined to direct its policy towards securing, inter alia, that the ownership and control of the material resources of the community are so distributed as to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. The words "public purposes" used in Article 23(2) indicate that the Constitution uses those words in a very large sense. In the never-ending race the law must keep pace with the realities of the social and political evolution of the country as reflected in the Constitution. If therefore, the State is to give effect to these avowed purposes of our Constitution we must regard as a public purpose all that will be calculated to promote the welfare of the people as envisaged in these directive principles of State policy whatever else that expression may mean.

In the light of this new outlook what, I ask, is the purpose of the State in adopting measures for the acquisition of the Zamindaries and the interests of the intermediaries? Surely, it is to subserve the common good by bringing the land, which feeds and sus-

*See AIR 1952 SC 252 (Para 106).

tains the community and also produces wealth by its forest, mineral and other resources, under State ownership or control. This State ownership or control over land is a necessary preliminary step towards the implementation of the directive principles of State policy and it cannot but be for a public purpose. It cannot be overlooked that the directive principles set forth in Part IV of the Constitution are not merely the policy of any particular political party but are intended to be principles fixed by the Constitution for directing the State policy whatever party may come into power.

Further, it must always be borne in mind that the object of the impugned Act is not to authorise the stray acquisition of particular property for a limited and narrow public purpose but that its purpose is to bring the bulk of the land producing wealth under State ownership or control by the abolition of system of land tenure which has been found to be archaic and non-conducive to the general interests of the community. The Act also sets up a Land Commission to advise the State Government generally with regard to the agrarian policy which it may from time to time follow. It is impossible to say that there is no public purpose to support the Act. This very Bihar Act was before the Constituent Assembly when it passed Article 31(4) and again when it took the trouble of amending the Constitution for saving this very Act. Would the Constituent Assembly have thought fit to protect these Acts unless it were convinced that this Act was necessary in the general interest of the community? I find myself in agreement with Reuben J. and S. K. Das J. that these circumstances also clearly indicate that the Constituent Assembly regarded this Act as well supported by a public purpose. To put a narrow construction on the expression "public purpose" will, to my mind, be to defeat the general purpose of our Constitution and the particular and immediate purpose of the recent amendments. We must not read a measure implementing our mid-twentieth century Constitution through spectacles tinted with early nineteenth century notions as to the sanctity or inviolability of individual rights. I, therefore, agree with the High Court that the impugned Act was enacted for a public purpose."

Judged by the standard laid down in these observations, it is absolutely clear that the impugned Act is for a public purpose.

(18) Turning next to the question of compensation the extent or the adequacy of the provisions of compensation contained in the Act is not justiciable in view of the decision of the Supreme Court above referred to, and Mr. Shah too has not questioned the validity of the Act on this ground. However he has urged that the compensation provided for in the Act is illusory, and that the Act is a fraud on the Constitution. He argues that the Girasdar was entitled to recover his rent every year from the tenant, and that what is paid to him is from his own income, and not from the Government's funds. Now the first part of the compensation which is equivalent to six times the assessment of the land, deposited by the tenant under Section 30(2), is paid to the Girasdar in lump at the outset and is not spread over the six years. Mr. Shah pointed out that there was no provision for the payment of interest but this contention has no basis because the sum is paid in lump at the initial stage and no question of paying interest can therefore arise. If anything, it enables the Girasdar to earn interest on the sum thus paid to him. On this payment being made the tenant receives an occupancy certificate whereupon he gets occupancy rights in the land and his liability to pay rent to the Girasdar ceases. The Girasdar's liability to pay land revenue also ceases simultaneously. The Girasdar cannot therefore claim the rent or the income of the land thereafter or for all time, and it is not correct to say that what he is receiving is out of his income. In addition to the above compensation, the Government is to pay to the Girasdar as compensation every year for fifteen years an amount equivalent to the assessment of the holding of the tenant as determined under Section 30(1)(B). Provision is also made for payment of interest on any unpaid instalment. Remission or suspension of land revenue granted to a tenant is not to affect the payment by the Government of the compensation payable by it. In addition to these compensation the Government is also to pay a rehabilitation grant to Girasdars of the B and C Class, and this rehabilitation grant is in the nature of compensation. Therefore there can be no analogy between the compensation provided for in the impugned Act and the provisions of Section 23(f) of the Bihar Act. The contention that the payment of compensation provided for in the Act is illusory is thus without substance altogether and is untenable.

(19) The plea that the Act offended against the fundamental rights guaranteed under Articles 14 and 19(f) of the Constitution is now no longer available to the applicants in view of the Supreme Court's judgment in the Bihar and other cases. As observed by Mahajan J. (See AIR 1952 SC 252, Para 30—Ed.).

> "In view of the Amendment Act (First Amendment) any argument regarding the unconstitutionality of Bihar Act based on the ground that the provisions of that Act contravened Articles 14, 19 or 31 of the Constitution does not survive and the Act is not open to challenge on any such ground."

For the same reasons, the present Act too is not open to challenge on the ground that it is in contravention of the provisions of Articles 14 & 19 (f) of the Constitution. On the merits, the contention as regards Article 14 is that the classification of the Girasdars into A, B and C Class and the allotment of the lands to them are discriminatory inasmuch as where as the Girasdars of the A Class have been allotted lands constituting three economic holdings, the Girasdars of the B Class have been allotted lands constituting one and a half to two and a half economic holdings and the Girasdars of the C Class are allotted lands so as not to exceed one to one and a half economic holdings. The allotment of the lands to the Girasdars of the different classes on the above varying scale is, in our opinion, not discriminatory at all, but is on the contrary founded on reality inasmuch as it is related to the total area of the agricultural land actually comprised in their estates. It is just and reasonable that the Girasdars who make larger contributions to the fulfilment of the public purpose underlying the Act should get larger areas of land for gharkhed than those whose contributions are less. Viewed from this angle of making amends for the acquisition, the allotment scheme cannot be said to be discriminatory. The contention that

the scheme contravenes Article 14 of the Constitution is thus untenable and must be rejected.

(20) It was lastly urged by Mr. Shah that Chapter IV of the impugned Act which deals with the allotment of lands to the Girasdars for personal cultivation has nothing to do with the acquisition of estates and is thus not covered by Article 31A and is void. This contention too is not correct. The allotment of the lands to Girasdars for personal cultivation provided for in Chapter IV is a part of the scheme of acquisition of estates and distribution of the lands envisaged by the Act. Chapter V which deals with the acquisition of occupancy rights by tenants is dependent on Chapter IV and the two chapters are interlinked and cannot be separated. The acquisition of occupancy rights by tenants is subject to the provisions contained in Chapter IV of the Act. Chapter IV is a preliminary step to be taken and is thus an integral part of the whole process of acquisition of the estates and the extinguishment of the Girasdar's rights therein. The said Chapter cannot be viewed in isolation as has been urged by Mr. Shah, and this plea too must accordingly be rejected.

(21) In the result therefore all the three applications fail on the grounds contended before us and they are dismissed with costs.

(22) CHHATPAR J.: I agree.

(23) BAXI J.: I agree.

A/V.S.B. Applications dismissed.

A. I. R. 1952 SAURASHTRA 123

SHAH C. J. AND BAXI J.

Natottamdas Harijivan, Applicant v. The Custodian General of Evacuee Property, India, New Delhi and another, Opponents.

Civil Misc. Appln. No. 24 of 1952, D/- 23-7-1952.

Constitution of India Art. 226(1) — Custodian General refusing to entertain appeal of petitioner on ground that transaction was governed by Ordinance 8 of 1948 and therefore petitioner's application for confirmation was barred — Transaction not governed by Ordinance which did not render it ineffective — High Court held had jurisdiction to quash order by issuing writ of certiorari — (Saurashtra Evacuee (Administration of Property) Ordinance (8 of 1948) S. 6 A (1)).

(Para 4)

Anno: C.P.C. Appendix III Constitution of India Art. 226 N. 13.

H. M. Chinoy, for Applicant; A. R. Bakshi, Advocate General (for No. 1) and A. R. Bakshi, Advocate General with Asst. Govt. Pleader B. R. Joshi (for No. 2), for Opponents.

REFERENCES: Courtwar/Chronological/ Paras
('52) AIR 1952 SC 179: (1952 SCR 519 SC) 4
Veerappa v. Raman and Raman Ltd.: (AIR 1952 SC 192) 4

BAXI J.: The applicant purchased certain immovable properties situated in Veraval from the evacuee Memon Noormahomed Ahmad on 29-5-48. The petitioner's case is that the vendor was a resident of Veraval and carried on business there long after the sale of his property. The Junagadh State had its own law relating to the administration of Evacuee Property viz. Act XII of 1948. After the administration of the Junagadh State was handed over to the Central Government on 9-11-47, the above Act was amended by Act II of 1948-49.

These Acts were subsequently repealed and the Saurashtra Evacuee (Administration of Property) Ordinance No. VIII of 1948 was applied to the territories of the former Junagadh State with important modifications. Section 6A (I) of the Ordinance was amended so that while under the unamended section 6A (I) a transaction made after 15-8-47 became ineffective unless confirmed by the Custodian, a transaction in the Junagadh State territory became ineffective if made after 20-1-49 unless confirmed by the Custodian. Therefore under the Ordinance No. VIII of 1948 as applied to the Junagadh State territories transactions made prior to 20-1-49 continued to be effective and did not require to be confirmed.

(2) The petitioner applied to the Custodian of Saurashtra for confirmation of the sale in his favour by his application dated 24-6-50. That application was rejected by the Custodian on the ground that it had not been entered into in good faith. In appeal the learned Custodian General held that the transaction was entered into on 29-5-48 and since on that date the Saurashtra Ordinance No. VIII of 1948 was in force, the petitioner's application for confirmation should have been made within two months of the date of the transaction. He therefore held that the petitioner's application was barred by time and dismissed it. The petitioner has applied to this Court for a writ of certiorari for quashing the order and for a direction that the learned Custodian General should be directed to hear his appeal on merits. His case is that his application was in time as it was governed by the Saurashtra Ordinance XLIII of 1949 and not by Ordinance No. VIII of 1948.

(3) Now Ordinance No. VIII of 1948 was applied with amendments to the Junagadh State territory on 10-6-49 vide Government Notification No. L. D. 89 dated 31-5-49 published on page 563 of part I of the Saurashtra Gazette dated 10-6-49 while the transaction was effected on 29-5-48 more than a year before the application of that Ordinance and even before the administration of the Junagadh State was handed over to the Saurashtra Government. The learned Custodian General therefore committed an apparent error in stating that the Ordinance was in force on the date of the transaction. Moreover the amended section 6A of the Ordinance rendered only those transactions ineffective which were made after 20-1-49. There was therefore no need for confirmation of the sale. Consequently the learned Custodian General could not throw out the appeal on the ground that the transaction was governed by Ordinance No. VIII and required to be confirmed by the Custodian.

(4) The learned Advocate General argued that we had no jurisdiction to quash the learned Custodian General's order. He submitted that the order was one which was within the competence of the learned Custodian General and even if it was erroneous, we could not rectify his error by means of a writ. He referred to two cases decided by Supreme Court, — 'Parry & Co. Ltd. v. Commercial Employee Association, Madras', AIR 1952 SC 179 and — 'Veerappa v. Raman & Raman Ltd.', (AIR 1952 SC 192). In both these cases the impugned orders were within the competence of the inferior Tribunal and the Supreme Court held that the High Court could not quash it on the ground only that they were erroneous orders.

In this case however there is much more than a mere error of law. The learned Custodian General refused to entertain the appeal

on the ground that the transaction was governed by Ordinance No. VIII of 1948 and therefore the petitioner's application for confirmation was barred. If this order is allowed to stand, the petitioner would be wrongfully deprived of his property under Ordinance No. VIII which did not govern the transaction and which did not render it ineffective. Therefore in examining the propriety of the learned Custodian General's order we are not taking upon ourselves the functions of an appellate Court but correcting an apparent error on the face of the record which made him exceed his jurisdiction.

(5) Lastly we may notice the learned Advocate General's argument that section 46 of Act XXXI of 1950 barred our jurisdiction to issue a writ. This jurisdiction cannot be affected if the learned Custodian General applied a law which did not apply to the transaction. The application must be allowed and the learned Custodian General's order set aside. We accordingly set aside his order and direct him to dispose of the appeal according to law.

(6) SHAH C. J. : I agree.

A/V.R.B. Application allowed.

A. I. R. 1952 SAURASHTRA 124

SHAH C. J. AND BAXI J.

Sanghar Umar Ranmal and another, Applicants v. State.

Criminal Misc. Applns. Nos. 65 and 70 of 1950, D/- 7-7-1952.

Nawanagar Pass Hazari Dhara Act of St. 2003 (1947 A D) — Validity — (Constitution of India (1950) Arts. 15(1) and 19(1)(d) and (e)).

The Act which has been made applicable to certain communities of the villages mentioned in the schedule and subjects them to the restrictions contained in the Act discriminates against them on the ground of their caste or communities only. It therefore offends Art. 15(1) of the Constitution and is void. (Para 3)

Further the important restrictive provisions of the Act, namely, Ss. 4, 5, 6, 10, 11, 13 and 14 impose restrictions not depending upon the individual propensities of the persons to whom the Act has been applied. Since a person who might not have committed a single offence and might be living a pure life would legally be subjected to the restrictions as a result of the provisions of the sections and since no public interest can be served by subjecting a person to the severe restrictions undeservingly these sections are void and of no effect as being in contravention of the provisions of Art. 19(1)(d) and (e). The other provisions of the Act being merely ancillary to these main provisions cannot stand independently. The whole Act therefore fails and must be declared void. (Para 3)

T. U. Mehta, for Applicants; A. R. Baxi, Advocate General, with B. R. Joshi, Asst. Govt. Pleader, for the State.

BAXI J. : These petitions have been preferred for a declaration that a certain Act of the former Navanagar State called the Pass Hajari Dhara dated 1-12-1911 was void and inconsistent with the provisions of the Articles 15 and 19 of the Constitution. The petitioners contended that the above Act was enacted for the Vaghers and Pindaras of Virpur under the Bhatia Mahal of the Nawanagar State and should not be applied to them. The learned Advocate General filed his rejoinder dated 6-1-51 in Miscellaneous Application No. 65 of 1950 wherein he stated that the above Act was subsequently applied to various other communities including the petitioner of that application by notifications published in the Gazette. He further contended that the impugned Act imposed reasonable restrictions in the general public interest and in the interest of the scheduled tribes. He also denied that the Act contravened provisions of Article 15 of the Constitution. The Court's attention was thereafter drawn to the Nawanagar State Pass Hajari Dhara of St. 2003 (1947 A.D.) repealing and consolidating the provisions of the previous laws on the subject. The petitioner's learned Advocate thereupon amended the petition and prayed that the Pass Hajari Dhara of St. 2003 should be declared void and inconsistent with the constitution.

(2) Section 1 of the Pass Hajari Dhara of St. 2003, which will hereinafter be referred to as the Act, declares that it shall come into force on the date of its publication in the Gazette. Sec. 2 repeals all previous Dharas and circulars pertaining to the matters dealt with by the Act and further provides that the villages as well as the persons to whom the previous Pass Hajari Dhara applied shall be governed by the Act as shown in Schedule A. This Schedule contains a list of the communities and individuals to whom the Act applies. Sec. 3 enacts that every male who has completed the age of 16 years shall, in the case of those villages and those persons to whom the Act has been applied or may hereinafter be applied, be governed by it. Sec. 4 requires every male above the age of 16 to attend upon the Police Officer in the village to mark his presence and in the absence of any such Police Officer he is required to attend the Police Patel. The attendance is to be marked in the morning and evening. By Sec. 5 every person to whom the Act applies is required to attend upon Police Officer at any time of the night if called for marking his presence. Sec. 6 prohibits these persons from leaving their villages between 11 p.m. and 5 a.m. except for attending to work in the Sim of the village after obtaining previous permission of the Police Officers specified in the section. They are however prohibited from leaving their village and passing a night in another village without obtaining a permit from the Officer in Charge of the Police Station. By Sec. 10 it is provided that if a person to whom the Act applies leaves his village and settles in any village of the Mahal of the State he shall continue to be governed by the Act and shall be required to attend regularly upon the Police Officer. Under Sec. 11 a person of one of the communities mentioned in the Schedule residing in another village becomes subject to the restrictions of the Act on his settling in any of the villages in which the Act has been applied to his community; and finally Sec. 13 empowers the Police Commissioner to direct any person from time to time to sleep at the Police Station if it appears to him that such person is a habitual offender and it is necessary to keep him under restraint. He may be required to sleep at the Police Station so long as he does not improve his character. By Sec. 14 the person to whom the Act applies is required to inform the Police Officer of the arrival of a

guest over the age of 16 years at his place. Sec. 15 prescribes punishment for contravention of the provisions of the Act and Sec. 16 gives jurisdiction to the Magistrates of the Mahal for trying offenders under the Act.

(3) The learned Advocate for the petitioners submitted that the Act discriminated against the persons mentioned in the Schedule on grounds only of race or caste and was therefore inconsistent with Article 15(1) of the Constitution. He also submitted that its provisions imposed unreasonable restrictions on their fundamental right of freedom of movement and freedom to reside and settle in any part of the territory of India guaranteed by Article 19(1) (d) and (e) of the Constitution. We agree with these contentions. The Act has been made applicable to certain communities of the villages mentioned in the Schedule. All male members of over 16 of these communities are subjected to the restrictions contained in the Act. The Act therefore discriminates against them on the ground of their caste or community only. The whole Act must therefore be declared as unconstitutional so far as it has been applied to the communities and castes mentioned in the Schedule. Furthermore the important restrictive provisions of the Act are sections 4, 5, 6, 10, 11, 13, and 14. Under these sections persons to whom the Act applies have to attend the Police Officers in the morning and evening. They are prohibited from leaving their village during the night and if they have to visit another village, they are required to obtain a permit. The Police Commissioner has been empowered to direct any one of them to sleep at night at the Police Station. If any one of them goes out of the village and settles elsewhere the restrictions contained in the Act continue to dog his steps. Persons who are originally not subject to the Act become automatically subjected to it on their coming down to reside and settle in any of the villages specified in the Schedule if they happen to belong to one of the castes mentioned therein. The imposition of these restrictions does not depend upon the individual propensity of the persons to whom the Act has been applied. A person may not have committed a single offence and may have been living a pure life and yet legally he must subject himself to the restrictions contained in the Act.

No public interest can be served by subjecting persons to severe restrictions for life whether they are in fact proved to be deserving of them or not. We, therefore, hold that these sections are void and of no effect being in contravention of the provisions of Article 19(I) (d) and (e) of the Constitution. The rest of the sections are ancillary to the main section and cannot stand independently of them. Consequently no provisions of the Act can be sustained and the whole Act must be declared as void. The petitioner Sanghar Umar Ranmal (Cri. Misc. Application No. 65 of 1950) has been named in the Schedule of the Act. It is therefore difficult to hold that he has been discriminated against on the ground of his caste only, because we have no evidence that there are no other Sanghars in Salaya but the Act is certainly in contravention of his fundamental rights under Article 19(I) (d) and (e) of the Constitution and the Act must be declared as void in his case on that ground. The case of the petitioner Sanghar Ali Umar of Nana Ambala (Cri. Misc. Application No. 70 of 1950) is slightly different. He is not named in the Schedule but belongs to the caste of Sanghar of Nana Ambala to whom the Act has been applied. The Act in his case therefore discriminates against him on the ground only of his caste. It also imposes unreasonable restrictions on his fundamental rights under Article 19(I) (d) and (e) of the Constitution. In his case therefore the Act must be declared unconstitutional on the ground that it contravenes both the Articles 15 and 19(I) (d) and (e) of the Constitution. The petitioners' applications are allowed and it is ordered that a writ as prayed shall issue. The opponent State shall pay the petitioners' costs of the petitions. There will be only one set of costs between them.

SHAH C. J.: I agree.

A/M.K.S. Petitions allowed.

A. I. R. 1952 SAURASHTRA 125

CHHATPAR J.

Girdharlal Kanji and others, Defendants-Appellants v. Kunvarji Keshavlal & Co., Plaintiffs-Respondents.

Civil Misc. Appeal Nos. 11 and 12 of 1950, D/- 26-12-1951.

(a) Civil P. C. (1908), O. 38, R. 5 — Fraudulent intention to defeat claims of plaintiff — Transactions before suit.

An order under Rule 5, Order 38 should not be passed, unless the Court is satisfied that the defendant, with intent to obstruct or delay the execution of a decree that may be passed against him, has brought himself within the terms of the rule; and it is not sufficient that there are merely vague allegations that the defendant is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court. There is, however, no rule that transactions before suit could not be taken into consideration.

Where the defendants had dishonoured cheques of a large amount of Rs. 14000/- admittedly issued by them and during the course of about a month the plaintiff had supplied goods of the value of about one lac and fifteen thousand to the defendants and yet when the attachment was levied goods hardly worth a few hundreds were found:

Held that under the circumstances the fraudulent intention to defeat the claim of the plaintiffs by disposing of their remaining property was legitimately deducible: Case law discussed. (Paras 2, 3)

Anno: C. P. C., O. 38 R. 5 N. 11, 12, 13.

(b) Civil P.C. (1908), O. 38, R. 6, O. 41, R. 1 — Order under O. 38, R. 5 — Appeal.

Where the lower Court has correctly stated and appreciated the most material facts in the case and has not misunderstood or misapplied law and has deliberately used the discretion entrusted to it by law, the appellate Court will not interfere with the order under O. 38, R. 5: AIR 1934 Cal 694; AIR 1941 Sind 178, Rel. on. (Para 4)

Anno: C. P. C., O. 38 R. 6 N. 3, O. 41 R. 1 N. 4

(c) Civil P. C. (1908), O. 38, R. 5 — Exercise of discretion — Omnibus order of attachment.

The mere fact that a case under Order 38, Rule 5 has been made out for an attachment before judgment, does not justify the Court to issue an omnibus order of attachment

of all the movable and immovable properties of the defendants. The Court has to exercise a sound discretion as very often the intention of the litigant is to disgrace the opposite party by unnecessarily asking for attachment of household goods, when other substantial property is available for attachment. (Para 5)

Anno: C.P.C., O. 38 R. 5 N. 11.

In No. 11

M. U. Shah, for Appellant; C. C. Shah (for No. 1) and M. M. Shah, Proxy for G. B. Joshi (for Nos. 2 and 3), for Respondents.

In No. 12

M. M. Shah, Proxy for G. B. Joshi, for Appellant; C. C. Shah (for No. 1) and M. U. Shah (for No. 2), for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('21) 45 Bom 1256: (AIR 1921 Bom 69) 2
('22) AIR 1922 Bom 276: (46 Bom 431) 2
('05) 11 Cal LJ 19: (5 Ind Cas 184) 2
('34) AIR 1934 Cal 694: (61 Cal 814) 2
('51) AIR 1951 Cal 156: (87 Cal LJ 41) 2
('38) AIR 1938 Pat 161: (17 Pat 89) 2
('41) AIR 1941 Sind 178: (ILR (1941) Kar 362) 2

JUDGMENT: These two appeals are from the same order of attachment before judgment passed by the Civil Judge, Senior Division, Surendranagar, in a suit filed by the first respondents Kunvarji Keshavlal & Co., against the appellants in the two appeals, i.e., Girdharlal Kanji, Morarji Kanji and Dahyalal Kanji. The plaintiffs claimed against the three defendants a sum of Rs. 30,000/- and odd on the foot of an account consisting of the price of goods supplied to the defendants. The account was in the name of Girdharlal Kanji. It was alleged that all the three defendants are brothers and members of a joint Hindu family and the business in the name of Girdharlal Kanji was a joint family concern.

Along with the plaint, an application was filed for attachment before judgment of all the moveable and immoveable properties of the family including not only the stock in trade in the shop and outstandings of business run by the defendants but also their house-hold goods. In addition, attachment was also sought on an immoveable property which admittedly stands in the name of their mother, and in which the three brothers reside. The plaintiffs alleged that this property belongs to the defendants, although it nominally stands in the name of their mother. The grounds of attachment before judgment sought were that the plaintiffs had a very large claim based on the value of the goods supplied to the defendants, that it was arranged that the plaintiffs were to draw hundis upon the defendants for the price of the goods but such hundis were dishonoured. Specific allegation was made about two hundis, one of Rs. 16000/- and another of Rs. 9000/- which were dishonoured, whereupon the plaintiffs' representative came to Rajkot from Surendranagar and the defendants paid Rs. 2000/- & gave three post-dated cheques, of Rs. 5000, Rs. 5000/- and Rs. 4000/-, in discharge of the hundi of Rs. 16000/- which was dishonoured. These three cheques were also dishonoured. This happened in March 1950.

The present suit was filed on 19th April 1950 on which date also the application for the attachment before judgment was made. Thus the plaintiff contend that they have a strong prima facie case and that the defendants to be dishonestly evading payment (sic.). The second ground alleged in the application is that the defendants with intent to defeat or delay the execution of any decree that may be passed against them had recently transferred their goods to six merchants of Rajkot, Junagadh and Morvi and that they were about to dispose of the rest of their property with a similar intention. On these statements made in the affidavit of one Kunvarji Tulsidas, one of the partners of the plaintiffs' firm, an interim order was made by the learned Civil Judge on 19th April 1950 and a notice was issued to the defendants to show cause why they should not furnish security and in default why the attachment should not be confirmed. In pursuance of this order, the attaching officer attached the places of business of the defendants and also other moveable property in the houses of the defendants.

Prohibitory orders were also served in respect of the outstandings of the defendants. In addition, the immovable property was also attached. The attaching bailiff's report shows the moveable property in the shops and in the houses attached to be of the value of about Rs. 2,600/- only which was however released on the defendants' furnishing security. So that this is the only tangible property attached in addition to the immoveable property which stands in the name of the mother of the defendants. The notice issued to the defendants to show cause was returnable on the 27th June, when the hearing of the application was adjourned to 20th July by the consent of the parties and it was again adjourned to 16th August 1950. On that date, the learned advocate for the defendants were unable to be present in the Court and a request was made for adjournment.

This motion for adjournment was opposed by the plaintiffs and the learned Civil Judge refused it and confirmed the attachment. His main ground for confirming attachment was that the moveable property actually attached was found to be of the value of about Rs. 2000/- and odd from which it was clear that the defendants had already disposed of their large stocks and that the apprehension of the plaintiffs that the defendants were about to dispose of the rest of their property was justified. In reply to the affidavit filed by Kunvarji Tulsidas, all the three defendants filed affidavits. The first defendant Girdharlal Kanji claimed that the business done with the plaintiffs was solely his concern and his brothers had no interest therein. He alleged that all the brothers were separate. He admitted that out of the six merchants mentioned in the affidavit of Tulsidas, he had sent goods to four of them for disposal but this was in the usual course of business, but no particulars of any sort were given. There was no intention to defeat or delay the execution of any decree that may be passed in favour of the plaintiffs.

He denied the claim of the plaintiffs but at the same time admitted that he had given three post-dated cheques of the aggregate value of Rs. 14000/- which were dishonoured. He further stated that he had no interest in the immoveable property which belonged solely to his mother. He as well as his brothers, the other two defendants, were residing in this property as tenants of their mother. The other two defendants filed affidavits on similar lines that they were not interested in the business

done by the plaintiffs with the first defendant Girdharlal, that they were separate, and they also had no interest in the immovable property, which belonged to their mother. But in support of the three brothers' contention that they are separate, none of them gave any particulars whatever of any partition between them. Nor has the mother filed any affidavit claiming this property as her own. Nor is there any indication from where the money for the purchase of this property came.

It is admitted before me that this property was purchased only in January 1948 for Rs. 19,900/-. No rent receipts have been produced of any rent paid to the mother, nor is the amount of rent paid by each of the brothers mentioned. It is admitted that all the three brothers are in fact living in this same building though it is alleged that they are occupying separate tenements. But beyond the affidavits of three brothers, there is no other affidavit on the record of any other person nor any document and book of account to support this fact that the three brothers are separate and not members of a joint Hindu family. Under the circumstances, since there is presumption of the jointness under the Hindu Law it must be assumed prima facie that the three brothers are members of a joint Hindu family. No doubt, the account on which the plaintiff had filed the suit stands in the name of Girdharlal Kanji, but he is the eldest member of the family and it is quite consistent with the business belonging to the joint family in which all the three brothers may be interested.

Regarding a prima facie case about the claim, there is the admission of the first defendant that at least the three cheques given by him amounting to Rs. 14000/- were dishonoured by non-payment. The claim of the plaintiffs is a very large one. The account filed with plaint shows that the plaintiffs had supplied goods worth a lac and fifteen thousand rupees to the defendants, out of which about eighty to eighty-five thousand of rupees have been paid. This turnover of the business with the plaintiffs alone was during the period of one month and five days only. Yet, we find that the goods actually found in the shops run by the defendants were hardly worth about Rs. 2000 only. Even out of these goods, it is admitted that goods worth about Rs. 1100/- were in the ration shop run in the name of Kantilal Hirachand in which the first defendant claims to be a partner only. The goods in this shop were also attached as it was alleged that this was the concern of the family.

So that we find that at the date of filing of the suit, the stock in trade of the businesses run by the defendants exclusive of this ration shop was worth a few hundreds only. This leads to a reasonable inference as alleged by the plaintiffs that the defendants had clandestinely done away with their goods in the shop which normally looking to the extent of business, must run to the value of several thousands of rupees, Under the circumstances ,the learned Civil Judge, rightly came to the conclusion that the defendants were about to dispose of the rest of their property with the intent to defeat or delay the execution of a decree that may be passed against them.

(2) Mr. M. U. Shah and Mr. G. B. Joshi, the learned Advocates for the defendants have strongly contended that the ingredients required by Order 38, Rule 5 have not been established. They have strongly relied upon a ruling of the Patna High Court in the case of — 'Bedanand Rai v. Nabhokumarsingh', A. I. R. (1938) Pat. 161 wherein it was held:

> "Before the provisions of R. 5 of O. 38 would come into play the Court has to be satisfied that transfers were going to be made by the defendant after the suit had been filed and that such transfers were with the object of obstructing the plaintiff if he won the suit in executing the decree; and mere allegations to this effect are of no avail but the facts must be positively proved by satisfactory evidence."

The second ruling cited by the learned advocates is of the Calcutta High Court in the case of — 'Durga Das v. Nalin Chandra', AIR 1934 Cal. 694 wherein it was observed that the mere fact that a defendant had in the past mortgaged or disposed of his property was not a sufficient ground for levying attachment. There must be a present intention.

Now it is no doubt true as laid down by the Bombay High Court in the case of — 'Senaji Kapurchand v. Pannaji Devichand', AIR 1922 Bom. 276 that an order under Rule 5, Order 38, should not be passed, unless the Court is satisfied that the defendant, with intent to obstruct or delay the execution of a decree that may be passed against him, has brought himself within the terms of the rule; and it is not sufficient that there are merely vague allegations that the defendant is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court. To the same effect are to be found remarks in the earlier case of — 'Nowroji Pudamji v. Deccan Bank', 45 Bom. 1256. The proposition laid down by the Patna High Court that the Court should be satisfied that the transfers were going to be made by the defendant after the suit had been filed has been dissented from by some other High Courts. In a recent ruling of the Calcutta High Court given in the case of — 'Premraj Mundra v. Md. Maneck Gazi', AIR 1951 Cal 156, Sinha J., reviewed all the authorities and laid down as one of the guiding principles that there was no rule that transactions before suit could not be taken into consideration.

The true test in my opinion appears to be as that laid down by Weston J., in the case of — 'Bishambardas & Co. v. Sachoomal Kotoomal', AIR 1941 Sind. 178, at page 183. The learned Judge remarks:

> "Rule 5 of Order 38 which lays down the conditions under which the Court may take action by attachment before judgment shows that such action is preventive to provide against future attempts of the defendant to place his assets beyond the reach of the potential decree-holder, and is not punitive in order to punish such acts of the defendant, committed, either before the suit was filed, or after suit but before presentation of the application under the rule. This does not mean that disposals shown to have been made prior to the application cannot be considered as evidence of intention to make further disposals. Of course, if the defendant has made a complete disposal of his property before the application is presented, there is no room for any action under the rule. Also a part disposal of property is not necessarily conclusive of further intention to dispose of all or part of the remainder, and it is evid-

ence of the intention required by R. 5 only it is shown to have been made with that same intention. In — 'Mac Gregor v. The Cawnpore Sugar Works Ltd.', 11 Cal L J 19, quoted in a Patna case — 'Bedanand Rai v. Nabhokumar', 17 Pat. 89, it was remarked:

> It is open to the Court to look to the conduct of the parties immediately before the suit, and to examine also the surrounding circumstances, and from these to draw an inference as to whether the defendant is about to dispose of his property and if so, with what intention."

I am in agreement with these observations. For the purpose of inferring that the defendants were about to dispose of their property with intent to defeat or delay the claim of the plaintiffs the Court in that case considered the circumstances under which the defendants had disposed of their goods clandestinely through another firm which was closely connected with the defendants' firm.

(3) In the present case we have the admitted fact that the defendants had dishonoured cheques of a large amount of Rs. 14000/- admittedly issued by them and the fact that during the course of about month the plaintiff had supplied goods of the value of about one lac and fifteen thousand to the defendants. And yet when the attachment was levied goods hardly worth a few hundreds were found. Under the circumstances, the fraudulent intention to defeat the claim of the plaintiffs by disposing of their remaining property was legitimately deducible.

(4) I see therefore no reason to disturb the finding of the lower Court. And, indeed, it has been laid down more than once that where the lower Court has correctly stated and appreciated the most material facts in the case and has not misunderstood or misapplied law and has deliberately used the discretion entrusted to him by law, the appellate Court will not interfere. See the remarks in the Sind case, as also in the Calcutta case cited above. In the latter case it was held:

> "The orders passed under O. 38, R. 5 and O. 39, R. 1 are discretionary and an appellate Court will not interfere with the exercise of a lower Court's discretion unless satisfied that the Judge acted on wrong principles. The mere fact that the appellate Court might have taken a different view is not a sufficient ground for interference. If the Judge rightly appreciates the facts and applied to those facts the true principles, that is a sound exercise of judicial discretion".

(5) There is however one circumstance in the present case which requires some consideration. The mere fact that a case under O. 38, R. 5 has been made out for an attachment before judgment, does not justify the Court to issue an omnibus order of attachment of all the moveable and immoveable property of the defendants. The Court has to exercise a sound discretion as very often the intention of the litigant is to disgrace the opposite party by unnecessarily asking for attachment of household goods, when other substantial property is available for attachment.

In the present case, I see no justification for the issue of an attachment on the moveable property in the house of the defendants consisting of house-hold goods and furniture worth a few hundreds only. Further the ration shop was being run in partnership with a stranger Kantilal Hemchand in whose name the licence was. I am satisfied that the attachment on this property was improper. I set aside the order so far as the attachment on this shop is concerned. I similarly set aside the order in so far as the attachment of the property in the house of the defendants is concerned. Subject to this the attachment made by the lower Court shall stand and the appeal is dismissed. In view of the fact that the plaintiffs have levied attachment on the house-hold goods and upon this shop, which should not have been done, I order that each party should bear his own costs in these appeals.

B/D.H. Order accordingly.

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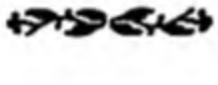
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WITH COMPARATIVE TABLES FOR

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1952

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THE

ALL INDIA REPORTER

1952

Travancore-Cochin High Court

(C. N. 1)

A. I. R. (39) 1952 TRAVANCORE-COCHIN 1

KUNHI RAMAN, C. J., AND SUBRAMANIA IYER, J.

In re Dr. John Matthai, Petitioner; Sayid Fakhruddin Shah and others, Cr. Petitioners.

O. P. Nos. 128 and 119 of 1951, D/- 13-11-1951.

† (a) *Representation of the People Act (43 (XLIII) of 1951), Ss. 2 (d), 36, 80, 100 (c) and 170 — Order of Returning Officer rejecting nomination paper of a candidate — High Court has no jurisdiction to entertain petition under Art. 226, Constitution of India against order — Election, meaning of — Constitution of India Arts. 226 and 329.*

The High Court has no jurisdiction to entertain a petition under Art. 226 of the Constitution of India for the issue of a writ of certiorari or mandamus against an order of the Returning Officer rejecting the nomination paper of a candidate under S. 36 (6), Representation of the People Act, in view of Art. 329 (b) of the Constitution of India read with S. 170 of the Representation of the People Act. (Paras 5, 13)

The word 'election' as used in Article 329 (b) of the Constitution must be understood in a comprehensive sense. It is wide enough to include the act of the Returning Officer in scrutinising the nomination paper and arriving at a decision on the question whether the nomination was proper or not. An election shall be deemed to have commenced as soon as any definite step is taken in respect of the candidature. The question when an election shall be deemed to have commenced will depend on th facts of each case. The definition of 'election' in S. 2 (d) of the Representation of the People Act is not helpful on this question. (Paras 6, 7)

In view of Clause (b) of Article 329 of the Constitution the act of the Returning Officer cannot be called in question except by the presentation of an Election Petition under the Representation of the People Act. Such a petition can be presented only after the result of the election or poll, if any, is announced and not at an earlier stage. (Para 8)

The issue of the writ of certiorari or mandamus is discretionary with the Court that is approached by the litigant. One of the fundamental principles is that being a high prerogative writ, once it is issued the result must be final and must not be subject to interference by any other authority or tribunal. In the present case, the relevant provisions of the Representation of the People Act which provide for the stage at which an election petition can be presented in which exception can be taken to the alleged improper rejection of a nomination paper make it clear that if the petitioners succeed in obtaining a writ the subject-matter of the writ can be open to reconsideration by the Election Tribunal. The membership of this tribunal is open to District Judges and it is invested with jurisdiction to give a final decision on the question as to whether the nomination paper is improperly rejected. This means that the Tribunal can sit in judgment over a writ which may be issued by a High Court and it would be competent to finally dispose of the matter. This is opposed to the very principle on which the granting of the writ is based. (Para 9)

A writ of 'certiorari' will be granted only if an authority exercising a judicial or quasi-judicial power, acts without or in excess of its jurisdiction and not when in the exercise of its jurisdiction it has arrived at a decision which is criticised as erroneous.

Hence, where the Returning Officer in rejecting the nomination paper of the candidate on the ground of disqualification acts in the exercise of a jurisdiction vested in him under the Act its decision whether right or wrong is not open to review by the High Court under Art. 226 unless the officer has acted mala fide. (Para 10)

A writ of certiorari will not be granted if it will not be effective. Even if the proceedings of the Returning Officer are quashed by a writ of certiorari, the only direction that can be given to the Returning Officer by a writ of mandamus is to do his duty and decide whether the nomination of the candidate is acceptable or not. It is not open to the High Court nor will it be in the exercise of its proper jurisdiction to give any specific directions as to the manner in which the duty should be discharged by the Returning Officer. Therefore, after the proceedings are quashed by a writ of 'certiorari' there is nothing to prevent the Returning Officer from arriving at the same conclusion, namely, that the nomination paper should be rejected. It is thus clear that the remedy asked for will not be effective by issuing such a writ. (Para 11)

(Desirability of amending the Representation of the People Act by making adequate provision for enabling a proper tribunal or Court to consider the legality of the decision of a Returning Officer rejecting or accepting a nomination paper at a stage before the poll, pointed out.) (Para 14)

(b) Constitution of India Articles 32 and 226 — Distinction.

The powers of High Court under Article 226 of the Constitution are wider than those of the Supreme Court under Art. 32. Under Art. 32 the Supreme Court can issue a writ only in enforcement of fundamental rights. But under Art. 226 the High Courts have got the power of issuing writs not only for the enforcement of rights which are recognised as fundamental rights by the Constitution but also "for any other purpose." (Para 12)

N. P. Engineer, M. S. Menon, G. B. Pai and K. V. Rajagapala Shenoi, for Petitioner in O. P. No. 128 of 1951; P. I. Simon, for Petitioner, (in O.P. No. 119 of 1951); T. N. Subramania Iyer, Advocate-General, for Cr. Petitioner, No. 1; T. K. Joseph, for Cr. Petitioner No. 4.

Case referred to:
2 Pr & D 308 (Pr 6)

KUNHI RAMAN, C. J.: These two petitions are presented to question the validity of the rejection of the nomination paper of a candidate for election to the House of the People from the Parliamentary Constituency of Kottayam in the Travancore-Cochin State. The first of these petitions is filed by the proposer of the candidate and the second by the candidate himself. The averments in both the petitions are to the effect that the rejection of the nomination paper by the Returning Officer was made by him while he was acting in a quasi-judicial capacity, that the order made by him was without jurisdiction or in excess of his jurisdiction and that there is an error of law which is one of substance on the face of the order. It is not necessary to mention any other aspect at this stage. The prayers in both the petitions are for a writ of 'certiorari' under Article 226, Indian Constitution, calling for the records of the case from the Returning Officer and quashing the order of rejection and for the issue of a writ of 'mandamus' directing the Returning Officer to include the petitioner's name in the list of valid nominations to be prepared and published by him. The first respondent in both these petitions is the Returning Officer. The remaining three respondents are the rival candidates who also had submitted nomination papers to the Returning Officer which have been accepted by him as valid. The second respondent however has since withdrawn his candidature.

(2) The learned Advocate-General of the State appears for the Returning Officer in both these petitions. He is the main contesting respondent. The other respondents are supporting the contentions of the first respondent, the 4th respondent being represented by Mr. T. K. Joseph.

(3) The main objection raised on behalf of the respondents relates to the jurisdiction of the Court to entertain and deal with these petitions. According to the learned Advocate-General, Art. 329 of the Constitution read with section 170 of the Representation of the People Act, 43 of 1951, makes it clear that it is only the Election Tribunal contemplated by the Act aforesaid that can deal with the questions raised in these petitions. The jurisdiction of a civil Court is expressly taken away by these relevant provisions. According to Article 329:

"Notwithstanding anything in this Constitution:

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Article 328, shall not be called in question in any Court;

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

It is contended that Clause (b) of this Article refers to the constitution of the authority which alone has power to deal with elections to either House of Parliament or to either House of Legislature of the States and that the law contemplated therein is the Representation of the People Act, 1951, duly passed by the Parliament.

(4) The question has been very ably argued by learned counsel appearing in this case. The petitioners have had the advantage of securing the services of Sir Noshirwan Engineer who has presented the case for the petitioners very forcibly. He, however, frankly concedes that if the case is covered by Clause (b) of Article 329 of the Constitution, then the petitioners will be out of Court. The argument addressed relates to the wording of Clause (b) according to which the power of this Court is taken away only in case an election to either House of Parliament, etc., is called in question. Learned counsel contends that in the present case the election has not yet taken place and he is not calling in question any election. He is basing the applications on the alleged error in the order made by the Returning Officer in rejecting the nomination paper. This according to him does not amount to calling in question any election. The argument, therefore, is that Clause (b) will not apply to the present case. The learned Advocate-General, on the other hand, contends that the word 'election' as used in this clause must be understood in a comprehensive sense. It is not restricted to the polling at the end of the proceedings for conducting an election. It begins at a much earlier stage. The presentation and scrutiny of the nomination papers by the Returning Officer form part of the election under this clause and consequently this Court has no jurisdiction to deal with these petitions. There is a special tribunal provided for by the Representation of the People Act, 1951. According to the relevant sections of the Act that tribunal alone has jurisdiction to deal not only with the irregularities at the actual polling but irregularities of the kind complained of in the present petitions in respect of the disposal of the nomination paper by the Returning Officer.

(5) On considering the various aspects of the case presented to the Court by learned counsel we have reached the conclusion that the contentions of the learned Advocate-General are well-founded. Both the Constitution and the provisions of the Representation of the People Act, 1951, expressly exclude the jurisdiction of this Court to entertain applications like the present.

(6) Dealing first with the provisions of Article 329 (b), the question that arises for determination is the scope and signification of the word 'election' as used in this clause. Arguments on behalf of the petitioners are addressed on the basis of the difference in the wording of Article 329 (b) on the one hand and Articles 327 and 328 on the other. The latter two articles make special mention of all matters relating to or in connection with elections whereas Art. 329 (b) refers only to election to either House of Parliament. The question then is whether this difference in wording can be regarded as excluding the stage at which nomination papers are scrutinised by Returning Officer from the scope of Art. 329 (b). In our view this has to be determined by reference to the nature and scope of the petition by which an election can be called in question under that clause. This will be considered at the appropriate place. In Parker's Election Agent and Returning Officer, 5th edition, at page 120, an endeavour is made to explain what is meant by the term election which, according to the learned author, has not been defined by the

legislature or by any judicial tribunal. According to the learned author, "an election is a process ending in a single valid and recognised return of a duly qualified candidate" 'Dungardan, 2 Pr. & D. 308.' The learned author also points out that there is no definition of the time at which an election is to be deemed to have commenced and he asserts that the election Judges have almost invariably declined to lay down any principle from which the commencement of the election may be determined. Indeed, in one of the cases quoted in the book a learned Judge had expressed his opinion that it was not possible to define the starting point for this purpose. It is also pointed out that the question has to be determined on the facts of each particular case. It is laid down as a safe proposition that an election shall be deemed to have commenced as soon as any definite step is taken in respect of the candidature. This, in our view, may be taken as an accurate estimate of the situation for the purpose of this case. As already stated, the answer to the question when the election shall be deemed to have begun will depend on the facts of each case. For example, in a case relating to election expenses or corrupt practices alleged against a candidate the election may be deemed to commence much earlier than the stage at which the nomination of the candidate for election takes place. There cannot be any doubt that an election commences at any rate when a candidate is duly proposed and seconded and his nomination paper filed with the Returning Officer. The act of the Returning Officer in scrutinising the nomination paper and arriving at a decision on the question whether the nomination was proper or not, therefore, took place after the commencement of the election and as a part of it.

(7) The Representation of the People Act, XLIII/1951, was passed in the exercise of the power conferred upon the Central Legislature by Art. 327 of the Constitution according to which:

"Subject to the provisions of this Constitution Parliament may from time to time by law make provision with respect to all matters relating to or in connection with elections to either House of Parliament..... including the preparation of electoral rolls, delimitation of constituencies, and all other matters necessary for securing the due constitution of such House or Houses."

The relevant provisions of the Act throw light on the controversy that has arisen in the present case. There is an attempt at definition of "election" in section 2 (d) of the Act which reads as follows:

"In this Act unless the context otherwise requires:

* * * * * *

(d) election means an election to fill a seat or seats in either House of Parliament or in the House or either House of Legislature of a State other than the State of Jammu and Kashmir and includes a primary election."

This definition is not helpful on the question that has to be decided in the present case relating to the applicability of Article 329 (b), Sections 7 and 8 of the Act specify the circumstances in which a person may become disqualified for membership of Parliament or of a State Legislature and the circumstances in which certain kinds of disqualification may be got rid of. Section 30 empowers the appropriate authority to fix the dates for making nominations, for scrutiny of nominations, for withdrawal of candidatures and for a poll, if necessary, by publishing a notification in the Official Gazette. Section 36 deals with the scrutiny of nominations and specifies the persons who may attend at the time and place fixed by the Returning Officer for scrutiny of nominations. On the dates so fixed the Returning Officer shall examine the nomination papers and decide all objections that may be made to the nomination. The case in which he may refuse any nomination is specified in clauses (a) to (e) of sub-section (2). According to sub-section (6) the Returning Officer shall endorse on each nomination paper his decision accepting or rejecting the same. Where he has rejected the nomination it is incumbent upon him to record in writing a brief statement of his reasons for such rejection. According to section 38 immediately after the expiry of the period within which candidatures may be withdrawn under section 37, the Returning Officer shall prepare and publish a list of valid nominations in the prescribed manner. The next section of importance is section 80 according to which no election shall be called in question except by an election petition presented in accordance with the provisions of this Act. Such a petition has to be presented to the Election Commission by a candidate or an elector in the prescribed form and within the time fixed. Provision is made for this in section 81 of the Act. Section 83 deals with the contents of the petition. Section 84 refers to the reliefs that can be claimed by the petitioner and section 100 which is the next important section prescribes the grounds for declaring an election to be void. It is this section that clarifies the position with regard to objections that can be taken. According to the relevant part of the section which is contained in sub-section (1):

"If the Tribunal is of opinion—

(a) * * *

(b) * * *

(c) that the result of the election has been materially affected by the improper acceptance or rejection of any nomination the Tribunal shall declare the election to be wholly void."

This last clause of the section makes it abundantly clear that the method of raising the question against the improper rejection of a nomination paper by the Returning Officer is by presenting an election petition and if the Election Tribunal is satisfied that the result of the election has been materially affected by the improper acceptance or rejection of a nomination then it is incumbent upon the Tribunal to declare the election to be wholly void. The appropriate stage at which the question can be raised is after the result of the election is published and not at an earlier stage. Section 170 of the Act expressly excludes the jurisdiction of civil Courts in relation to this matter. According to this section, no civil Court shall have jurisdiction to question the legality of any action taken or of any decision given by the Returning Officer or by any other person appointed under this Act in connection with an election. There cannot be any doubt that this section is comprehensive in its wording and includes the act of the Returning Officer in recording his decision as to whether the nomination of a candidate is acceptable or not. This being an Act passed in the exercise of the powers expressly conferred on the Legislature by Article 327 of the Constitution, in view of the provisions of the Article, notwithstanding anything in the Constitution, the validity of any such law made or purporting to be made under it shall not be called in question in any Court. Nor was any such objection raised before us. Whatever may be the effect or inconvenience caused by the provisions of the Representation of the People Act, the Constitution expressly excludes the jurisdiction of a Court of law to question the validity of its provisions and the opening words of Art. 329 that this is notwithstanding anything contained in the Constitution make it abundantly clear that no power that is reserved in the High Court or in the Supreme Court can be exercised in contravention of its provisions.

(8) In view of Clause (b) of Article 329, it is clear that in the present case the act of the Returning Officer cannot be called in question except by the presentation of an Election Petition under the Representation of the People Act, 43 of 1951. Such a petition can be presented only after the result of the election or poll if any is announced and not at an earlier stage. Therefore, it is not open to the petitioners in these two cases to apply to this Court for the issue of the writs mentioned in the two petitions.

(9) Apart from this fundamental provision which puts the petitioners out of Court, we may also mention other obstacles which would stand in the way of the petitioners getting the relief which they are asking for. In the first place it has to be borne in mind that writs of 'certiorari' and 'mandamus' mentioned in the prayers in the petitions are high prerogative writs under the English law. The issue of the writ is discretionary with the Court that is approached by the litigant. One of the fundamental principles is that being a high prerogative writ once it is issued the result must be final and must not be subject to interference by any other authority or tribunal. In the present case, the relevant provisions of the Representation of the People Act which provide for the stage at which an election petition can be presented in which exception can be taken to the alleged improper rejection of a nomination paper make it clear that if the petitioners succeed in obtaining a writ the subject-matter of the writ can be open to reconsideration by the Election Tribunal. The membership of this tribunal is open to District Judges, and it is invested with jurisdiction to give a final decision on the question as to whether the nomination paper is improperly rejected. This means that the Tribunal can sit in judgment over a writ which may be issued by a High Court and they would be competent to finally dispose of the matter. This is opposed to the very principle on which the granting of the writ is based.

(10) Another question to be considered in deciding whether a writ should be issued or not is as to whether the authority whose act is called in question by the petitioners had acted in the exercise of a jurisdiction vested in him by law or in excess of the jurisdiction so vested. A writ of 'certiorari' will be granted only if an authority exercising a judicial or quasi-judicial power acts without or in excess of its jurisdiction and not when in the exercise of its jurisdiction it has arrived at a decision which is criticised as erroneous. What has happened in the present case, is that the Returning Officer in rejecting the nomination paper of the candidate on the ground of disqualification was acting in the exercise of a jurisdiction vested in him. Whether that decision is right or wrong, it would not be open to this Court to issue a writ except when the officer has acted mala fide. No such case of mala fides is urged on behalf of the petitioners.

(11) Yet another point to be borne in mind is that a writ of the nature asked for in the present case will not be granted if it will not be effective. Here the first prayer is for calling for the records of the case from the Returning Officer and quashing his proceedings by issuing a writ of 'certiorari.' After this is done, the petitioners want that a writ of 'mandamus' should be issued. After quashing the proceedings by certiorari, in the writ of mandamus the only direction that can be given to the Returning Officer is to do his duty and decide whether the nomination of the candidate is acceptable or not. It is not open to this Court nor will it be in the exercise of its proper jurisdiction to give any specific directions as to the manner in which the duty should be discharged by the Returning Officer. Therefore, after these proceedings are quashed by a writ of 'certiorari' there is nothing to prevent the Returning Officer from arriving at the same conclusion, namely, that the nomination paper should be rejected. It is thus clear that the remedy asked for will not be effective by issuing such a writ.

(12) We are mentioning these features of the application because this, so far as we are able to gather, is the first case which has come up before a High Court where the question about the tenability of an application for a writ to quash an order of a Returning Officer rejecting a nomination paper is raised under the new Constitution. We do not wish to express any opinion on the merits of this application. To make this judgment complete we should express our view on yet another objection raised on behalf of the Returning Officer by the learned Advocate General. It was contended that the right to stand for an election is not recognised as a fundamental right by the Constitution and that, therefore, it is not open to this Court to grant relief by issuing a writ. But it will be seen that according to Art. 32 it is only in the case of the Supreme Court that there is a restriction imposed by the Constitution that it can issue a writ only in enforcement of fundamental rights. In the case of High Courts wider powers are conferred by the Constitution which is clear from the wording of Art. 226 according to which the High Courts have got the power of issuing writs not only for the enforcement of rights which are recognised as fundamental rights by the Constitution but also "for any other purpose". Therefore, this objection raised on behalf of the Returning Officer by the learned Advocate General cannot be upheld.

(13) We hold in the present case that Art. 329(b) read with the provisions of the Representation of the People Act, 43 of 1951, expressly excludes the jurisdiction of this Court to issue the writs asked for and, therefore, the prayers in the petitions cannot be granted.

(14) Before leaving these cases, we must advert to the material inconvenience that will be caused to the State and to the parties as a result of the legislation on the subject of Election. The learned counsel for the petitioners has pointed out that there are as many as 600 polling booths in the constituency for which the name of the petitioner in O P. No. 128 of 1951 has been proposed and there are as many as 4 lakhs of voters in this constituency. The provisions of the Representation of the People Act and Art. 329 of the Constitution prevent a person in the position of the petitioner in the present case asking for relief from the decision recorded by the Returning Officer at a stage earlier than the stage at which an election petition can be presented by him. By the time such a petition is presented the election must have terminated. Rival candidates whose nominations have been held to be proper and the State would have incurred very great trouble and inconvenience not to speak of expense in connection with the election. After they have gone through all those tribulations should an election petition presented by the present petitioner be successful the result would be that the election will have to be declared void. We, therefore, strongly feel that in fairness adequate provision should be made by the legislature for enabling a proper tribunal or Court to consider the legality of the decision of a Returning Officer rejecting or accepting a nomination paper, as in the present case, at a stage before the poll. If such a provision is made considerable expense and inconvenience to parties and to the State can be avoided and we trust that the authorities concerned will apply their minds to this aspect of the case.

(15) The next question we have to consider is with regard to costs. Seeing that the question has

arisen for the first time under our new Constitution and consequently there are no prior decisions on the point we consider that in the interests of justice it will be sufficient if nominal costs are awarded to the respondents. Only two of them are represented by counsel. In dismissing these two petitions we, therefore, direct the petitioner in each case to pay as advocate's fee Rs. 25/- each to respondents 1 and 4 in the two cases.

(16) The petitions having been dismissed the interim injunction already granted shall be dissolved and the fact intimated to the Returning Officer without any delay.

(17) After this judgment is pronounced an oral application is made by Mr. M. S. Menon, learned counsel appearing for the petitioner in O. P. 128/1951 and Mr. P. I. Simon, learned counsel appearing for the petitioner in O. P. 119/1951 for a certificate under Article 132(1) of the Constitution. The question involved in this case is a substantial question of law relating to the interpretation of the Constitution and therefore we have no hesitation in granting the certificate asked for.

K.S. *Petitions dismissed.*

(C. N. 2)

A. I. R. (39) 1952 TRAVANCORE-COCHIN 5

SANKARAN AND GANGADHARA MENON, JJ.

Ichi Warasyar Thayikutty Warasayar and others; Appellants v. Innooli Warasyar Kunhan Warrier and others Respondents.

Second Appeal No. 111 of 1124, D/- 21-3-1951.

(a) Court-fees Act (1870), S. 7 (v) — Suit for possession — Defendant's appeal — Court-fee in appeal.

An arbitrary valuation of the declaratory reliefs claimed by an appellant in his appeal memorandum before the lower appellate Court cannot be a proper valuation of the essential reliefs which he wants the appellate Court to grant him. Thus where he wants the trial Court's decree permitting the plaintiff to recover possession of the properties from him to be cancelled, he is bound to pay Court-fee on the market-value of those properties as valued in the plaint itself. (Para 3)

Anno: C. F. Act, S. 7 (v) N. 30 Pt. 1.

(b) Civil P. C. (1908), O. 7, R. 11 — By virtue of S. 107, O. 7, R. 11 applies to appeal — Deficit court-fee — Time to make good deficiency — Court-Fees Act (1870), S. 28.

In view of S. 107, it is clear that just as it is the duty of the original Court to see whether the plaint presented before it is properly valued and duly stamped the appellate Court has also the duty to see whether the appeal memorandum presented before it is properly valued and duly stamped, and in case it is found that the Court-fee paid is insufficient to fix a reasonable time to enable the appellant to pay the deficit Court-fee. The provision contained in O. 7, R. 11, applies to appeals also and that the appellant should be given an opportunity of making good the deficient court-fee due on the appeal memorandum. A I R (26) 1939 Pat 137, Rel. on. (Para 5)

Anno: C. P. C., O. 7, R. 11, N. 6, Pt. 4; C. F. Act S. 28, N. 30.

Sankara Menon, for Appellants; Achutha Menon; for Respondents.

Case referred to:

('39) A I R (26) 1939 Pat 137: (178 Ind Cas 976) (Pr 5)

SANKARAN, J: Defendants 1 to 3 and 8 in O. S. No. 335/1119 on the file of the Trichur District Munsiff's Court are the appellants. The 8th defendant is the husband of the 1st defendant, and defendants 2 to 7 are their children. According to the plaintiffs, the 1st defendant, who had been appointed as their agent under Ext. B agreement dated 20-11-1109 for the management of the plaint properties and also for the performance of the duties specified in the agreement, had violated the terms of the agreement and had acted in excess of the powers conferred by the terms of the agreement and had also acted against the interests of the plaintiffs and accordingly the agency created by Ext. B was terminated by the plaintiffs by the issue of a registered notice to the 1st defendant. The plaintiffs' suit is for a declaration that the agency created under Ext. B agreement has been duly terminated or in the alternative for a cancellation of the agreement, for the reasons already stated. It is also prayed that the suit properties may be allowed to be recovered by the plaintiffs from the defendants with future mesne profits at the rate of 40 paras of paddy per year. The suit properties were valued at Rs. 1,660 and on that basis a Court-fee of Rs. 94 was paid by the plaintiffs. The defendants resisted the suit and contended that Ext. B agreement is not a mere contract of agency but is a permanent arrangement under which a right was created in favour of the defendants over the plaint properties and that even otherwise the agency created under Ext. B was coupled with an interest in favour of the agent and as such the agency cannot be terminated by any unilateral act on the part of the plaintiffs. It was also contended that the defendants had become joint owners of the plaint properties along with the plaintiffs and as such the plaintiffs are not entitled to recover possession of the properties from the defendants. The defendants also put forward a claim for the value of the improvements effected by them in the properties in case it is found that they are liable to surrender possession of the properties. The trial Court repelled all these contentions and gave a decree in favour of the plaintiffs for recovery of possession of the properties from the defendants. It was declared that Ext. B agreement was validly terminated as per the registered notice issued to the defendants by the plaintiffs on 2-3-1119. Against that decree defendants 1 and 3 to 8 preferred an appeal to the Trichur District Court as A. S. No. 33 of 1123. The two main reliefs claimed by them in that appeal were for a declaration that Ext B agreement was not liable to be cancelled as a mere contract of agency and also for a declaration that the defendants, who have become joint owners of the plaint properties with the plaintiffs, are not liable to be evicted from the properties. The first of these reliefs was valued at Rs. 100 and the second relief was valued at Rs. 200. On each of these counts the appellants paid a court-fee of Rs. 10/-, the total amount of court-fees thus paid being only Rs. 20. By the several grounds raised in the appeal memorandum they had questioned the correctness of the trial Court's findings on the several issues raised in the case. There was also a general prayer in the appeal memorandum that the trial Court's decree may be set aside and the plaintiffs' suit may be dismissed.

(2) When A. S. No. 33 of 1123 came on for hearing before the lower appellate Court, an objection was raised on behalf of the respondents that the appellants had not paid proper court-fee on the appeal memorandum and as such the appeal was unsustainable. In answer to this objection the appellants maintained that the court-fee paid on the basis of the reliefs as valued in the appeal memorandum was sufficient. This contention was overruled by the lower appellate Court and it was held that the appellants were bound to pay the Court-fee as per the plaint valuation. On behalf of the appellants request was made for granting them time to pay up the deficit Court-fee. This prayer

was disallowed by the lower Court. The request of the appellants' learned counsel that he may be allowed to argue the appeal on the points expressly valued in the appeal memorandum and on which Court-fee had been paid, was also disallowed on the ground that no effective decree could be passed in the appeal by a decision on those points alone. Accordingly the appeal was dismissed with costs, without considering it on the merits, but merely on the ground that proper Court-fee had not been paid on the appeal memorandum. This decision of the lower appellate Court is challenged in this second appeal.

(3) The first point urged on behalf of the appellants is that the valuation made by them in the appeal memorandum before the lower Court is proper and that therefore they should have been allowed to argue the appeal on the merits. This position cannot be accepted as correct. As already stated the essential reliefs claimed in the plaint were for a declaration that Ext. B agreement had been duly terminated and cancelled and also for a decree permitting the plaintiffs to recover possession of the plaint properties from the defendants. Consistent with these reliefs claimed by the plaintiffs, they had paid court-fee on the market-value of the plaint properties. The trial Court's decree granted the plaintiffs all the reliefs claimed by them. In A. S. 33 of 1123 preferred by the defendants against that decree, they wanted a cancellation of the trial Court's decree and also for a declaration that Ext. B agreement cannot be cancelled as a mere contract of agency and that the defendants as joint owners of the plaint properties with the plaintiffs, are not liable to be evicted from the plaint properties. The essential and substantial relief which the appellants claimed in the lower appellate Court was that they should be allowed to retain possession of the plaint properties on the strength of Ext. B agreement as construed by them. An arbitrary valuation of the declaratory reliefs claimed by them in their appeal memorandum before the lower appellate Court cannot be said to be a proper valuation of the essential reliefs which they wanted the appellate Court to grant them. Since they wanted the trial Court's decree permitting the plaintiffs to recover possession of the properties from the defendants to be cancelled, it is clear that the appellants were bound to pay Court-fee on the market-value of those properties as valued in the plaint itself. In this view of the matter, we uphold the finding of the lower appellate Court that proper Court-fee had not been paid on the appeal memorandum in A. S. 33 of 1123 on its file.

(4) The next aspect to be considered is whether the appellants in A. S. 33/1123 before the lower appellate Court should have been allowed a reasonable time to pay the deficit Court-fee due on the appeal memorandum. In Clause 15 of the appeal memorandum in A. S. 33/1123, the appellants have stated that the question of Court-fee due on the appeal should be heard and decided by the lower appellate Court. In Clause 17 it was stated that the appellants had altered the valuation in the plaint and had paid Court-fee on the specific reliefs which they had valued in the appeal memorandum and that if after hearing the correctness of such valuation, the Court finds that the appellants are to pay additional Court-fee, they were prepared to pay such additional Court-fee also. In spite of the position thus taken up by the appellants in their appeal memorandum, the appeal was admitted and registered without raising any objection as to the insufficiency of the Court-fee paid on the appeal memorandum. That question was raised for the first time only when the appeal came on for final hearing. At that stage the appellants had expressed their willingness to pay up the deficit Court-fee and had also asked the Court for time to pay such Court-fee. We think that in the circumstances of this case that prayer should have been allowed by the lower appellate Court.

(5) Clause (c) of R. 11 of O. VII of the Code of Civil Procedure (Cochin) lays down that where the plaint is written upon paper insufficiently stamped and the plaintiff on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court fails to do so the plaint shall be rejected. This provision indicates that when the plaint is presented to the Court, it is the duty of the Court to see if proper Court-fee has been paid on it and in case the Court-fee paid is insufficient, to fix a time to enable the party to pay up the deficit Court-fee. There is no reason why the same procedure should not be followed when an appeal memorandum is presented to the Court. For all practical purposes an appeal memorandum presented by an appellant is in the same position as a plaint presented by a plaintiff. The provisions contained in R. 11 of O. VII of the Civil Procedure Code should be applicable to appeals also. This view gains support from the general provisions contained in Cl. (2) of S. 91 of the Cochin Civil Procedure Code corresponding to Cl. (2) of S. 107 of the Indian Code. This clause lays down that:

> "the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on the Courts of original jurisdiction in respect of suits instituted therein."

In view of this provision, it is clear that just as it is the duty of the original Court to see whether the plaint presented before it is properly valued and duly stamped, the appellate Court has also the duty to see whether the appeal memorandum presented before it is properly valued and duly stamped and in case it is found that the Court-fee paid is insufficient to fix a reasonable time to enable the appellant to pay the deficit Court-fee. The view taken by the Patna High Court in 'Sarjug Prasad v. Surendrapat', A I R (26) 1939 Pat 137, is also to the same effect. In that case it was laid down that the provision contained in R. 11 of O. VII applies to appeals also and that the appellant should be given an opportunity of making good the deficient Court-fee due on the appeal memorandum. Section 120 of the Cochin Civil Procedure Code (corresponding to S. 149 of the Indian Civil Procedure Code) also gives a general power to the Court to permit a party to pay up the deficit Court-fee found due from him. There is no reason why the discretion conferred on the Court by this section should not be exercised in favour of the present appellants. It cannot be said that they were acting with any 'mala fides' in valuing the appeal memorandum in A. S. 33 of 1123 before the lower appellate Court in the manner they did. It can only be taken that they were acting in good faith in making such a valuation, believing that the declaratory reliefs thus valued would be sufficient, if granted, to have the trial Court's decree vacated. At the same time they had expressly stated in the appeal memorandum itself that the question of the sufficiency of the Court-fee paid by them may be decided by the Court and that in case it is found that additional Court-fee is due from them they are prepared to pay up such deficit Court-fee also. Thus it was only proper that the lower appellate Court should have exercised the power conferred on it by S. 120 and R. 11 of O. VII of the Civil Procedure Code (Cochin) and should have granted a reasonable time to the appellants to pay up the deficit Court-fee. The dismissal of the appeal on the mere ground that proper Court-fee had not been paid on the appeal memorandum, having been made without affording an opportunity to the appellants

to pay up the deficit Court-fee, cannot therefore be sustained and we hold accordingly.

(6) In the result this second appeal is allowed and in reversal of the lower appellate Court's decree, A. S. 33/1123 is restored to the file and the case is remanded to the lower appellate Court for fresh disposal after allowing the appellants a reasonable time to pay up the deficit Court-fee found to be due on the appeal memorandum. In case such deficit Court-fee is not paid within the specified time, the appeal will of course be dismissed for that reason. The Court-fee paid on the appeal memorandum in this Court will be refunded to the appellants.

V.S.B. *Appeal allowed.*

(C. N. 3)

A. I. R. (39) 1952 TRAVANCORE-COCHIN 7

SANKARAN, J.

Vishnukrishnan Namboodiri and others, Petitioners v. Brigadier K. N. Kripal and others; Counter-Petitioners.

O. P. Nos. 67 of 1950 and 9 to 16 of 1951, D/-31-3-1951.

(a) Constitution of India Arts. 226, 227 (4) — Tribunal constituted by law relating to Army — High Court's powers of — Superintendence.

Ordinarily the civil Court has no power to interfere with the administration of military law by the properly constituted tribunals acting within their jurisdiction. Matters which are placed within the jurisdiction of Military tribunals or authorities constituted under the military law must be determined by such authorities themselves and their decisions cannot be reviewed or set aside by civil Courts. This principle of the common law has been embodied in Clause (4) of Art. 227 of the Constitution of India which deals with the High Court's power of superintendence over all courts and tribunals within its jurisdiction. The general power conferred on the High Court under Art. 226 of the Constitution has to be construed subject to the limitation imposed by Cl. (4) of Art. 227. It cannot however, be said that the High Court has no jurisdiction to relieve against unauthorised or illegal acts of military authorities affecting the fundamental rights of persons in military service. (1917) 2 K. B. 504 and (1919) 35 T L R 642, Relied on. (Para 3)

(b) Army Act (1950), S. 2 (h) and S. 3 (XVIII) (e) — Application of Act to officers of Land Forces in Part B States — Effect on their status.

By virtue of the provisions of S. 2 (h) and Notification No. S. R. O. 131, dated 22nd July 1950 issued by the Government of India under S. 5, the Army Act, 1950, is made applicable to the personnel of the Travancore-Cochin State Forces. But the mere fact that the Army Act became applicable to them cannot mean that they automatically acquired the status and rights of the personnel of the regular Indian Army. It is also clear from Sub-clause (e) of Clause XVIII of S. 3 that an officer of the Land Forces in any Part B State is not recognised as a regular officer of the Indian Army for all purposes and for all time. The expression "for the time being subject to the Act" indicates that the subsequent absorption of such an officer into the regular Army was contemplated by the Act. (Para 5)

(c) Army Act (1950), S. 18 — Constitution of India, Art. 310 — Duration of service in Army — Termination held not illegal.

Both S. 18 of the Army Act, 1950 and Art. 310, of the Constitution of India lay down that a member of the defence services holds office during the pleasure of the President. Where therefore, in exercise of the powers conferred by both these provisions, the President has decided to terminate the services of certain officers in the Army of a Part B State after adopting the usual proceduare for determining the competency and eligibility of the officers for obtaining Commission as Officers of the Indian Army, from the President, the termination of the services cannot be questioned on the ground that the proceedings which culminated in the sanction of the President are 'ultra vires' or illegal. (Para 6)

(d) Constitution of India, Art. 16 — Discrimination — Selection, whether amounts to.

Discrimination as between those 'acceptable' and those 'unacceptable' is inevitable in any process of selection and grading and there can be nothing wrong in such a discrimination. Thus where all officers of certain Part B State Forces were subjected to the screening by the Selection Board, and those who were graded as "acceptable were given Commission as Officers in the regular Indian Army, and as between Officers similarily situated, there had been no discrimination in the matter of being subject to 'screening', the officers who were graded as unacceptable as the result of such screening cannot complain that there was any discrimination violating the fundamental right guaranteed by Art. 16 of the Constitution. (Para 7)

(e) Constitution of India Art. 226 — Writ of mandamus — Issue of — Writ cannot be issued for enforcement of rights claimed in general and in several alternatives. (Para 8)

K. T. Thomas, for Petitioners; T. K. Joseph, for Counter-Petitioners; T. N. Subramania Iyer, Advocate-General, for rest of the Counter-Petitioners; T. R. Balakrishna Iyer; Govt. Pleader; for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

(1917) 2 K B 504: (86 L J K B 1087) (Pr 3)

(1919) 35 T L R 642 (Pr 3)

ORDER: In all these 9 petitions the questions raised and the reliefs claimed are substantially the same. The petitioners are officers attached to the Travancore-Cochin State Forces stationed at Trivandrum. They were originally enrolled as Officers of the Travancore Nayar Brigade as per the Brigade Standing Orders issued under the Nayar Brigade Act, Act VI of 1079 of Travancore; and by virtue of the Commission granted to them they are holding their respective positions in the Travancore-Cochin State Forces. The petitioners in OP No. 15/51 & 16/51 are occupying the rank as Captains, while all the other petitioners are occupying the rank as Majors in the State Forces. With the formation of the Travancore-Cochin State as per the Covenant entered into by the Rulers of Travancore and Cochin with the concurrence of the Government of India on 1-7-1949, the erstwhile Travancore State Forces became the Armed Forces of the Travancore-Cochin State. Even before the formation of the Travancore-Cochin State, the Rulers of the State of Travancore & Cochin had executed instruments of accession in favour of the Government of India in respect of the three subjects, Defence, Communications and Foreign Affairs. Subsequent to the integration of the two States, His Highness the Raj Pramukh executed an instrument of accession on behalf of the Travancore-Cochin State, conceding in favour of the Dominion of India, Jurisdiction in respect of Defence, Communications and Foreign Affairs pertaining to the State. Later on, by a Proclamation issued by H. H. the Raj Pramukh on 24-11-1949, the Travancore-Cochin State acceded to the Union of India and the Constitution of India was accepted as the Constitution for the Travancore-Cochin State also. By Clause 2 of Article 259 of the Constitution, the Armed Forces of the State

became part of the Armed Forces of the Union subject to the conditions laid down in Clause 1 of the same Article. As a preliminary step in furtherance of the assimilation and absorption of the State Forces into the regular Indian Army, these petitioners and other Officers of the Travancore-Cochin State Forces were ordered to appear before the Indian Army Services Selection Board. The Board graded these petitioners as 'unacceptable.' On the strength of such a grading by the Indian Army Services Selection Board, the Army Headquarters ordered the release of these petitioners from their ranks in the Army on certain specified dates. Notices of such release were also served on the petitioners. The grading of these Officers as 'Unacceptable' by the Indian Army Services Selection Board and the consequent order for the release of these petitioners are impeached by them as illegal and void, and accordingly they have filed these petitions seeking relief against the enforcement of those release orders. All these petitions are filed under Article 226 of the Constitution and the petitioners have prayed that this Court may be pleased to issue a writ in the nature of 'Mandamus' directing the counter-petitioners not to release the petitioners from their respective ranks in the Army, but to retain them in such ranks with Indian Army rates of pay, allowances and emoluments or, in the alternative, directing the counter-petitioners to provide the petitioners with suitable other employments on terms no less advantageous, or to pay them reasonable compensation, or to retire them on proportionate pension.

(2) In O. P. No. 67-1950 the counter-petitioners are (1) Brigadier P. N. Kripal, Commandant, Travancore-Cochin State Forces, Trivandrum, (2) Captain C. S. Gautam, Adjutant, Training Centre, Travancore-Cochin State Forces, Trivandrum and (3) The Chief Secretary to the Government of Travancore-Cochin, Trivandrum. In all the other petitions the counter-petitioners are four in number, viz., (1) The Union of India, (2) The Commander-in-Chief, Indian Army, (3) the Travancore-Cochin State represented by the Chief Secretary to Government, Trivandrum, and (4) Brigadier P. N. Kripal Commandant, Travancore-Cochin State Forces, Trivandrum. All the counter-petitioners have entered appearance and have objected to the sustainability of these petitions. The Government Pleader appears on behalf of the Travancore-Cochin State, and the Advocate-General appears for all the other counter-petitioners. On behalf of these counter-petitioners a counter-affidavit has been filed, setting forth the grounds of objection to the sustainability of the several petitions.

(3) One of the objections raised on behalf of the counter-petitioners is that this Court has no jurisdiction to entertain the present petitions for the issue of a writ in the nature of Mandamus against the Military authorities in respect of the proceedings taken under the Military Law. Ordinarily, the civil Court has no power to interfere with matters of military law. Courts will not interfere with the administration of military law by the properly constituted tribunals acting within their jurisdiction. Matters which are placed within the jurisdiction of Military tribunals or authorities constituted under the military law must be determined by such authorities themselves and their decisions cannot be reviewed or set aside by civil Courts. It has ruled in R. v. Army Council Ex. P. Ravensdroft (1917) 2 K B 504, that civil Courts will not interfere with matters relating to military law prescribed in the rules for the guidance of Officers or with the proceedings of a military Court of enquiry or with an action that may be taken by the Army Council. This principle of the common law has been embodied in Clause 4 of Article 227 of the Constitution of India. That clause deals with the High Court's power of superintendence over all Courts and Tribunals within its jurisdiction. In Clause 4 it is stated that nothing in this Article shall be deemed to confer on a High Court the powers of superintendence over any Court or Tribunal constituted by or under any law relating to the Armed Forces. The general power conferred on the High Court under Art. 226 of the Constitution has to be construed subject to the limitation imposed by Clause 4 of Article 227. In the present petitions the allegation put forward by the petitioners is that the proceedings which have led up to the passing of orders directing their release from their ranks in the Army, have not been passed by any authority lawfully constituted under the provisions of the Military law in force in the State and as such the entire proceedings are 'ultra vires' and consequently void. They have also contended that in directing them to appear before the Army Services Selection Board they have been discriminated as against other officers of the Indian Army and that such discrimination is repugnant to the fundamental right guaranteed by Article 16 of the Constitution. If, as complained of by the petitioners, there has been any violation of the fundamental rights guaranteed under the Constitution and if the entire proceedings resulting in the orders for their release from their ranks in the Army are shown to be void 'ab initio', the petitioners will certainly be entitled to the protection of their rights by means of a writ in the nature of 'Mandamus' as prayed for by them. It cannot be said that the Court has no jurisdiction to relieve against unauthorised or illegal acts of military authorities affecting the fundamental rights of persons in military service. In 'Heddon v. Evans (1919) 35 T L R 642, it was held that the Court can interfere when the authority constituted under military law acts without jurisdiction or in excess of jurisdiction and does something which would be a wrong at common law. Accordingly I hold that in view of the allegations made in these petitions this Court has jurisdiction to entertain the petitions and is bound to examine the question as to how far the allegations are well-founded and tenable.

(4) One of the grounds on which the order directing the petitioners to appear before the Army Services Selection Board is impeached is that this order was issued on the strength of Army Instruction (India) No. 11/S, dated 9th April 1949. This order was in respect of Merger State Forces. Obviously therefore this order could not apply to the Armed Forces in the Travancore-Cochin State. The counter-petitioners maintain that the petitioners and other Officers of the Travancore-Cochin State Forces were directed to appear before the Indian Army Services Selection Board not on the strength of this Order, but on the strength of a reorganisation scheme which had already been sanctioned by the Government of India. Excepting the bare allegation of the petitioners that it was on the strength of Army Order No. 11/S, that they were made to appear before the Selection Board, there is nothing to substantiate the same. On the other hand, Exs. A, A (1) and B clearly go to show that a reorganisation scheme had been sanctioned by the Government of India and that Officers of the Travancore-Cochin State Forces including the present petitioners were directed to appear before the Selection Board on the strength of such reorganisation Scheme. Copy of the scheme of reorganisation of the Forces of Travancore-Cochin Union and of Mysore has been produced on behalf of the counter-petitioners, and it has been marked as Ex. B. Ex. A is the communication No. F. 147/479 D-1 (a) dated 17-1-50 sent by the Government of India to the Commander-in-Chief of the Indian Army. That communication states:

"that in consultation with the Government of Travancore-Cochin Union and Mysore the Governor-General has been pleased to approve of the attached scheme of re-organisation of their State Forces."

The attached scheme is Ex. B. It was further stated that no change in the existing terms and conditions of service will be made under paragraph 8 of the scheme without specific order of Government. Ex. A (1) is the communication dated 20-1-1950 sent by the Government of India to the Travancore-Cochin Government forwarding copy of the scheme Ex. B. Clause 3 of the re-organisation scheme Ex. B stated that the State Forces will be under the operational control of the G.O.C.-in-C., of the Indian Army Command in which the Union State is located and that on and from the 1st April 1950 the entire administrative control will also be taken over by the Indian Army, but until that date the Government of the Union State will be in the administrative control. In Clause 5 of Ext B it is stated that the training and equipment of the State Forces will be gradually brought up to the level of the Indian Army. In Clause 6 it is stated that:

"since it is essential that the standard of Officers must be the same as in the rest of the Indian Army, the present Officers will be screened by an Indian Army Services Selection Board; an Officer of the Union State will be co-opted temporarily to the Board to assist in determining the suitability of the Officers. From 1-4-1950, the responsibility for providing Officers and other ranks will automatically be that of the Indian Army."

By Clause 8 it is provided that until the process of re-organisation, reconstitution and reduction is complete the personnel will continue on the existing terms and conditions of service. In view of these provisions in Ext. B it is clear that the Officers of the Travancore-Cochin State Forces were made to appear before the Indian Army Services Selection Board on the strength of that scheme and that the screening and the consequent grading of these Officers were done by the Board as contemplated by Clause 6 of the scheme. This grading is impeached by the petitioners as having been unauthorisedly done and without any legal sanction. As already stated, the control of the Defence Forces in the State had become vested in the Government of India from the date of the execution of the Instrument of Accession by H. H. the Raj Pramukh in favour of the Government of India. The Government of India had therefore the legal right to reorganise and reconstitute the State Forces as a preliminary step to the subsequent absorption and assimilation of these Forces into the Indian Army. Ex. B. reorganisation scheme ordered by the Government of India cannot therefore be said to be unauthorised or illegal. Since by that time the Government of India had not taken over complete control of the State Forces, both operational and administrative, the scheme of reorganisation was formulated in consultation with the Government of Travancore-Cochin State. The Scheme having been thus evolved with the concurrence of the Government of India and the Government of the Travancore-Cochin State, had full legal force. Pending such reorganisation and reconstitution, the Constitution of India came into force on 26-1-1950. By Clause 2 of Article 259 of the Constitution, the Armed Forces of the Travancore-Cochin State also became part of the Armed Forces of the Indian Union. In Clause 1 of the same Article it is provided as follows:

"Notwithstanding anything contained in this Constitution a State specified in Part B of the First Schedule having any Armed Forces immediately before the commencement of this Constitution may until Parliament by law otherwise provides, continue to maintain the said Forces after such commencement subject to such general or special orders as the President may from time to time issue in that behalf."

Reading these two clauses together, it is clear that even though the State Forces became part of the Armed Forces of the Indian Union, its separate existence for such time until Parliament by law otherwise provided was also recognised subject to general or special orders as may be issued from time to time by the President.

(5) It is argued on behalf of the petitioners that by virtue of Clause 2 of Article 259 the Travancore-Cochin State Forces acquired the same status and the same rights and privileges possessed by the Indian Army. In support of this position it is pointed out that the Adaptation of Laws Order, 1950 amended Section 5 (1) of the Indian Army Act, Act VIII of 1911. so as to make the Act applicable to the Armed Forces maintained in any Part B State. On 1st April 1950, Notification No. 11/E was also issued by the Central Government in exercise of the powers conferred by Section 5 of Act VIII of 1911, making the Act applicable to the Armed Forces of the Travancore-Cochin State also. Clause 2 of Section 7 of the Act defined 'Indian Commissioned Officer' as follows:

"Indian Commissioned Officer' means a person commissioned, gazetted or in pay as an officer holding His Majesty's Commission in the Indian Land Forces, and includes in relation to a person subject to this Act when serving under such conditions as may be prescribed, a person holding a Commission in the Indian Air Force."

By Notification No. 11/E, dated the 1st April 1950 the following expression was also added to Clause 2 of Section 7 viz., "and also includes an Officer of the State Forces." Thus by virtue of this Notification, the Indian Army Act, Act VIII of 1911, was made applicable to the Travancore-Cochin State Forces also. All the same it cannot be said that by the mere fact of the Army Act having been made applicable to the State Forces, the personnel in those Forces acquired the same status and rights as the Officers of the regular Indian Army. Such status had yet to be determined by Parliament enacting suitable laws as contemplated by Clause 1 of Article 259 of the Constitution. The Army Act, Act XLVI of 1950 is such a law passed by Parliament. By the passing of this Act, the earlier Act, Act VIII of 1911, was repealed. The provision for the application of Act XLVI of 1950 to the Land Forces in Part B States is contained in Clause (h) of Section 2. In that Clause it is provided that persons belonging to the Land Forces of the Part B States will also be governed by the Act when the whole or part of such Forces is placed at the disposal of the Central Government in pursuance of a Notification issued under Section 5 of the Act. S. R. O. No. 131, dated the 22nd July 1950, in such a Notification issued by the Central Government and it is directed that all persons belonging to the Land Forces of the States of Mysore, Hyderabad and Travancore-Cochin shall be placed at the disposal of the Central Government. By virtue of this Notification the Army Act of 1950 became applicable to the personnel of the Travancore-Cochin State Forces. Here again the mere fact that the Army Act became applicable to them cannot mean that they automatically acquired the status and rights of the personnel of the regular Indian Army. An Officer under the Indian Army is defined in Section 3 Clause (xviii) as follows:

"Officer means a person commissioned gazetted or in pay as an officer in the regular Army and includes.....(e) an officer of the Land Forces in Part B States who is 'for the time being' subject to this Act."

It is clear from Sub-clause (e) of Clauses (xviii) of Section 3 that an Officer of the Land Forces in any Part B State was not recognised as a regular Officer of the Indian Army for all purposes and for all time. The expression "for the time being subject to the Act" indicates that the subsequent absorption of such an Officer into the regular Army was contemplated by the Act. He would attain the full status as an Officer of the Indian Army only on getting a Commission from the President as contemplated by Section 10 of the Act. That section lays down that the President may grant to such person as he thinks fit a Commission as an Officer or as a Junior Commissioned Officer or appoint any person as a Warrant Officer of the Regular Army. Admittedly these petitioners have not yet been granted any such Commission by the President, as Officers of the Regular Army. Under Section 10 the President will grant a Commission only to such persons as the President thinks fit. This necessarily means that a process of selection and grading by competent authorities has to take place for ascertaining those who are fit for the grant of Commission as Officers under the Regular Indian Army. Army Instruction No. 12/B, dated the 29th September 1950 was issued for the reorganisation and reconstitution of the State Forces on being taken by the Government of India. The preliminary steps for such reorganisation and reconstitution had already been taken on the strength of Ex. B scheme which had been formulated by the Government of India. The Officers of the Travancore-Cochin State Forces were accordingly made to appear before the Indian Army Services Selection Board. After screening these Officers, the Board graded them under different classes. The petitioners were graded as 'unacceptable." The Army authorities accepted such grading and the release orders against these petitioners were passed on the strength of such grading.

(6) Before obtaining the sanction of the President for the termination of the services of these petitioners and releasing them from their ranks, orders appear to have been issued by the Army Head Quarters directing the release of these petitioners. Such were the orders in force when the present petitions were filed in Court. But subsequently, these release orders were all cancelled and those officers who had been released were reinstated. On 31-1-1951 a memo was filed in Court on behalf of the Counter-petitioners stating that all the prior orders of release issued against these petitioners were cancelled. Normally, these petitions would have become infructuous on account of such a cancellation of the release orders. But a communicaion dated the 5th March 1951 was issued by the Government of India to the Commander-in-Chief of the Indian Army, conveying the sanction of the President for the relinquishment of Commissions and termination of the services of these petitioners. Ex. I is that Communication and it states as follows:

> "I am directed to convey the sanction of the President to the relinquishment of Commissions and termination of services of the following Officers of the Travancore-Cochin State Forces with effect from the dates they are relieved of Military duty."

The names of all these petitioners with their respective ranks are also given in Ex. I. On the strength of this Communication, revised orders have been served on the petitioners intimating them that they may proceed on eligible leave on the afternoon of 31st March 1951 and that at the end of the leave period they will be relieved of their ranks in the Indian Army. It is common ground that the President's sanction referred to in Ex. I was accorded on the strength of the grading of these petitioners as 'unacceptable' by the Indian Army Services Selection Board. It has already been found that the proceedings which led up to such a grading were legal and proper. What remained for giving effect to such grading was the obtaining of the sanction of the President for the termination of the services of these petitioners. Ex. I shows that the sanction for such termination has also been accorded by the President. Section 18 of the Army Act of 1950 lays down that every person subject to this Act shall hold office during the pleasure of the President. Article 310 of the Constitution also lays down that every person who is a member of the Defence Services holds office during the pleasure of the President. Ex. I shows that in exercise of the powers conferred under Article 310 of the Constitution and Section 18 of the Army Act, the President has decided to terminate the services of these petitioners in the Army. Such a decision was arrived at after adopting the usual procedure for determining the competency and eligibility of these petitioners for obtaining Commission as Officers of the Indian Army, from the President. The proposed termination of the services of these petitioners in the Army cannot therefore be questioned on the ground that the proceedings which culminated in the sanction referred to in Ex. I are 'ultra vires' or illegal.

(7) The position taken up by the petitioners that in thus terminating their services in the Army a discrimination has been shown against them as compared with other officers in the Indian Army and that their right to continue to hold their present ranks in the Army has been infringed, has no substance in it. In the first place, it has to be stated that as Officers in the Army there is no guarantee for the continuance of their services and rank. Such service is liable to be terminated by the competent authority at any time and for any valid reason. Want of fitness as declared by a competent body is certainly a valid ground for terminating the service of these persons. The complaint of discrimination is based on the assumption that with the passing of the Indian Constitution and also of the issue of the Notification under Section 5 (1) of Act VIII of 1911, these petitioners had acquired the full status and rights as Officers of the regular Indian Army. I have already found that such status and rights would be acquired by these petitioners only on receipt of Commission as Officers of the regular Indian Army from the President, as contemplated by Section 10 of the Army Act of 1950. The screening of these Officers by the Selection Board was only a step in that direction. Even though the result of such screening has been unfavourable to these petitioners, they cannot now complain that it was the result of any discrimination shown against them. Discrimination as between those 'acceptable' and those 'unacceptable' is inevitable in any process of selection and grading and there can be nothing wrong in such a discrimination. Admittedly all officers of the Travancore-Cochin State Forces were subjected to the screening by the Selection Board, and those who were graded as 'acceptable' were given Commission as Officers in the regular Indian Army. Thus as between Officers similarly situated, there has been no discrimination in the matter of being subjected to 'screening' by the Selection Board. It follows therefore that the fundamental right guaranteed by Article 16 of the Constitution has not in any way been violated or infringed by the proceedings which culminated in the sanction referred to in Ex. I. The prayer in these petitions for the issue of a writ in the nature of 'Mandamus' directing the counter-petitioners to retain them in their present positions on the Indian Army rates of pay, allowances and emoluments, is clearly unsustainable and cannot be granted.

(8) Then there is the alternative prayer made by the petitioners that a writ may be issued directing the counter-petitioners to provide the petitioners with employments no less advantageous or to award reasonable compensation to them or to retire them on proportionate pension. This alternative prayer is stated to be based on Article 19 of the Covenant entered into between the Rulers of Travancore and Cochin and concurred in by the Government of India on 1-7-1949. The counter-petitioners have questioned the petitioners' right to agitate the question of any right arising out of any provision in the Covenant and it is pointed out that Article 363 of the Constitution stands as a bar to the consideration of such matters by any Court. I do not think it necessary in these proceedings to consider and decide the question as to the legality and the enforceability of the rights claimed by the petitioners on the strength of Article 19 of the Covenant. Even assuming that the petitioners have got the right as claimed by them, I am definitely of the view that a writ in the nature of 'Mandamus' cannot be issued for the enforcement of such rights claimed in general and in several alternatives. In the first place, there is no definiteness about these reliefs claimed by the petitioners. They ask for three alternative reliefs, namely that they may be provided with alternative employments no less advantageous, or that they may be paid reasonable compensation or that they may be retired on proportionate pension. No writ in the nature of 'Mandamus' can be issued directing the grant of one or other of such alternative reliefs. The authority concerned may have to exercise its discretion in the light of all attendant circumstances, in deciding as to the particular relief that could be granted to each of these petitioners. The Court will not issue a writ of 'Mandamus' so as to compel such authority to exercise its discretion in any particular and specified manner. It is not shown that any or all of the alternative reliefs have been denied to these petitioners. On the other hand, it is admitted even in the present petitions that suitable employments have been provided for some of the other Officers who were included in the list of 'unacceptables.' From the records Exts. F., H., K., L., and M, which have been produced at the instance of the present petitioners, it is evident that the counter-petitioners have been and are taking the necessary steps for the grant of one or other of the alternative reliefs claimed by the petitioners. It is premature at this stage to foresee what would be the outcome of such attempts. The present situation does not therefore call for the issue of any writ in the nature of 'Mandamus' even in respect of the alternative reliefs claimed by the petitioners.

(9) In the result I hold that all these petitions have been misconceived and are unsustainable. Accordingly all the petitions are dismissed with costs, Advocate's fee Rs. 200.

D.R.R.

Petitions dismissed.

(C. N. 4)

A. I. R. (39) 1952 TRAVANCORE-COCHIN 11

KUNHI RAMAN, C. J. AND JOSEPH J.

Damodaran, Appellant v. The State.

Criminal Appeal No. 177 of 1950 and Criminal Revn. Petn. No. 44 of 1950, D/- 11-6-1951.

(a) *Criminal P. C. (1898), S. 342 — Cochin Criminal P. C., S. 259 — Examination of accused — Inquisitorial nature of.*

Where the trial had gone on beyond reasonable limits and in view of the time taken in finishing the evidence on behalf of the prosecution and the voluminous depositions given by the witnesses especially as a result of cross-examination:

'Held' that the Cout below was fully justified in inviting the attention of the accused to the essential features of the case against him and ascertaining from him whether he had any explanation to give of the circumstances appearing in evidence against him. The examination was not inquisitorial in its nature and did not contravene the provisions of S. 342. (*Para 9*)

Anno Cr. P. C., S. 342, N. 14, Pt. 6.

(b) *Criminal P. C. (1898), Ss. 223, 225, 537 — Cochin Criminal P. C., Ss. 201 ill. (c), 434 — Accused charged with cheating — Particulars not mentioned — Accused fully understanding charge — No prejudice — Defect cured.*

Where neither the accused nor his advocate is misled by the charge of cheating or fails to understand the nature of the case brought against him on behalf of the prosecution but on the other hand both of them fully understand the nature of the charge and raise all possible defence in the trial Court, the case does not fall within the purview of illustration (c) to section 201, Cochin Cr. P. C., (Corresponding to ill. (b) of S. 225, Cr. P. C.). On the other hand, it comes within the purview of the section which lays down in unequivocal terms that absence of particulars in the charge shall not be regarded as material, unless the accused was in fact misled by the omission and it has occasioned a failure of justice. (*Para 10*)

Anno: Cr. P. C., S. 223, N. 7; S. 225, N. 3, S. 537, N. 10.

Malloor K. Govinda Pillai and M. Kochunny Panicker; for Appellant; Special Prosecutor, Seranjami and T. N. Subramania Iyer, Advocate-General, for the State.

KUNHI RAMAN, C. J.: Calendar Case No. 1 of 1125 (M. E.) was disposed of by a special Tribunal constituted for that purpose by the Government of India consisting of a senior District and Sessions Judge deputed from the Madras State. The crime excited considerable local interest in Cochin. The subject-matter of the offence was over 5 (five) lakhs of rupees taken from the coffers of the erstwhile Cochin State during the time of His Highness Kerala Verma who was then the ruling Prince of the State and who died before the trial commenced. Three persons were charged with offences of forgery and cheating under the Cochin Penal Code which was then in force in the State. The 2nd accused was a son of the then Maharaja and it was believed that he wielded considerable influence over his father. The Police investigation was conducted by an officer deputed by the Union Government at Delhi. The trial before the Special Tribunal continued for over eight months at Ernakulam (from January to September 1950) and on the 12th of September 1950 the judgment of the Tribunal was pronounced convicting the 1st accused Damodaran of the offence of cheating under Section 400 of the Cochin Penal Code and sentencing him to rigorous imprisonment for 18 months. The 2nd accused who was charged with abetment of the offence was acquitted. The 3rd accused died pending trial and the case against him, therefore, terminated. The present appeal is brought on behalf of the first accused.

(2) The evidence is considerable in quantity. The appeal was argued before us by Mr. Malloor Govinda Pillay who appeared for the appellant, Mr. Saranjame, the Special Public Prosecutor appointed by the Government of India appeared on behalf of the State. The Advocate-General of this State who had filed a criminal revision case, contended that the punishment was not adequate and he, therefore, prayed for a more severe sentence. According to him, a sentence of fine should have been coupled with the sentence of imprisonment. We should like to record that learned counsel who appeared before us discharged their respective duties with commendable brevity without at the

same time omitting to deal with any relevant aspect of the case, with the result that it was possible for us to conclude the hearing in a little over two days.

(3) It is necessary at the outset to refer to the main features of the case which came in for comment in the course of the arguments. We propose to confine our attention to these and these alone and not to refer to the wealth of detail which is contained in the judgment of the Tribunal.

(4) To begin with the substance of the case for the prosecution is that the 1st accused appellant practised deception and fraudulently induced P.W. 1 who was then employed as Director of Food Supplies in the Cochin State to part with two cheques for Rs. 1,10,740 and Rs. 4,42,960 respectively on 15-7-1947 and 21-7-1947 in his favour, by making false representations. The representations were that the 1st accused on behalf of his firm, the South Indian Agencies had purchased 200 and 800 tons of cocoanut oil, on doing which P.W. 1 was to pay him the difference between the controlled rate and the market rate for the commodity the cheques being for such differences. The oil was intended to be exported to certain merchants in Hyderabad (Dn) who were reported to be having such influence over H. E. H. the Nizam that they would be able to coax him to accede to the Indian Union. It will be seen that during the period in question the major States had not yet acceded to the Indian Union. It will also be remembered that the political situation in India at that time was unsettled and efforts were being made to induce the princely States to accede to the Indian Union. The then Maharaja of Cochin was a strong believer in this course and he felt that he would be doing a great service to the country if he brought about the accession of Hyderabad.

(5) At the first blush, the statement that H.E.H. the Nizam could be made to take a decision on such a vital question, if 1,000 tons of cocoanut oil were supplied at controlled rates to certain of his subjects, sounds fantastic. That was what the then Diwan who was examined as P.W. 6 and the then Food Minister of the State who was examined as P.W. 14, felt when the idea was propounded to them in all seriousness by His Highness who was then completely under the influence of the second accused, one of his sons. The latter was no doubt interested in getting the amounts involved in the case paid to his friends and reputed partner, the first accused. Since the 2nd accused has been acquitted and there is no appeal from the order of acquittal, we shall not say anything in this judgment to his prejudice except to refer to the links in the chain of events which he had forged. To understand how His Highness was so credulous, it is enough if we refer to the evidence of his Diwan. Here are his words:

"During the period I was Diwan I had to interview His Highness the Maharaja at least two or three times a week. Due to his mental and physical weakness, I used to notice that he was generally unwilling to discuss files seriously. In the middle of discussions, he used to tell me that he was tired and we used to stop discussions. I noticed that he used to be sometimes absent minded and not coherent while discussing matters."

It also appears from the evidence that the Maharaja was then 79 years of age.

(6) Fully believing that the despatch of cocoanut oil to Hyderabad sold at controlled rates would enable him to attain his object, the Maharaja issued the necessary orders. He spoke to the Diwan P.W. 6 and the Food Minister, P.W. 14 at the Hill Palace where they were called for interview. At that time, the control over the price of cocoanut oil which had remained in force for some time in the State had been removed. The market prices naturally went up subsequent to this event and the difference between the controlled and the market rates would be in the vicinity of 5½ lakhs of rupees for 1,000 tons of cocoanut oil at the relevant period.

(7) Having adverted to the main features of the incident which led to the commission of the offence, we shall come to the events that happened which resulted in the prosecution of the accused. The Maharaja having conceived the idea of paying the firm of the first accused the amount of the difference between the controlled and market prices of 1,000 tons of cocoanut oil to enable the company to export the oil to the Hyderabad State, communicated the idea to his Minister for Food and his Diwan. The former pointed out to the Maharaja that such a payment would come in for adverse criticism in the Legislature of the State and lead also to interpellations. He therefore, advised His Highness that if he had definitely made up his mind on the point, the safer course would be to pay the amount out of the political funds of the State which were under the control of the Diwan. This would not lead to any protests from the legislature, the fund being outside the purview of the jurisdiction of the Legislative Assembly. The suggstion appealed to the Maharaja who sent for his Diwan and asked him to carry out his idea. This did not find favour with the Diwan who pointed out that the funds of the State would be depleted beyond the capacity of the State and that it was not provident to use the amount for the benefit of persons outside the State. These arguments, however, did not convince the Maharaja although they were accompanied by a threat of resignation by the Diwan which made the Maharaja angry to such an extent that he left the audience chamber abruptly. The Diwan returned home greatly perturbed at the extraordinary order transmitted to him and not knowing what to do. At that stage he got a personal letter written to him by the Maharaja. This has been marked as Ext BC. Paragraphs 2 & 3 of this letter contained the mandate issued by His Highness. The whole of the letter deserves to be read in full:

"My dear Karunakara Menon,

" I am afraid you have not understood clearly what I wanted to convey to you. This oil question involves a big political issue which I am obliged to keep secret. In substance it is to prevent a political alliance detrimental to the country. This I told Mr. Panampalli Govinda Menon and he is, I think, right when he told me that there would be difficulty in doing this through the normal channel.

Therefore, after discussion with him it has been decided by me that the Government should purchase 1,000 tons at market rate through the Director of Food Supplies and give it to the party who is nominally acting here at controlled rate. The loss will be treated as political expenditure and no question, Govinda Menon says, can be asked then in the Council.

The issues are too big and no consideration of loss should stand in the way. Therefore, please issue a cheque, for the necessary amount for purchase to the Director of Food Supplies and direct him to effect the purchase as quickly as he can. This should be done immediately. Mr. Govinda Menon will explain everything."

This letter was written on the 11th July 1947. On the 12th July the Diwan evidently to safeguard his position wrote for formal sanction of the payment (Ext K) and on this payment was sanctioned in the usual way by the Maharaja. The note submitted by the Diwan is worded as follows:

"As commanded in His Highness' D. O. Dated 11-7-47 I have isued a cheque for Rs. 5,65,600 in favour of the Director of Food Supplies and ordered its debit as a grant on political issues

under the Budget Head, 41 Miscellaneous — Political Expenditure — other charges — not voted. I am asking the Controller of Finance and Accounts to admit this expenditure without vouchers. Formal sanction of His Highness is solicited. An additional allotment to this extent may be sanctioned. This represents the estimated difference between the old controlled rate of Rs. 1,390 per ton and the market rate (which may fluctuate) of Rs. 1,955 a ton on 1,000 tons."

This is dated 12th July 1947. On the 13th of July 1947, the endorsement containing the sanction for this expenditure and the additional allotment, was made on this note by the Sarvadhikariakar on behalf of His Highnes and sent to the Diwan.

(8) Fortified with this voucher, the Diwan passed the amount in two cheques to the Director of Food Supplies, P.W. 1. The Diwan and P.W. 1 had in the meantime agreed that since the Maharaja had given strict orders that the matter should be kept as a 'top secret', the proper course to adopt would be to make the purchaser through the first accused and then reimburse him by giving the two cheques to cover the loss. The Diwan has stated in his evidence that he and P.W. 1 felt that Ext K would warrant such a procedure and we cannot say that this assumption was wrong. The parties whom the Maharaja wanted to benefit were the 1st accused and his firm in which incidently the 2nd accused was also interested. P. W. 1 contacted the first accused who represented in due course that the purchases were concluded and the commodity obtained which representations were untrue. The two cheques were then pasesd on to the 1st accused. He passed two formal receipts Exts W and W (1) when he got the two cheques.

(9) It would be convenient to deal with the two questions of law that were raised on behalf of the accused appellant by his learned counsel at this stage. The first point urged on behalf of the appellant is that the questions asked by the Court below in examining the accused after the witnesses for the prosecution had been examined are inquisitorial in their nature and that they contravene the provisions of Section 259 of the Cochin Code of Criminal Procedure which was the law applicable on the date of the trial to the present case. Section 259 of the Cochin Code corresponds to Section 342 of the Indian Code of Criminal Procedure. All the questions were read out to us by the learned counsel for the appellant and we are not satisfied that they were asked for the purpose of eliciting information which would incriminate the accused appellant. On the other hand, the trial had gone on beyond reasonable limits and in view of the time taken in finishing the evidence on behalf of the prosecution and the voluminous depositions given by the witnesses especially as a result of cross-examination, the Court below was fully justified in inviting the attention of the accused to the essential features of the case against him and ascertaining from him whether he had any explanation to give of the circumstances appearing in evidence against him. There is no defect in the procedure adopted by the trial Court in respect of this point as urged on behalf of the defence.

(10) The next point urged is that the charge is not sufficiently explicit to give reasonable notice to the accused of the prosecution case against him. This contention is based upon illustration (C) to Section 201 of the Cochin Code of Criminal Procedure. According to the section no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission and it has occasioned a failure of justice. Illustration (C) refers to a case of cheating where there are many transactions between 'A' and 'B' in the course of which 'A' is alleged to have cheated 'B' but the manner in which he cheated 'B' is not set out in the charge. If 'A' had no means of knowing to which of them the charge referred and had offered no defence the Court may infer that the omission to set out the manner of the cheating is a material error. The charge could have been more explicit in the present case but there were only two incidents in respect of which the accused was charged with cheating. He obtained by making untrue representations two cheques from P.W. 1 Director of Food Supplies in the Cochin Government. They were for the difference between the controlled price and the market price of coconut oil on the relevant dates. The Maharaja had given directions that the Diwan should see that P.W. 1 made the purchase in the market at the market rates and passed the commodity on to the 1st accused and his firm at the controlled rates, the Government bearing the difference between the two rates which would roughly work out at the total amount involved in the case. The Diwan and P.W. 1 decided that instead of the Government making the purchase which would have led to undue publicity contrary to the strict injunction given by the Maharaja that the matter should be regarded as 'Top Secret' the proper course to adopt would be to ask the first accused and his firm to make the purchase and pay him the difference between the market rate and the controlled rate. The 1st accused represented that he had not only arranged for the purchase of the 1,000 tons in two instalments of 200 and 800 tons but produced documents to show that the purchases had been effected by him. As a matter of fact, no such purchases were effected. He thus induced P.W. 1 to part with the two cheques in his favour after practising this deception. There is no doubt that the accused and the advocate who appeared for him in the Court below fully understood the nature of the case against him. The charge does not specifically state in so many words that the accused made representations that he had arranged to buy and had actually purchased the commodity and thus induced P.W. 1 to part with the two cheques in his favour. This omission in the present case we do not consider as material within the meaning of illustration (C) to Section 201. It is stated in that illustration that the accused in the case contemplated had no means of knowing to which of the various transactions between him and the complainant the charge referred. As a result of that, he offered no defence. In the present case the accused not only raised a defence but strenuously pressed the defence in the Court below through his advocate and even applied for process to call a witness. In the circumstances we are not satisfied that the accused was in any way misled by the omission of details in the charge framed against him or that it has occasioned a failure of justice. There was no objection raised in the course of the trial in the Court below about the nature of the charge. The memorandum of appeal filed in this Court bears the signature of the advocate who appeared for the first accused appellant in the trial Court. There is no question raised in these grounds about the legality of the charge or the insufficiency of the particulars disclosed in the charge. From this it is apparent that neither the accused nor the advocate who appeared for him at the trial was misled by the charge or failed to understand the nature of the case brought against him on behalf of the prosecution. Both the accused and his Advocate fully understood the nature of the charge and raised all possible defence in the trial Court. The case therefore does not fall within the purview of illustration (C) to Section 201. On the other hand, it comes within the purview of the

section which lays down in unequivocal terms that absence of particulars in the charge shall not be regarded as material, unless the accused was in fact misled by the omission and it has occasioned a failure of justice. We have already stated that both these conditions are not fulfilled in the present case. There is also Section 434 of the Cochin Code of Criminal Procedure corresponding to Section 537 of the Indian Code of Criminal Procedure according to which:

"no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of (a) any error, omission or irregularity in the ..... charge..... or other proceedings before or during trial or in any inquiry or other proceedings under this Code ..... unless such error, omission, irregularity ..... has in fact occasioned a failure of justice."

The explanation to this section makes the position clearer still by laying down that in determining whether any omission has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. Here, no objection was raised either during the course of the proceedings or even in the memorandum of appeal filed in this Court by the advocate who represented the accused in the trial Court. It was another learned counsel who represented the accused before this Court who thought of raising this point in his arguments. We hold that there is no substance in this objection.

(After discussing the evidence his Lordship dismissed the appeal of the accused and further holding that the ends of justice were sufficiently satisfied by the punishment awarded by the Court below saw no reason to enhance or to supplement it by imposing a sentence of fine dismissed also criminal revision petition.)

V.S.B. *Appeal and revision dismissed.*

(C. N. 5)

A. I. R. (39) 1952 TRAVANCORE-COCHIN 14

KOSHI, J.

V. S. T. Shaik Mansoor, Petitioner v. Government of United State of Travancore and Cochin and others; Counter-Petitioners.

O. P. No. 6 of 1125, D/5-4-1950.

(a) Companies Act (1913), S. 171 — Travancore Companies Act, S. 210 — Proceedings against Company.

An application for issuing a writ in the nature of certiorari to quash certain notifications published by the Govt., by certain share-holders of a Company under liquidation, is not a proceeding against the Company and S. 210 (corresponding to S. 171, Indian Companies Act) cannot, therefore, apply. (Para 15)

Anno: Companies Act, S. 171, N. 3.

(b) Companies Act (1913), Ss. 171, 202 —Travancore Companies Act, Ss. 210, 245 — Company in liquidation — Application by share-holders for writs of certiorari for quashing certain notifications by Govt. — Applicability of Ss. 210 and 245, Travancore Companies Act — Applications if maintainable — Constitution of India, Art. 226 — Travancore-Cochin High Court Act (1125) (M. E.), S. 18 (2).

Matters which are sought to be made the subject of extraordinary writs as certiorari and 'prohibition' cannot be adjudicated upon by the winding up Court so that the aggrieved party may prefer an appeal to the High Court under S. 245 (corresponding to S. 202, Indian Companies Act.)

The share-holders of a Company in liquidation who are aggrieved by certain Notifications issued by the Govt. and the action proposed to be taken thereunder, have the right to move the High Court for issuing a writ of 'certiorari' against the Govt. The winding up Court has no jurisdiction to entertain them. (Para 15)

(c) Constitution of India Arts. 13 and 31 (2) — Notifications issued by the Travancore-Cochin Govt. under (Travancore) Salt Act (III (3) of 1088 ME) acquiring salt factory and establishing new one in its place — Provision contemplated by Art. 31(2) absent — Notifications if invalid on that ground.

The Notifications issued by the Govt. under powers vested in them by Ss. 11 and 14, (Travancore) Salt Act (III (3) of 1088 M.E.), acquiring an existing salt factory and establishing a factory by Govt. in its place, are not the laws which authorise the Govt. the taking possession of or acquiring a salt factory. The law invoked by Govt. in that behalf is the Salt Act. The Notifications are only the orders issued by the executive Govt. in exercise of powers they claim as vested in them under the Act. If the Salt Act confers on Govt. the powers they claim even if it contains no provisions as contemplated by Art. 31 (2), they are saved by Cl. 5 (a) of Art. 31 and Art. 13 of the Constitution cannot be invoked. (Para 19)

(d) Interpretation of Statutes — Construction in favour of subject.

The question for the Court is not what the Legislature means, but what its language means, i.e., what the Statute has said that it meant. In cases of doubt it is always safe to give the benefit of such doubt to the subject, especially when the power sought to be exercised restricts the normal rights of the subject in relation to his person or property. (Para 20)

Anno: C. P. C., Preamble N. 7.

(e) (Travancore) Salt Act (III (3) of 1088 M.E.), Ss. 11 (2) and 14 — Salt factory established by Company at their own cost in lands let out by Govt. for 50 years — Power of Govt. under Ss. 11 and 14 to close down factory before expiry of 50 years and establish their own.

Where a Company had established a salt factory at their own cost in the lands let out to them by the Govt. for a period of 50 years and the salt factory came into existence before Act III (3) of 1088 (ME) was itself enacted, the Govt. have no power to issue notifications under Ss. 11 and 14 closing down such a factory before the expiry of the 50 years and establishing a factory of their own (which meant converting the Company's salt factory into Govt.'s own.) In publishing such notifications, the Govt. assume a power which is beyond the provisions of the Act. (Para 20)

(f) Interpretation of Statutes — Ejusdem generis rule.

Where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified. (Para 22)

The rule of 'ejusdem generis' applies as much to associated words in one sentence as to terms or phrases appearing in parts of the same section or in different sections in the same chapter. (Para 23)

(g) Constitution of India Art. 226 — Travancore-Cochin High Court Act (1125 M.E), S. 18 (2) — Certiorari — Writ of against Govt.

Where executive actions of Govt. are in excess of jurisdiction or are 'ultra vires' their powers, the issue of a writ of 'certiorari' against the Govt. is a legitimate remedy. (Para 34)

K. P. Abraham and T. S. Krishnamoorthy Iyer; for Petitioner; Advocate-General for the State.

Cases referred to:

(Arranged in order of Courts and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('49) 51 Bom L R 997: (A I R (37) 1950 Bom 144) (Pr 23)

('43) A I R (30) 1943 Lah 140: (208 I C 89 FB) (Pr 23)
(1700) 1 Ld Raym 580 (Pr 34)
(1819) 2 Swanst 518 (Pr 21)
(1822) 5 B & Ald 869: (106 E R 1409) (Pr 21)
(1825) 7 B & C 836: (108 E R 935) (Pr 21)
(1861) 30 L J M C 155: (1 B & S 381) (Pr 21)
(1880) 49 LJCh 355: (14 Ch D 521) (Pr 21)
(1881) 6 Q B D 607: (50 L J Q B 233) (Pr 21)
(1884) 53 L J Ch 124: (24 Ch D 477) (Pr 21)
(1887) 18 QBD 588: (56 L J Q B 446: 56 L T 620: 35 WR 511) (Pr 21)
(1929) 1 K B 619: (98 L J K B 636) (Pr 34)
(1930) 2 K B 98: (99 L J K B 457) (Pr 34)
(1931) A C 494: (100 L J K B 306) (Pr 34)

ORDER: This is an application for issuing a writ in the nature of certiorari to quash two Notifications published by Govt. one under Ss. 11 & 14, Travancore Salt Act III (3) of 1088 closing down a salt factory & the other under S. 11 of the said Act establishing a Govt. salt factory on the premises of the salt factory closed down & for issuing another writ in the nature of 'prohibition' prohibiting Govt. from taking any further step by way of implementing those Notifications & to prevent Govt. or their officers from entering upon or taking possession of the existing factory or the premises thereof & for other ancillary or incidental orders & directions upon the ground that the said Notifications & all actions taken or proposed to be taken thereunder are 'ultra vires' the Govt. The salt factory in question belongs to the Cape Comorin General Traffic Co. Ltd., (hereafter in this order referred to as the Company) now under liquidation & the petitioners are two share-holders of the Company. A scheme for the reconstruction of the Company filed by them & other share-holders is now before the Company Court viz., the Dist. J.'s Court, Nagerciol. The Govt. of Travancore-Cochin State & two of their Officers — the Commissioner of Excise (the First Member of the Board of Revenue) & the Division Peishkar (now District Collector) Trivandrum — are made Counter-petitioners 1, 2 & 3 respectively to the application. The Official Liquidator of the Company is Counter-petitioner 4. The main application filed on 21-6-1949 was accompanied by a subsidiary petition (C. M. P. 1813 of 1125) asking for interim reliefs & on 23-12-1949, the Court directed notices to be issued on them to the opposite parties. In due course the learned Advocate-General entered appearance on behalf of Govt. & opposed both petitions. The Official liquidator also entered appearance through Counsel, but his attitude has throughout been one of neutrality.

(2) The Cape Comorin General Traffic Co., Salt Factory known as the extension Salt Factory No. 11, was established by the Company in the lands mentioned & described in Schs. A & B of the main petition, under an agreement (Ex. F, Copy), entered into by the Company on 7-5-1909 with the then Govt. of Tranvancore. The lands in which the salt factory was established belonged to Govt. but they were transferred to the Company under the said agreement on lease for a period of 50 years. By that agreement the Company undertook to establish in those lands a salt factory at their own cost & to maintain it in such condition as Govt. may from time to time prescribe. According to the petitioners the Company had to invest more than fifteen lakhs of rupees in establishing their salt for & obtained from Govt. the necessary licence for manufacturing salt. The license was being renewed from time to time & Ex. G is one such renewed licence issued in Kumbhom 1122. Even after the Company went into liquidation manufacture of salt continued to be undertaken in this factory by a contractor on terms & conditions fixed by the liquidation Court. But the first Notification among the series which form the subject of this application cancelled the license then current. That, at any rate, is what the Notification purported to do. The petitioners aver in their petition that the Company had not committed any default within the intent of the agreement or of the law & that the Company is entitled to continue in possession of the lands & factory for the full period of 50 years, 9 years of which are yet to expire & manufacture salt so long as they do not commit any breach of the agreement or contravene the law. According to the petitioners that is a right guaranteed to them by the then Govt. of Travancore under the agreement, Ex. F. The present Govt. however with a view to carry out a proposed scheme for nationalisation of the industry intended taking possession of the factory under the purported authority of the Notifications sought to be impugned in this proceeding. The salt factory was in existence when the Travancore Salt Act III (3) of 1088 was enacted & the law in force when it was established was the Travancore Salt Act VII (7) of 1063. The petitioner's case is that Ss. 11 & 14 of Act III (3) of 1088 under which sections these Notifications are published do not contemplate any such power as Govt. assume to close down a salt factory other than their own or to establish one on lands in the lawful possession & occupation of other persons or bodies without the consent of the persons or bodies in lawful possession. On the other hand Govt.'s case is that under the powers vested in them by the said sections they can close down 'any' salt factory by whomsoever established & if so advised, enter into possession or establish a salt factory of their own which in this case can only mean converting the Company's salt factory into Govt.'s own.

(3) The principal questions that fall for decision in this proceeding are which of these contentions should prevail, & assuming the petitioners' contention to be sound whether this Court can or need exercise the jurisdiction invoked to protect the rights & interests of the Company by averting the threatened wrong. Before these questions are discussed there are certain preliminary points to be disposed of, but I shall first refer to the several Notifications Govt. published in this matter & the steps taken by the petitioners to prevent immediate dispossession by Govt. of the Company's salt factory from the hands of the Company.

(4) The first Notification was published on page 911, Part 1 of the Govt. Gazette dated 13-12-1949. That is styled a "Draft Notification", it is numbered as No. 1-2/2471/49/DD and it bears the date 10-12-1949. It is published by Sri V. Kunjukrishnan, Secretary to Govt. The purport of it is that in exercise of the powers conferred on Govt. by Ss. 11 & 14, Travancore Salt Act III (3) of 1088 (as continued in force by the Administration & Application of Laws Ordinance, 1124) Govt. notifies the closing down of the Cape Comorin General Traffic Co., Salt Factory No. 11 established in the lands mentioned & described in the three schedules annexed to the Notification with effect from 26th Vrischigom 1125 (11-12-1948), that the 'licenses' relating to the 'salt works' comprised within the factory will be deemed to have been cancelled with effect from that date & that the 'salt works' of which the 'licenses' have been cancelled be retained as such works within the salt factory. The three schedules mentioned are the same as those appended to the petitioner's application. This Notification is Ex. A in this proceeding. The second Notification was published under date 15-12-1949 on page 929 of Part 1 of the Govt. Gazette dated 20-12-1949. This is marked Ex. B & it sets out that in the exercise of the powers conferred by S. 11, Travancore Salt Act, Govt. have established a salt factory in the lands mentioned & described in the schedules annexed

thereto with effect from the 1st Dhanu 1125 (16-12-1949.) Four schedules (Schs. A to D) are annexed to this Notification of which Schs. A, B & C to Ex. A Notification & to the petitioners' application. This Notification is also published by Sri V. Kunjukrishnan, Secretary to Govt. The petitioners' application O. P. No. 6 of 1125 filed on 21-12-1949 (6-5-1125) makes no reference to the second Notification Ex. B. The reliefs claimed are all with respect to the first Notification Ex. A. A third Notification, Ex. C which is no more than a correction of the schedules to the second Notification was published by the same officer under date 26-12-1949 at page 951, Part 1 of the Govt. Gazette, dated 27-12-1949. Its purpose was to omit Sch. C from Ex. B Notification & to renumber Sch. D thereto as Sch. C. The properties mentioned in Sch. C of Ex. B belong to the Company. They were acquired by Govt. for the Company at the latter's cost. The Sch. D properties renumbered as C as per the third Notification belong to Govt. & the Company have no interest in them. Later Ex. A Notification & ex. B as amended by Ex. C were cancelled & superseded respectively by Exs. D & E Notifications published in the Govt. Gazette dated 31-1-1950. This proceeding is now primarily concerned with these two latter Notifications. In fact the three prior Notifications had to be referred to in order to explain how the petitioners' application came to be filed even before Exs. D & E Notifications were published. The latter two Notifications bear one & the same date 'viz', 25-1-1950 & they are published by Sri K. G. Menon, Chief Secretary to Govt. The petitioners had in their application taken exception to the first Notification appearing in the name of Sri V. Kunjukrishnan, a Secretary to Govt. & stated that legally it cannot amount to a Notification by Govt. The primary question involves in this proceeding, as stated already is as to the jurisdiction of Govt. to issue such Notifications with respect to a salt factory like the one we are concerned with here. We have seen that the Company had established the salt factory at their own cost in the lands let out to them by Govt. for a period of 50 years & that the salt factory had come into existence before Act III (3) of 1088 was itself enacted.

(5) It is at this stage convenient to reproduce Exs. D & E Notifications here: Ex. D runs thus:

"In supersession of the Notification No. 1-2/2471/49/D.D. dated 10-12-1949, published at page 911 of Part 1 of the Govt. Gazette, dated 13-12-1949, & in exercise of the powers conferred by Ss. 11 & 14, Travancore Salt Act, III (3) of 1088, as continued in force by the United State of Travancore-Cochin Administration & Application of Laws Act, VI (6) of 1125, Govt. hereby notify that the Cape Comorin General Traffic Company, Salt Factory known as the extension Salt Factory No. 11 established in the lands mentioned & described below will be closed with effect from 31-1-1950, that the licenses relating to the salt works therein comprised will be deemed to have been cancelled with effect from that date, & that the salt works of which the licenses have been cancelled shall be retained as such works within the said salt factory."

Two schedules are appended to this Notification & the properties described therein are the same as those Govt. leased to the Company under the agreement dated 7-5-1909. Ex. E Notification reads thus:

"In supersession of Notification dated 15-12-1949 published at page 929 of Part 1 of the Govt. Gazette dated 20-12-1949 & in exercise of the powers conferred by S. 11, Travancore Salt Act III (3) 1088, as continued in force by the United State of Travancore & Cochin Administration & Application of Laws Act VI (6) of 1125, it is hereby notified that Govt. are pleased to establish a salt factory in the lands mentioned & described in the schedule given below, with effect from 31-1-1950."

Three schedules are appended to it & the first two schedules mention & describe the same properties as mentioned in the two schedules to Ex. D, while Sch. 3 the C schedule mentions & describes some Govt. lands the same as those mentioned in Sch. C to Ex. B as amended by Ex. C. Soon after the two latter Notifications appeared in the Govt. Gazette, to be precise, on 8-2-1950 the petitioners sought leave to amend their main petition O. P. No. 6 so as to convert the same into one seeking reliefs with respect to actions taken or proposed to be taken under them. The prayer made in the application for amendment (C. M. P. 230 of 1950) is that the reliefs asked for in the main petition be granted with respect to these fresh Notifications.

(6) In the mean time in response to the notices issued pursuant to the orders the Court passed on 23-12-1949 on the main application & the subsidiary petition M. P. 1813 of 1125 the learned Advocate-General had, as mentioned earlier, entered appearance on behalf of the State & opposed both petitions. On 6-2-1950 one of the Assistant Secretaries to Govt. filed an affidavit setting out Govt's objections to the two applications & the grounds therefor. According to Govt. as the Company is in liquidation the petitioners have no 'locus standi' to file such an application, & in any event the application filed without the leave of the winding up Court is not maintainable. On the merits the objection raised is that the provisions of the Salt Act invoked in the Notifications confer on Govt. power to close down any salt factory by cancelling the licence issued for the salt works therein comprised & that they have also power to establish a salt factory as the second Notification, Ex. E purports to do. In other words according to Govt. the two notifications impugned are 'intra vires' the Govt. & the general law of the land or the provisions of the agreement entered into between the Company on the one hand & Govt. on the other do not stand in the way of Govt's. exercise of such powers. The agreement is & has always been subject to the salt laws of the land & no term contained therein can affect Govt.'s powers under the Salt Act. Mention has already been made that the Official Liquidator who entered appearance through Counsel did not oppose or support the application.

(7) After these preliminaries the petition came up for hearing before a Bench consisting of the learned Chief Justice & K. S. Govinda Pillai, J., on 27-2-1950. On that date the Govt. Pleader appearing for the learned Advocate-General asked for a short adjournment. The Court ordered as follows:

"Adjourned to 2-3-1950. In the meantime the 'status quo' will continue so far as the manufacture of salt is concerned, provided the license issued to the liquidator has not been cancelled or suspended."

(8) The understanding would appear to be that during the pendency of this proceeding Govt. would take no further action to implement the two impugned Notifications. On the adjourned date of hearing the case came up before the same Bench when the petitioners' learned Counsel asked for time & also requested that the case be placed before a Single Bench as a single Judge was under S. 20 (4) (A) (X), Travancore-Cochin High Court Act, 1125 competent to hear & dispose of the matter. The Statute provides for an appeal to a Bench against the single Judge's decision. The case was therefore directed to be posted before a single Judge & was placed before me. The first thing I had to do was to dispose of the petitioners' application (C. M. P. 230) to amend their main petition & as it was not opposed by the learned Ad-

vocate-General or the learned Counsel for the Official Liquidator I allowed it.

(9) From the foregoing resume of events that lead to this proceeding & that followed its initiation it is clear that the decision of the case on the merits must depend upon the true construction of the relevant provisions of the Salt Act. That is, whether those provisions permit Govt. to derogate from their grant. It may here be mentioned that Para. 24 of the agreement contains a provision as follows:

"The Company doth agree & bind themselves to abide at all times by the provisions of the salt regulation which shall be then in force as also of all rules framed thereunder & now in force as well of those that may be framed & put in force from time to time hereafter."

(10) Paras. 5 & 14 confer a general power on Govt. to resume the grant if & when the Company fails to discharge any of the obligations undertaken by them. The other terms of the agreement so far as they are relevant for our purposes are contained in Paras. 20, 25 & 26 & for a proper appreciation of the contentions and the arguments advanced at the Bar it would be helpful to extract those provisions here:

"That both the parties to these presents mutually covenant & agree that this agreement shall remain in force for a period of fifty years from the date of these presents & that after such period the lands & premises mentioned & described in Schs. A & B annexed hereto together with all the works thereon shall lapse to & be possessed by the Sirkar provided that if on the expiration of the said period of fifty years both the parties to these presents desire & agree to this argeement may be renewed for any further period on the terms, covenants & conditions herein specified or on any other terms, covenants & conditions as may then be mutually agreed to. And provided further that if this agreement be not renewed on the expiration of the said period of fifty years it shall not be lawful for the Company to manufacture any salt on the lands & premises on which under the terms of these presents the company were till that time allowed to manufacture salt or to carry on any other works towards manufacturing salt.

"The Sirkar doth hereby covenant & agree that they shall permit the Company to be in undisputed occupation & enjoyment of the salt factories put up under the provisions of these presents & to exercise full rights over the same to effectuate their intents & purposes so long as the Company observe & perform terms, covenants, conditions & provisions hereinbefore referred to & which are or ought to be observed & performed on their part.

"The Sirkar doth further covenant with the Company that they shall on their part, in consideration of the Company, having agreed & covenanted to observe & perform the terms, covenants conditions & provisions which are or ought to be observed & performed by them.

(11) In this context, I shall also read here the relevant sections of the Salt Act. Ss. 11 & 14 are specifically referred to in Ex. D Notification while the Notification Ex. E refers to S. 11. S. 14 refers to S. 16 in more places than one. In view of that & as the provisions of S. 16 are both helpful & necessary to understand the implications of the second sentence in S. 11, I shall quote S. 16 as well here.

Section 11: Our Govt. may by notification establish a salt factory in any land which is the property of the Govt. or other land in which the owner thereof shall permit the establishment of a salt factory, subject to the payment of compensation as hereinafter provided. Our Govt. may, in like manner, close any salt factory or portion thereof, by directing the cancellation of the licences relating to salt works therein comprised.

Section 14: Salt works for which licences have been relinquished under S. 9 or cancelled under Ss. 7, 11, 13, 23, 25 or 65, shall be at the disposal of our Govt. who shall determine whether the salt works shall be retained within the salt factory or not.

(a) If our Govt. direct that the salt works shall be retained within the factory, the proprietary right of other persons therein, if any, shall thereupon vest in our Govt., who shall pay the value of such proprietary right to the late licensee. In calculating such value the value of the land as a site for salt manufacture shall not be taken into account. The Govt. shall, if they admit the existence of such proprietary right, tender to the late licensee such sum as they consider to represent the value thereof, & if the sum tendered is not accepted or such proprietary right is not admitted by the Govt. they shall refer the late licencee to a Court of competent jurisdiction. In the case of salt works for which licences have been cancelled under Ss. 7, 11, or 13, the Govt. shall also pay to the late licensees compensation at the rates fixed in S. 16:

(b) If our Govt. direct that the salt works shall not be retained within the factory, they shall exclude them from the limits thereof, & no payment for the value of any proprietary right shall be made; but in the case of salt works for which licences have been cancelled under S. 7, 11, or 13, the Govt. shall pay the late licensees compensation at the rates fixed in S. 16:

Provided that no compensation under this section shall be payable, if it is excluded by express stipulation in the conditions of the license.

Section 16: The compensation payable under S. 14 to a licensee shall be at the rate of eight chuckrams for every maund of salt on the average quantity annually stored from the salt works to which the licence cancelled relates. Such average shall be calculated, (a) in the case of salt works of more than five years' standing, on their yield during the five years immediately preceding the date of the cancellation of licence, & (b) in the case of salt works of less than five years' standing, on their yield during the whole period of their working."

(12) The contention raised by the learned Advocate-General is that the expression "any salt factory or portion thereof" in the second sentence of S. 11 is used in the most unqualified terms & that the provision enacted by that sentence to close down a salt factory by directing the cancellation of the licences relating to salt works therein comprised entitle Govt. to close down any factory by whomsoever established whether before or after Salt Act III (3) of 1088 came into force. The learned Advocate-General went further & contended that when a salt factory was so closed down S. 14 left the entire factory at the disposal of Govt. & that if Govt. so chose to decide that the salt works shall be retained within the salt factory the proprietary right of all concerned in the factory would become vested in Govt. & they were free to enter upon it, take possession & deal with it as they liked. The liability to pay compensation was not however denied but the extent thereof or the manner in which that was to be fixed or given was not disclosed. Even a statement filed on 16-3-1950 by way of compliance of a direction made by me during the course of the argument has not thrown much light on this aspect of the question. The view appears to be Govt. can pay it in their own good time. According to the learned Advocate-General such payment was not a condition precedent to the closing down of a salt factory or to Govt. entering into possession of the closed

down factory to establish a salt factory of their own or for any other purpose.

(13) In answer to the above what the petitioners' learned Counsel contended was that the meaning of the word "any" occurring in the second sentence of S. 11 is restricted by the context in which it occurs. The argument was that as the first sentence in S. 11 speaks of a specified class of salt factories or rather it authorises Govt. to establish salt factories in their own land or in land belonging to others with the consent of those others the authority which the second sentence confers on Govt. is with respect to such Govt. established salt factories & not to salt factories which form the private property of other persons or bodies as the salt factory in question. For this reliance was placed on what is called the 'ejusdem generis' rule according to which general words have a meaning attributed to them less comprehensive than they would otherwise bear, by reason of particular words preceding them. It was further contended that S. 14 had not the effect of leaving the salt factory as such at Govt.'s. disposal when a licence was cancelled or relinquished & that all the reference in that section & the succeeding sections conferring authority on Govt. to take possession or to deal with was to "salt works" & "salt works" alone & not to "salt factories." The learned Counsel also did not agree to the contention urged on behalf of Govt. that compensation need only be paid after possession was taken by Govt. Before dealing with all these matters certain preliminary points have to be disposed of & I now proceed to discuss them.

(14) The learned Advocate-General raised certain preliminary objections to the maintainability of the petitioners' application. It was urged that in view of the liquidation proceeding pending before the Nagercoil District Court that Court was the proper forum to entertain the application & not this Court. Alternatively it was argued that this application filed without the sanction of the winding up Court cannot be maintained. I may at once state that in my view these objections are untenable. What the petitioners have invoked is the extraordinary jurisdiction vested in this Court as a Court of record & whether this Court ultimately grants the reliefs asked for or not, the jurisdiction invoked is one which this Court alone has & not the Company Court. When the application was filed on 21-12-1949 there was no statutory provision investing this Court with jurisdiction to issue writs of the kind asked for, but within two days of it the Travancore-Cochin High Court Act 1125, became law & S. 18 (2) of that Act enacts that the High Court shall have power throughout the territories of the Travancore-Cochin State to issue to any person or authority, including in appropriates cases Govt. directions, orders, or writs in the nature of mandamus, prohibition, quo-warranto and certiorari.' S. 8 of the Act provides that all proceedings commenced prior to the coming into force of this Act in the existing High Court..... shall be continued & depend in the High Court as if they had commenced in the High Court after the coming into force of the Act. There is therefore no merit in the first objection.

(15) As for the second that the proceeding cannot be maintained without the sanction of the liquidation Court the provisions relied on were Ss. 210 & 245, Travancore Companies Act, corresponding to Sections 171 & 202 respectively of the Indian Companies Act. These sections have in my view no bearing on the present proceeding. The former section only says that when a winding up order has been made or a provisional liquidator has been appointed to suit or other legal proceeding shall be proceeded with or commenced against the Company except by leave of the Court, & subject to such terms as the Court may impose. Here there is no proceeding against the Company & the section cannot therefore obviously apply. S. 245 only provides that re-hearings of & appeals from any order or decisions made or given in the matter of the winding up of a company by the Court may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction. This only shows that when the winding up Court passed an order in relation to winding up or allied matters there shall be an appeal to the Court from which appeals ordinarly lie from that Court. The two orders of the winding up Court dated respectively 13-1-1950 & 27-2-1950 produced before me do not fall within the purview of the orders contemplated by the section. The first order related only to the terms on which the contractor was allowed to manufacture salt and apparently nobody had any complaint about it. The second order refers to the present proceeding & only gave further directions concerning manufacture of salt pending disposal of this proceeding. No other order of the winding up Court was brought to my notice nor am I able to appreciate how matters which are sought to be made the subject of such extraordinary writs as 'ceriorari & prohibition' can be adjudicated upon by the winding up Court so that the aggrieved party may prefer an appeal to this Court. It is settled law that any aggrieved party has the right to move the High Court for writs of the kind asked for in this proceeding. 'Reference may in this connection be usefully made to pages 325 to 327 of Thoms and Bellet's Leading Cases in Constitutional Law, (Edn. VII) where with reference to decided cases it is explained that a party aggrieved, as distinguished from a person who is a stranger, has, as a matter of justice & right, the right to move the High Court if he suffers from usurpation of jurisdiction by another tribunal.' It was not disputed that though the Company is in liquidation the share-holders are persons aggrieved by the Notification sought to be impugned & the action proposed to be taken thereunder. The Official Liquidator is, as noticed already, made a counter-petitioner to the proceeding. The statement in the petitioners' application that in spite of requests made to him to protect the interests of the Company he has not moved in the matter, has not even been attempted to be controverted. I would, therefore, as stated earlier, hold that the preliminary objections are without merit & overrule them.

(16) A further point that a writ of 'certiorari' cannot be issued 'to correct executive or administrative acts of Govt.' was mentioned by the learned Advocate-General during the course of his argument. However that was not advanced as an absolute proposition. It was conceded that the proposition had its limitations. It is more convenient to advert to this aspect after the case is discussed on the merits.

(17) I must now refer to certain arguments the learned Counsel for the petitioners advanced based on various Articles of the Constitution of India & several rules of the Adaptation of Laws Order 1950. Though arguments from both sides on this branch of the case covered a very wide range & though several questions were raised, if I may say so, most of them got themselves resolved during the course of the interesting & protracted discussion we had at the Bar. Arguments such as those based on Arts. 246, 295 & Sch. 7, List 1, Union List, Entry No. 58 that after 26-1-1950 the State Legislature or the State Govt. have no right or jurisdiction to deal with subjects included in the Union List were virtually abandoned ultimately.

Other provisions in the Constitution & the Adaptation of Laws Order to be referred to presently keep the existing laws alive: I shall therefore confine myself to such points that survived the discussion at the Bar. At the same time it may be mentioned that the argument raised at the earlier stages was that though the two impugned Notifications bear the date 25-1-1950 as they were published in the Govt. Gazette only on 31-1-1950 after the Constitution of India had come into force they are ineffective or of no avail as Notifications issued under the Travancore Salt Act. It was even urged that the Salt Act (Travancore) had itself become a dead letter.

(18) To advert to the points that survived the discussion at the Bar my impression is that there are only two such points. One is that though R. 22 of the Adaptation of Laws Order continue to vest in the Govt. of Travancore-Cochin State the power to issue Notifications under S. 11 or 14, Travancore Salt Act notwithstanding the entry in Item 58 of the Union List, the authority invoked in the concerned Notification is the Travancore-Cochin Administration & Application of Laws Act 1125 & not the Adaptation of Laws Order 1950 issued by the President of the Republic of India on 26-1-1950. This does not appear to me to be a serious or substantial objection. In the first place if it be a flaw it is one which is cured by, or can easily be cured under R. 24, Adaptation of Laws Order, 1950. Secondly, under Art 372 (1) of the Constitution of India, all existing laws & their adaptations shall continue in force until altered or repealed or amended by a competent Legislature or other competent body. So the Travancore-Cochin Adaptation & Application of Laws Act, 1125 is still good law as an existing (State) law. The term 'existing law' is defined by Art. 366 (10) as meaning any law, ordinance, order, bye-law Rule or Regulation passed or made before the commencement of the Constitution of India by any Legislature, authority or persons having power to make such law, ordinance, order, bye-law rule or regulation. R. 2 (1) (e) of the Adaptation of Laws Order defines that existing law "means an existing Central law, existing Provincial law or existing State law." Cl. (d), Sub-R. 1, R. 2, so far as relevant states that "'existing State Law' means an Act, Ordinance, or other Legislative Enactment by whatever name called which immediately before the appointed day was a law in an Indian State corresponding to the whole or any party of a Part B State....." These provisions therefore in my view give sufficient authority for the Govt. of Travancore-Cochin State to issue Notifications, orders, etc., as they were doing before. At any rate on 31-1-1950 there was no legal impediment in their way to publish such Notifications & the omission to refer expressly to the Adaptation of Laws Order does not render these Notifications invalid if they are otherwise valid.

(19) It was next argued that assuming these Notifications were 'intra vires' the Govt. under powers vested in them Ss. 11 & 14 Salt Act, they were rendered 'void by reason of their violation of "Fundamental Rights"' safeguarded by Part 3 (Arts. 12 to 35), Constitution of India. 'Article 13 provides that laws inconsistent with fundamental rights recognised by the Constitution shall to the extent they are inconsisent with such rights be void . Article 31 (1) provides that no property movable or immovable shall be compulsorily taken possession' of or acquired for public purpose under any law authorising such taking possession or acquisition unless the law provides for compensation for the property taken possession of or acquired & either fixes the amount of the compensation or specifies the principles on which & the manner in which the compensation is determined or given. The argument of the learned Counsel for the petitioners is that since S. 72, Salt Act, provides that Notifications issued by Govt. under the authority of the Act shall have the force of law & shall be read as part of the Act, in so far as these Notifications do not satisfy the requirements of Art. 31 (2) of the Constitution they are useless to enable Govt. to take possession of or acquire the salt factory in question. It was urged Art. 13 (2) rendered the Notifications void. The argument is founded on an assumption that the Notifications represent the laws authorising the taking possession of or the acquisition of the property concerned. The assumption is in my view unsound. 'The Notifications are not the laws which authorise Govt. the taking possession of or acquiring a salt factory.' The law invoked by Govt. in that behalf is the Salt Act. 'The Notifications are only the orders issued by the executive Govt. in exercise of powers they claim as vested in them under the Act.' If the Salt Act confers on Govt. the powers they claim even if it contains no provisions as contemplated by Art. 31 (2), they are saved by Cl. 5 (a) of Art. 32 which provides that nothing in Cl. (2) shall affect the provisions of any existing laws other than a law to which the provisions of Cl. (6) apply. Obviously Cl. 6 has no application here. In the view I take that Notifications are not the laws under which the salt factory is sought to be taken possession of or acquired the argument based on the two articles of the Constitution now referred to ceases to have any force.

(20) Now we come to the construction or interpretation of the relevant sections of the Salt Act. This is by far the most important question in the case. These sections, already quoted earlier in this order, are not quite easy to construe. I am free to confess that my mind wavered a good deal with regard to the arguments for & against the construction I have ultimately accepted. My conclusion is that in publishing Exs. D & E Notifications impugned here, Govt. assume a power which seems to me to be beyond the provisions of the Act. The Notifications (Exs. D & E) are in my view 'ultra vires' the Govt. The question for the Court is not what the Legislature meant, but what its language means, i.e., what the statute has said that it meant. In cases of doubt it is always considered to be safe rule to give the 'benefit of such doubt to the subject, especially when the power sought to be exercised restricts the normal rights of the subject in relation to his person or property.' No doubt the position of a person who has accepted a licence under a fiscal statute is different from that of an ordinary member of the public, but having given the matter my best & most careful attention, I think that consistently with certain well settled rules of construction of Statutes the conclusion I have come to is the correct one. Perhaps the difficulty has been created by Act 3 of 1088 giving to "salt-work" a definition different from the one it had under the earlier enactment, Act 7 of 1063. The definition given to "Salt-work" in the earlier Act has now almost in terms been applied to "salt factory" & "salt-works" now becomes a part of a bigger unit, "the salt factory." In this as in other respects the Travancore Salt Act 3 of 1088 followed the lead the Madras Salt Act 4 of 1889 gave & if a reference is permissible to the statement of objects & reasons for enacting the Madras Act the purpose with which this particular alteration of the law was made would become clear. What is said there is the words "salt factory" have been substituted for the words "salt work" in the existing law & the latter has been taken to mean an individual holding within a salt factory. That would lend support to a point taken in Paras. 15 & 16 of the petitioners' applica-

tion that there are no "salt works" within the meaning of the Act in the salt factory in question & that therefore no question of any licences relating to salt works being cancelled, or of ordering salt works being retained within the salt factory or not, or of closing down the salt factory by cancelling licences relating to salt works would arise with respect to a factory like the one before me in this case. When the whole salt factory is registered as one unit I find it difficult to apply the provisions of S. 11 or those in S. 14 to such a salt factory. Ex. F, the licence shows that we have only such a salt factory here. Be that as it may, I shall now refer to the main points relied on by the learned Counsel for the petitioners in support of his argument that the Notifications impugned are 'ultra vires' the Govt.

(21) The most important argument adduced by Counsel was that the 'ejusdem generis' rule should be applied in interpreting the word "any" occurring in the second sentence of S. 11. We have seen the first sentence of that section enacts a provision for establishing Govt. salt factories on their own land or in the land of other people with their consent. The second sentence enacts that the Govt. may by Notification close any salt factory or portion thereof' by cancelling the licenses relating to salt-works. The argument is that specific words referring to the particular type or class of salt factories referred to in the first sentence & which preceds the second sentence wherein the word 'any' occurs must control the meaning of that word. A large number of authorities were cited in support of this contention. In Stroud's Judicial Dictionary, Edn. 2, pp. 92 to 93, it is said, 'any' is a word which excludes limitations or qualifications, but that its generality may be restricted by the subject-matter or the context. Among the several instances cited there of the word 'any' being given a meaning limited by its context of the subject-matter a few may be quoted here.

"Thus, 'Any action', S. 36, Co. Co. Act, 1856, meant any Co. Co. Action (Re. Copp. (1881) 6 Q. B. D. 607: 50 L. J. Q. B. 233. So, under R. 295, Bankry R. 1870, 'any Creditor' might oppose registration of resolutions; but that meant 'any creditor who had previously proved his debt' (Ex parte Bagster (1884), 53 L J Ch 124: 24 Ch D 477; 'Cp. Wells v. Greenhill', (1822) 5 B and Ald 869). So, 'any other Person,' in R. 32 Ord. 42, R. S. C., means, by the context, any Officer of a judgment — debtor Corporation ('Irwell v. Eden', (1887) 18 QBD 588: 56 L J Q B 446: 56 L T 620: 35 W R 511); and by a context 'any person' may mean any eligible person ('Tobacco Pipe Makers v Woodroffe', (1825) 7 B and C 838; 'Vf. Metrop. Bd. Works v. Lond. and N. W. Ry.', (1880) 49 L J Ch 355: 14 Ch D 521. So, under Romilly's Act, 52 G. 3, c. 101, 'any two or more persons' to present a petition, means persons having an interest (Re Bedford Charity, (1819) 2 Swanst. 518). 'Vf. R. v. Comptroller of Patents', inf."

"A local Harbour Act which imposed a penalty on 'any person' who placed articles on any quay, wharf, or landing place, within 10 feet of the quay head, or any space of ground immediately adjoining the said haven, within 10 feet from high-water mark," so as to obstruct the free passage, was held inapplicable to private property over which there was no public right of way ('Harrod v. Worship', (1861) 30 L J M C 165: 1 B & S. 381.)"

(22) These instances will support the contention of the learned counsel for the petitioners. In Craies on 'Statute Law' (Edn. 4) at p. 165 it is seen stated that where there are general words following particular & specific words, the general words must be confined to things of the same kind as those specified. The discussion on page 48 Maxwell's Interpretation of Statutes, (Edn. 9) & that on pp. 336 to 342 are also in favour of the petitioners' contention. A passage occurring on page 337 is particularly instructive. It reads: "But the general word which follows particular & specific words of the same nature as itself takes its meaning from them, & is presumed to be restricted to the same genus as those words. In other words, it is to be read as comprehending only things of the same kind as those designated by them, unless, of course, there is something to show that a wider sense was intended. "Salt factories established by Govt. form a particular category among the generality of salt factories & as the first sentence of the section refers to the particular category of salt factories established by Govt. the reference to 'any' salt factory in the subsequent sentence must according to the learned Counsel for the petitioners necessarily refer to salt factories of the specified class, i.e., salt factories established by Govt.

(23) In 'Bharat National Bank v. Bhagwan Singh', A I R (30) 1943 Lah 140, it was held as follows: The rule of 'ejusdem generis' applies as much to associated words in one sentence as to terms or phrases appearing in parts of the same section or in different sections in the same chapter. Accordingly it was held that the expression "determination of any question" in the second sentence of S. 2 (2), Civil P. C., (Act V (5) of 1908) is used 'ejusdem generis' with the phrase "conclusively determines "etc., in the first. (See page 143.) In another case referred to at the Bar 'Jagat Chandra v. Province of Bombay', 51 Bom L R 997, the contention raised by the learned Advocate-General of Bombay that the expression "any premises" occurring in S. 6 (1), Bombay Land Requisition Act, 1948 should be given its full & unrestricted meaning was held to be untenable by the Court. The reason given was that the word "premises" being defined in the Act in understanding the section where that word is used the definition of the word must be substituted in its place. The reason assigned makes this case not of much help to the petitioners.

(24) In my view the petitioners' contention that the word 'any' must be given a restricted sense is entitled to weight & has to be accepted, particularly so when there are other reasons for giving a limited scope to the second sentence of S. 11. The effect of giving a full & unrestricted meaning to the word 'any' in that sentence would in my opinion as the sequel would show lead to anomalous results.

(25) Another rule of construction which lends support to the contention that the second sentence of S. 11 refers to salt factories established by Govt. is that normally every section of an Act would deal with a distinct subject. Bowvier's Law Dictionary speaks of a section as the smallest numbered sub-division of a statute, Code, textbook, etc., which contains a distinct subject (See Edn. 3, Vol. III p. 3032.) When the first sentence deals with the establishment of Govt. salt factories it is not unreasonable to think that the closing down referred to in the second sentence refers to salt factories established by Govt. A section may contain more than one enactment as S. 11 does. Reading the section as a whole & if the marginal note "power to establish & close factories" be any pointer to interpretation I think it must be held the second sentence relates to the closing down of salt factories established by the provision enacted by the first sentence. If the legislature had intended otherwise my view is that the second sentence would have been the subject of an independent substantive section.

(26) Further, the language of the second sentence would seem to indicate that the compensation

contemplated therein is to make good the loss sustained by the premature cancellation of the license & not for the loss or deprivation of title to the salt factory. That can be true only if the factory is owned by a person other than the licensee, say Govt. This view gains strength from Ss. 14, 15 & 16. The first part of S. 14 states that salt-works for which licenses have been relinquished under S. 9 or cancelled under Ss. 7, 11, 13, 23, 24, or 65 shall be at the disposal of Govt. who shall determine whether the salt-works shall be retained within the salt factory or not. By a relinquishment or cancellation of a license what is left at the disposal of Govt. is only the salt-works" & not the salt factory. What would happen to the rest of the salt factory when the salt works happen to fall at Govt.'s disposal As noticed earlier salt-works & salt factory are differently defined by the Statute. S. 3 Cl. (j) states:

"Salt factory" includes any place used or intended to be used for the manufacture of salt, or for the storage or keeping of the same pending payment of duty, & all embankments channels, reserviors, lands, buildings & waste places, situated within the limits thereof as defined from time to time by our Govt. by Notification in the Gazette."

(27) Cl. (k) defines "Salt-work" & that definition reads thus:

"Salt work" means any defined area within a salt factory which is used for the manufacture of salt & which is separately registered as such in the Sirkar accounts."

"Salt work" therefore is a smaller unit included in the bigger one the 'Salt Factory." Even where there are several licensees in a salt factory & all the licenses are cancelled or relinquished it is only those parts which constitute the salt works that would fall at the disposal of Govt. & not the rest of the factory which as the definition would indicate includes buildings, waste lands, etc., which would not form part of the land used for manufacture of salt & separately registered as such in Govt. accounts. There is no provision anywhere in the Act that by cancellation or relinquishment of a license the salt factory as such would vest in or even be at the disposal of Govt. The learned Advocate-General wanted to counter this position by stating the words "salt-works" in S. 14 or allied sections mean the same thing as "salt factory" & "salt works" are terms defined in the Act & it is settled rule of interpretation of Statutes that when a word or a term is defined in an Act the definition must be substituted for the word or term defined wherever it occurs in the Act. When both terms occur not only in the same section but in the same sentence it is difficult to hold that there is repugnancy in the subject or context in applying these definitions in interpreting the meaning of those sentences or sections. When the first part of S. 14 states that Govt. shall determine whether the salt-works shall be retained within the "salt factory" or not, how can a Court accept the argument that the term "salt-works" in this part of the section, or that term used to open the section means the same thing as "the salt factory."

(28) Again S. 14 (a) states that:

"If Govt. directed that the salt-work should be retained within the factory, the proprietary right of other persons therein, if any, shall thereupon vest in our Govt. who shall pay the value of such proprietary right to the late licensee."

Here also both terms occur in the same sentence. The proprietary right that vests in Govt. & which is sought to be purchased by them, is the proprietary right in the "salt-works" & not in the "salt factory. I also find it difficult to accept the learned Advocate-General's argument that the word "therein", occurring in the first sentence of S. 14 (a) refers to the salt factory & not to the salt-works. The provision to pay the value of the proprietary right of other persons in the salt-works to the licensee comes to my mind as a corollary to S. 10 & the proviso thereto. The second sentence of S. 14 (a) which reads: "in calculating such value, the value of the land as a site for salt manufacture shall not be taken into account," was relied upon to suggest that it is the factory that vests in Govt. & whose purchase is provided for in the section. But it was mentioned during the course of the argument before me that licenses are issued to persons who opened their own salt pans on lands taken on lease or mortgage or otherwise. There is in my view therefore no difficulty to reconcile that sentence with the remaining part of the section or with the construction which I have sought to give to the relevant sections of the Act. The impression I have formed on reading the two Travancore Salt Acts, Act VII (7) of 1063 & Act III (3) of 1088 & other relevant literature relating to salt manufacture in Travancore confirms the statement made at the Bar that a person may hold a license to manufacture salt on land belonging to the another. Whatever that be the view I have taken of the meaning & interpretation of S. 11 no question of paying the licensee the value of the land can arise when a salt factory is closed down under that section.

(29) Section 14 (b) also uses the two terms "salt factory" & "salt-works" in one & the same sentence. S. 15 makes it clear that what is left at the disposal of Govt. by relinquishment or cancellation of the license is only the "salt-works." The provisions in Ss. 14 & 16 to fix compensation also relate only to fix the value of the salt-works & not of the salt factory. If the Legislature intended that by a cancellation or relinquishment of a license to manufacture salt the entire salt factory should be at the disposal of Govt. the omission to state that the factory shall be at the disposal of Govt. or the omission to refer to the proprietary right of the owner of the factory is difficulty to explain. If S. 11 or S. 14 has the meaning or the effect the learned Advocate-General seeks to put on them & if Govt. needed such powers as are claimed on their behalf the legislature would have expressed those matters in unambiguous terms. No statute would easily be construed as depriving the subject of his rights unless the language is clear in that behalf. Throughout, the Salt Act makes a distinction between a "salt factory" & a salt-work & when the Statute states that "salt-works" shall be at the disposal of Govt. or it shall vest in them or that its value shall be paid in the prescribed manner it is difficult for me to hold that these provisions refer to a "salt factory." Reference to a part can in my view under no circumstances be held to be a reference to the whole. Nor can a person or authority take possession of the whole in the name of a part or portion. In these circumstances I feel constrained to hold that Ex. D Notification closing down the Cape Comorin General Traffic Co., Salt Factory known as the Extension Salt Factory No. 11 is 'ultra vires' the powers vested in Govt. under S. 11 & 14, Salt Act. It follows from that that the cancellation of the license is also without jurisdiction. Without offending well-known rules of construction these sections cannot in my view be held to lend themselves to the construction the learned Advocate-General seeks to put on them. To accept that construction would in my opinion lead to anomalous results. It may well be the Legislature did not want Govt. to be clothed with authority to ride rough shod over solemn undertakings with impunity. Or

it may perhaps be a case of the Legislature failing to achieve its purpose or even a case of 'casus omissus', a possible explanation I have attempted to give elsewhere in this order.

(30) Equally invalid is in my opinion the Notification Ex. E establishing a salt factory in the lands in the possession & occupation of the Company. The first part of S. 11 states Govt. may by Notification, establish a salt factory in any land which is the property of the Govt. or other land in which the owner thereof shall permit the establishment of a salt factory. The Company has under the terms of the agreement the right to retain possession of the properties comprised therein with all their improvements thereon for a further period of 9 years & admittedly they have not committed any breach of the agreement so as to entitle Govt. to resume possession. When the first Notification is 'ultra vires' even the salt works not to speak of the bigger unit the salt factory, does not legally come to be at the disposal of Govt. & to my mind so long as the agreement subsists it cannot be said that A & B Schedule lands which Govt. leased to the Company for a specified period of 50 years can be treated as Govt. property so as to entitle them to establish a salt factory in those lands now. Obviously the Company has not given any consent for Govt. to establish a salt factory in these lands. S. 11 cannot therefore enable Govt. to establish a salt factory in these lands now.

(31) The logical effect of these conclusions is that with respect to Salt Factories, as the one in question established by private owners under agreement with Govt., rights & obligations of both the contracting parties are primarily those prescribed & provided in the agreement. A reference to Ex. F. the agreement in this case, would show that it is a self-contained document providing for all eventualities. Before legislation on the lines of Madras Act IV (4) of 1889 was undertaken in Travancore this agreement incorporates into it many of the provisions which then found a place in that Act & which later on were practically bodily adopted in Travancore by Act III (3) of 1088. In fact para. 24 of the agreement would seem to have been introduced more by way of abundant caution than by any other consideration. Far be it from me to suggest that that clause is without effect, or was introduced without purpose. As I understand the provisions of the Salt Act, if Govt. so desire to acquire the Company's right to remain in possession of their salt factory for the unexpired portion of the lease, Govt. will have to fall back upon the provisions of the Land Acquisition Act & Ss. 11 & 14 would in my opinion be poor substitutes for them.

(32) It is now time to consider whether in all the circumstances of the case all or any of the writs applied for in this case should be directed to be issued by this Court to the first counter-petitioner before me, the Govt. of Travancore-Cochin State. Before that is done I desire to make a passing reference to one of the points left undisposed until now. Earlier in this order I mentioned that the contending parties are not agreed as to when the compensation mentioned in the second sentence of S. 11 should be paid. That sentence has been read several times in this order & to read it once again runs:

> "Subject to the payment of compensation as hereinafter provided, our Govt. may, in like manner, close any salt factory or portion thereof, by directing the cancellation of the licenses relating to salt works therein comprised."

(33) The view pressed on me by the learned Advocate-General is that compensation need only be paid or even tendered after Govt. assume possession of the salt factory & the lands appertaining thereto. The question did not receive much serious argument at the Bar, but the opposite view does not to my mind appear to be untenable. The section does not say, subject to the liability for payment of compensation as hereinafter provided, but states "subject to the payment of compensation as hereafter provided." The expression "as hereinafter provided" refers to Ss. 14 & 16 which only provide the mode or the basis of fixing the compensation & not the time of payment. The expression "subject to the payment of compensation" is one peculiar or special to S. 11 when compared to Ss. 7, 9, 23, 25 or 65, which are the other sections the operation of which may entitle a licensee to obtain compensation. To my mind the opening words of S. 15 "pending the disposal of salt-works under S. 14" lend support to the petitioners' contention that payment should precede the closing down of the salt factory. Fixation & payment of compensation involve performance of functions of a judicial character. A decision on evidence by the authority concerned is implicit in that provision. That would be a good reason to attract the application of the law relating to the issue of a 'writ' of 'certiorari.' However in view of the conclusions I have arrived at about other questions involved in the case it is unnecessary to express any final opinion when payment of compensation should be made.

(34) The only question now left over is whether all or any of the writs applied for by the petitioners should be granted in this case. The prayer portion of the application is as follows:

1. That the said Notification No. 1. 2./2471/49/-DD, dated 10-12-1949 be quashed; (This prayer has been made to refer to Exs. D & E Notifications.)
2. that all steps directed to close the salt factory be prohibited;
3. that the Govt. & their officers particularly the counter-petitioners 2 & 3 be directed not to enter upon or take possession of the schedule lands & not to obstruct the manufacture of salt therein by the 4th counter-petitioner & his lessees;
4. that the Govt. & counter-petitioners 2 & 3 be directed to restore the lands & the factory if in the meanwhile they take possession thereof;
5. That Govt. be ordered to issue licenses as before for the manufacture of salt; &
6. that such other orders as this Honourable Court deems fit for protecting the petitioners & others be issued.

While disposing of the preliminary objections raised by the learned Advocate-General I mentioned that it was argued on behalf of the State that no writ of certiorari' can be issued against the Govt. of a State with respect to their executive or administrative acts & that at the same time it was admitted that the rule has its limitations. One of such limitations the learned Advocate-General himself pointed out was a case where the action of the executive Govt. is 'ultra vires' their powers. To me it appears that in view of the express provision in S. 18 (2) of the Travancore Cochin High Court Act, 1125 that the High Court shall have power throughout the territories of the Travancore-Cochin State to issue to any person or authority, 'including in appropriate cases Govt.' (italics (herein inverted commas) are mine), directions, orders or writs of the nature of 'mandamus prohibition, quo-warranto & certiorari', it is unnecessary to labour this, which at one time was a moot question. The English Common Law rule limiting the power of the High Court to issue a writ of certiorari or prohibition' to prevent excess of jurisdiction by subordinate Courts need I think no longer be followed by this Court. No more appropriate cases of intervention

by this Court against the actions of Govt. can, in my opinion, be found than when such actions are 'ultra vires.' Such intervention is in my view essential to safeguard "the rule of law." That the word "Court" has obtained a very extended meaning in the matter of the exercise of the High Court's jurisdiction to issue prerogative writs in well-known. Dr. C. K. Allen's 'Law & Orders' (1947) pp. 86 & 87 & pp. 282 & 283 of Constitutional Law by Wade & Philips may usefully be referred to here. The discussion in these books would show that even under the English Common Law where executive or administrative sections of Govt. are in excess of jurisdiction, to grant a writ of 'certiorari' is considered to be a legitimate remedy. The following quotation from the second book named seem to be opposite:

"Two decisions of the Court of Appeal illustrate the working of these orders ((certiorari & prohibition.) They both arose out of housing schemes prepared in terms which were not authorised by the Housing Act, 1925. In 'The King v. Minister of Health', Ex parte, Davis, (1929) 1 K B. 619, a property owner in the area affected by the proposed scheme successfully applied for a writ of prohibition to prevent the Minister proceeding to consider the scheme with a view to confirmation. The scheme contained provisions 'ultra vires' the Housing Act, &, therefore, it was not within the jurisdiction of the Minister to confirm it. The Act only contemplated the submission to the Minister of 'intra vires' schemes for confirmation.

"In the second case, 'The King v. Minister of Health'; Ex parte 'Yaffe', (1930) 2 K. B. 98, the scheme had been confirmed by the Minister, after modification by him. The writ of prohibition was, therefore, of no avail. But the applicant applied for a writ of certiorari to review the Minister's decision. In this he was successful in the Court of Appeal. Although the Housing Act provided that the Minister's order when made should have statutory effect as if enacted in the Act, it was held that this did not prevent the validity of the order being enquired into by the Court. The Act only contemplated orders having statutory effect, if the scheme presented had been drawn up in strict compliance with its terms: 'Minister of Health v. The King', Ex parte 'Yaffe', (1931) A C 494. The principle was however, confirmed that, while the provision makes the Minister's order speak as if it were contained in the Act, the Act in which it is contained is the Act which empowers the making of order. If, therefore, the order as made conflicts with the Act, it will have to give way to the Act."

A passage Swift, J., quotes in his judgment in the second case referred to in the above extract from an earlier decision may also usefully be quoted here. In 'The King v. Minister of Health', Ex parte 'Yaffee', (1930) 2 K B 98 at pp. 117 & 118, the learned Judge makes the following quotation from the case of 'Rex v. Inhabitants in Glamorganshire', (1700) 1 Ld. Raym. 580:

"This Court will examine the proceedings of all jurisdictions enacted by Act of Parliament. And if they, under pretence of such Act proceed to encroach jurisdiction to themselves greater than the Act warrants, this Court will send a certiorari to them, to have their proceedings returned here; to the end that this Court may see that they keep themselves within their jurisdiction; & if they exceed it, to restrain them."

No doubt the decision Swift, J., gave in the case did not prevail, but his view of the Court's jurisdiction to intervene to appropriate cases reflected in the quotation he cited with approval was not disapproved by the House of Lords.

(35) My conclusion that the Notifications in question are in truth no Notifications under the Act, but they are something which have without jurisdiction obtained semblance of such Notifications renders the writ of certiorari asked for by the petitioners a legitimate remedy & I would accordingly direct that the purported Notifications be removed into this Court to be quashed. As further steps remain to be taken pursuant to the Notifications I think it also necessary to issue a writ prohibiting Govt. from taking any further action by way of implementing the said Notifications or from entering upon or taking possession of the lands described in Schs. A & B of those Notifications or the salt factory established thereon by the Company, & that will be my order in this matter.

(36) As for the remaining prayers that further directions or a writ of 'mandamus' calling upon Govt. to renew the license I do not find my way to accede to them. The Company is under liquidation & manufacture of salt was stopped as per orders of the winding up Court. That Court no doubt passed that order in view of Ex. D Notification cancelling the license. The effect of the order I pass now is to declare that cancellation invalid. However, it is for the winding up Court to decide what further steps should be taken to implement it. The share-holders who feel aggrieved by all that has happened will of course be free to move that Court to do the needful.

(37) In the result I allow the petition to the extent indicated above & direct the two writs mentioned, 'certiorari & prohibition' be issued to Counter-petitioner I before me, the Govt. of Travancore-Cochin State as prayed for in the petitioners' application. No other order or direction is in my view called for. Nor is it necessary to issue any writ or give any directions to counter-petitioners 2 & 3 who are mere agents or servants of counter-petitioner 1, the State. The Notifications are issued by Govt. & all actions taken or proposed to be taken pursuant thereto would necessarily be in their name & under their direction.

(38) The petition substantially succeeds & the petitioners will be entitled to their costs from Counter-petitioner 1, the Govt. of Travancore-Cochin State. Advocate's fee Rs. 100/-. Ordered accordingly.

V.B.B. *Order accordingly.*

(C. N. 6)

✠ A. I. R. (39) 1952 TRAVANCORE-COCHIN 23

KOSHI AND GOVINDA PILLAI, JJ.

Muhamathu Kunju, Appellant v. Muhammathu Kunju and others, Respondents.

A. S. No. 83 of 1123, D/- 11-7-1951.

(a) T. P. Act (1882), S. 128 — Suit on hypothecation against father alone — Before suit property gifted in favour of sons — Sons held to be universal donees — Decree against father — Pending execution father dying — Creditor decree-holder whether can execute decree against donees — Civil P. C. (1908), S. 52.

Where a donor makes a gift of his property in favour of his children before the suit filed against him by his creditor to enforce a hypothecation, assuming the children are universal donees, a decree passed against the donor without the donees on record cannot bind them and cannot be executed against them. If devolution of interest and the consequent transfer of liability happen to take place during the lifetime of the obligor and if the person on whom the liability has got fastened is also to be made

liable or the decree is otherwise to bind him, the suit must be instituted against him as well. The creditor cannot, therefore, seek to proceed against the properties in the hands of the donees in the execution of his decree to which they are not parties. (*Paras 12, 18*)

Though by their personal law the donees are the legal heirs of the deceased donor by reason of his death pending the execution proceeding his estate does not devolve on them. They have no status as legal representatives any more than an ordinary transferee of the judgment-debtor would have had that status. The creditor's right against the donees cannot be any the higher because under their personal law they happen to be the legal heirs of the deceased donor judgment-debtor. Hence, the creditor decree-holder cannot have any relief against the donees or the properties in their hands by proceeding in execution. 12 Cal 458; 26 All 447 (FB). Rel. on.; A I R 1930 Cal 762; A I R 1938 Mad 684 Ref. (*Paras 13, 18*)

The right of a creditor to follow the properties in the hands of a universal donee is a right which has to be exercised by a suit. That right cannot be exercised merely by levying execution against the properties in their hands under a judgment obtained against the donor; A I R 1930 Oudh 270; A I R 1927 Rang 273; A I R.1936 Cal 67, Expl. (*Para 18*)

Anno.: C. P. C., S. 52, N. 10, Pt. 6, T. P. Act, S. 128, N. 5.

(b) *Civil P. C. (1908), S. 48 — Amendment of execution application beyond 12 years from decree.*

The Court's discretion to amend a pending execution application after twelve years had elapsed from the passing of the decree is, no doubt, a discretion to be exercised very carefully and very sparingly. But if the circumstances of a case demand it the Courts are not powerless to allow suitable amendments to be made in order to enable the decree-holder to proceed further with the execution. A I R 1940 Mad 19; A I R 1947 Mad 216, Rel. on. (*Para 7*)

Anno.: C. P. C., S. 48, N. 7, Pt. 8.

T. K. Narayana Pillai, for Appellant; T. N. Subramania Iyer, Advocate-General, for Respondents.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('04) 26 All 447 : (1 All L Jour 65 F B) (Pr 13)
('79) 4 Cal 897 : (4 Cal L R 193) (Pr 14)
('86) 12 Cal 458 (Pr 13)
('30) A I R (17) 1930 Cal 762 : (58 Cal 170) (Pr 14)
('35) A I R (22) 1935 Cal 713 : (159 Ind Cas 370) (Pr 17)
('36) A I R (23) 1936 Cal 67 : (166 Ind Cas 786) (Pr 17)
('37) A I R (24) 1937 Cal 226: (172 Ind Cas 121) (Pr 17)
('38) A I R (25) 1938 Mad 684: (182 Ind Cas 333) (Pr 14)
('40) A I R (27) 1940 Mad 19 : 1939 M W N 988 (Prs 8, 9)
('47) A I R (34) 1947 Mad 216: (I L R (1947) Mad 525) (Prs, 9, 10)
('30) A I R (17) 1930 Oudh 270: (5 Luck 684) (Prs 15, 18)
('27) A I R (14) 1927 Rang 273: (5 Rang 393) (Pr 16)
(1827) 3 Russ 130 at p. 136: (38 E R 525) (Pr 14)

KOSHI, J.: This is a decree-holder's appeal. In O. S. No. 89 of 1101 on the file of the District Court, Alleppey, the appellant obtained a money decree against one Mytheen Kunju on foot of a hypothecation bond. Though the suit was to enforce a hypothecation an attachment before judgment was taken out by the appellant of certain immoveable properties on the footing they belonged to the defendant. Immediately the defendant's children (four in number) came forward with a claim in C. M. P. No. 5529 of 1101 that the attached properties were not liable to be proceeded against for any debt the defendant might owe, in that they (the claimants) had obtained full title to and possession of those properties under a registered 'udampady' dated 22-8-1100 and that the defendant had no subsisting interest thereto. That claim petition was allowed to lie over until after the passing of the decree which took place on 14-3-1103. It is this decree which is now under execution.

(2) Soon after the decree was passed, to be precise, on 18-6-1103 the appellant filed an execution application in E. P. No. 279 of 1103 for bringing the hypotheca and the properties attached before judgment to sale. The claim was enquired into after this petition came and on 20-6-1104 the Court passed an order allowing it. The appellant then filed O S. No. 36 of 1105 before the lower Court to set aside that order and for a declaration that the 'udampady' or partition arrangement on which the claimants rested their title and possession was executed in fraud of creditors. The lower Court allowed the suit and set aside the order passed on the claim petition. That decision was given on 1-2-1110. The contesting defendants to the suit viz., the claimants preferred an appeal against it before the High Court of Travancore in A. S. No. 366 of 1110.

(3) Meanwhile E. P. No. 279 of 1103 happened to be dismissed and Mytheen Kunju, the judgment-debtor, died not long afterwards. A fresh execution petition was filed on 2-6-1110 impleading the four claimants as legal representatives of the deceased and in that application it was prayed that the properties attached before judgment may be brought to sale. The claim order had, as noticed, been set aside on 1-2-1110. It would appear that the hypotheca was sold pursuant to the prior execution petition and purchased by the decree-holder himself but that proved to be of no avail to him as the judgment-debtor's title to the property was itself challenged in other proceedings. We are, however, not here concerned with that sale or the crop of litigation which it gave rise to. The second execution application was dismissed on 14-7-1110 and the next one wherefrom the present appeal arises was filed only on 8-6-1117. (E. P. 89 of 1117). That purported to be a continuation of E. P. No. 279 of 1103 and though it was opposed as time-barred, the Court allowed the decree-holder's prayer to treat it as one to revive the first application. It is not very clear to our minds how that could have been done when another application had intervened and that was dismissed for want of prosecution. However it is common ground now that the order allowing the last execution petition, E. P. No. 89 of 1117 to be treated as a continuation of E. P. No. 279 of 1103 has become final. The decree-holder's prayer in this last application is to bring the properties attached before judg-

ment to sale. A new party was also impleaded in it on the ground that he has obtained some interest in the attached properties under the judgment-debtor's children, the other counter-petitioners to the application.

(4) The appeal preferred against the decree the lower Court passed in O. S. No. 36 of 1105 was pending when the question how far E. P. No. 89 of 1117 can be treated as a continuation of the prior application was being agitated before the execution Court. The High Court pronounced its judgment in the appeal on 3-1-1118 and by that the lower Court's decision setting aside the claim order was reversed. The parties now became relegated to the position they were on 26-6-1104 when the execution Court allowed the claim order. The decision of the High Court made it impossible for the decree-holder to proceed against the attached properties on the footing that there was a pending attachment. The question whether he could do it on any other basis is the principal question to be decided in the appeal. But we must first state how that question is brought up for decision.

(5) The effect of the High Court's decision allowing the appeal (A. S. No. 366 of 1110) was that there ceased to be any attachment of the properties the decree-holder wanted to proceed against. On the date of the High Court pronounced its judgment very nearly fifteen years had elapsed since the decree in O. S. No. 89 of 1101 was passed and a fresh execution application was in view of the twelve years' rule altogether out of the question. Though the High Court allowed the appeal and thus upheld the title the judgment-debtor's children claimed in the properties, the learned Judges who decided the case had expressed in their judgment the view that as universal donees of the properties of their father they were liable for his debts. It was found that there were not sufficient materials in the case to make out the partition arrangement the father made with the children was a fraudulent transfer and hence void. All the same it is seen stated in the judgment that even without a displacement of the title the appellants derived from their father they had a liability to discharge their father's debts, as mentioned before, as universal donees. Taking advantage of these observations the decree-holder filed an application before the execution Court on 31-12-1120 seeking to amend E. P. 89 by introducing a prayer for fresh attachment of the very same properties he had got attached before judgment. An alternative prayer was also made that he may be allowed to sell the properties without attachment. The Court repelled both the prayers and dismissed the application for amendment. As it was no longer open to the decree-holder to seek to proceed with the relief asked for in the execution petition viz., sale of the properties attached before judgment that was also dismissed when the petition for amendment was rejected. The decree-holder has brought this appeal against that order.

(6) The main question is whether the amendment applied for should have been allowed. Mr. T. K. Narayana Pillai, the learned counsel who appeared before us on behalf of the decree-holder, did not contend that without the amendment any useful purpose would be served by proceeding with the execution. Unless the amendment is permitted to be made he did not want the execution petition to be restored to the file. It was also conceded that the prayer made in the amendment application to permit the decree-holder to sell the properties without fresh attachment was not proper. What Counsel pressed for was that an amendment so as to enable the introduction of a prayer for fresh attachment should be allowed by this Court.

(7) The learned Judge in the Court below turned down that prayer in the following terms:

> "The next question is whether the prayer for attaching the properties which is made 12 years after the date of the decree can be allowed. It is really a new prayer which, is not contained in any of the existing petitions, which merely pray for the sale of the properties on the assumption that there is a subsisting attachment. The prayer for attachment of properties which is made after the lapse of 12 years is not legally sustainable. There is also no decree against defendants 2 to 5."

We are afraid if the decision of the appeal is to rest solely on the question whether the lower Court should have allowed the amendment we would have found it difficult to sustain the order. No doubt the Courts' discretion to amend a pending execution application after twelve years had elapsed from the passing of the decree is a discretion to be exercised very carefully and very sparingly. But in circumstances similar to the present Courts have not felt powerless to allow suitable amendments to be made in order to enable the decree-holder to proceed further with the execution. Here the necessity for the amendment arose on account of the decision the High Court gave raising a pending attachment long after the execution application was filed.

(8) In 'Jhorama v. Latchanna Dora', AIR (27) 1940 Mad 19, King and Krishnaswami Ayyangar JJ. had a case before them where the facts are strikingly similar to the present. In that case by an order in a previous appeal the High Court held an attachment to be illegal as the properties attached happened to be unenfranchised service inams. A prayer for fresh attachment in a pending execution application was however allowed to be introduced by way of amendment twelve years after the passing of the decree when the character of the property changed and it became attachable. The decision states that decided cases have laid down the very salutary rule that ordinarily an amendment should not be allowed which would have the effect of depriving the respondent of putting forward the plea of limitation, but that they do not say that in special circumstances the Court is powerless to order such amendments. It was held that in that case the circumstances were so exceptional as to justify the amendment proposed. In our opinion the same is the case here.

(9) The comments Mr. Justice Patanjali Sastri made about that case in a subsequent decision of the Madras High Court where the question of amending an execution application after twelve years had elapsed from the date of the decree was elaborately discussed and a strict view taken regarding the Court's powers in that behalf are well worth being quoted here. In that subsequent case 'Venkata Lingama v. Venkata Narasimha', AIR (34) 1947 Mad 216,

the following observations regarding the case above-named occur 'on page 223' of the report:

"We find nothing opposed to this view in '1939 M W N 983: A I R 1940 Mad 19, to which also our attention was called. The decree-holder in that case did not seek to add fresh items of property to those included in his previous application for execution but only to add a prayer for attachment of some of those items which, having been released from attachment as unenfranchised service inams not liable to attachment, had since been enfranchised and thus become liable to be attached. The previous application which was filed during the subsistence of the prior attachment had asked for the sale of those properties, and all that the decree-holder subsequently required was that they should be re-attached before they were brought to sale, as the previous attachment had been set aside."

(10) In our opinion the learned Judge in the Court below, took a very narrow view about the Court's powers to amend an execution application when a fresh application would be barred under the twelve years' rule. However questions more fundamental to the case than this were raised before us and as we have after careful consideration came to the conclusion that the decree-holder cannot seek to proceed against these properties in the hands of the children of the deceased judgment-debtor in proceeding in execution, our decision that there was no serious impediment for the amendment being allowed serves the decree-holder no useful purpose. All the same we thought it proper to make it clear that we cannot agree with the decision of the Court below on the ground on which it is based and that we cannot accept the very strenuous argument the learned counsel for the respondents urged before us to sustain it. All the decisions brought to our notice on this aspect of the case are referred to and reviewed in 'A I R (34) 1947 Mad 216'.

(11) Besides the propriety involved in permitting the amendment asked for, two other questions were also raised before us. The first among them was whether the decree-holder can seek to proceed against the properties the judgment-debtor's children got from him during his life-time so long as the order allowing their claim remains not set aside. In allowing the claim against the attachment the learned District Judge, before whom the matter came up for disposal, passed his order in the following terms:

"Ex. 1 'Udampady' shows that the defendant has gifted the properties to the claimants even before the date of the present suit. The claim is therefore allowed and the attachment raised. No order for costs."

It was contended that though the High Court had expressed views to the effect that the properties in the hands of the donees will be liable as the gift comprised the entire assets of the defendant, the terms of the above order preclude the decree-holder from seeking to attach the properties over again. The argument was that the partition arrangement was virtually treated as a gift even by this order and that since it was treated as an impediment to attach those properties the execution Court cannot go behind that order now and allow execution to proceed against them as if nothing had happened before. The decree-holder's answer was the attachment before judgment was effected as if the properties belonged to the judgment-debtor and that the effect of the order on the claim petition and its subsequent affirmation by the High Court in A. S. No. 366 of 1110 was only that as the properties did not belong to the judgment-debtor the title having validly passed to the donees, the decree-holder cannot proceed against them as properties belonging to the judgment-debtor. It was contended that the prior proceeding was no bar to execution being taken out as against those properties as belong to the donees themselves and that the previous order was no impediment in the way of the Court permitting execution to be taken out with a view to give effect to the principle underlying S. 128, Transfer of Property Act, referred to in the judgment of the High Court in A. S. No. 366 of 1110. That section has enacted that where a gift consists of the donor's whole property, the donee is personally liable for the debts due by and liabilities of the donor at the time of the gift to the extent of the property comprised therein. In the view we take on the next question raised by the respondent's learned counsel, it is unnecessary to decide which of these rival contentions should be accepted. We shall for our present purpose assume, without deciding, that the claim order or the decision of the High Court in the subsequent suit to set it aside is no bar to the present claim to proceed against the properties sought to be re-attached provided, the condition precedent for the exercise of the right such as that the donees are universal donees and that they have properties in their hands not duly applied for payment of the donor's debts are satisfied. As on the question of amendment after the twelve years' period prescribed for execution was over, even if we were to decide this question on the lines of the above assumption it will not be of any assistance to the appellant here. As indicated earlier our decision on the third point arising in the case is going to be against the appellant and that must mark the end of his case to execute the present decree against these properties.

(12) That point is, assuming the respondents are universal donees, a decree passed against the donor without the donees on record cannot bind them and cannot be executed against them. We have noticed that the partition arrangement was in 1100 and that the suit which resulted in the decree under execution was instituted only in 1101. The donor was the sole defendant in that case and his legal heirs, the present respondents came on the record as his legal representatives in the execution application filed in the case in 1110. Their title to the properties sought to be proceeded against did not result from, nor was it consequent upon, the death of the defendant. They got the properties under the partition arrangement of 1100 and their independent title was upheld by the Court in 1104 when the donor was alive. That position was maintained by the High Court decision in A. S. 366 of 1110. The Civil Procedure Code makes provision as to what a decree-holder should do to realise his debt when the judgment-debtor dies before the decree is fully satisfied. (Section 50). The Code also provides the mode of relief obtainable against the legal representative when the obliger happens to die before the suit. (S. 52). Order XXII makes provision for the procedure to be adopted in case of devolution of interest by death, insol-

vency, transfer etc., while the suit is pending. These form part of the procedural law, but if devolution of interest and the consequent transfer of liability happen to take place during the life-time of the obligor it looks fairly clear that if the person on whom the liability has got fastened is also to be made liable or the decree is otherwise to bind him, the suit must be instituted against him as well. A suit on a lease where there is an assignment of the lease-hold interest or a suit on mortgage when there has been a subsequent mortgage or an assignment of the equity of redemption are familiar instances where this principle is often invoked. It is difficult to comprehend how a decree obtained against the donor alone in a suit instituted after the gift can be enforced against the donees or can be said to be binding on them as well. If we understood the learned counsel for the appellant aright, as an abstract proposition of law, he did not dispute this position. He conceded that there may be cases in which the donee if he were made a party might succeed in showing that the debt was a bogus one or that it was duly discharged even before the gift came into being. His contention, however, was that there were no such circumstances in this case and to give effect to the above rule here will be to press technical considerations in such a way as to work injustice. We regret we cannot accede to the argument. If we were to accept it, it would really be an instance of hard cases tending to make bad law.

(13) It is unthinkable how a decree can be executed against a person or persons who are not bound by it. No doubt, S. 47, C. P. C. directs that all questions arising between the parties to the suit or their representatives shall be determined by the Court executing the decree and the word 'representative' is wider in its connotation than the words 'legal representative'. Section 47, however, does not confer any right of proceeding in execution against persons who are not judgment-debtors themselves. The right of proceeding in execution against persons other than judgment-debtors is conferred by S. 50, Civil Procedure Code. Subsection (1), Section 50 provides that where a judgment-debtor dies before the decree is fully satisfied, the decree-holder may apply to the Court which passed it to execute the same against the legal representatives of the deceased; and sub-s. (2) limits the extent of the liability of the legal representatives. The respondents are certainly not judgment-debtors nor are they legal representatives of the judgment-debtor so far as properties sought to be proceeded against are concerned. As noticed earlier they obtained title to the properties sought to be re-attached long before the judgment-debtor died, or before the suit itself was instituted. They no doubt are persons, or form some of the persons, on whom the estate of the judgment-debtor would have devolved had he died without disposing of his assets by deed 'inter vivos'. They are not representatives of the judgment-debtor within the meaning of Section 47 because the decree does not bind their interest in the properties. Nor are they the legal representatives of the judgment-debtor, as defined under the Code, or under S. 50 for purposes of execution. Section 2 (11) states 'inter alia' that "legal representative" means a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased. Though by their personal law the respondents are the legal heirs of the deceased judgment-debtor by reason of his death his estate did not devolve on them. They have no status as legal representatives any more than an ordinary transferee of the judgment-debtor would have had that status. The liability which the decree-holder contends the respondents have, is one which would have arisen even if the donees were absolute strangers. The decree-holder's right against the present donees cannot be any the higher because under their personal law they happen to be the legal heirs of the deceased judgment-debtor. These propositions would seem to be elementary or common-place and if authorities be needed reference may be made to the decisions in 'Kameshar Pershad v. Run Bahadur Singh', 12 Cal 458 and 'Gulzari Lal v. Madho Ram', 26 All 447 (F B). A purchaser of the judgment-debtor's interest who so far as such interest is concerned is bound by the decree will be the representative for the purpose of execution but not otherwise. That means the purchase must be after the decree or at least after the suit in which the decree is passed is brought.

(14) The appellant's learned counsel has not been able to invite our attention to any decided case or other authorities which run counter to the views expressed above. Some cases to which he drew our attention will presently be referred to, but before we proceed to do that we consider it helpful to refer to certain cases which support our view. In 'Joy Chandra v. Satis Chandra', A I R (17) 1930 Cal 762, the question arose whether the right of a creditor to follow the assets in the hands of a legatee is a right which has to be exercised by a suit, or whether it can be exercised merely by levying execution against the assets in the hands of the legatee under a decree obtained against the legal representative. In that case a decree was passed for surrender of certain properties during the life-time of the person in possession, but mesne profits were assessed only after his death with his legal representatives alone on the record. He, the defendant, had bequeathed the properties sought to be proceeded against for realisation of the mesne profits so determined to the 'shebaits' of a certain idol. The question that arose for decision was whether the execution-creditor can proceed against the properties in the possession of the idol in execution of the decree passed against the administrators i.e., the legal representatives of the deceased defendant. The decision was that the property in the hands of the legatees can be proceeded against only by means of a fresh suit. It is instructive to read here what Sir George Rankin, C. J., who passed the judgment in that case said there.

> "The present question however is not merely whether the creditor can follow the assets in the hands of the legatee but whether he can do so by the simple process of levying exetion under a decree against the executors or in this case, the administrators. It is reasonably clear to me that that he cannot do. As 'Lord Eldon pointed out in the case to which I have referred, 'Gillespie v. Alexander', 3 Russel C C 130 at p. 136, the legatee cannot be affected except by a suit and it is not possible upon a judgment against the legal representative to proceed to attach property which has years before been parted with to a specific legatee. The matter was considered

in the case of an alienee in the case of 'Greeder Chunder Ghose v. Mackintosh', 4 Cal 897. The language in the older Code of the section which corresponds to S. 52 was somewhat different from what it is now and the alterations were apparently made in consequence of the observations made by Mr. Pontifex, J. in this very case where he pointed out that under that section it was intended to confine the procedure to property remaining in the possession of the legal representative, leaving the creditors to follow property improperly alienated by the legal representative by a separate suit. If one considers the language of S. 52 of the Code and if one considers the machinery provided thereunder by R. 58 onwards of O. 21, Civil P. C., it is clear to my mind that the right of a creditor to follow the assets in the hands of a legatee is a right which has to be exercised by a suit. It cannot possibly be exercised merely by levying execution against the assets in the hands of the legatee under a judgment against the legal representative."

What is true of a legatee must 'a fortiori' be true of a donee. Another case we would refer here is a decision by Horwill J. in 'Thiagaraja v. Narayanaswami', A I R (25) 1938 Mad 684. It is enough for our present purpose to quote a short passage from that decision which reads thus:

"It (S. 52, C. P. C.) does not give the creditor a right to proceed against property which is no longer in the hands of the judgment-debtor. To proceed against a transferee he must therefore establish his equitable right to do so in a separate suit."

(15) Now we shall proceed to refer to the decisions relied on by the learned counsel for the appellants. Much store was laid by him on a decision of the Oudh Chief Court in 'Rugghu Singh v. Dy. Comr., Sitapur', A I R (17) 1930 Oudh 270. The facts in that case resemble the facts here except with regard to one matter. There the gift was made while the suit in which the decree under execution was passed was pending. It was however a money suit and nothing would seem to have depended upon the above circumstance. After the defendant died execution was taken out by attaching the property in the hands of the donee who was the only son of the defendant. The donee's objection to the attachment was not upheld by the execution Court and he instituted a suit to set aside that order. All the three Courts viz., the Court of the Subordinate Judge which tried the suit, the Court of the Additional District Judge which heard the appeal from the trial Court's decision and the Chief Court which heard the second appeal held that the donee's remedy was to take the execution Court's order in appeal and not to institute a regular suit to vacate it. In fact that was the principal point which the Chief Court decided and as correctly noted in the head-note the other points decided were only that a point abandoned before a lower appellate Court, though a point of law, cannot be raised in second appeal and that Section 128, Transfer of Property Act applies equally to a Muhammadan donee. The effect of the decision no doubt was to make the property in the hands of the donee liable to be proceeded against for a decree obtained during the donor's life-time without the donee being made a party to it. But we cannot regard the Chief Court having decided the case that way. All that happened there was that the wrong procedure adopted by the donee to get the execution Court's order vacated eventually brought about that result.

(16) Another case cited by the appellant's Counsel was that reported in 'S.R.M.M.R.M. Chettiar Firm v. Teo E.E. San', A I R (14) 1927 Rang 273. The only point decided there was that where one of the legal representatives, who was a legatee under the will left by the deceased debtor was in possession of certain house property attached in execution of a personal decree against the executors, and was not made a party to the suit as a legatee, the title of the legatee should be decided in execution proceedings before removing attachment on the ground of his possession, and a separate suit was not necessary. We do not know how that case helps the appellant, but it may be added that there the legatee was a party defendant to the suit and that ultimately the Court found the transfer he claimed to have from the executors was not really a 'bona fide' one. Here in this case the claim the donees made was upheld by the execution Court when the judgment-debtor was alive.

(17) The third and the last case, the learned Counsel for the appellant referred to on this branch of the case was a decision of the Calcutta High Court reported in 'Bhujendra Nath Biswas v. Sushamoyee Basu', A I R (23) 1936 Cal 67. There a rent decree obtained against certain female limited owners was allowed to be executed against properties in the hands of the reversioners to whom the last surviving female owner had relinquished her whole interests on an undertaking by them that they would discharge all her debts. There the transfer of interest or relinquishment took place after the decree so that the decree was one binding on all subsequent transferees. The learned Judges (Guha and Bartley, JJ.) also placed reliance on the express undertaking the transferees had made with transferor to discharge all her debts including the particular decree debt. It was not open to the reversioners there to question the validity or the binding character of the decree. On the facts and circumstances of the particular case it was thought it unnecessary to drive the decree-holder to a fresh suit to realise or recover the fruits of the decree already passed. That case cannot certainly be extended beyond its own facts. However it is interesting to mention here that on the same facts and between the same parties in an earlier execution case another Division Bench (Nasim Ali and Henderson, JJ.) had held that the decree-holder must institute a fresh suit against the persons to whom the last of the female owners had relinquished all her interests in her father's properties. See 'Sudhamoyee v. Bhujendra', A I R (22) 1935 Cal 713. As a result of this decision the decree-holder instituted a regular suit and she obtained a decree. That case is reported in 'Sudhamoyee v. Bhujendra Nath', A I R (24) 1937 Cal 226.

(18) Our decision on the third and last point in the case discussed above is that the decree-holder cannot seek to proceed against the properties in the hands of the respondents in the execution of the present decree to which they are not parties. No Court will allow an amendment which would ultimately prove to be purposeless. It is clear from what we have said above that the decree-holder cannot have any relief against the respondents or the properties in their hands by proceeding in execution. The

right of a creditor to follow the properties in the hands of a universal donee is a right which has to be exercised by a suit. We came across several cases in the books where suits were brought against a donor and the donee together or against the donee alone after the donor had died. The right which a creditor has against a universal donee cannot be exercised merely by levying execution against the properties in their hands under a judgment obtained against the donor. The only case where a decree was sought to be executed against a universal donee who was not a party to the creditor's suit was in 'A I R (17) 1930 Oudh 270' already referred to and if we may say so the execution creditors' success there was by mere chance. The case did not go up to the Chief Court for a decision on the merits.

(19) The present is really a hard case, but we cannot allow that to influence our decision. The respondents put forward their claim immediately the attachment before judgment was taken out in 1101 and all that the appellant had to do to get relief against them or the properties in their hands as well was to make them party defendants to the suit; instead he went on an entirely wrong track and has ultimately landed himself in the predicament he finds himself now. All the money and labour spent during the twenty five years the parties were in Court have proved to be in vain. There was also a substantial sum due under the decree.

(20) The appeal fails for the foregoing reasons and we dismiss it. As our decision rests on grounds different from that given by the Court below we make no order for costs in the appeal.

V.S.B. *Appeal dismissed.*

(C. N. 7)

A. I. R. (39) 1952 TRAVANCORE-COCHIN 29

KOSHI AND GOVINDA PILLAI, JJ.

Yohannan John, Appellant v. Geevarghese Geevarghese, Respondent.

Appeal Suit No. 754 of 1950, D/- 16-3-1951.

Debt Laws — Travancore Debt Relief Act, S. 9 (3) (b) — Right of forfeiture — If can be waived — Acceptance of overdue instalment — Waiver — What amounts to — Limitation Act (1908), Art. 75.

The right of forfeiture provided by the Debt Relief Act is one made solely for the protection and benefit of the decree-holders. It does not infringe on any public right or public policy or affect the right of any third party and there is nothing to prevent the decree-holder waiving any advantage conferred on him thereunder. (1884) 9 App Cas 927, Ref. (Para 3)

It is a question to be inferred from the facts and circumstances of a particular case as to whether a decree-holder has by accepting an overdue instalment waived his right to enforce the penal provisions. (Para 4)

The payment by the debtor and the acceptance by the creditor specifically made towards the satisfaction of a particular defaulted instalment would amount to a waiver of that default and of the benefit arising out of that default even in the absence of either fresh consideration, a fresh agreement or something amounting to an estoppel. The benefit of instalment payments would remain upon to the debtor even in cases where he has not changed his position to his detriment on account of the conduct of the creditor in accepting payment of an overdue instalment: Case Law considered. (Para 4)

Anno: Lim. Act, Art. 75 N. 11.

K. Koruthu, for Appellant — T. K. Joseph, for Respondent.

Cases referred to:

(Arranged in order of Courts and in the Courts chronologically. List of foreign cases referred to comes after the Indian cases.)

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('92) 17 Bom 555 (Pr 7)
('03) 27 Bom 1: (4 Bom L R 688) (Prs 5, 7)
('87) 14 Cal 352 (Pr 7)
('88) 15 Cal 502 (Prs 5, 7)
('94) 21 Cal 542 (Pr 7)
('97) 24 Cal 281: (1 Cal W N 229) (Pr 5)
('11) 15 Cal W N 10: (6 Ind Cas 138) (Pr 8)
('23) 27 Cal W N 893: (A I R (11) 1924 Cal 139) (Pr 5)
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('28) A I R (15) 1928 Lah 378: (107 Ind Cas 392) (Prs 6, 7)
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('89) 12 Mad 192 (Pr 5)
('11) 12 Ind Cas 741: (7 Nag L R 147) (Pr 7)
('36) 159 Ind Cas 96: (18 Nag L Jour 104) (Pr 7)
('48) A I R (35) 1948 Nag 225: (I L R (1947) Nag 947) (Prs 6, 7)
('49) A I R (36) 1949 Nag 385: (I L R (1949) Nag 295) (Pr 7)
('39) A I R (26) 1939 Pat 433: (18 Pat 459) (F B) (Pr 6)
(1830) 1 Russ & My 178: 32 R R 181 (Pr 5)
(1873) L R 8 Ch 295: (42 L J Ch 417) (Pr 7)
(1884) 9 A C 927: (54 L J Ch 162) (Pr 3)

KOSHI J.: This is an appeal against an order passed by the learned Temporary Second Judge, Mavelikara, holding that the judgment-debtor has incurred forfeiture of his right to pay the decree-debt by instalments as per the provisions of the Travancore Debt Relief Act and directing execution for the entire balance due under the decree. When the 12th instalment fell due on 30-2-1122 two previous instalments were already in default. Even according to the judgment-debtor-appellant, in case it is found that the decree-holder had not accepted a certain payment towards one of the over-due instalments, to wit the 10th instalment, the latter had the right to execute the decree for the entire balance without reference to the provisions of the Debt Relief Act. In other words, the appellant's case is that by a subsequent payment and acceptance of an overdue instalment the decree-holder had waived his right to enforce the penal provisions of S. 9 (3) (b) of the Debt Relief Act. The decree-holder would, however, have it that the acceptance was not on account of any specific instalment in arrear, but was only in reduction of the whole debt, i.e., a mere payment on account. Alternatively it was contended on his behalf that a mere acceptance of an overdue instalment will not in itself amount to waiver or otherwise disentitle him to claim the entire balance due under the decree. To appreciate these contentions we must know the true facts of the case.

(2) As already mentioned the 12th instalment for payment fell due on 30-1-1122. Two previous instalments were already in default. On 29-1-1122 the appellant sent a cheque for Rs. 136-12-0 to the decree-holder together with a

covering letter intimating him that the cheque was in lieu of the amount for the 10th instalment and that the Banker's commission was also included in it. The decree-holder was asked to acknowledge receipt of the same and certify the payment in Court. In the ordinary course the cheque would have reached the decree-holder the next day, but he got it actually only on 3-2-1122. The cheque was got cashed on 4-2-1122, but no acknowledgment would seem to have been given to the judgment-debtor nor was any certification made to the Court. There is no dispute however that the proceeds of the cheque were not sufficient to cover the amount due on the 10th instalment as also the commission on the cheque. On 4-6-1122 the decree-holder filed the execution petition giving rise to the present appeal alleging that the judgment-debtor has forfeited his right to the benefit of the Debt Relief Act by reason of default having been made for three consecutive instalemnts, namely, 10th, 11th & 12th instalments. The execution petition further stated that the amount received as per the cheque sent on 29-1-1122 has been credited towards the decree-debt. On notice being given about this execution application the present appellant filed written objections contending 'inter alia' that the payment as per the cheque dated 29-1-1122 was made specifically towards the 10th instalment which was overdue and that the decree-holder's conduct in cashing the cheque (assuming it was received late) showed that it was accepted towards that specific instalment and that he cannot now be heard to say that it was a receipt towards account generally. The appellant's case is that the decree-holder had no right to take the money except on the terms on which it was paid and his conduct in cashing the cheque was clear evidence of his having accepted the terms of the covering letter. According to the appellant there was therefore a clear case of waiver of the right to enforce payment of the balance decree-debt without reference to the provisions of the Debt Relief Act. The lower Court gave its decision against the appellant without considering this question of waiver and it is for us now to decide whether the appellant's plea can be sustained on the materials existing on the records of the case.

(3) The question whether a subsequent payment and acceptance of an overdue instalment would amount to waiver has been the subject of a large number of decisions in the Indian High Courts in connection with instalment bonds and instalment decrees with the usual default clause. The law on the point is if we may say so, correctly set out in Vol. II of Rustomji's Law of Limitation p. 807 (5th Edition, 1938) as follows:

> "The law now appears to be that such payment and acceptance (a subsequent payment and acceptance of an overdue instalment) is sufficient 'evidence' of waiver, but the payment must be on account of the specific instalment in arrear, and not a mere part payment in reduction of the whole debt (i.e. a mere payment on account generally will not suffice). When it is sought to establish waiver by payment of an overdue instalment it is not necessary that the creditors should expressly say that he waives the forfeiture. It is sufficient if from the amount paid and accepted, and the circumstances attending the payment and the conduct of the parties, an intention to set up the bond (notwithstanding the default) as one payable by instalments is unequivocally indicated."

At one stage of the argument it was faintly suggested that the law relating to waiver applicable to instalment bonds and instalment decrees will not apply to a statutory right of forfeiture created by the provisions of the Debt Relief Act. We are not inclined to think that there is any substance in this suggestion. The right of forfeiture provided by the Debt Relief Act is one made solely for the protection and benefit of the decree-holders. It does not infringe on any public right or public policy or affect the right of any third party and there was nothing to prevent the decree-holder waiving any advantage conferred on him thereunder. The right conferred by the statute is a personal right and that such rights, even though conferred by a statute can be voluntarily renounced and parted with unless the statute conferring the right excludes it was clearly laid down by so eminent an authority as the House of Lords so long ago as the decision in 'Great Eastern Rly. v. Goldsmid', (1884) 9 A C 927 at pp. 936-37.

(4) It is a question to be inferred from the facts and circumstances of a particular case as to whether a decree-holder has by accepting an overdue instalment waived his right to enforce the penal provisions enacted for his benefit by the Debt Relief Act. Here the amount due for the 10th instalment was sent so as to reach the decree-holder on the date of the 12th instalment. It is clear that the remittance was made with a view to avoid three consecutive defaults. The evidence which we see no reason to doubt is to the effect that the decree-holder received the cheque only on the third of Kanni 1122. For more reasons than one he could have refused to accept it. He was not bound to accept payment made by a cheque, nor was he bound to accept the payment (even if made in money) when it reached him only on the third. He, however, without any objection or protest, cashed the cheque and kept quiet for four months or so. The appellant's letter sent along with the cheque, as already mentioned, clearly stated that the remittance was made for the 10th instalment. In our opinion the conduct of the decree-holder clearly indicates that he accepted the cheque in lieu of the amount due for the 10th instalment and that his attempt to claim the entire balance due under the decree without reference to the provisions of the Debt Relief Act is the result of an afterthought. Decided cases, Indian & English, show that the decree-holder cannot under the circumstances take advantage of the so-called default. The contention raised by Mr. T. K. Joseph, the learned counsel for the respondent, that to enable the appellant to avail himself of the equitable doctrine of waiver there must be either fresh consideration, a fresh agreement or something amounting to an estoppel, is, in our opinion, not warranted on principle or on authorities. There is large preponderance of judicial opinion to the effect that the benefit of instalment payments would remain open to the debtor even in cases where he has not changed his position to his detriment on account of the conduct of the creditor in accepting payment of an overdue instalment.

(5) An early English Case may first be referred to in this context. In 'Norton v. Wood', (1830) 1 Russ & My 178: 32 R R 181, the obligee

under a bond had bound himself not to call the principal for a specified period, if interest were regularly paid. On two occasions interest was paid after the due date. In delivering the judgment Lord Lyndhurst said:

"The question, whether payment of interest tendered after it is due, and accepted by the creditor, is or is not a regular payment, is one which at law would be left to the jury. As to the construction to be put upon the memorandum, I agree with the opinion of the Vice-Chancellor; and then, the only remaining question will be, whether this amounts to a regular payment of the interest. Upon that point I feel myself bound to express a different opinion from that entertained by his Honour. I think, if money is tendered after the period when it became due, and the person to whom it has been paid does not see fit to refuse it, it is a waiver of the objection; it must be taken as a regular payment, if the person receives it the day after without making any objection. The order of the Vice-Chancellor, must be dicharged; but if any interest has since become due, it is competent to the defendant to move to dissolve the injunction." (p. 183).

There when the obligee commenced an action on the bond the bill which gave rise to the decision was filed to have the benefit of the undertaking and to stay the proceedings at law. This English decision has been followed in a good many decisions of the Indian High Courts. To avoid multiplicity of reference to decided cases in India and at the same time to acquaint ourselves with the trend of judicial opinion in the Indian High Courts a passage from the decision of the Allahabad High Court in 'Badri Narain v. Kunj Bihari Lal', 35 All 178, may with advantage be quoted here; at page 184 of the report the learned Judges in that case said:

"There is a consensus of opinion among the High Courts that the subsequent payment and acceptance of overdue instalments must be taken into consideration for the purpose of applying the rules of limitation to an instalment decree, although the articles applicable contain no such provision as that to be found in Art. 75. The Calcutta High Court seem to treat it as a case of waiver and as an exception to the rule that limitation runs from the date of default — 'Mon Mohun v. Durga Churn', 15 Cal 502, and the same view seems to have been accepted by this Court and by the Madras High Court. The Bombay High Court treat it as a kind of estoppel 'Kashiram v. Pandu', 27 Bom 1. Whatever may be the true reason for the rule, it seems to be well settled that after defaults have occurred, which according to the decree set time running against the decree-holder, the payment and acceptance of the overdue instalments may have the effect of preventing him from saying that the payments were not made regularly and in satisfaction of the decree, and remitting the parties to the rights which they would have had if no default had occurred."

Among the later decisions of the Calcutta High Court which take the same view as that Court took in the case referred to in the above extract mention may be made of the decisions in 'Sital Chandra v. Hyder Molla', 24 Cal 281; 'Surendra Nath v. Rishikesh Law', 27 Cal W N 893 and 'Jalim Chand v. Yusuf Ali Chowdhuri', 54 Cal 143. The Madras view is to be found in 'Papamma v. Venkaiya', 5 Mad H C R 198 and 'Nagappa v. Ismail', 12 Mad 192. The Bombay decision referred to in the extract made above from the Allahabad case will presently be referred to.

(6) The view of the Lahore High Court is seen set out in a decision by Jai Lal, J. reported as 'Gopol Mal v. Gopal Singh Hira Singh', A I R (15) 1928 Lah 378. The head-note to that case which correctly sets out the sense of the decision is in these terms:

"It is open to the D.H. to expressly state when accepting the instalment that he does so without prejudice to his rights which have already accrued owing to the default or to show by his conduct at the time of accepting the instalment that he does not waive his rights under the default clause. But in the absence of proof to the contrary tender by the debtor & acceptance by the creditor of an overdue instalment must be deemed to amount to a waiver & condonation of the default."

We are not unaware that criticism has been made in certain quarters that the law has been too broadly stated by the learned Judge. In 'Gokhul Mahton v. Sheoprasad', A I R (26) 1939 Pat 433 at pp. 440-441 of the report Manohar Lall, J. one of the Judges constituting the Full Bench observed:

"The weighty observations of Lord Denman & Fry, J. quoted in the Order of Reference correctly indicate how this question should be determined. It is there laid down that mere failure to sue or inaction by the creditor is not a waiver of the default something else must be established to show that the promisee has waived his rights. For instance his acceptance of an overdue instalment or his communicating to the promisor for a consideration that he will not insist upon his rights which have already accrued to him on the default which has taken place, or, it may be that the promisor himself approaches the promisee or writes to him to stay his hands & not to proceed to demand the full amount & if the promisee agrees to such request, these will ordinarily amount to a waiver. In such cases, it is clear that some overt act has been established from which the Court of fact can draw the conclusion that the obligee has waived the default.

In some cases it will be easy to decide this quesion by looking at the frame of the suit & to find from the plaint the manner in which the allegations have been made. When the plff. alleges, for instance that all the previous instalments have been paid he proceeds on the footing that there has been no default & no waiver, & if his allegations are, in the course of the trial, found to be false, in my opinion, it is not open to the promisee to turn round & ask the Court to infer any waiver. Some High Courts have held that a mere acceptance of an overdue instalment cannot be treated as waiver of the default in the view that the promisee is merely taking what was due to him. But the Calcutta High Court has consistently held that an acceptance of an overdue instalment amounts in law to a waiver of the default. As this High Court has adopted the view that where there is a 'Cursus curiae' of the Calcutta High Court they will ordinarily adopt the same as a rule of law binding upon this Court. I am inclined to agree with the view that where

the promisee has accepted an overdue instalment it must be held that he has waived his rights which accrued to him on that default & that the starting point of limitation would be from the next default, if not waived."

The view contained in the above extract has been cited with approval & followed by Padhye, J. in 'Ragunathdas Madangopal Bhangade Shop v. Warlu Bapu', A I R (35) 1948 Nag 225. The learned Judge quotes a portion of the above extract in his judgment & concludes his discussion by formulating the points which appeared to him to be well-established. Among points (a) to (e), points (a) & (c) are alone of assistance to us & we quote them here:

"(a) That the exigibility clause in an instalment is for the benefit of the creditor & he has a right to waive that benefit even in the absence of a fresh agreement, a fresh consideration or a fresh bilateral arrangement.

(b) .....

(c) The payment by the debtor & the acceptance by the creditor specifically made towards the satisfaction of a particular defaulted instalment would amount to a waiver of that default & of the benefit arising out of that default.

(d) .....

(e) ....."

In view of this long current of decisions elsewhere we feel justified in holding that on the facts & circumstances of this case the D.H. had waived his right to avail himself of the benefit of the so-called default for three consecutive instalments. The payment made by cheque dated 29-1-1122 was accepted by him as & for the 10th instalment.

(7) We must not however omit to notice a few cases cited at the bar in support of the contention that a mere waiver will not enable the debtor to prevent the creditor from enforcing the penal consequences of the default provided by contract, decree or statute. The contention is that waiver must be such as would amount to estoppel. Earlier in this judgment we have said that the contention is unwarranted & that it cannot be supported on principle or on authorities. The learned counsel for the respondent placed reliance on certain observations of Sir Lawrence Jenkins, C. J. in the Full Bench case in '27 Bom 1' to support him. No doubt certain observations on p. 11 of the report have been interpreted by certain decisions of the Nagpur Court, as supporting the above contention. See 'Ballabhdas v. Dalipsingh', 12 Ind Cas 741 (Nag), 'Tukaramappa v. Laxmanappa', 159 Ind Cas 96 (Nag) and 'Maruti Laxman v. Namdeo Sheoramji', A I R (36) 1949 Nag 385. But the learned Judges in these cases would seem to have lost sight of the fact that the observations were made in connection with the first of the two points which the learned Chief Justice was discussing in that case. That point was whether the statute of limitation operated notwithstanding subsequent payments of overdue instalments. In discussing the second point whether payments of overdue instalments cannot by themselves prove a waiver what the learned Chief Justice had to say is to be found on pp. 12-13 & it is as follows:

"I now proceed to deal with the second of the two difficulties which confronted the referring Bench, viz., the opinion expressed in 'Balaji v. Sakharam', 17 Bom 555 at p. 559 that payment and acceptance of overdue instalments cannot by themselves prove waiver. This (if intended to be general proposition of law) is opposed to the view expressed in several Calcutta cases 'Ram Culpo v. Ram Chunder', 14 Cal 352; 'Mon Mohun v. Durga Churn', 15 Cal 502; 'Hurri Pershad v. Nasib Singh', 21 Cal 542 at p. 547 & in its operation conflicts with the decision of Lord Lyndhurst, which I have already cited. In my opinion the point is one to be determined on the circumstances of each case, & unless the proposition in 'Balaji v. Sakharam' was intended to be limited to the facts of that case, I think it cannot be sustained, & that we should decline to follow it.

The result is that, in my opinion, we should answer the reference by holding that, having regard to the payment & acceptance of instalments in this case, the application is within time. I think we are entitled so to decide, notwithstanding that this is a second appeal, for it is a mixed question of law & fact that is involved.

I am glad that it is open to us to come to this conclusion as to the effect of waiver on instalment decrees; for, though in this case the result is that a judgment-debtor is held to his obligation, to hold otherwise, instead of being beneficial to judgment debtors generally, would preclude decree-holders under instalment decrees, however favourably inclined, from acting with reasonableness, & would possibly in the result throw debtors (to use the language of Lord 'Selborne in Cotterell v. Stratton', (1873) L R 8 Ch 295 at p. 302 "into the hands of those who indemnify themselves against extraordinary risks by extraordinary exactions."

This view was concurred in by all the other four learned Judges who took part in the decision of the case. The Allahabad decision in 'Badri Narain v. Kunj Behari Lal', 35 All 178 quoted earlier & the Lahore decision in 'Gopal Mal v. Gopal Singh Hira Singh', A I R (15) 1928 Lah 378 already referred to have not understood or interpreted the decision in '27 Bom 1' in the sense in which the above mentioned Nagpur cases interpreted it. In A I R (15) 1928 Lah 378 the comment made regarding 27 Bom 1 is this:

"The learned Counsel for the respondent relied upon a Full Bench judgment of the Bombay High Court in Kashi Ram v. Pandu, in which a different view was alleged to have been taken but I have been unable to discover where the difference lies. In that case Jenkins, C. J. held that acceptance of an overdue instalment may have the effect of estopping the creditor from enforcing the default clause but that there may be circumstances which may negative the operation of a estoppel, & Astone, J. expressed himself strongly in favour of the proposition that under the circumstances mentioned the creditor must be deemed to have waived his rights under the default clause." (380)

How the learned Judges of the Allahabad High Court understood the view of Sir Lawrence Jenkins, C. J. is explained in the extract quoted earlier. Our reading of the Bombay Full Bench case is that it fully accepted the view of the Allahabad, Calcutta & Madras decisions that subsequent payment & acceptance of an overdue instalment is sufficient evidence of waiver. In fact the reference to

the Full Bench was itself to see whether the Bombay High Court should not on this question fall into line with the decisions of the other High Courts and the Full Bench accepted the view of the other High Courts and overruled the prior decisions of the Bombay High Court. We, therefore, venture to observe that in the three cases mentioned the Nagpur Court misinterpreted the Bombay decision. Further, the observations in A I R (36) 1949 Nag 385, the case most relied on by the learned counsel for the respondent, are purely obiter. A prior order in execution operated as res judicata against the judgment-debtor's surety who brought the appeal before the High Court and he had himself during the course of the proceeding in the Court of execution abandoned the point as to waiver. These grounds had really concluded the case against the appellant and it is in spite of that the learned Judge went on to discuss the question of waiver. Besides the decree-holder had made his election before the debtor paid the amount into Court. No reference is made in that decision to the case in 'Raghunathdas Madangopal Bhangade Shop v. Warlu Bapu', A I R (35) 1948 Nag 225, referred to by us earlier.

(8) One more case remains to be referred to and that is the decision in 'Easin Khan v. Abdul Wahab Sikdar', 15 Cal W N 10. This case was cited by the appellant's counsel, but by some strange irony it contains observations favourable to the respondent. The learned Judges in that case suggest two tests to see whether there is waiver or not in a particular case. We are afraid these tests go beyond what the decisions the learned Judges themselves rely on warrant. We have referred in this judgment to the more important cases cited in that decision. Though the facts of the case before the learned Judges answered the two tests, the tests proposed need not in our opinion necessarily be satisfied to make out a case of waiver. No fresh consideration or any action on the part of the debtor on the belief the creditor accepted the payment in satisfaction of the obligation is needed in cases similar to the present to enable the debtor to avoid the penal consequences of a provision on account of default.

(9) In the result the appeal is allowed with costs in both the Courts and the execution petition giving rise to it will stand dismissed. If by reason of any subsequent default the decree-holder has become entitled to claim the whole balance due under the decree without reference to the part of the Debt Relief Act he will of course be free to pursue his remedy.

G.M.J. *Appeal allowed.*

(C. N. 8)

A. I. R. (39) 1952 TRAVANCORE-COCHIN 33

SANKARAN AND GANGADHARA MENON JJ.

Lakshmi Amma and others, Appellants v. Kunjukunjamma and others, Respondents.

A. S. No. 148 of 1124, D/- 8-6-1951.

Limitation Act (1908), S. 7 — Right under, whether personal — Travancore Limitation Act S. 8.

Where the decree is one for redemption and plaintiffs are joint decree-holders, the decree has to be executed and the mortgage redeemed as a whole. It follows therefore that without the concurrence of the minor plaintiff the other plaintiffs cannot give a valid discharge and that time for the execution of the decree cannot run as against any of them during the continuance of the minority of the minor plaintiff. Section 7 does not confer exclusive personal right in favour of the person under disability. The section does not warrant the construction that the benefit accruing from the suspension of the period of limitation is a purely personal benefit available only to the original parties and not to others who acquire their rights. So long as the decree is kept alive by virtue of S. 7, there is no reason to restrict the right to execute the decree, in favour of the original decree-holders alone. Such right must be equally available to their assignees or transferees also. The right which is alive and capable of enforcement by the decree-holders themselves cannot be said to be barred or extinguished immediately on transfer of the same to a third party. Thus the auction purchaser of the rights of the decree-holders under the decree for redemption can enforce the rights within such time as was available to the original plaintiffs-decree-holders. (*Paras 3 and 4*)

Anno : Lim. Act, S. 7 N. 2.

N. Varadaraja Iyengar, for Appellants; S. Narayanan Potti and N. K. Narayana Pillai, for Respondents.

SANKARAN, J. : Additional plaintiffs 7 to 11 have preferred this appeal against the lower Court's order dismissing the execution petition filed by them on 12-3-1123 as being barred by limitation. Originally there were two plaintiffs in the case who were the owners of the equity of redemption of the suit properties. By a partition arrangement in their family this right is stated to have devolved on the 2nd plaintiff alone. The decree in the case is for redemption of the properties from the defendants who are in possession of the same as mortgagees. The final decree was passed on 11-6-1103. The present appellants had instituted a suit O. S. No. 10/1102 in the Quilon District Court against the 2nd plaintiff in the present suit and had obtained a decree against him. In execution of that decree they attached his rights under the present decree and sold the same in Court auction and themselves purchased such rights on 27-2-1121 with his legal representatives on record. Under Ext. C. dated 7-1-1123 these appellants obtained formal delivery also of such rights. It is on the strength of such purchase and delivery that they have now sought to execute the decree as additional plaintiffs 7 to 11. The defendants in the case raised the objection that the decree has become barred by limitation. In answer to this objection the additional plaintiffs 7 to 11 stated that before the decree became time barred, the 2nd plaintiff decree-holder had died in the year 1106 leaving additional plaintiffs 3 to 6 as his legal representatives and that since the additional 6th plaintiff continued to be a minor till 7-1-1121 the period of limitation for the execution of the decree was suspended till that date and as such the present execution petition filed on 12-3-1123 and which is the first execution petition, is within time. The lower Court found that the additional 6th plaintiff was born on 7-1-1103, that there was a suspension of the period of limitation for the execution of the decree till the 6th plaintiff attained majority and that therefore the decree in the case has not become barred so far as additional plaintiffs 3 to 6 are concerned. At the same time the lower Court held that the benefit arising on account of the minority of the 6th

plaintiff could be availed of by the plaintiffs 3 to 6 only and not by the additional plaintiffs 7 to 11 who have acquired the rights of plaintiffs 3 to 6 under the decree. The respondents have not objected to the lower Court's finding that the decree has not become barred by limitation so far as plaintiffs 3 to 6 are concerned. But in the objection memorandum filed on behalf of the respondents, an objection is raised to the lower Court's finding that the 6th plaintiff had attained majority only on 7-1-1121.

(2) The objection raised to the finding on the question of the age of the 6th plaintiff may be disposed of at the outset. It is seen that there is very strong and convincing evidence in support of the lower Court's finding that the 6th plaintiff was born on 7-1-1103 and that he attained majority only on 7-1-1121. To Ext. F partition deed executed by the members of the tarwad of plaintiffs 3 to 6, on 31-1-1191, the present 6th plaintiff is not a party and it shows that he was not born at that time. Ext. H is copy of the admission Register of the School in which the 6th plaintiff had his primary education. In this document his date of birth is given as 7-1-1103. There is nothing to doubt the correctness of this statement. Ext. 1 mortgage deed dated 9-11-1119 wherein the 6th plaintiff is described as a major cannot by itself destroy the significance of the evidence furnished by Exts. F and H. There are other documents Exts. D, E and C also, going to show that the 6th plaintiff was not born prior to the year 1103. In view of the documentary evidence thus adduced in the case, the contention of the defendants that the 6th plaintiff was born long prior to the year 1103, cannot prevail. We would therefore confirm the finding of the lower Court that the 6th plaintiff was born on 7-1-1103 and that he attained majority only on 7-1-1121.

(3) Then there is the question of limitation which has been found by the lower Court against plaintiffs 7 to 11. The position taken up by the appellants is that the question of limitation in this case is governed by section 8 of the Travancore Limitation Act corresponding to section 7 of the Indian Limitation Act. This section lays down that where one of several persons jointly entitled to make an application for the execution of a decree is under a disability and where without his concurrence the other decree-holders cannot give a complete and valid discharge, time will not run as against any of them until one of them becomes capable of giving such a discharge without the concurrence of the others or until the disability has ceased. In the present case the decree is one for redemption and plaintiffs 3 to 6 were joint decree-holders. The decree had to be executed and the mortgage redeemed as a whole. It follows therefore that without the concurrence of the 6th plaintiff the other plaintiffs could not give a valid discharge and that time for the execution of the decree could not run as against any of them during the continuance of the minority of the 6th plaintiff. To this extent the finding of the lower Court also is in favour of the position taken up by plaintiffs 7 to 11.

(4) The lower Court has held that the benefit thus accruing to plaintiffs 3 to 6 under section 8 of the Travancore Limitation Act is a personal benefit which cannot be availed of by others who have acquired the rights of these plaintiffs under the decree. The wording of section 8 of the Limitation Act does not lend support to such a narrow and limited construction being put upon the section. Under section 6 of the Limitation Act a special right is conferred on persons under disability. That section lays down that where a person enittled to institute a suit or make an application for the execution of a decree is at the time from which the period of limitation is to be reckoned, a minor, or insane or an idiot, he may institute the suit or make the application within the same period after the disability had ceased as would otherwise have been allowed. It is significent to note that the expression used is "he may institute the suit or make the application". This necessarily indicates that the right conferred by the section is a personal right to be availed of by the person under disability after such disability has ceased. The generally accepted view is that the right conferred by section 6 is a personal right in favour of the person under disability and it could be availed of only by such person after the cessation of the disability or in case the disability continues up to the death of such person, then by his legal representatives. But so far as section 8 of the Limitation Act is concerned it cannot be said that the section confers any such exclusive personal right in favour of the person under disability. It is significant to note that the benefit conferred by this section is not only in favour of the person under disability, but is also in favour of the persons who are under no disability at all. The wording in this section is that:

> "time will not run as against any of them until one of them becomes capable of giving a discharge without the concurrence of the others or until the disability has ceased."

In this respect the wording of section 8 is entirely different from the wording of section 6. What is stated in section 6 is not that time will not run during the continuance of the disability; on the other hand, what is stated is that after the cessation of the disability the person concerned may institute the suit or make the application within the same time as would otherwise have been available to him. This would indicate that so far as the right to be enforced is concerned the period of limitation prescribed will run in the normal course, but that the person under disability is given a special personal right to enforce such a right within a similar period after the cessation of such disability. But in section 8 it is expressly stated that time will not run even against persons not under disability just as against the person under disability, during the continuance of such disability. This must necessarily mean that during the continuance of the disability the running of the period of limitation is suspended; in other words, the right is kept alive during that period. The section as it stands does not warrant the construction that the benefit accruing from the suspension of the period of limitation is a purely personal benefit available only to the original parties and not to others who acquire their rights. So long as the decree is kept alive by virtue of section 8, there is no reason to restrict the right to execute the decree, in favour of the original decree-holder alone. Such right must be equally available to their assignees or transferees also. The right which is alive and capable of enforcement by the decree-holders themselves cannot be said to be barred or extinguished immediately on transfer of the same to a third party. In the present case the period of limitation did not run against

the decree for redemption during the period of the minority of the 6th plaintiff i.e., from 7-1-1103 to 7-1-1121. On 7-1-1121 his disability ceased and as such additional plaintiffs 3 to 6 could execute the decree within the period available from 7-1-1121. Under section 9 of the Travancore Limitation Act (corresponding to section 8 of the Indian Act) the extended period of limitation is limited to three years from the date of the cessation of the disability i.e., from 7-1-1121 in this case. It was on 21-2-1121 that the rights under this decree were purchased in Court auction by additional plaintiffs 7 to 11. At the time of the purchase such rights were alive and capable of enforcement by additional plaintiffs 3 to 6 none of whom was under a disability then. Such rights cannot be said to have become non-existent or unenforceable merely on account of the Court sale. On the other hand, such rights as they existed on 21-2-1121 passed on to the auction-purchasers. It follows therefore that these auction-purchasers also could enforce such rights within such time as was available to the additional plaintiffs 3 to 6. The present execution petition filed on 12-3-1123 is within that time i.e., within three years from 7-1-1121, and as such there is no bar of limitation for the execution petition and we hold accordingly.

(5) In the result this appeal is allowed with costs, and in reversal of the order of the lower Court additional plaintiffs 7 to 11 are allowed to proceed with the execution petition dated 12-3-1123.

D.H. *Appeal allowed.*

(C. N. 9)

A. I. R. (39) 1952 TRAVANCORE-COCHIN 35

SANKARAN AND GANGADHARA MENON JJ.

Mosa Kunju, Appellant v. Chandy and others, Respondents.

A. S. No. 219 of 1951, D/- 21-3-1951.

Civil P. C. (1908), Ss. 2 (2), 92, O. 43, R. 1— Scheme decree — Provision in, for management of trust offending against procedure in S. 92 — Effect.

In a suit a scheme decree was passed by the Court providing a scheme for the management of the Kadavumbhagom Jewish Synagogue and the properties appertaining thereto. One of the clauses in the Scheme decree dealing with powers of the general body provided that the parties who take objections to the resolutions passed by the general body may appeal to the District Court within 15 days of the date of the resolution. By virtue of this provision the appellant filed in the Court below, miscellaneous petition objecting to the resolution passed by the general body meeting and prayed for the cancellation of that resolution. The lower Court holding that there was no case for interference dismissed the application. The petitioner came in appeal.

'Held' that order in question did not come under any of the appealable orders provided under O. XLIII nor could the order be considered as a decree within the meaning of the definition of the terms in S. 2, sub-section 2.

'Held' further that merely because the Court was called upon to prepare a scheme for the management of the trust, it could not retain perpetual jurisdiction to interfere with the affairs of the trust for all time. In respect of reliefs for which a suit has to be instituted with the necessary sanction as prescribed by S. 92 the Court cannot get jurisdiction by inserting a special provision to that effect in the scheme. Any provision in a scheme prepared by the parties themselves for the management of the trust which offends against the procedure prescribed by S. 92 would be clearly inoperative. The position cannot be different when the scheme is framed by the Court. As the reliefs sought for in the miscellaneous petition were not outside the scope of the reliefs mentioned in Clauses (a) to (h) of S. 92 the Court below had no jurisdiction to entertain the application of the appellant. C.R.P. 366 of 1125 (Trav), Rel. on. (*Paras 1, 2, 3*)

Anno : C. P. C., S. 2 (2) N. 2; S. 92 N. 21, O. 43 R. 1 N. 1.

K. P. Abraham, for Appellant; T. K. Joseph, for Respondents.

Case referred to :

('50) CRP No. 366 of 1125 : 1950-5 DLR (Trav.) 267 (Pr 3)

GANGADHARA MENON, J. : This appeal is directed against the order of the learned District Judge of Anjikaimal on M. P. 196 of 1951 in O. S. 65 of 1114 of that Court. In O. S. 65 of 1114 a scheme decree was passed by the Court providing a scheme for the management of the Kadavumbhagom Jewish Syagogue and the properties appertaining thereto. Clause 8 of the part in the scheme decree dealing with powers of the general body provides that the parties who take objections to the resolutions passed by the general body may appeal to the District Court within 15 days of the date of the resolution. By virtue of this provision the appellant along with another filed in the Court below M. P. 196 of 1951 objecting to the resolution passed by the general body meeting on 16-1-1951 and prayed for the cancellation of that resolution.

(2) The facts that gave rise to the resolution that is impugned may briefly be stated as follows. After the establishment of the State of Israel in Palestine, Jews from all parts of the world were invited, to settle down there. This scheme for the national re-union of the Jews inspired the Jews of Travancore-Cochin also. A meeting of the Kadavumbhagom Synagogue members was held on 23-6-1125 to consider the question as to how far the Synagogue could render assistance to the immigration of the members of the congregation to Palestine. It was resolved that every individual above 10 years of age should be given a free grant of Rs. 400/- each and every child below 10 years Rs. 200/- each. After the passing of this resolution another meeting was held on 11-11-1125 wherein it was resolved that the grant voted at the meeting of 23-6-1125 should be increased by Rs. 100/- each in the case of those above 10 years and Rs. 50/- each in the case of those below 10 years of age. Soon after a third meeting of the general body held on 20-11-1125 resolved that the grants decided upon should be restricted to cases of genuine immigrants and should not be paid to those who wished to go to Palestine as mere pilgrims with the idea of coming back and that those who accept the contributions are to give in writing a release of their rights as members of the congregation of the Kadavumbhagom Synagogue. As the income from the properties belonging to the Synagogue was not sufficient to meet the expenses towards the contemplated payments to the immigrants, certain immovable properties that belonged to the Synagogue have been sold

and an amount of nearly a lakh and ten thousand rupees was raised thereby. Pursuant to the resolutions mentioned above money was paid to several persons intending to immigrate and releases were obtained from them. While matters were moving on like this a resolution was passed on 16-1-1951 at a meeting of the general body wherein it was resolved that a sum of Rs. 125/- in the case of every person above 10 years of age and Rs. 50/- each to those below 10 years may be paid as advance from the amounts provided in the resolution dated 23-6-1125 and 11-11-1125. The validity of this resolution was challenged by the appellant in M. P. 196 of 1951 on several grounds and he prayed for a cancellation of the resolution. The lower Court holding that there is no case for interference dismissed the application. One of the petitioners has therefore come in appeal.

(3) A preliminary point was taken by Sri T. K. Joseph the learned Advocate for the respondent that no appeal lies. It is contended that the order in question does not come under any of the appealable orders provided under Order XLIII of the Cochin Civil Procedure Code nor could the order be considered as a decree within the meaning of the definition of the terms in section 2, sub-section 2 of the Civil Procedure Code. We are inclined to think that there is considerable force in the objection taken by the learned Advocate. The learned Advocate for the appellant has prayed in C. M. P. 619 of 1951 that if no appeal lies the appeal may be treated as a revision petition. We think that there is no merits in this case even treating it as a revision petition. Though grounds are taken in the appeal memorandum that the diversion of funds as contemplated in the resolution dated 23-6-1125 and 11-11-1125 is not within the purposes of the trust and that therefore it is ultra vires of the powers of the general body, the learned Advocate for the appellant conceded at the time of the arguments that it may be taken that the purpose for which the funds of the Synagogue were proposed to be spent comes within the scope and objects of the trust. It is however contended for the respondents that the question agitated by the appellant being essentially a matter declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust is one coming within Clauses (e) and (h) of Section 77 of the Cochin Civil Procedure Code and could therefore be agitated only in a fresh suit with the necessary sanction contemplated under Section 78 and not by a miscellaneous application like the present one in the suit in which the scheme decree was passed. The learned Advocate for the respondents therefore argues that the lower Court had no jurisdiction to entertain the application. This contention is not without force. The combined effects of Sections 77 and 78 of the Cochin Civil Procedure Code in relation to an application in a suit in which a scheme decree was passed for reliefs mentioned in Clauses (a) to (h) of Section 77 has been considered by us in detail in our judgment in 'Chandy v. Yessaya', C R P No. 366 of 1125 reported in '1950-5 D L R (Trav.) 267'. We have stated therein :

> "Merely because the Court was called upon to prepare a scheme for the management of the trust, it cannot retain perpetual jurisdiction to interfere with the affairs of the trust for all time. The scheme may at best make provision for seeking the directions and help of the Court for a successful working of the scheme itself. The power that may thus be reserved in the Court has necessarily to be very limited in its scope. In respect of reliefs for which a suit has to
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> "be instituted with the necessary sanction as prescribed by S. 77, Civil P. C., the Court cannot get jurisdiction by inserting a special provision to that effect in the scheme. Any provision in a scheme prepared by the parties themselves for the management of the trust which offends against the procedure prescribed by Section 77, Civil Procedure Code, would be clearly inoperative. The position cannot be different when the scheme is framed by the Court. When the statute has prescribed a special procedure to be followed for invoking the jurisdiction of the Court to grant certain specified reliefs, the Court cannot assume such a jurisdiction in any other manner by inserting a provision to that effect in the scheme prepared by it. Any such provision which is opposed to the statutory provision contained in Section 77, Civil Procedure Code, would be clearly ultra vires."

The reliefs sought for in C.M.P. 196 of 1951 cannot be said to be outside the scope of the reliefs mentioned in Clauses (a) to (h) of Section 77 of the Cochin Civil Procedure Code. In this view the Court below had no jurisdiction to entertain the application of the appellant.

(4) Assuming that the Court below had jurisdiction even on the merits the appellant's case cannot stand scrutiny. The main objection of the appellant centred round the fact that the resolution dated 16-1-1951, though it purports to have been passed with a view to implement the previous resolutions of the general body was really going against the restrictions imposed by the resolution of 11-11-1125. It is contended that as a portion of the amount was resolved to be paid in advance without taking any release of the rights of membership as contemplated in the resolution dated 11-11-1125 or at any rate without even a guarantee for repayment in case the members who receive the advance payments do not go to Palestine the funds of the trust are likely to be dissipated without any corresponding benefit envisaged in the resolutions of the general body. The fear evidently is that those who receive the advance money may spend it away for purpose other than for which the advance was made. In this connection Sri K. P. Abraham referred to us a letter dated 15th October 1950 from Mr. Gance, Director of the Emigration Department of the Jewish agency in Palestine to Mr. S. S. Koder, President, Cochin Zionist Association. The letter says that Mr. Koder should make it clear to all his members and associates that under no condition should money be paid to any one in connection with their emigration to Israel dispose of their property, resign from their job etc. until they hear from Mr. Gance. Sri Abraham states that there is no possibility for any permission for immigration in the immediate future and that any advance money paid would consequently be a sheer waste. Subsequent developments show that there is no foundation for this fear. The 4th respondent has filed before this Court an affidavit stating that a notice has been published by the Zionist Association of which Mr. Koder is the President intimating that application forms for immigration have been received

by him from Mr. Gance and that those who wish to emigrate to Palestine must duly fill up and sign the application forms and present them to the Association. Along with the affidavit a copy of the notice signed by the Secretary has also been filed. This notice is dated 30-1-1951. It is obvious from the record and the affidavit of the 4th respondent that though Mr. Gance in his letter dated 15-10-1950 directed Mr. Koder to wait till he heard from him, Mr. Gance has subsequently moved in the matter and is taking necessary steps for sending people that are willing to go to Palestine. We may also in this connection refer to the affidavit filed by Mr. Josephai Issac, Advocate of this Court who is a member of Kadavumbhagom Jewish Synagogue and also a member of the All India Immigration Committee. It is this committee that arranges immigration of Jews to Palestine. Mr. Issac swears that the last batch of Jews left Bombay for Palestine by plane on 25-2-1951. It is also stated in his affidavit that on 11-2-1951 there was a meeting of All India Immigration Committee at Bombay which he attended and that it was decided in that meeting that thereafter Jews from Cochin who desired to go to Palestine will proceed by ship from Cochin and not by plane from Bombay and that the Jewish agency in Palestine has consented to give the programme in April 1951 showing the dates for the immigration. We are inclined to accept this affidavit. There is therefore no justification for the inference that the plan for immigration has been temporarily suspended. People who wish to go have necessarily to equip themselves for their journey to Palestine. Evidently the grant contemplated in the resolutions of the general body are intended as a help to the members of the congregation to go to Palestine and settle down there. The resolutions of the general body have been passed unanimously and therefore one will not be wrong in thinking that they have the support of an overwhelming majority of the members of the congregation. In a matter like this, it is essentially for the general body and its executive committee to decide in what manner and in what time the assistance decided on by the general body should go to the individual members for fully implementing the purpose behind the resolutions. We do not think that the apprehension of any possible misuse of the advance amounts that might be paid, has any foundation nor do we think that in a matter like this, it is for the Court to interfere in the discretion exercised by the general body. The authorities who are to disburse the amounts can be expected to see that the amounts are advanced only to such of the persons as are genuinely desirous of emigration to Palestine and that they use the money for that purpose. We agree with the lower Court in its view that the petition is not actuated by any good faith and that this is not a fit case for interference by the Court.

(5) Viewed from any stand-point therefore the appeal is groundless and is dismissed with costs.

D.H. *Appeal dismissed.*

(C. N. 10)

A. I. R. (39) 1952 TRAVANCORE-COCHIN 37

KOSHI AND MATHEW MURICKEN, JJ.

D. S. Pillay, Plaintiff-Appellant v. Madappan Pillay, Defendant-Respondent.

Second Appeal No. 91 of 1124, D. - 16-1-1950.

Limitation Act (1908), Articles 180 and 181 — Travancore Limitation Act, Articles 164 and 165 — Property purchased at sale in execution — Certificate issued by Registrar, Co-operative Societies — Application for delivery of possession — Limitation — Travancore Co-operative Societies Act (1112), Section 59 (a).

When the machinery of the Court is put in motion to give effect to the certificate issued to the auction purchaser by means of an application to the Court that application is necessarily an appln. under Civil P.C. and must be governed by the provisions of the Limitation Act. Hence, an appln. for delivery of possession of immoveable property purchased at a sale held by a Civil Ct. in execution of a certificate issued by the Registrar of Co-operative Societies under S. 59 (a), Travancore Co-operative Societies Act will be governed by Art. 164, if it be held that the decision of the Registrar when it is filed in a Civil Ct. becomes in effect a decree of the Civil Ct. and, in any case, Art. 165 would clearly apply. (*Paras 1, 3, 4*)

Anno: Limitation Act, Article 180, N. 2.

T. S. Krishnamoorthi Iyer, for Appellant; P. Kochu Krishna Pillai, for the Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

25 Coch L R 724 (Pr 2)
36 Coch L R 918 (Prs 2, 4)
('40) AIR (27) 1940 Mad 635: (ILR (1940) Mad 649) (Prs 2, 4)
('44) AIR (31) 1944 Mad 434: (1944-1 Mad L J 492) (Pr 5)
('49) 1949 Mad W N 727: (AIR (37) 1950 Mad 234) (Pr 5)
27 T L J 238 (Pr 2)

KOSHI, J.: The question raised in this second appeal is whether there is no time-limit for an appln. for delivery of possession of immoveable property purchased at a sale held by a Civil Ct. in execution of a certificate issued by the Registrar of Co-operative Societies under Section 59 (a), Travancore Co-operative Societies Act, 1112. In execution of such a certificate the Dist. Munsiff of Padmanabhapurom sold two items of immoveable properties on 17-11-1118 as separate lots. As regards the first item deft. 2 who was the owner thereof filed an appln. under O. 21, R. 87, Civil P. C., to set aside the sale and that was eventually dismissed on 29-11-1122 when the sale of that item was confirmed. As regards the second item there was no petn. by its owner deft. 1 & that sale was therefore confirmed on 17-12-1118. The appln. for delivery with respect to both items was made only on 7-4-1122. Since by that date more than 3 years had elapsed after the confirmation of the sale of the second item the Dist. Munsiff refused to allow delivery with respect to it while delivery was allowed as regards the other. On appeal by the D. H.-purchaser the Munsiff's decision was confirmed. This second appeal is preferred against that appellate decision of the Dist. Ct.

(2) In supporting the appeal the appellant's learned Advocate dealt at length on the meaning of the words "in the same manner as a decree of such Court" occurring in Sub-s. (a) of S. 59, Travancore Co-operative Societies Act & contended that those words did not attract the appln. of the provisions of the Limitation Act to an execution by a

civil Court of a certificate issued under that sub-section. The argument was that as there was no period of limitation prescribed by the Co operative Societies Act or the rules framed thereunder for the execution of a certificate issued by the Registrar the decree-holder could make an application at any time he chooses. The argument is in our opinion not only unsound but also irrelevant for our present purpose. It has been settled by a long line of decisions that the words "in the same manner as a decree of such Court" or words similar to them make all the provisions of the Civil P. C. and the Limitation Act applicable to the execution by a civil Court of the decision of an outside authority than the Court. See '*Pathanamthitta Co-operative Taluq Bank* v. *Parvathi Amma*, 27 T. L. J. 238, '*Trippunithura Peoples Co-operative Bank, Limited* v. *Kunhan Thirupad*, 25 Coch. L. R 724, '*Kunhumuhammad* v. *Eriyad Edavilangu Co-operative Society Limited*', 36 Coch. L. R. 918, *Subba Rao* v. *Calicut Co-operative Urban Bank*, A. I. R. (27) 1940 Mad. 635 and the decisions referred to in these cases. The argument is irrelevant for we are not here concerned with the execution of a certificate of the Registrar but with the enforcement of a sale certificate granted by the Court itself.

[3] All that we are, therefore, called upon to decide here is whether the Court having issued a certificate to the auction-purchaser law prescribes no time-limit for its enforcement by an application to the Court. If the purchaser has a right to seek the aid of the Court to put him in possession of the property it is idle to contend that the law of limitation will not apply to him. It will be against both reason and convenience to hold that the Court has no power to enforce a certificate issued by it under circumstances similar to the present. When the machinery of the Court is put in motion to give effect to the certificate by means of an application to the Court—a procedure which in our opinion the purchaser is entitled to adopt—that application is necessarily an application under the Code of Civil Procedure and must be governed by the provisions of the Limitation Act. The petitioner cannot be heard to say that his application is not amenable to the provisions of the Code of Civil Procedure, and the Limitation Act.

[4] Article 164, Travancore Limitation Act, provides a period of three years for an application by a purchaser of immovable property at a sale in execution of a decree for delivery of possession from the time the sale becomes absolute. Article 165 is the residuary article which provides a period of three years from the time the right to apply accrues for application for which no period of limitation is provided by the Act or S. 41, Civil P. C. If the view the Madras High Court took in A.I.R. (27) 1940 Mad. 635 that by reason of a similar provision in the rules framed under the Madras Co-operative Societies Act the decision of the Registrar when it is filed in a civil Court becomes in effect a decree of the civil Court be accepted Art. 164 would as if it were in terms apply. The Madras view was followed in 36 Coch. L. R. 918. But if it is considered not necessary or expedient to go so far, Art. 165 would clearly apply. But whichever article applies, it makes no difference in this case, as computation of limitation has to be made from the date of the confirmation of the sale. The right to apply would only accrue from that date. The lower Courts have therefore decided the case rightly.

[5] Before concluding reference may also be made to two reported decisions bearing on the point. In *Krishna Rao* v. *Bhaskararaopuram Co-operative Society*, A.I.R. (31) 1944 Mad. 434 a sale certificate granted by the Registrar of Co-operative Societies was sought to be enforced in a civil Court by means of an application to obtain delivery of possession. Though the rules authorising the civil Court to enforce the certificate prescribed no period of limitation for its enforcement the Court held that the right to apply accrued on the date of the confirmation of the sale and the application for delivery of possession made beyond three years of such date was held to be barred. The article applied is Art. 181, Limitation Act, corresponding to Art. 165, Travancore Limitation Act. In *Muhammed Amin Sahib* v. *Tiruvannumalai Co-operative Society*, 1949 Mad. W. N. 727, a civil Court's decree was executed through the Registrar of Co-operative Societies and it resulted in the sale of certain immovable properties in respect of which the Registrar issued a sale certificate to the purchaser. The purchaser's application to the civil Court for recovery of possession was held to be governed by Art. 180, Limitation Act (Travancore Art. 164). There Art. 180 applied in terms because the sale was held in execution of a decree.

[6] The second appeal fails in the result and it will stand dismissed with costs.

V.R.B. *Appeal dismissed.*

[C. N. 11.]

A. I. R. (39) 1952 Travancore-Cochin 38

GOVINDA PILLAI J.

Kalavilasini Publishing House—Petitioner v. *Government of Travancore and Cochin and another—Counter-Petitioners.*

O. P. No. 62 of 1951, D/- 28-6-1951.

† Constitution of India, Art. 226—Other legal remedy open—Infringement of copyright—Remedy by way of writ under Art. 226 is open to author—Copyright Act (1914), S. 6.

Where copyright in a work has been infringed, the owner of the copyright shall be entitled to all such remedies by way of injunction or interdict, damages, accounts, and otherwise, as are or may be conferred by law for the infringement of a right. The proper remedy for the author is to pursue that allowed to him by a civil suit. The owner is not entitled to a writ under

Art. 226 against the person alleged to have infringed the copyright to prohibit and prevent him from publishing and selling any copies of the infringing work. [Para 3]

Anno. Copyright Act, S. 6 N. 1.

Manual T. Paikeday—for Petitioner ; Government Pleader—for the State.

Order.—The Kalavilasini Publishing House, Trivandrum, represented by its managing proprietor John Peter Thottam, has filed this petition against the Government of Travancore-Cochin State and the Text Books Officer for the said Government. It was alleged that the petitioner's firm had been continuously and progressively carrying on its publishing business and was having a goodly number of well-known copy-right books to its credit, that one such book is a book of poem called "Kavitharamam" by Miss Mary John Thottam (now Rev. Sister Mary Benigna), that one of the poems in this book was entitled "Painkili" covering about three pages of the book, that the 1st counter-petitioner had published recently certain books prescribed as text books for the compulsory use in the schools in Travancore-Cochin State, that one such book was "Kerala Padya Patavali" (words in Tamil) a text book of poems for the Fifth Form, that the same was published a week before this petition which was filed on 13-6-1951, that this book contained the above said poems "Painkili" also printed on pages 51 to 53 of the book, that the copy-right for the whole book "Kerala Padya Patavali" was claimed and declared to be with the 1st counter-petitioner, that the exclusive copyright of the said poem had been the petitioner's property ever since its publication by them, that the counter-petitioners had not obtained any manner of right in respect of the same, that the publication of this poem by the counter petitioners was a flagrant piracy and infringement of the copyright of the petitioner, that the counter-petitioners were therefore liable under the copyright law and that the petitioner was entitled to all the remedies allowed by law against the counter-petitioners. It was further stated that it was for that the counter-petitioners while pirating the said literary work mutilated it materially in many ways by variations and interpolations, that the same was however published as the original work of the author, that this was derogatory and damaging to the literary value and reputation of the work and the author, that the counter-petitioners had printed 32000 copies of this pirated production, that these were arranged to be sold and distributed all over the State, that if they did so, considerable mischief and irreparable damage would be caused unless immediately prevented, and that therefore this Court may be pleased to issue under Art. 226 of the Indian Constitution such directions, orders or writs to or against the counter-petitioners as would prohibit and prevent them from further publishing and selling any copies of the infringing work and to seize and obtain possession of all the infringing copies wherever found and to grant all other necessary and consequential reliefs as this Court might deem fit and proper.

[2] The 2nd counter-petitioner on his behalf and on behalf of the State has filed a counter-affidavit. He stated that the selection in Malayalam poetry for Forms IV, V and VI, were made and edited by a committee consisting of reputed poets and critics, that the usual practice was to contact the authors and poets for permission to include their writings and to award to each of them a suitable remuneration that would be sanctioned by Government, that the authors and poets whose writings had been thus selected had always considered it as an honour to include their writings, that there had been no instance of any objection or protests on their part, that since such readers were intended for the students for compulsory study, the committee usually touched up the selected poems and writings so as to fit in with the educational requirements and the standard of the particular class to which the book was intended, that the selection in the present instance was received from the committee by about the middle of May 1951, that the 2nd counter-petitioner thereupon wrote to sister Mary Benigna on 22-5-1951 for formal permission, that it was usual to anticipate such permission and to make arrangements for printing since the books were required by the re-opening of the schools early in June, that the author in the particular case sent a reply from Carmalite Convent on 2-6-1951 stating that the copyright of the said poem had been transferred to her brother and that he might be contacted, that thereupon the petitioner was contacted over the phone on the same day and was told of the selection and appraised of the fact that a formal communication would be sent, that he had replied that his sister had already written about this and that a permission for the inclusion of this passage might be taken as granted, that a formal letter was subsequently sent to him, that the same had not been replied to formally, that on the faith of his permission the printing of the book was completed and distribution started in the usual course, that the petitioner subsequently got disappointed as one of the books submitted by him for selection as a text book was rejected by the committee, that the allegation that the incorporation of the poem in the "Padya Patavali" was a piracy was false, that there was no breach of copy-right, since Miss Mary John's authorship of the poem had been admitted in the book itself, that permission for its inclusion in the collection had in fact been granted, and that the petition was devoid of any *bona fides*. The petitioner had filed an answer to this. It was affirmed that the written communication for permission was received only after this petition was filed, and that the state-

ment contained in the counter-affidavit that permission had been granted by the petitioner on 6-6-1951 over the phone was false. The statement that the book was printed only after the alleged permission obtained over the phone was also false because the book itself showed that it was printed even in May 1951. He therefore pressed for the main relief prayed for together with his costs.

[3] The copies of "Kavitharamam" and "Kerala Padya Patavali" were produced before me for purposes of comparison and study. In "Kavitharamam", this short poem "Painkili" appears at pages 26 to 29. It contains seventy lines. In the "Kerala Padya Patavali" this poen appears at pages 51, 52 and 53 of the book. It was acknowledged to be the work of Miss Mary John and was mentioned to have been extracted from "Kavitharamam". This contains only fifty lines It is true that certain lines of the original poem have been omitted, while certain modifications have been made regarding a few of the other lines. At any rate, the publishers of "Kerala Padya Patavali" had no intention to do things surreptitiously as the authorship was acknowledged. But it was evident that the permission of the author or of the copy-right holder of the book could not have been obtained before the book was given to the press for printing. The month and year of the printing are mentioned at left hand top corner of the first sheet on the second page. The following entries appearing there (1st Edition Copies 32,000, May 1951) would show that the printing commenced before the alleged formal sanction had been obtained. The 2nd counter-petitioner stated that he wrote to the authoress on 22-5-1951 for formal permission. She had already transferred her copyright over the poem to her brother who was the petitioner — publisher. The reply from Miss Mary John to the 2nd counter-petitioner that he was to contact the petitioner was received by him only on 6-6-1951. By this time the printing must have been completed. Even if the 2nd counter-petitioner's statement that the petitioner had given his formal consent for the inclusion of the poem in the book be true, it could be seen that the poem had already been included and printed before obtaining such formal sanction. As stated by him in para. 4 of the counter-affidavit, he might have anticipated the formal consent from the necessary party as, according to him, the authors and poets had always considered it an honour to include their writings in the selection. Though this would not in any way take away the legal formalities that he had to observe, I do not think that this is a proper case in which a writ as prayed for could be issued. The "Kerala Padya Patavali" which is prescribed as a text book for the Fifth Form, contains sixteen poems each written by a different author. Admittedly by the time this petition was filed, a good number of the copies had been sold and distributed among the students. Restraining the circulation of the whole book at this juncture because of the objected piece of poem contained therein, would necessarily cause inconvenience to the education of thousands of children. I do not therefore consider it advisable to restrain its circulation. In view of the facts proved and admitted in this case, I would not have hesitated to issue the writ prayed for, if the petitioner had no other legal remedy except the one now sought for. The law that governs the copyright of books or poems is the Indian Copyright Act of 1914 which has adopted with suitable modifications the Copyright Act of 1911 passed by the British Parliament. The Act of 1911 has been added as the first schedule to the Act of 1914. Section 6 of the Act of 1911 provides proceedings for infringement by way of injunction, or interdict, damages, etc. Where copyright in any work has been infringed, the owner of the copyright shall be entitled to all such remedies by way of injunction or interdict, damages, accounts, and otherwise, as are or may be conferred by law for the infringement of a right. The proper remedy for the petitioner is to pursue that allowed to him by a civil suit. If this poem had been included by the counter petitioners without the permission of the petitioner, the damages, if any, sustained by him would be ascertained, accounts looked into, and the necessary reliefs granted by a competent Court of law in case the petitioner is able to substantiate his plea. It is therefore not considered proper or expedient to allow this petition. The petition is therefore dismissed, but in the circumstances of this case, without costs.

V.B.B. *Petition dismissed.*

[C. N. 12.]

A. I. R. (39) 1952 Travancore-Cochin 40

KUNHI RAMAN C. J. AND SANKARAN J.

Kochu Vareed and another—Appellants v. *Mariayam guardian of Ouseph—Respondent.*

Second Appeal No. 181 of 1124, D/- 25-6-1951.

(a) Limitation Act (1908), Arts. 181, 182 — Applicability to application for restitution—Civil P.C. (1908), S. 144.

An application for restitution under S. 144, Civil P. C. is an application for execution of a decree and as such is governed by Art. 182, Limitation Act (1908) (corresponding to Art. 166, Cochin Limitation Act) and not by Art. 181 (i.e. Art. 165 of the Cochin Act). *Case law referred.* [Para 5]

Anno. Limitation Act, Art. 181, N. 7; Art. 182 N. 18; Civil P. C., S. 144, N. 33.

(b) Civil P. C. (1908), S. 145—Proceedings against surety—Nature — Proceedings can be only by way of execution.

Anno. Civil P. C., S. 145, N. 10a. [Para 5]

S. Narayana Iyer—for Appellants ; *P. K. Krishnan Kutty Menon—for Respondent.*

Cases referred to.—

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian cases).

('09) 31 All. 551 : (36 Ind. App. 197 P.C.) [Pr. 5]
('34) A.I.R. (21) 1934 All. 626 : (57 All. 26 F.B.) [Pr. 5]
('17) 41 Bom. 625 : (A.I.R. (4) 1917 Bom. 210) [Pr. 5]

('28) A.I.R. (15) 1928 Cal. 645 : (29 Cri. L. Jour 927) [Pr. 5]
('34) A.I R. (21) 1934 Lah. 190: (149 Ind. Cas. 1103). [Pr. 5]
('17) 40 Mad. 780 : (A.I.R. (4) 1917 Mad. 185). [Pr. 5]
('47) A.I.R. (34) 1947 Nag. 239 : (I.L.R. (1947) Nag. 176). [Pr. 4]
('34) A.I.R. (21) 1934 Pat. 246(2) : (13 Pat. 411 F.B.) [Pr. 5]
('33) A.I.R. (20) 1933 Rang 180 : (11 Rang 275). [Pr. 5]

Kunhi Raman C. J.—The plaintiff-decree-holder and his surety are the appellants. The proceedings in the Court below were for restitution for which an execution petition was filed in respect of a sum of money drawn out by the decree-holder under an *ex parte* decree. The *ex parte* decree was passed on 9-10 1117 in O. S. 311 of 1117. In execution of that decree, a certain amount standing to the credit of the judgment-debtor was proceeded against and a sum of Rs. 200 odd was brought into Court and credited towards the decree. Thereupon, the decree-holder who had secured the *ex parte* decree applied for payment out. This was granted subject to security being furnished. The surety who is one of the appellants in the present case was the person who furnished such security by executing a bond. Subsequently, the *ex parte* decree was set aside on application made by the judgment-debtor. This was done on 15-10-1118. The suit was heard in due course on the merits and ultimately a decree for Rs. 7 odd was passed on 28-11-1119. From this decision A. S. No. 50/1120 was preferred and the appellate Court on 26-2-1121 confirmed the decision of the trial Court. On 10-12-1122 E. P. 1334/1122 was filed on behalf of the judgment debtor for getting back the excess amount drawn out by the decree-holder when the *ex parte* decree was in force. This was resisted both by the decree holder and the surety according to whom the application was barred by limitation. Their contention was that the right to claim the amount accrued on the trial Court setting aside the *ex parte* decree on 15-10-1118. If that position is not tenable then according to them in any event when the suit was tried on the merits and the decree for Rs. 7 odd was passed on 28-11-1119 the right to claim the excess amount drawn out from the Court must necessarily have arisen. If either of these dates is taken as the starting point for limitation, then the application filed on 10-12-1122 for recovering the surplus was barred by limitation more than three years having elapsed from the starting point of limitation. The answer of the judgment-debtor was that the right accrued only on the decree passed by the appellate Court in A. S. 50/1120 which as already stated was on 26-2-1121. The execution petition in the present case with respect to which the question of limitation is raised was filed as already stated on 10-12 1122 and it was contended that it was within time.

[2] Both the Courts below have accepted the respondent's contention that the application for recovering the surplus amount drawn out by the decree-holder was in time. They have both based their conclusion on the wording of the surety bond under which the surety undertook to bring the amount back whenever the Court directed him to do so. It was contended in the Courts below that such a direction was not given prior to three years from the date of execution petition No. 1334 of 1122.

[3] In second appeal, the question was argued purely as a question of law based upon the appropriate article of the Limitation Act which would apply to a petition like E.P. 1334 of 1122. Articles 165 and 166, Cochin Limitation Act correspond to Arts. 181 and 182, Indian Limitation Act. Therefore, if the residuary article which is Art. 165, Cochin Act applies, the application for recovering the surplus amount is clearly barred by limitation. If, on the one hand Art. 166, Cochin Act which corresponds to Art. 182 of the Indian Act is applicable, then the execution petition is within time.

[4] It is conceded by the learned counsel appearing on both sides that there is a divergence of views on this question in the High Courts in India. This is correctly summarised in Rustomji's Commentaries on the Indian Limitation Act 5th Edn., p. 1662 of Volume II :

"There is a conflict of authority as to the limitation applicable in the case of an application for restitution under S. 144, Civil P. C. 1908, and the decisions are not easy to reconcile. According to the Madras, Bombay, Lucknow, Patna and Rangoon Courts, the application is considered to be one *for execution* and as coming within the purview of Art. 182. On the other hand, according to the Calcutta, Allahabad and Lahore Courts, the application for restitution under S. 144, Civil P. C., is held to be not an application *for execution* so as to be governed by Art. 182, and is held to come within the residuary Art. 181."

The learned counsel for the appellants invites our attention to the view taken by the Nagpur High Court which adopts the view expressed by the Calcutta, Allahabad and Lahore Courts. The case in which this point came up for decision is reported in *Allawali* v. *Kesharimal Ramlal*, A. I. R. (34) 1947 Nag. 239.

[5] The view taken by the majority of the High Courts in India is based mainly upon the opinion expressed by the Judicial Committee of the Privy Council in the case reported in *Prag Narain* v. *Kamakhya Singh*, 31 ALL. 551. The important decisions on this controversial question were all read in Court by learned counsel appearing on both sides. *Somasundaram Pillai* v. *Chokkalingam Pillai*, 40 Mad. 780; *Kurgodigouda* v. *Ningangovda*, 41 Bom. 625 ; *Muthukasuppan Chettiar* v. *Annamalai Chettiar*, A.I.R. (20) 1933 Rang. 180; *Bhaunath Singh* v. *Kedarnath*, A.I.R. (21) 1934 Pat. 246(2); *Serajul Islam* v. *Emperor*, A. I. R. (15) 1928 Cal. 645; *Parameshwar Singh* v. *Sitladin Dube*, A.I.R. (21) 1934 ALL. 626; *Ghulam Rasul* v. *Rammon Mal*, A.I.R. (21) 1934 Lah. 190. We are inclined to adopt the view expressed by

the majority of the High Courts in India, namely Madras, Bombay, Lucknow, Patna and Rangoon. We, therefore, hold that the application in the present case in respect of which the question of limitation is raised must be regarded as one for executing the decree and in that view since it was filed within three years from the date of the appellate decree, it is within time. In other words, it is Art. 166, Cochin Limitation Act corresponding to Art. 182, Indian Limitation Act that applies to the present case. We are also satisfied that the terms of the surety bond in this case relied upon strongly by both the Courts below to support the contentions of the learned counsel for the respondent as also the provisions of S. 145, Civil P. C. (1908) according to which and also according to general principles, the proceedings against the surety can only be by way of execution and not by way of restitution. In the view that we have taken on this interesting question of law that has arisen in this case, both the Courts below have correctly decided the point in issue between the parties and this second appeal must be dismissed with costs.

D.R.R. *Appeal dismissed.*

[C. N. 13.]

A. I. R. (39) 1952 Travancore-Cochin 42

KUNHI RAMAN C. J. AND SUBRAMANIA IYER J.

Aiyamperumal—Petitioner v. *State.*

Cri. Revn. Petn. No. 138 of 1125, D/- 31-1-1951.

Municipalities—Trivandrum City Municipality Act (IV [4] of 1116 M. E.), Ss. 295 Sch. IV, 375, 384 — "Beating of metals"— Metal whether includes gold— Licence to carry business of goldsmith — Necessity of—Words and Phrases—"Metal."

The word "metal" does not include precious metals such as gold and silver. Hence, the word 'metals' in the expression "beating of metals" for doing which a licence is necessary under the Trivandrum City Municipal Act does not include gold. Therefore, there is no necessity for a goldsmith resident of Trivandrum to apply for or obtain a licence for practising his profession as goldsmith. [Para 4]

(1831) 2B. & Ad. 592, *Foll.*

C. I. Parameswaran Pillai — for Appellant; Public Prosecutor — for the State.

Case referred to :—

(1831) 2 B. & Ad 592 : (9 L. J. K. B. 280). [Pr. 4]

Kunhi Raman C. J. — The accused who is a goldsmith by profession and who is carrying on business at Trivandrum has brought this criminal revision petition against the decision of the learned Sessions Judge of Trivandrum in Criminal Appeal No. 16 of 1124. The learned Judge has confirmed the conviction and sentence passed on the accused by the First Class Bench of Magistrates at Trivandrum and dismissed the appeal.

[2] The accused was prosecuted under S. 375, Trivandrum City Municipal Act (IV [4] of 1116) read with S. 295, Sch. IV, and S. 384 of the same Act. The case against the accused was that he carried on his profession as a Goldsmith in a building in the city of Trivandrum without obtaining a license for "beating metal" as required by Sch. IV of S. 295 of the Act aforesaid. The accused admitted in the trial Court that he was carrying on his profession as a goldsmith which involved "beating" of gold for making ornaments and other articles. He pleaded in both the Courts below that for doing this business, no license was required, since the relevant clause of Sch. IV relied upon by the prosecution did not apply to his case. This contention did not find favour with both the Courts below and therefore on the question of law as to whether a license is necessary in the circumstances of the present case, he has brought the criminal revision petition to this Court. Since the question involved is one of importance, affecting as it does both the Corporation of Trivandrum and a class of persons resident at Trivandrum who are carrying on business there, the case was directed to be posted before a bench of two Judges and it has thus come up before us for disposal.

[3] The learned Sessions Judge has set forth the facts clearly in his judgment. According to Cl. (1) of S. 295, Trivandrum City Municipal Act, no place within the City limits shall be used for any purpose mentioned in Sch. IV without obtaining a license from the Commissioner of the Municipality. This schedule contains a list of cases in which licenses must be obtained for using premises for particular purposes. In the present case, we are concerned with two of these purposes as given in S. 295 The first is "Gold Refining". This is followed after a few items by the item "Metals—beating, breaking, hammering, casting, etc."

[4] The lower appellate Court has proceeded upon the basis of the meaning of the words 'beating metals' as given in Chamber's 20th Centuary Dictionary. But when words which are used in a statute have to be interpreted, to ascertain the sense in which they are used, legal dictionaries are more appropriate for reference. In Bouvier's *Law Dictionary*, Vol. 2, Edn. 3, at p. 2207, it is explained that the word 'metal' does not include 'precious metals'. A similar explanation is given in Vol. 3, p. 364 of Poland Burrows' *Judicial Dictionary* (Words and Phrases Judicially Defined). There is high judicial authority for this interpretation in the case of *Casher* v. *Holmes*, (1831) 2 B & AD 592. That was a case in which the plaintiff sued the Commissioners of Arundel Port for recovering a sum of £. 750 in the following circumstances. In September 1899, His Majesty's frigate "Druid" arrived off Portsmouth with a quantity of gold and silver amounting in value to £273,091 8s. 5d. The plaintiff was employed by the captain of the vessel to convey the gold and silver from Portsmouth to London, and deliver it at the bullion office in the Bank of England, which was used by merchants as a place of deposit of precious metals. The plaintiff

received the gold and silver on board a sloop belonging to him called the "Elizabeth" and conveyed it first to Portsmouth and from there to the little Hamption Harbour in the Port of Arundel. When his sloop arrived there, he transhipped the cargo into barges for conveying the same to London by Inland navigation. The Commissioners of Arundel Port demanded from him £787. 10s. od. as dues payable to them on the cargo. The plaintiff resisted the demand. Thereupon the cargo was seized and detained by the Commissioners. To release it from detention, the plaintiff was obliged to pay the amount demanded by the Commissioners. He did this under protest and afterwards brought an action against the Commissioners to recover it from them. The point urged on behalf of the Commissioners was that they had a right to charge 10d. for every £ 10 value of the cargo consisting of "all other metals not enumerated." The contention urged on behalf of the Commissioners was similar to what was urged in the Courts below in the present case. It was argued on behalf of the Commissioners that gold and silver are clearly metals and, therefore, they could not be excluded from the category of "all other metals" appearing in the statute which authorised the Commissioners to levy a duty. But this contention was not accepted by the Court. Lord Tentorden C. J. stated as follows in his judgment :

"'All other metals' in this Act of Parliament must be understood in their ordinary and popular sense; and in that sense they certainly do not include gold and silver. They are never spoken of in popular language as metals, but as the precious metals. That being so, the Commissioners were not entitled to demand £.787-10s. as dues payable on this cargo ....."

Littledale J. stated as follows :

"Undoubtedly, gold and silver are, strictly speaking, metals; but as articles of commerce, they are never so spoken of as metals, but are described by name, or as the precious metals.

A similar view was expressed by Parke J. who said :.

"The word 'metal' taken in its ordinary sense, does not include the precious metals, and I am of opinion that that word must be understood in its ordinary sense in the schedule of this Act of Parliament ..... Besides it is a good rule of construction that where a charge is to be imposed on the subject, it ought to be done in clear and unambiguous language, and as, at all events, it is not clear that gold and silver are included in the word 'metals' ..... I should be of opinion that the plaintiff was not bound to pay this sum claimed by the Commissioner."

This interpretation of the word 'metal' seems to us to be applicable to the word appearing in the relevant section of the statute in the present case, especially in view of the fact that there is specific mention made in an earlier item in the schedule to "gold" for refining which a license is necessary. Adopting this interpretation, the word 'metals' in the expression "beating of metals" for doing which a license is necessary under the Trivandrum City Municipal Act, will not include gold. In this view there is no necessity for the accused petitioner to apply for or obtain a license for practising his profession as goldsmith and he is not guilty under the provision of law mentioned in the judgments of the Courts below. The conviction and sentence shall, therefore, be set aside and the fine if collected from the petitioner shall be refunded to him.

V.S.B. *Conviction set aside.*

[C. N. 14.]

A. I. R. (39) 1952 Travancore-Cochin 43

KOSHI AND GOVINDA PILLAI JJ.

Krishnan Padanayar—Appellant v. *Parameswaran Nair and others—Respondents.*

A. S. No. 285 of 1950, D/- 17-7-1951.

Court-fees Act (1870), S. 7 (iv) (f) — Travancore-Cochin Court-fees Act (1125), S. 3 (iv) (c) — Final decree in suit for accounts — Appeal by plaintiff — Appellant seeking to make defendant liable for more amounts than found by lower Court — Valuation for court-fee.

When in a suit for accounts the plaintiff complains that the trial Court has not made the defendant liable for all the amounts he is truly liable for, it is open to the plaintiff to have the whole case re-opened in appeal from the final decree on court-fee paid on a notional valuation: *Case law discussed.* [Paras 2, 4]

In appeal the suit does not lose its character of being an account suit so as to entitle the Court or the parties to treat it as an appeal from a money decree. [Para 10]

In a suit for partition every party is in the position of of a plaintiff. [Para 11]

Anno. Court-fees Act, S. 7 (iv) (f), N. 4, 7.

T. S. Venkiteswara Iyer and C. S. Ananthakrishna Iyer—for Appellant.

Government Pleader—for Respondents.

Cases referred to—

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('29) A. I. R. (16) 1929 P. C. 147 : 56 Ind. App. 232 : (57 Mad. L. Jour. 281 : 31 Bom. L. R. 841) [Prs. 5, 7, 8]

('41) A.I.R. (28) 1941 Bom. 242: (I.L.R. (1941) Bom. 477) [Prs. 7, 9]

('36) A. I. R. (23) 1936 Lah. 458: (160 Ind. Cas. 642) [Pr. 7]

('46) A. I. R. (33) 1946 Lah. 280: (I. L. R. (1947) Lah. 47 F. B.) [Prs. 7, 8]

('33) A.I.R. (20) 1933 Mad. 330: (56 Mad. 705) [Pr. 7]

('38) A.I.R. (25) 1938 Mad. 435: (I.L.R. (1938) Mad. 598 F. B.) [Prs. 7, 8]

('43) A I.R. (30) 1943 Mad. 685: (211 Ind. Cas 10) [Pr. 7]

('30) A.I.R. (17) 1930 Pat. 1: (8 Pat. 818) [Pr. 9]

(31) A. I. R. (18) 1931 Rang. 146: (9 Rang. 165 F. B.) [Pr. 7]

Koshi J.—This appeal has been placed before us now to decide whether proper court-fee has been levied on it. The appeal is from a final decree in a suit for partition among the members of a Nair Tarwad in which there was also a claim for rendition of accounts by defendants 1 and 2 regarding the surplus profits of the tarwad properties. During the relevant period these defendants were in management. The appellant was also a defendant (defendant 5) in the suit, but he was not one of the parties liable to account. On the other hand, his case throughout has been that on a proper accounting large amounts of the sur-

plus profits of the common properties will be found due by defendants 1 and 2 to the tarwad. The lower Court after an elaborate enquiry found that defendants 1 and 2 were liable in the sum of Rs. 1,272-10 0 to the appellant and his thavazhi. The appellant's main complaint in the appeal is that the lower Court fixed the liability of defendants 1 and 2 at a very low figure and that further amounts will be found due if accounts are taken properly. The appellant's position in the suit is really that of a plaintiff and the court-fee payable on the appeal preferred by him has to be determined on that basis.

[2] Besides paying a court-fee of Rs. 10 as in a suit for partition the appellant has estimated the value of the relief as to accounting at Rs. 100 and also paid *ad valarem* court-fee thereon. The Office Report is: "whether the court-fee of Rs. 10 for the partition matter is sufficient, has to be decided." The learned Government Pleader who represented the State before us on this reference conceded that proper fee has been paid regarding the relief as to partition. We are unable to appreciate how the office could have entertained any doubt with regard to it. The learned Government Pleader, however, urged before us that proper court-fee has not been paid with respect to the relief relating to accounting. We are afraid that in raising this point he omitted to notice that the position of the appellant here is not that of a defendant in an ordinary suit for accounts. As stated earlier the appellant is not one of the members of the tarwad liable to account for the profits, but is one entitled to call those in management to disgorge the surplus profits in their hands. He was truly a plaintiff in the suit and there is a consensus of judicial opinion that when a plaintiff in a suit for accounts complains that the trial Court has not made the defendant liable for all the amounts he is truly liable for it is open to the plaintiff to have the whole case re-opened in appeal on court-fee paid on a notional valuation. That appears to us also to be the true construction of the relevant provision of the Court-fees Act.

[3] Before proceeding to discuss the question we think it proper to mention here that the appellant's counsel raised a point before us that when a junior member of a joint family adds a relief asking for accounts, a suit for partition cannot become a suit for accounts and that court-fee payable in partition suits, pure and simple alone need be paid in such suits as well. Reliance was placed for this position on the case reported in *Jyotibati* v. *Lackhmeshwar Prasad*, A. I. R. (17) 1930 Pat. 1. This is, however, a controversial matter and for our present purpose it would suffice to state that the memorandum of appeal itself does not proceed on that basis. What we have to decide is what the court-fee payable is on the reliefs as valued in the memorandum of appeal.

[4] Now to come back to the point raised by the learned Government Pleader, the relevant provision of law is to be found in S. 3 (iv) (c) of the Travancore-Cochin Court-fees Act, 1125. It states that in suits, original or appeal, falling within the clause, the amount of fee payable shall be computed according to the amount at which the relief sought is valued in the plaint or memorandum of appeal and that in all such suits, the plaintiff shall state the amount at which he values the reliefs sought. Treating the appellant here as a plaintiff in the suit and due regard being had to the change the Travancore-Cochin Court-fees Act introduces into the opening sentence of the section from the corresponding provisions of the Indian Court-fees Act (S. 7) it appears to us to be plain that it is open to the appellant here to put his own valuation regarding the relief as to accounts claimed in the appeal. The opening sentence in S. 7, Court-fees Act, does not contain the words 'original or appeal' after the words 'in suits'. Even as S. 7, Court-fees Act, 1870 stands judicial opinion is unanimous that where in an appeal from a suit for accounts the plaintiff claims further amounts from the defendant he can invoke the aid of S. 7 (iv) (c) of the Act and pay court-fee according to the amount at which the reliefs sought is valued by him in the memorandum of appeal. There is difference of opinion whether a defendant's appeal could be valued likewise and court-fee paid accordingly. There is also difference of opinion whether the above mode of valuation can be permitted to be made when the plaintiff is seeking to get rid of a liability the trial Court found against him. However when the plaintiff is by his appeal only claiming further amounts from the defendant we have not come across a single case which lays down that valuation and court-fee should be on a basis different from that found in the provision referred to.

[5] The case which would seem to be very relevant here is a decision of the Privy Council reported in *Faizullakhan* v. *Mauladad Khan*, A. I. R. (16) 1929 P. C. 147: 56 Ind. App. 232. The head note to that case as occurring in the Indian Appeals series reads as follows:

"On taking accounts in a partnership suit a decree was made that Rs. 19,991 were due from the plaintiffs to the first defendant. The plaintiffs, who had valued their suit at Rs. 3,000, appealed within the time limited, praying that the decree be set aside and that a decree be made for such an amount as might be found due to them. By their memorandum of appeal they valued the appeal at Rs. 19,991, and paid court-fees accordingly. The Appellate Court remanded the matter for a retrial, but ordered that the plaintiffs should not have a decree for any sum which might be found due to them, since in their view the court-fees paid did not cover that relief, and to that extent the appeal was then barred by limitation."

[6] It was held by their Lordships, reversing the Judicial Commissioner of the North-West Frontier Province, Peshawar, that the memo-

randum of appeal by the plaintiff to the Court below correctly stated "the amount at which relief is sought" within the Court-fees Act, 1870, S. 7 (iv) (f) and that the court-fees paid entitled the plaintiffs to claim a decree if any sum should be found to be due to them. The claim in the appeal to the Court of the Judicial Commissioner was expressed as follows:

"Claim in appeal—For reversal of the decree against the appellants and for granting a decree in their favour for such of that amount as may be found due. Value for purposes of Court-fee of appeal Rs. 19,991."

Two sentences from the judgment Lord Shaw delivered in that case may usefully be quoted here:

"Their Lordships are clearly of opinion that the Memorandum of appeal in the present case did state in terms of the Act the amount at which the relief was sought. This determines the appeal."

[7] This case has been differently interpreted by different High Courts as to whether it would apply to an appeal by a defendant in a suit for accounts or to an appeal by a plaintiff when he is seeking to get rid of a liability the trial Court found against him. See *Umar* v. *Ali Umar*, A. I. R. (18) 1931 Rang. 146. *In re Venkatanandam*, A. I. R. (20) 1933 Mad. 330, *Tarif Singh* v. *Kanshi Ram*, A. I. R. (23) 1936 Lah. 458, *In re Dhanukodi Nayakkar*, A. I. R. (25) 1938 Mad. 435, *Kashiram* v. *Ranglal*, A. I. R. (28) 1941 Bom. 242, *Ramadoss* v. *Appalanarasayya*, A. I. R. (30) 1943 Mad. 685 and *Megh Raj* v. *Rupchand Uttamchand*, A. I. R. (33) 1946 Lah. 280. Even cases which give a very restricted scope to the Privy Council decision (A. I. R. (16) 1929 P. C. 147) are agreed that when a plaintiff prefers an appeal claiming more amounts from the defendant than that found by the lower Court his appeal need be valued and court-fee paid only as envisaged in S. 7 (iv) of the Court-fees Act, 1870.

[8] In the Full Bench decision of the Madras High Court mentioned above viz., A. I. R. (25) 1938 Mad. 435, referring to the Privy Council decision in A. I. R. (16) 1929 P. C. 147, Sir Lionel Leach C. J. said:

"In the course of the arguments which are to be found reported in 57 M. L. J, 281; 31 Bom. L. R. 841 (P. C.) it was pointed out by Lord Tomlin that the scheme of the Act was that the plaintiff should be allowed to value his own relief, and the decision proceeded on this basis."

Lord Tomlin's observations are found quoted at page 290 of the Lahore Full Bench case mentioned above, (A. I. R. (33) 1946 Lah. 280 at p. 290). Those observations are:

"In S. 7 the amount of the fee is to be computed, in suits for accounts, according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. If, therefore, the appellant (who was the plaintiff) values the relief in the memorandum of appeal and pays a fee thereon, that is the amount of fee properly payable. Of course if the appellant recovers more, he pays the extra fee under S. 11 of the Act (which again applies to plaintiffs alone). But you (counsel for respondents) cannot complain that the amount valued in the memorandum of appeal is not the proper amount".

Later on in his judgment Sir Lionel Leach C. J. observed:

"*Faizulla Khan's case*, A. I. R. (16) 1929 P. C. 147, as I have already indicated, only dealt with the case of a plaintiff-appellant. The section gives great freedom to plaintiff-appellants, but we do not consider that it gives the same freedom to defendant-appellants."

[9] We will also quote here a passage from the decision of Beaumont C. J. in the Bombay case mentioned above. A. I. R. (28) 1941 Bom. 242. The Bombay High Court does not share the view of Madras, Lahore or Rangoon High Courts that the Privy Council decision would govern all manner of appeals by a plaintiff in a suit for accounts. In the case now under reference Sir John Beaumont C. J. and Sen J., held that when a plaintiff is seeking to get rid of a liability found against him by the lower Court he must value the appeal and pay court fee according to the amount of liability sought to be got rid of. In laying down that rule what Sir John Beaumont says about a plaintiff's appeal of the kind before us now is instructive. The relevant observations are:

"If the plaintiff's suit had failed and he had appealed against the refusal to take an account, the appeal would have related solely to a right to an account, and I agree that the appellant might have placed his own value on the memorandum of appeal. But as the suit resulted in a decree for a certain amount against the plaintiff it seems to me that the appeal is not merely in relation to an account, but is really an appeal against a money decree, and he must at any rate stamp his memorandum of appeal with an ad valoram stamp in respect of the amount of the decree. He may add a nominal amount in respect of any further relief claimed which may accrue by reason of the account being taken on a different basis from that adopted by the lower Court, but the stamp on the memorandum of appeal must, to my mind, cover the amount of the decree which is standing against the appellant, and which he seeks to have set aside."

The learned Chief Justice's view as to how a plaintiff seeking to obtain more amounts from the defendant should value his appeal or pay court-fee can be found in the first part of the last sentence of the above extract.

[10] For the reasons stated by us earlier and on the authority of the cases referred to here we hold that proper court-fee has been paid regarding the relief for accounting sought for by the memorandum of appeal and we decide accordingly. In appeal the suit does not lose its character of being an account suit so as to entitle the Court or the parties to treat it as an appeal from a money decree.

[11] Even at the risk of repetition we once again state that we have here confined ourselves to the immediate requirements of the case on hand viz., how a plaintiff in a suit for accounts, should value his appeal for purposes of Court-fees when all that he claims in the appeal is to make the defendant liable for more amounts than that found by the lower Court. Though the appellant here is only a defendant in the suit we have proceeded to decide the question on the basis that he is to all intents and purposes a plaintiff. In

fact it is an accepted view now that in a suit for partition every party is in the position of a plaintiff.

V.B.B. *Order accordingly.*

[C. N. 15.]

A. I. R. (39) 1952 Travancore-Cochin 46

SANKARAN AND GANGADHARA MENON JJ.

H. Ramasubbier — Appellant v. *Janaki Ammal — Respondent.*

A. S. No. 148 of 1950, D/- 1-6-1951.

Companies Act (1913), S. 229 — Rules of law of insolvency — Applicability to winding up proceeding — Winding up Judge if can compel secured creditor to prove his debt — Travancore Companies Act (IX [9] of 1184), S. 284.

The words "the same rules . . . as are in force for the time being under the law of insolvency," in S. 284, Travancore Companies Act, are wide enough to include rules contained in the sections of the Insolvency Act, rules if any made under that Act, and any appropriate established rules of practice in the insolvency proceedings unless there is something in the Companies Act itself already providing for the matter in question, or in conflict with the rules which the section purports to import. Therefore, in determining the respective rights of secured and unsecured creditors under S. 284 in a winding up proceeding under the Companies Act, the provisions of the law of insolvency in respect of that matter are attracted. And it is a well-established principle of insolvency law, that in the case of insolvency of an individual a secured creditor can stand outside the proceedings. Hence, the winding up Judge cannot compel a secured creditor to prove his debt or subject it to his scrutiny nor has the Judge jurisdiction to annul or modify a secured creditor's security or decree : A.I.R. (16) 1929 All. 353 (F. B.), *Rel. on*; (1907) 2 K. B. 23, *Disting.* [Paras 3, 5]

Anno. Companies Act, S. 229, N. 1, Pt. 2 and N. 11, Pt. 3.

T. N. Subramonia Iyer —for Appellant; *N. Varadaraja Iyengar —for Respondent.*

Cases referred to.—

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('29) A.I.R. (16) 1929 All. 353 : (51 All. 695 F. B.). [Prs. 3, 5]

(1907) 2 K. B. 23 : (76 L. J. K. B. 644). [Pr. 5]

Gangadhara Menon J.—This appeal is directed against the order of the learned District Judge of Quilon dismissing Company Petition No. 11 of 1124 of his Court filed by the liquidator of a limited company by name "The Sri Ram Tile Works, Ltd., Quilon," which has gone into voluntary liquidation. On 17-8-1121, respondent obtained a decree against the company in O. S. No. 13 of 1121 on the basis of a hypothecation bond dated 31-1-1107. When execution was taken out by the respondent an application was filed on behalf of the company to have the debt discharged as per the provisions of Ss. 8, 9 and 11, Debt Relief Act XI [11] of 1116. It was dismissed on 11-7-1124 under Ex. 11 order. Thereafter the entire decree amount appears to have been deposited in Court on behalf of the company by a vendee of the liquidators. But before the decree-holder drew the money from Court the liquidators filed Company Petition No. 11 of 1124 attacking the hypothecation bond as wanting in consideration and the decree based thereon as fraudulent and collusive and praying for an enquiry into the claim of the decree-holder and to call her for proof of the debt. The respondent decree-holder resisted the application on the grounds (1) that the Court has no jurisdiction to entertain such an application, (2) that the liquidators are concluded by the order of the execution Court and (3) that the application is barred by limitation. The Court below repelled the first two grounds of objection but it upheld the plea of limitation and dismissed the petition. One of the joint liquidators has, therefore, come in appeal. The respondent has filed a memorandum of objections in regard to the findings against her on the first two points.

[2] As already stated the hypothecation bond is dated 31-1-1107. The decree was passed on 17-8-1121. It is admitted that the resolution for the voluntary winding up of the company was passed only on 4-2-1123. The respondent is, therefore, a secured creditor who has obtained her decree long before the winding up proceedings. This being the case it is contended for the respondent that the winding up Court has no jurisdiction to call her for proof of the debt or to institute an enquiry into the extent and validity thereof. We think that there is considerable force in this argument.

[3] Section 284, Travancore Companies Act which corresponds to S. 229 of the Indian Act provides that :

"In the winding up of an insolvent company the same rule shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section."

The words "the same rules . . . . as are in force for the time being under the law of insolvency," in the above section are wide enough to include rules contained in the sections of the Insolvency Act, rules if any made under the Act, and any appropriate established rules of practice in the insolvency proceedings unless there is something in the Companies Act itself already providing for the matter in question, or in conflict with the rules which the section purports to import. (Vide *Hansraj* v. *Dehra Dun Missoorie Electric Tramway Co. Ltd.*, A. I. R. (16) 1929 ALL. 353). There are no such provisions in the Companies Act except those contained in S. 208 of the Act regarding stay of proceedings and in S. 210 regarding granting or refusing leave to commence or proceed with suit or legal proceeding, with which we are not concerned here as no reliefs are sought for in this case on the basis of these

sections. Therefore, in determining the respective rights of secured and unsecured creditors under S. 284, Companies Act, in a winding up proceeding under the Act, the provisions of the law of insolvency in respect of that matter are attracted. It is a well-established principle of insolvency law, that in the case of insolvency of an individual a secured creditor can stand outside the proceedings as indicated by S. 9 (2), S. 28 (2) and S. 47, Travancore Insolvency Act VIII [8] of 1108 more particularly the proviso to S. 28 (2) which provides that nothing in the sub-section shall affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if the sub-section had not been enacted.

[4] There is, however, no warrant for importing the provisions of S. 53, Insolvency Act also as is contended for by the appellant. With reference to secured and unsecured creditors in the matter of the winding up of an insolvency company the rules on insolvency that S. 284, Companies Act seeks to import are only those rules that relate to their respective rights. The provisions of S. 53, Insolvency Act cannot be considered as such rules.

[5] Applying, therefore, the rules under the law of insolvency in determining the rights of a secured creditor as enjoined under S. 284, Travancore Companies Act, it is evident that a secured creditor can stand altogether out of the winding up proceedings if he so elects and rely upon his security or his decree if he has obtained one subject of course, to the restrictions that may be imposed by virtue of Ss. 108 and 110 of the Act. The winding up Judge cannot compel a secured creditor to prove his debt or subject it to his scrutiny nor has the Judge jurisdiction to annul or modify a secured creditor's security or decree. We are fortified in our conclusions by the Full Bench decision of the Allahabad High Court in *Hansraj* v. *Dehra Dun Mussoorie Electric Tramway Co. Ltd.*, (A. I. R. (16) 1929 ALL. 353), referred to above. No decision has been brought to our notice either English or Indian which takes a contrary view. The decision *In re Van Laun. Ex-parte Chatterton*, (1907) 2 K. B. 23, which the learned Advocate for the appellant relied on, does not touch the question that we are called upon to consider in this case. It is clear from the facts of that case that the secured creditor had exercised his option to come into the winding up proceedings and submit his claim to the winding up Judge.

[6] It, therefore, follows that the Court below had no jurisdiction to entertain company Petition No. 11 of 1124. It ought to have been dismissed on that sole ground.

[7] Though we are not inclined to accept the view of the lower Court on the question of limitation, we think it unnecessary to discuss the point in detail inasmuch as the application of the liquidators has to be dismissed on the ground of want of jurisdiction.

[8] For the foregoing reasons we allow the memorandum of objections of the respondent to the extent indicated above and dismiss the appeal with costs.

V.S.B. *Appeal dismissed.*

[C. N. 16.]

A. I. R. (39) 1952 Travancore-Cochin 47

KOSHI AND GOVINDA PILLAI JJ.

Gangadhara Iyer and others — *Appellants* v. *Kulathu Iyer Sankara Iyer* — *Respondent.*

Second Appeal No. 564 of 1124, D/- 27-6-1951.

(a) T. P. Act (1882), S. 122 — Gift — Acceptance by or on behalf of donee.

One of the requisites of a valid gift is that it must have been accepted by the donee personally or by some one on the donee's behalf. An acceptance may be either express or implied. An acceptance can be inferred from the facts and surrounding circumstances attending a transaction of gift: A. I. R. (19) 1932 All. 444; 13 Trav. L. Tim. 58 & 11 Trav. L. Tim. 1099, *Rel. on.* [Paras 4, 12]

Anno. T. P. Act, S. 122, N. 7, Pts. 5, 6.

(b) T. P. Act (1882), S. 127—Gift followed by direction to donee to maintain donor — Effect of such direction.

When there is an out-and-out transfer by way of gift followed by a direction to the donee to maintain the donor the latter direction is only a pious wish. On the other hand, if the gift deed starts with a statement that it is made with the object of providing for the maintenance of the donor and this statement is followed by the operative clause, there can be no doubt that the gift is subject to the liability to maintain the donor. Thus, where after the operative portion of the gift deed other clauses providing for the expenses in connection with the donor's funeral ceremonies and for the services expected from the donee are introduced, the directions will not give any right to the donor to revoke the gift if the conditions are not observed: 2 Trav. L. Jour. 105 & 23 Trav. L. Jour. 637, *Rel. on.* [Para 7]

Anno. T. P. Act, S. 127, N. 3.

(c) T. P. Act (1882), S. 126 — Gift — Enjoyment of profits postponed till after death of donor — Right to revoke gift.

An incomplete gift can be revoked at any time. Where reading the gift deed as a whole it appears that the true intention of the donor was to effect a transfer *in praesenti* of the proprietory interest in the property and to vest the same in the donee, but with a reservation of the right to enjoy the usufruct during the donor's own life time. There is an immediate gift of the property and the enjoyment by the donee of its profits is postponed till after the death of the donor. A gift of this character is recognised as valid under Hindu law. In such a case the gift having become complete it cannot be revoked unless there is an express reservation in that behalf in the deed of gift itself: A. I. R. (9) 1922 All 467 (F. B.) & A. I. R. (34) 1947 Mad. 137, *Rel. on.* [Para 10]

Anno. T. P. Act, S. 126, N. 1.

N. Varadaraja Iyengar — *for Appellants*; *K. P. Abraham* — *for Respondent.*

Cases referred to :—

(Arranged in order of Courts, and in the Courts chronologically. List of foregin cases referred to comes after the Indian Cases.)

('22) A. I. R. (9) 1922 All. 467 : (45 All. 115 F. B.). [Pr. 10]

('32) A. I. R. (19) 1932 All 444 : (54 All. 534). [Pr. 12]

('46) 1946-2 Mad. L. Jour. 357: (A.I.R. (34) 1947 Mad. 127). [Pr. 11]
2 Trav. L. Jour. 105. [Pr. 7]
23 Trav. L. Jour. 637. [Pr. 7]
11 Trav. L. Tim. 1099. [Pr. 4]
13 Trav. L. Tim. 58. [Pr. 4]

Govinda Pillai J. — The father of minor defendants 1 to 4 who had been appointed as guardian ad litem has filed this appeal. The plaintiff is the son of the sister of one Pichu Ammal who is now dead. This Pichu Ammal was a Brahmin widow. On 28-4-1115 she had executed a gift deed for the plaint properties in favour of one Valli Ammal, the mother of the defendants. This Valli Ammal was the daughter's daughter of Pichu Ammal's deceased brother Sankaranarayana Iyer. Valli Ammal died in 1116. Pichu Ammal then executed Ex. B on 6-12-1116 cancelling the gift deed Ex. A to Valli Ammal. The same day she had executed Ex E, a gift deed for the plaint and other properties in favour of the plaintiff in the case. It was the plaintiff's allegation that Valli Ammal had no knowledge of the execution of Ex. A gift deed in her favour, nor had she accepted the same. She had also not acted according to the provisions made therein. According to him Ex. A was therefore an invalid document. The properties covered by Ex. A remained in the possession of Pichu Ammal, and the plaintiff stated that after Pichu Ammal's death he got possession of the same. The plaintiff applied before the Taluk Office. Thovala for mutation of name in the revenue records. This was not allowed by the Tahsildar. His appeal against the order before the Assistant Peishkar, Padmanabhapuram, and the revision petition before the Division Peishkar. Trivandrum, were unsuccessful. This has cast a cloud on his title, and so he prayed for the cancellation of the orders passed by the revenue authorities. He also prayed for an injunction restraining the defendants from interfering with his possession, and for a direction to the revenue authorities to grant him Patta pursuant to Ex. E gift deed in his favour.

[2] The guardian of the minor defendants contested the case. He had stated that the gift deed Ex. A to Valli Ammal was a valid document, that she had accepted the same, that the donor herself had produced the original gift deed for registration and got it back, that the donor had the custody of the gift deed and the prior title deeds on behalf of the donee, that when it was necessary for Valli Ammal to go and render assistance to Pichu Ammal, the former went and resided with Pichu Ammal at her residence in Erachikulam, that Ex. A gift deed was valid and enforceable, that for the execution of the gift deed by Pichu Ammal to the plaintiff, Pichu Ammal was not a conscious party, that she was also absolutely incompetent to execute the gift deed Ex. E, that plaintiff had not obtained possession of the plaint properties, for they were still with Pichu Ammal's lessees, that the orders passed by the revenue authorities mentioned in the plaint were all correct, that the minor defendants had obtained Patta for the properties after the death of Pichu Ammal, that the suit was wanting in bona fides and that it was conceived in the hope that the defendants being poor could not effectively resist the plaintiff who was a vakil of the District Court, Nagercoil. They therefore prayed for the dismissal of the suit with costs. They filed an additional written statement in which it was stated that though Ext. A was styled a gift deed, it was in effect a settlement deed, and that it was referred to as the gift deed in the previous written statement because it had been so described in Ext. A.

[3] The trial Court held that Ext. A gift deed in favour of Valli Ammal had taken effect and had become operative, that Pichu Ammal was therefore incompetent to execute Ex. E gift deed to the plaintiff, that Ex. E had not come into operation, that the plaintiff was not entitled to effect the mutation in his name, that the question of possession after the death of Pichu Ammal was not very material since she had a right to be in possession of the properties till her death, and that the plaintiff was not entitled to any relief. In the course of the suit, a Receiver had been appointed for the plaint properties. The trial Court gave a direction for handing over possession of the plaint properties to the defendants. The plaintiff appealed against this to the District Court. The learned Judge came to the conclusion that Ex. A gift deed had not been accepted by Valli Ammal, that it was therefore incomplete and invalid, that the gift deed Ext. E to the plaintiff was valid, and that the plaintiff was entitled to the decree as prayed for. The Receiver was directed to hand over possession of the properties to the plaintiff. He was also allowed to get all the amounts deposited by the Receiver in Court. The present appeal is against this decree passed by the Judge.

[4] There is no doubt, that one of the requisites of a valid gift is that it must have been accepted by the donee personally or by some one on the donee's behalf. The rulings in *Kalyani Amma* v. *Gopala Pillai* 13 Trav. L. Tim. 58 and *Raman Pillai* v. *Padmanabhan* 11 Trav. L. Tim. 1099 have discussed this position and laid down the principle mentioned above. The learned advocate for the appellants does not question the correctness of this position, so that what is necessary is to go directly into the question whether Valli Ammal before her death had accepted the gift deed in question. Ext. A is the gift deed. It stated that the donee was the donor's brother's grand daughter. In consideration of the affection the donor felt for the donee and also for the protection of the donee, the donor gifted away the decree schedule properties which were worth Rs. 600. After mentioning this operative portion that the doner's right

over the properties were given over to the donee, it was stated that the latter was to enjoy the properties and pay the tax without encumbering the properties during the lifetime of the donor and that after the death of the donor the donee was to meet all the expenses in connection with the funeral ceremonies and to enjoy the properties with absolute right. In the succeeding portion it was mentioned that the donor for her lifetime would appropriate the yield from the properties, that she would also pay the tax in the name of the donee, that the donee was to take good care of the donor, and that the donor was retaining with her all the prior title deeds. The direction that the donee was to take full care of the donor would have been made in it only in consultation with the donee who was to perform these services. The donor might have directed the donee to meet the expenses of the funeral ceremonies also with the latter's consent. The internal evidence in the document would therefore indicate that the gift deed itself was executed with the concurrence of Valli Ammal.

[5] In the cancellation deed Ext. B executed by Pichu Ammal after the death of Valli Ammal, it was nowhere stated that Ext. A gift deed had not come into operation because Valli Ammal had not accepted the same. Pichu Ammal had also no case in Ext. B that Ext. A was executed due to fraud or misrepresentation. The execution of a gift deed in a small village like Erachikulam would be known to all the parties in the locality. There was a car brought to the village to take Pichu Ammal to the Sub-Registrar's Office, Nagercoil, which is four miles away from Erachikulam. One of the attestors to the gift deed was one Krishna Iyer Ganapathi Iyer who was mentioned to be one of the trustees of the Brahmin trust at Eranhakulam. Another witness who is D. W. 1 is also a resident of Erachikulam. But he is of a different caste. The execution of Ext. A was therefore with the full knowledge of the villagers. Ordinarily, such a gift deed would be executed after due deliberation and with the concurrence of the persons benefited by the gift. In this case, there is the evidence of D. Ws. 1, 3 and 4 to show that Valli Ammal had accepted the gift deed. D. W. 1 is an attestor to Ext. A. He was also examined as an identifying witness before the Sub-Registrar. He stated that the parties returned to Erachikulam from Nagercoil by about 8 P. M. with Ext. A, that Pichu Ammal then handed over the gift deed to Valli Ammal who placed it in a trunk which was inside the dwelling house. No doubt, it would appear that there was some sort of artificiality in the part said to have been played by Valli Ammal. But the evidence was clear to show that after registration of the gift deed, D. W. 1 and others returned to Pichu Ammal's house at Erachikulam where Valli Ammal was present with her minor children. That was what Valli Ammal's husband also deposed as D. W. 4. There is the further fact that Valli Ammal's husband had accompanied Pichu Ammal to the Sub-Registrar's Office for the purpose of rendering the necessary help to Pichu Ammal to execute the gift deed. If Valli Ammal had not accepted the gift, there would have been no occasion for D. W. 4 to go to the Sub-Registrar's Office. The gift itself was for 91 cents of paddy land, and in view of the poor circumstances of Valli Ammal, her husband and children would have been only too glad to accept the gift by the mere mention of it.

[6] D. W. 3 was the Pakuthy Accountant at Erachikulam for three years from 1115. There was provision made in Ext. A to make mutation of names in the revenue records in favour of Valli Ammal. Ext. L, copy of A form prepared in connection therewith, would show that within one month of Ext. A, mutation of names has been effected in the revenue records in the name of Valli Ammal. D. W. 3 would say that he had gone to Pichu Ammal's house at Erachikulam to ask her about the transfer of registry of names, that Valli Ammal was also in that house at that time, that the gift deed in the house was shown to him by Valli Ammal and that Pichu Ammal and Valli Ammal had agreed to the transfer of registry of names. The witness stated that though the proceedings relating to the transfer of registry were undisputed, yet it was the practice to ascertain from the executant of the document her views in the matter. There was no enmity between D. W. 3 and the plaintiff. It was seen that in Medom 1117, the plaintiff had taken Ext. D lease deed from P. W. 1 in the handwriting of this D. W. 3. There can therefore be no doubt that the plaintiff and D. W. 3 were then on friendly terms. Nothing had been suggested to show that the relationship between D. W. 3 and the plaintiff got estranged after the date of Ex. D. The learned Munsiff who had examined the witness in this case had believed D. Ws. 1, 3 and 4 regarding the acceptance of Ex. A by the donee. Though there were some embellishments in the evidence given by D. Ws. 1 and 3 as to what transpired after Pichu Ammal returned from the Sub Registrar's Office, there does not appear to be any objection in accepting their statement that Valli Ammal and her children were in Erachikulam in Pichu Ammal's house at that time. The evidence and circumstances mentioned above would lead to the conclusion that Valli Ammal had accepted the gift deed and that the finding of the learned Munsiff on this question has to be accepted. It has therefore to be held that Ex. A is a valid document and that it had come into force.

[7] The respondent's learned advocate then argued that Ex. A was only a revocable instrument for its validity depended upon the perfor-

mance of certain services mentioned in the document. He stated that Valli Ammal was to render services to Pichu Ammal and to meet the expenses in connection with Pichu Ammal's funeral ceremonies. These directions appeared after the operative portion of the document for it was stated at first, that in consideration of love and affection the donor had to the donee, and for the well being of the donee, the properties were being gifted. The donee was also asked to enjoy the properties and effect mutation of name. The gift was therefore complete. It was then that the other clauses providing for the expenses in connection with the donor's funeral ceremonies and for the services expected from the donee were introduced. These are only pious wishes after the operative portion of the gift deed. *Samuel* v. *Oosmansa*, 2 Trav. L. Jour. 105 and *Yesuvadiyan* v. *Kanthaswami Nadan*, 23 Trav. L. Jour. 637 would support this position. When there is an out and out transfer followed by a direction to the donees to maintain the donors the latter direction is only a pious wish. On the other hand, if the gift deed starts with a statement that it is made with the object of providing for the maintenance of the donors, and this statement is followed by the operative clause, there can be no doubt that the gift is subject to the liability to maintain the donors. In this case the two directions mentioned above were after the operative portion in the gift deed as in 2 Trav. L. Jour. 105. This will not give any right to the donor to revoke the gift if the conditions were not observed. The first condition to meet the expenses of the funeral ceremonies of Pichu Ammal was a contingency that would arise only after Pichu Ammal's death so that the non-performance of that direction could not in any way affect the validity of the gift deed. This contention of the respondent has therefore to be repelled. The plaintiff is therefore not entitled to the relief claimed by him in the plaint. The suit has therefore to be dismissed with costs in all the Courts. This appeal is therefore allowed.

[8] But another matter that has incidentally arisen in the case has to be mentioned and provided for. Valli Ammal's legal representatives would get the right to take the yield from the properties only after the death of Pichu Ammal. Pichu Ammal died on 23-9-1117. Till then she was in possession of the properties. But by the end of 1116 she had executed EX. E to the plaintiff transferring her right over the properties. Naturally therefore, the plaintiff was entitled to be in possession of the properties till her death. The unregistered lease deed EX. D also would show that at least from Meenom 1117 the plaintiff had entered into possession of the plaint properties. While he was thus in possession, a receiver had been appointed for the properties. The trial Court directed the receiver to hand over the properties to the defendants, whereas, the lower appellate Court reversed that direction and gave possession to the plaintiff. The plaintiff also has obtained possession from the receiver. Though he is not entitled to be in possession, he cannot be ousted from possession in this suit. That is not to be the case as regards the money in Court deposited by the receiver. The defendants are the rightful persons to the properties as well as to the profits arising therefrom. So the money in Court will be paid to the defendants. They will have to file a suit for possession of the properties with arrears of profits, excluding the sum they are allowed to draw from Court. This will be the direction as regards the money held in deposit in Court.

[9] **Koshi J.**—I agree that this second appeal should be allowed and the plaintiff's suit dismissed with costs in all the Courts. At the same time I desire to add a few words of my own.

[10] An incomplete gift can be revoked at any time. The main question in the case therefore is whether the gift evidenced by EX A had become complete by Valli Ammal accepting it. The further point raised that Pichu Ammal, the donor, could have revoked it even after acceptance by the donee, is to my mind not at all tenable. Reading the gift deed as a whole, it appears to me that the true intention of the donor was to effect a transfer *in presenti* of the proprietory interest in the property and to vest the same in the donee, with a reservation of the right to enjoy the usufruct during her own life time. The whole interest in the property was intended to be vested in the donee immediately and the donor reserved for herself no power of disposal over it. The only right that was reserved to her was to enjoy the profits thereof. There is an immediate gift of the property, but the enjoyment by the donee of its profits was postponed till after the death of the donor. A gift of this character is recognised as valid under Hindu Law. See *Lallu Singh* v. *Gur Narain*, A. I. R. (9) 1922 ALL. 467. To quote from Mulla's *Transfer of Property Act* (3rd Edn. 1949, p. 758.)

"A gift may be revocable by being object to a condition subsequent; or it may be contingent so that there is no gift at all, unless a condition precedent is fulfilled. But the condition cannot depend upon the will of the donor, for gift revocable at pleasure is no gift at all."

Exhibit A does not impose any condition precedent for the gift to take effect nor does it contain any defeasance clause. Reference may usefully be made here to certain passages in Mayne's *Hindu Law and Usage* (11th Edn. 1950) at pp. 868, 869 it is seen stated thus:

"A gift can be made in favour of a person so as to take effect at the happening of specified uncertain event or if a specified uncertain event shall not happen. In such a case, the donee acquires only a contingent interest which becomes a vested interest on the happening of the event in the one case, or, when it becomes impossible in the other. A gift can be made in favour of a person with the condition superadded that if a specified uncertain event happens, the interest shall pass to another person, or that if a specified uncertain event does not happen such interest shall pass to another person . . . . ."

The next section, S. 735, proceeds to state:

"A gift is revocable only when there is a condition authorising it, or on the grounds of coercion, fraud or undue unfluence. If a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, a Court of Equity will not loose the fetters he has put upon himself, but he must lie down under his own folly."

The second sentence of the section (735) is from Lord Nottingpam's judgment in *Villers* v. *Beamont-White* and *Tuder's Leading Cases*, Edn. 6 p. 353 and is often referred to in text books and decided cases as laying down a test to determine whether a particular gift is revocable or not. The law appears to be well settled that when once the gift becomes complete it cannot be revoked unless there is an express reservation in that behalf in the deed of gift itself.

[11] The mention in Ex. A that Valli Ammal should look after the donor in her old age and that she should meet the donor's funeral expenses etc. cannot be taken to be directions amounting to an obligation, they are merely an expression of the donor's wishes and belief. They come after the dispositive words contained in the earlier part of the document which are absolute in terms. A Madras decision reported as *Ankamma* v. *Narasayya*, 1946-2 Mad. L. Jour 357 may with advantage be referred to here. For the present purpose, it would suffice to quote the relevant portion of the head note :

"A donor by a deed of gift conveyed to the donee the suit properties and the relevant words in the deed were to this effect, 'I have a belief that you would maintain me well during my lifetime. And as I bear affection towards you, I have got the idea of conveying my property to you. Therefore I have conveyed to you under *dhakal* the property worth Rs. 800.' By a later document, he revoked the same and some years later sold the suit properties to the appellant. The donee in his turn sold the same properties to the plaintiff. In a suit by the plaintiff for a declaration of his right under the sale to him and for possession it was contended that the gift deed was conditional and that the donor was entitled to revoke it when the condition was not fulfilled and that therefore the revocation was valid and the donor had the right to transfer the properties to the appellant. *Held* that the gift deed was valid, that it was not conditional but absolute, that it was intended to be given effect to and had been actually acted upon and therefore the revocation by the later deed was not valid and operative."

In the view of the law set out in the preceding paras Ex. B, the cancellation deed, or the subsequent gift to the plaintiff cannot be of any avail to the plaintiff if the gift under Ex. A had become a completed one during Valli Ammal's lifetime. The trial Court was of the view that the evidence that the gift deed (Ex. A) was handed over to Valli Ammal on the same day as it was executed and registered was worthy of credence. The appellate Court, however, took a different view regarding that evidence and reversed the trial Court's judgment and decree. I am unable to place any reliance on the testimony of D. W. 1, D. W. 2 or D. W. 4 when they say that there was any such formal handing over of the document to the donee. For one thing, even though the plaint set out in clear language that the gift deed had throughout remained in the possession of the donor herself, the written statement filed in the case on behalf of the defendants by no less a person than D. W. 4 their father, makes no mention of the delivery of the document though that was sought to be made the central fact at the stage of evidence. I have carefully read the testimony of these three witnesses and I am in full agreement with the lower appellate Court that no reliance can be placed on their evidence. The whole episode of the gift deed changing hands looks unnatural and artificial. That however does not mean that the Court cannot infer from the facts and circumstances of the case an acceptance by Valli Ammal of the gift.

[12] The rule of pure Hindu Mitakshara law as to acceptance of a gift is not different from that laid down by the Transfer of Property Act. See Mulla's *Transfer of Property Act* pp. 749 and 750 under heads "Acceptance" and "Hindu law" Mulla's commentaries to S. 122, T. P. Act pp. 749 and 750 and Mayne's *Hindu law and Usage*, pp. 862 and 863 show that an acceptance may be either express or implied. An acceptance can be inferred from the facts and surrounding circumstances attending a transaction of gift. Here I quote the following from a decision of Sulaiman and Young JJ. (as they then were) reported as *Mt. Annandi Devi* v. *Mohan Lal*, A.I.R. (19) 1932 ALL. 444. The judgment was pronounced by Young J.

"We accept the findings of the learned Judge as regards the value to be attached to the oral evidence called on behalf of the plff. and his finding that an express acceptance by Mt. Kapuri (donee) has not been proved. The learned Judge however merely finds acceptance not proved, because he disbelieves the actual case set up by the plff. as regards express acceptance. He never directed his mind to the vital question as to whether there was proof of acceptance within the meaning of S. 3, Evidence Act. It has been argued here by counsel for the respondents that the only acceptance under S. 122, T. P. Act, contemplated by that section is an express acceptance. We however do not find anything in the section to limit acceptance to an express acceptance, and we must take it that acceptance may be either express or implied. As the learned Judge has not considered the question of an implied acceptance based upon circumstantial evidence at all, we must consider it."

The learned Judge then proceeds to show that the rule of English law which presumes acceptance of a gift was not applicable to India and concludes that part of the discussion by stating that there is no difficulty in reading into S 122, T. P. Act, that the acceptance may either be express or implied. A few observation made in discussing the evidence in that case is also worthy of notices. At p. 445, Col. 2 the following passage occurs :

"Further, the deed of gift was witnessed by four witnesses, two of them actually resident in the village of Karauli itself. There must have been publicity of the deed of gift and we think that apart from what we have said above knowledge of the deed of gift must, in all probability have come to the wife. The husband proceeded immediately to apply for mutation. In the ordinary course proclamation was made in the village of the intended change of names. This therefore must have been

known to the inhabitants of the village and again we think that knowledge of this must, in all probability, have come to the wife. A few days later Mohan Lal (donor) filed the deed of gift itself in the Revenue Court."

[13] In the case in hand Pitchu Ammal executed EX. A when she was over 75 years of age. She was a childless widow and had considerable properties. Valli Ammal was her deceased brother's grand daughter and was in really indigent circumstances. She had a large family too. Admittedly she did not come in the line of heirs to Pitchu Ammal. In these circumstances, the probability is that Pitchu Ammal must have taken Valli Ammal and her husband into confidence regarding this gift. Though I cannot believe D. W. 4 when he speaks to a handing over of the gift deed to Valli Ammal there is no reason to disbelieve him when he states that he accompanied Pitchu Ammal to the registration office and assisted her to get the document written, executed and registered. That would not have been the case if Valli Ammal or the witness did not assist to the gift being made. It is impossible to believe that Valli Ammal never knew anything about the proposal or for that matter about the gift itself. For Pitchu Ammal to have kept the information back from Valli Ammal served no other purpose than to defeat her own ends. Regard being had to the circumstances Valli Ammal would only have accepted the gift gladly. The thought of cancellation occurs to Pitchu Ammal only some months after Valli Ammal died. The contents of EX. B clearly show that it is a case of her being made to become wise when it was too late.

[14] I am therefore in full agreement with my learned brother in holding that Valli Ammal had actually accepted the gift and thus made it a completed transaction.

[15] The inference I seek to draw from the facts and surrounding circumstances is reinforced by the testimony of D. W. 3. He is admittedly a friend and confident of the plaintiff as EX. D would show. He states that both Pitchu Ammal and Valli Ammal had spoken to him about the gift while he was attending to his official duties in connection with the transfer of patta to the name of Valli Ammal. He holds a position in life and there was occasion for him to contact the donor and the donee. I cannot therefore agree with the lower appellate Court or accept the argument of the learned counsel for the respondent that the witness cannot be relied upon. When his testimony is accepted, there is sufficient proof of express acceptance as well. His evidence is that Valli Ammal also wanted the mutation of names to be effected

[16] With these observations I concur in my learned brother's decision.

V.S.B. *Appeal allowed.*

[C. N. 17.]

A. I. R. (39) 1952 Travancore-Cochin 52

KUNHI RAMAN C. J.

State v. *M/s. V. Ouseph Thomas — Cr.-Petitioner.*

Cri. R. P. No. 354 of 1950, D/- 2-3-1951.

Cri. P. C. (1898), Ss. 471, 475 — Travancore Cri. P. C., S. 384 – Detained in safe custody, meaning of.

The expression 'detained in safe custody' in S. 471 Cr. P. C. (S. 384, Travancore Cr. P. C.) does not mean detained in the Custody of friends or relatives. A Court has, therefore, no power under S. 471 to direct that the accused be placed in the safe custody of his father or other persons. It is only the Local Government that is given the power under S. 475, Cr. P. C., to direct that the accused shall be delivered to any relative or friend for safe custody. A. I. R. (15) 1928 Cal. 653 and A. I. R. (35) 1948 Mad. 291, *Rel. on*; 1948 T. L. R. 907, *Disting.* [Paras 1, 2]

Any rule made under the Travancore Lunacy Act cannot have application to the provisions of S. 384, Travancore Cri. P. C., which is meant to apply to criminal lunatics or persons who at the time they committed a heinous crime could not understand the nature of such act, as a result of unsoundness of mind. [Para 1]

Public Prosecutor — for the State; K. S. Sebastian — for Cri. Petitioner.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('28) A I.R. (15) 1928 Cal. 653: (29 Cri. L. Jour 847). [Pr 1]

('28) A. I. R. (35) 1948 Mad. 291 : (49 Cri. L. Jour 313). [Pr 1]

('48) 1948 T. L. R. 907 (Trav Co.) [Pr 1]

Order.—This application is brought on behalf of the State in respect of a direction made by the additional Sessions Judge of Kottayam in Sessions Case No. 19 of 1950. The accused in that case was charged with having brutally murdered his father's mother. The learned trial Judge on hearing the evidence arrived at the conclusion that he had caused the death of the victim in the manner alleged by the prosecution, but that at the time that he did it, owing to unsoundness of mind, he was not able to understand the nature of the act he was doing. In the circumstances, the learned Judge, instead of sending him to jail, has directed:

"that the accused shall be placed in safe custody under the protection & care of his father Thomas Ouseph, P. W. 2, and either Ulahannan Devasia, the second surety in Ex. I, surety bond dated 11-8-1122 or any one of the brothers of P. W. 2 (P. W. 2 or P. W. 4) upon their executing a fresh bond for the purpose. . . . ."

On behalf of the State it is argued by the learned Public Prosecutor, that this direction is opposed to the provisions of S. 384, Travancore Cri. P. C., according to which the direction to be given by the Court in similar circumstances is that the accused shall be detained in safe custody in such place and manner as the Court thinks fit and shall report the action taken to the Government. Before the section was amended, the wording was slightly different. After the amendment, which brings it into conformity with the latest provisions of the Indian Criminal Procedure Code

S. 471, the learned Public Prosecutor contends that there can no longer be any direction that the accused person in such circumstances could be entrusted to the safe custody of his relations. In support of his contention he relies upon a number of decisions of the Indian High Courts. It is enough to refer to two of these decisions. The first is reported in *Superintendent and Remembrancer of Legal Affairs* v. *Srish Chandra*, A. I. R. (15) 1928 Cal 653 where it is clearly laid down that "detained in safe custody" under S. 471, Cri. P. C., does not mean 'detained in the custody of friends or relatives". What a Court has to do under this section is to "detain" the accused in safe custody and report the matter to the local Government. It is the local Government that is given the power under S. 475, Cri. P. C., to direct that the accused shall be delivered to any relative or friend of his for safe custody and not the Court. A similar view was adopted by the Madras High Court in the case reported in *Public Prosecutor* v. *Nellayappa Pillai*, A. I. R. (35) 1948 Mad. 291. The learned Public Prosecutor at the same time invites the attention of the Court to a decision reported in 1948 T. L. R 907 where a different view was expressed by the learned Judges who were responsible for that judgment. The learned Public Prosecutor submits that this is an erroneous decision which was based upon a misunderstanding of the wording of the proviso to S. 384, Travancore Cri. P. C., which refers to the Travancore Lunacy Act of 1110. As pointed out by the learned Public Prosecutor, persons sent to the Mental Hospital under the provisions of the Travancore Lunancy Act are not necessarily criminal lunatics. They may be innocent of any crime, but at the same time they may be liable to be confined in the Mental Hospital and therefore any rule made under the Travancore Lunacy Act cannot have application to the provisions of S. 384, Travancore Cri. P. C., which is meant to apply to criminal lunatics or persons who at the time they committed a heinous crime as in the present case could not understand the nature of such act, as a result of unsoundness of mind. Those contentions are well founded. It is not possible for this Court to adopt the view expressed by the erstwhile Travancore High Court in the case reported in 1948 T. L. R. 907.

[2] Following the view taken by the Indian High Courts the decisions of two of which have already been adverted to the order made by the Court below must be set aside. There will be a direction that the accused shall be detained in custody in the Central Prison at Trivandrum and the matter reported to the local Government for such orders as the Government have jurisdiction to pass.

K.S. *Order set aside.*

[C. N. 18.]

A. I. R. (39) 1952 Travancore-Cochin 53

GOVINDA PILLAI AND GANGADHARA MENON JJ.

Raman Pillai Krishna Pillai—Appellant v. *Cherian Abraham—Respondent.*

Appeal Suit No. 258 of 1950, D/- 8-3-1951.

T. P. Act (1882), S. 60 — Mortgagee bound to pay *mischavaram* due committing default — Mortgaged property sold in execution sale to recover *mischavaram* due—Mortgagee purchasing property benami — Right of redemption not affected.

A mortgagee, who is liable under the mortgage deed to pay the *mischavaram* due on the property mortgaged, if allows it to accumulate and then purchases the property in the name of another person on his behalf in the sale in execution of the decree passed in a suit for its recovery, does not get any advantage by such sale. He does not loose his characteristic as the mortgagee of the property and the real owner or the holder of the equity of redemption from him will not be prejudiced by such sale. The well known principle that no man can take advantage of his own wrong would apply to such a case. It is contrary to justice that a party should avoid his own contract by his own wrong. It follows from this principle that he who prevents a thing from being done shall not avail himself of the non-performances of that he has occasioned. On this principle the mortgagee cannot be heard to say that by virtue of the court sale he has obtained the right over the equity of redemption. A. I. R. (3) 1916 P.C. 227; 28 Trav. L. Jour. 536 and 190 Ind. Cas. 40 (Pat), *Rel. on*; 42 T. L. R. 337 and 30 T. L. R. 105, *Disting.* [Paras. 6, 11]

(*Note.*—It was held that a clear case of fraud on the part of the mortgagee to obtain full right over the property had been made out in this case. See Para. 5.)

Anno. T. P. Act, S. 60 N. 23 Pt. 8.

T. K. Narayana Pillai — for Appellant; K. P. Abraham—for Respondent.

Cases referred to :—

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('17) 44 Cal. 573 : (A. I. R. (3) 1916 P. C. 227). [Pr. 11]
('32) A.I.R. (19) 1932 P. C. 199: (59 Ind. App. 366). [Pr. 7]
('36) A. I. R. (23) 1936 Pat. 434 : (164 Ind. Cas. 213). [Prs. 7, 8]
('39) A.I.R. (26) 1939 Pat. 382 : (18 Pat. 133). [Prs. 7, 8]
('40) 190 Ind. Cas. 40 : (21 P. L. T. 699). [Pr. 11]
('49) A. I. R. (36) 1949 Pat. 99 : (27 Pat. 705). [Pr. 7]
28 Trav. L. Jour. 536. [Pr. 11]
30 T. L. R. 105. [Pr. 9]
42 T. L. R. 337. [Pr. 9]

Judgment.—The defendant 1 is the appellant. The plaint property originally belonged to one Cheriyan Ouseph who was the father of defendants 6 and 9. He was holding the property on a Kanom tenure and he had mortgaged his right in favour of defendants 1 and 2 for a term of 12 years. Ex. A is the mortgage deed. They had been directed to pay the tax due to Government and the Mischavaram due to the Perunnayil Devaswom. Subsequent to Ex. A, one Souriyar purchased the equity of redemption of the plaint property in 1104 in execution of the decree in O. S. 595 of 1100 of the Changanacherry Munsiff's Court, obtained against the Kanomdar Ouseph. He assigned that right to defendant 6 under Ex. C and the latter gifted the same to the plain-

tiff, who has therefore brought the suit for redemption. He claimed mesne profits at the rate of 500 paras of paddy per annum according to the Kalloorkadan Para. The Perunnay Devaswom had filed O. S. 742 of 1112 in the Changanacherry Munsiff's Court for arrears of Jenmi Karam, renewal fee etc., due on the plaint property and others. Both Ouseph and Souriyar and the mortgagees were impleaded in that case. D. W. 1 who is the brother-in-law of defendant 1 obtained an assignment of that decree and brought the decree schedule properties to sale. He purchased the property in court auction and redeemed defendant 2's right over the same. Subsequently he assigned his right to defendant 1 stating that he was only a benamidar for him. The plaintiff stated that the execution proceedings taken in O. S. 742 of 1112 were all fraudulent, that defendant 1 himself was liable to discharge that debt, and that in any event, the benefit of the same would enure to him who now stood in the position of the mortgagor and that he was therefore competent to redeem EX. A. mortgage.

[2] The main contention of defendant 1 was that by the execution sale in O. S. 742 of 1112 and the subsequent transfer of the auction right in his favour, the equity of redemption had vested in him, that all the rights of the mortgagor and of the auction-purchaser in O. S. 595 of 1100 were lost and that the plaintiff would not obtain any right to redeem the property. He also stated that the mesne profits claimed were execessive. He therefore pressed for the dismissal of the suit.

[3] The lower Court found that in spite of the court sale in O. S 742 of 1112, defendant 1 continued to be the mortgagee, that the equity of redemption was not therefore lost to the plaintiff, that he was entitled to redeem EX. A mortgage, that the mesne profits would be 400 Kalloorkadan Paras of paddy per annum and that the plaintiff was entitled to a decree for redemption.

[4] Exhibit F the sale Sannad in O. S. 595 of 1100 of the Changanacherry Munsiff's Court would show that Souriyar had purchased the equity of redemption over the plaint property in execution of that decree. He had transferred his right to defendant 6 by EX. C and the latter in his turn under EX. D gifted it to the plaintiff. Thus whatever right Souriyar had over the property now vested in the plaintiff. Exhibit A would show that the mortgagees-defendants 1 and 2 had been directed to pay the tax due to Government and also Michavaram due on the property. This Michavaram was left in arrears and so the Perunnayil Devaswom which was the Jenmi had filed the Suit O. S. 742 of 1112 for the realisation of its dues from the plaint and other properties. Defendant 1 was Ouseph, the original Kanomdar and defendant 2 was the present defendant 1. The Devaswom subsequently got Souriyar impleaded as additional defendant 3 by a petition filed in 1113. This is evident from EX. I copy of the plaint filed in that case. Defendant 2 who is the present defendant 1 alone contested the case. The suit was however decreed. The plaintiff was allowed to realise 303 fanams 1 Chuckram—12 cash with interest charged on the plaint properties and from defendant 1. The plaint properties, defendant 1 and defendant 2 were made liable for the costs.

[5] D. W. 1 took an assignment of the decree, executed the same and purchased the properties in court auction. Exhibit III copy of the execution B diary would show this. He also obtained delivery through Court. Exhibit IV is copy of the delivery Kychit. Then he executed EX. B release deed in favour of defendant 1. It stated that for the renewal and other fees due from the Kanomdar Ouseph the Perunnayil Devaswom had obtained the decree in O. S. 712 of 1112, that with the money advanced by defendant 1 he had taken an assignment of that decree for and on behalf of defendant 1, that with the funds supplied by defendant 1 he brought the-property for sale and purchased the Jenmavakasam in court auction, that subsequently he paid whatever amount was due to Gopala Pillai and defendant 2 under EX. A by instituting the Suit O. S. 376 of 1118, that the money for the same also belonged to defendant 1 that all these had been done because of defendant 1 was unable to attend to these matters due to illness, that no amount of his own had been actually spent by him for obtaining the above rights, that the properties were still in the possession of defendant 1 and that he was by this document surrendering whatever nominal rights he had over the property. The execution diary EX. III would show that it was the entire rights over the plaint properties that had been sold in execution. But EX. B release would indicate that the mortgage right had not been sold and that what was sold was only the right over the equity of redemption. That was why subsequent to the court sale in O S 742 of 1112, D. W. 1 had to file O S. 376 of 1118 to redeem whatever rights defendant 1's co-mortgagee had over the property. The statement in EX. III that all the rights of the defendants over the property had been sold would, therefore, lose its importance for defendant 1 was careful to see that in any event his mortgage right and that of defendant 2 were not affected. Exhibit B would clearly show that the proceedings in execution were taken for and on behalf of defendant 1 with the monies advanced by him. He himself could not take the assignment for he also was personally liable for at least a portion of the decree amount and for the remaining portion the property over which he had a mortgage right was fully liable. So if he had taken the assignment of the decree in his name the second proviso to O. XXI, R. 14, Civil P. C., would have disentitled him to execute the decree. Thus in order to hoodwink

the execution Court, the assignment was taken benami in the name of his brother-in law D. W. 1 and the execution proceedings completed. A clear case of fraud on the part of the mortgagee to obtain full rights over the property had, therefore, been made out in this case.

[6] It was admitted that though the mortgagee was not liable to pay the renewal fees relating to the plaint property and the jenmi's dues in respect of two other items included in the decree Ex. II, the mortgagee was liable to pay the michavaram due on the plaint property. It was because of his default to pay at least a portion of this amoumt that he was bound to pay that the plaint property also came to be sold in execution of the decree and after all the amount due to the jenmi was only 303 fanams with interest. The decree schedule in Ex. II would show that the extent of the two items that had not been mortgaged to defendants 1 and 2 was only 19 cents. whereas extent of the plaint property was 6 acres and 48 cents. So a major portion of the decree in Ex II was because of michavaram due from the plaint property. Defendants 1 and 2 were the persons who were liable to pay the same. After having brought about this situation by his own default, defendant 1 could not be heard to say that he was entitled o get the benefit of the court sale. The well-known principle that no man can take advantage of his wrong would apply with great force in the case of the present defendant 1. It is contrary to justice that a party should avoid his own contract by his own wrong. It follows from this principle that he who prevents a thing from being done shall not avail himself of the non-performances of that he has occasioned. On this simple principle defendant 1 could not be heard to say that by virtue of the court sale in Ex. II decree he had obtained the right over the equity of redemption.

[7] The learned Advocate for the appellant relied on *Gauri Shanker* v. *Sheotahal*, A. I. R. (23) 1936 Pat. 434, *Fekua Mahto* v. *Babu Lal*, A. I. R. (26) 1939 Pat 382, *Sheo Pujan Prasad* v. *Bhagwath Dubey*, A. I R. (36) 1949 Pat. 99 and *Sorabji* v. *Dwarkadas*, A. I. R. (19) 1932 P. C. 199 in support of his position that without getting the court sale set aside by the owner of the equity of redemption he would not be entitled to ask for redeeming the mortgage. Of these the Privy Council case had held that it was wrong to suppose that S. 63, T. P. Act, went further than S. 90, Trusts Act, and entitled the mortgagor on redemption to treat subordinate tenures acquired by the mortgagee for his own benefit as accessions to the mortgaged property without regard to the question whether the mortgagee had any special advantage by reason of his position as mortgagee in acquiring them. Section 63, T. P. Act, has provided that where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession. Section 90, Trusts Act, had given a qualification to the manner in which the mortgagee secured that accession. Where a mortgagee, by availing himself of his position as such gained an advantage in derogation of the rights of other persons interested in the property, he must hold for the benefit of all persons interested the advantage so gained, but subject to re payment by such persons of their share of the expenses properly incurred. What was stressed by their Lordships of the Judicial Committee was that the accession must have been made by the mortgagee in his capacity as mortgagee. If his acquisition was independently of his position as mortgagee then the mortgagor could not treat it as an accession mentioned in S. 63, T. P. Act, and claim that also on redemption.

[8] In A. I. R. (23) 1936 Pat. 434 and A.I.R. (26) 1939 Pat. 382, the landlord had let a tenant to possession on certain conditions. That tenant had mortgaged his right to a third party with directions to pay the rent to the landlord. For arrears of rent, the landlord brought an action and purchased the full rights of the tenant over the property. Subsequently he retransferred the property to the mortgagee who was to hold it as a tenant. The question that arose was whether the tenant could redeem his mortgage. It was held that as the sale put an end to the original tenancy there was no subsisting mortgage unless the tenant showed that the rent sale was fraudulent. These two cases therefore emphasised the position that if the sale held at the instance of the landlord was fraudulent such sale would not affect the tenant's right of redemption. The 1949 case also is not of much help. It lays down the test to be applied whether the mortgagee availing himself of his position as such has gained advantage in derogation of the rights on other persons interested in the property. If it appears that by reason of his position as mortgagee in possession he has had peculiar facilities for acquiring the properties in question, such properties should be regarded as an acquisition to the mortgaged property. If on the other hand it appears that in regard to such acquisitions, the mortgagee in possession is in the same position as any third party, then the properties so acquired should not be regarded as an accretion to the mortgaged property. The facts of the case mentioned in this case and the conclusion arrived at on those facts will not help the appellant. The question whether a particular thing can be regarded as part and parcel of another thing has to be decided in the light of various facts, in some cases upon the intention of the parties, and in some, upon the law applicable thereto, and in some, upon both.

[9] Though D. W. 1 the benamidar of deft. 1 had purported to have purchased the full right over the property he had accepted that the mortgage right to defts. 1 and 2 was subsisting and had redeemed deft. 2's right by a suit after the court sale. It was clear that it was not the intention of deft. 1 to treat the court sale as an absolute sale affecting the entire rights over the properties. He had also purchased the property for a debt which was mainly due from him. He could not, therefore, claim any exclusive benefit by virtue of the court sale brought about by his own intentional default. Two Travancore rulings *Nilakanta Pillai* v. *Narayanan* (42 T. L. R. 337) and *Mathevan* v. *Sri Krishnan*, 30 T. L. R. 105 were relied on to show that the mortgagee when he got a superior title over the mortgaged property was entitled to keep that separately for his own benefit. In 30 T. L. R. 105 a property which was on Nadappattom tenure had been morgaged by the parties in possession thereof to the mortgagee. Subsequently the Govt. which was the full owner of the property registered it in favour of the mortgagee. The registry was effected after open contest and after hearing the objections of the mortgagors. It was held that such a registry would enure to the benefit of the mortgagee as he had not by fraudulent or unfair or sharp practice or behind the back of the mortgagor obtained an advantage to the prejudice of the right of redemption. In 42 T L. R. 337 it was held that the mortgagee who purchased the equity of redemption in court auction was in the same position as any other purchaser unless he had availed himself of his position as mortgagee to procure some facility or advantage relating to the purchase or connected with it. When there was the possibility of some undue advantage having been taken by the mortgagor.

[10] But for the wilful default of deft. 1 in discharging a major portion of the decree-debt, the court sale would not have taken place and it was because of unfair and sharp practice resorted to by deft. 1 that the decree for such a paltry sum of 303 fanams was taken assignment of in the name of his brother-in-law and purchased in court auction by the benamidar. These two rulings referred to above have no application to the facts of the present case.

[11] It had been held in several cases that when a mortgagee who was liable to pay the Govt. revenue allowed that to accumulate and then purchased the property in revenue auction he would not get any advantage by such sale. He does not lose its (his?) characteristics as the mortgagee of the property and the real owner will not be prejudiced by such revenue sale. In the case of revenue sales it is the paramount right over the property that is proclaimed and sold and the mortgagor who is the Pattadar is presumed to be a party to the proceedings. Yet if the sale was brought about due to the default of the mortgagee and he purchased the right over the property it was held that such purchase would enure to the benefit of the mortgagor. The decision of the Judicial Committee of the Privy Council in *Deo Nandan Prasad* v. *Janki Singh* (44 Cal. 573), *Govindan* v. *Sirkar*, 28 Trav. L. Jour. 536 and *Chandi Mander* v. *Sitabi Bhagat*, 190 I. C. 40 (Pat. amply support the above position.

[12] Souriyar was seen to have been added as a party in Ex. II decree. After the suit was filed he had remained ex parte and the execution diary Ex. III would show that the court sale was once stopped and was conducted again without notice to the parties. The sale itself was after deft. 1's nominee took an assignment of the decree in his favour. Under these circumstances he can ignore the court sale and say that he is entitled to redeem the property after giving credit to the proportionate amount he is liable to pay over and above that is due from the mortgagee. The one year rule to set aside the court sale to entitle the mortgagor to file the suit would not apply to the facts of this case. The view of the lower Court that the pltff. is entitled to sue for redemption of the mortgage is therefore correct.

[13] The plff.-respondent had filed a cross-appeal claiming mesne profits at 500 Paras of paddy a year. The learned Judge had taken into account the leases Exs. VIII and E fixed the mesne profits at 400 Paras of paddy a year. Ex. E was produced to show that this property was leased out for 451 Paras of paddy. The plaint property is only 70 Paras in extent whereas Ex. E is for 77 Paras of paddy land. If a proportionate reduction is made for the excess area of seven paras, it will be seen that the rate fixed by the lower Court is fair. The cross-appeal has therefore no substance. In confirmation therefore of the Court below we dismiss the appeal and the cross-appeal with costs.

V.S.B. *Appeal and cross-appeal dismissed.*

[C. N. 19.]

A. I. R. (39) 1952 Travancore-Cochin 56

GOVINDA PILLAI J.

Chacko Ulhannan, Petitioner and another, Cr. Petitioner v. *State.*

Criminal M. P. No. 114 of 1951, D/- 2-7-1951.

Criminal P. C. (1898), S. 531—Commitment to Sessions — Defect of jurisdiction discovered before trial.

Where the order of commitment is to a Sessions Court which has no jurisdiction over the offence, and the defect is discovered before the trial begins, the commitment need not be quashed, but the case should be transferred to the Sessions Court to which it ought to have been committed. 'Case law discussed.' [Paras 4, 7]

Anno: Criminal P. C., S. 531, N. 2.

Mathew Muricken, for Petitioner—Public Prosecutor, M. N. Parameswaran Pillai, for the State.

Cases referred to.—

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('96) 18 All 350: (1896 All. W. N. 96) [Pr. 4]

('50) 5 D. L. R. (All. L. B.) 397. [Pr. 6]

('84) 8 Bom 312 : (8 Ind. Jour. 627). [Pr. 4]
('82) 11 Cal L. R. 55 [Pr. 4]
('73) 19 Suth. W. R. Cri. 31. [Pr. 4]
('11) 12 Ind. Cas. 301: (12 Cri. L. Jour. 533 Mad). [Pr. 4]
('13) 36 Mad. 387: (13 Cr. L. Jour. 35). [Pr 4]
('20) A. I. R. (7) 1920 Mad. 824 : (20 Cr. L. Jour. 484). [Pr. 4]
('19) A. I. R. (6) 1919 Oudh. 69 (1) : (21 Cri. L Jour. 635). [Pr. 4]
('25) A. I. R. (12) 1925 Pat. 187 : (26 Cri. L. Jour. 49). [Pr. 4]
3 Trav. L. Jour. 76. [Pr. 5]
6 Trav. L. Jour. 29 (F. B.). [Pr. 5]

Order.—The petition by accused 1 and 2 is to transfer a case (P. E. 4 of 1125) committed for trial to the Sessions Court, Quilon, by the Special First Class Magistrate, Quilon. The case is against eight persons for the offences under S. 492 (a) to (d) T. P. C. for counterfeiting ten rupee currency notes, using them as genuine etc. The occurrence is said to have taken place at Sherthallai so that the Police there registered this case as crime No. 52 of 1124 and investigated the same. Sherthallai is within the jurisdiction of the Alleppey Sessions Court. Since a Special First Class Magistrate's Court was established at Quilon to try certain cases expeditiously, the District Magistrate, Quilon within whose jurisdiction are the Courts at Sherthallai and Quilon, transferred this case to that Special Court for enquiry. After concluding the enquiry, the Magistrate committed the accused to the Sessions Court, Quilon, to stand their trial in that Court. In the petition for transfer, the accused had alleged only the general convenience of the parties and witnesses in support thereof. No accused lives within the jurisdiction of the Quilon Court, whereas, most of them, as well as most of the prosecution witnesses, live within the jurisdiction of the Alleppey Court.

[2] At the time of argument, Sri Mathew Muricken, the learned Advocate for the petitioner, had also questioned the jurisdiction of the Quilon Sessions Court to try the case. Both sides were prepared to argue this question as well.

[3] It was admitted by both sides that the offences alleged were committed within the jurisdiction of the Sessions Court, Alleppey. Most of the accused and the witnesses also live there. There is therefore no doubt that, looking to the convenience of the parties, Alleppey Sessions Court has to be preferred.

[4] The question of the jurisdiction of the Sessions Court, Quilon, to try the case has now been questioned. The procedure prescribed by the Indian Criminal P. C. is in S 177: (S. 175, Travancore Code) and it lays down that every offence shall ordinarily be enquired into and tried by a Court within the local limits of whose jurisdiction it was committed. An enquiry Magistrate is under S. 213 directed, if a case is made out against the accused, to commit him for trial to the Sessions Court. The Sessions Court, to which the commitment is made, should necessarily be a Court competent to try the case. So, strictly, the accused in this case should have been committed to the Sessions Court, Alleppey for trial. An order of commitment by a Magistrate who has no local jurisdiction over the offence is cured by S. 531, Criminal P. C. (Indian) and cannot be quashed on that ground unless there has been a failure of justice. If the order of commitment was to a Sessions Court which had no jurisdiction over the offence, and if such Court of Sessions tried the case on such commitment, its finding, sentence or order would also be cured by the said section if there has been no failure of justice vide *In re Ganapathy Chetty*, A.I.R. (7) 1920 Mad. 824 But if the defect is discovered before the trial begins, should the commitment be quashed? On this point there is a conflict of opinion. The High Courts of Madras in *Sadaya Pillai* v. *Emperor*, 12 Ind. Cas. 301 (Mad), *In re Ganapathy Chetty*, A. I R. (7) 1920 Mad. 824 and *Assistant Sessions Judge North Arcot* v. *Ramammal*, 36 Mad. 387 : Calcutta *Queen* v. *Agur Mullack*, 19 Suth. W. R. Cr. 31 and *Empress* v. *Alim*, 11 Cal. L. R. 55 and Patna in *Mt. Bhagavathia* v. *Emperor*, A. I. R. (12) 1925 Pat. 187; and the Judicial Commissioner's Court of Oudh in *Emperor* v. *Sheo Dayal*, A.I.R. (6) 1919 Oudh 69 (1) have held that it should be quashed. The High Courts of Bombay in *Queen Empress* v. *Thakku*, 8 Bom. 312 and Allahabad in *Queen Empress* v. *Ram Dei*, 18 ALL. 350 held that in such cases the commitments need not be quashed, but that the case should be transferred to the Court to which it ought to have been committed. The view expressed by the two latter Courts appears to be more acceptable than that of the other High Courts. The powers of the Magistrate to commit the accused to the proper Court are not questioned; but in passing the order, the Magistrate said, that the accused are to stand their trial not in Court A where they were to be tried but in Court Q. Even if the commitment was to Court A, it is open to the High Court on proper grounds being shown to transfer the case for trial to the Sessions Court Q. It is mere a matter of procedure than one affecting substantially the merits of the case. I am, therefore, of the view that the irregularity committed by the Magistrate could be cured by ordering the transfer of the case to the file of the Sessions Judge, Alleppey, for trial.

[5] It has also to be mentioned here that this question in a different form had been before the Travancore High Court in Criminal Proceedings No 184 of 1087, 3 Trav. L. Jour. 76 and Criminal Reference 19 of 1090, 6 Trav. L. Jour. 29 (F.B.). In the first case the offences were said to have been committed within the jurisdiction of the Alleppey Sessions Court. The case was, however, enquired into, after successive transfer of the case by the District Magistrate, Quilon, by the First Class Magistrate, Quilon. The enquiry Court committed the accused to the Quilon Sessions Court for trial. On objection being raised, as to jurisdiction, the Sessions Judge, Quilon, made

a reference to the High Court, without discussing the questions raised, and in accordance with the consent expressed by both sides before the High Court, the Quilon Judge was allowed to try the case. A similar matter again came up before the High Court and it was placed before a Full Bench for decision. One of the judges who took part in the 3 T L J case was among the judges who decided the latter case; i.e. 6 T L Jour 29 (F B). It was accepted there that the principle that could be inferred from the 3 T L J case was wrong and that the forum of trial in criminal cases was determined by the scene of the alleged occurrence. The Court of Session mentioned in S. 213, Criminal P. C. (: S. 184 of the Travancore Code in force then) is the Court which would have territorial jurisdiction over the place where the offence is alleged to have been committed. Thus the accused should have been committed to the Alleppey Sessions Court for trial.

(6) If the First Class Magistrate, Quilon, had tried the accused for an offence committed outside his jurisdiction because of the transfer of the case to his file by a competent authority, and convicted them, then the Court where an appeal against the conviction has to be filed would have been the Sessions Court, Quilon, and 'Shori Lal v. the State', 5 D L R (All Luck) 397 would be an authority for that position. In that case also a distinction had been made by His Lordship Mr. Justice Wailullah between cases of commitment and appeal.

(7) It is therefore my view that since the question of jurisdiction has been raised before the trial began in the Quilon Sessions Court, there is no necessity to quash the order of commitment, but it is only proper and legal to order the transfer of the case in question to the file of the Sessions Judge, Alleppey, for trial. The order of commitment would be deemed to be one made to the Sessions Court, Alleppey, and not to the Sessions Court, Quilon. Order accordingly.

D.H. *Order accordingly.*

[C. N. 20]

A. I. R. (39) 1952 Travancore-Cochin 58

SANKARAN AND GOVINDA PILLAI JJ.

Hajee Habeeb Hajee Peermahomed, Plaintiff-Appellant v. Commercial Union Assurance Co. Ltd. and another, Defendants-Respondents.

A. S. No. 686 of 1122(T), D/- 23-9-1949.

Insurance — Marine insurance — Absolute total loss — What is.

A loss in respect of insured goods may be either total or partial. Any loss other than a total loss is a partial loss. A total loss may be either an actual total loss or a constructive total loss. In the case of an actual total loss which is also known as absolute total loss, the assured is entitled to recover from the underwriter the whole amount covered by the policy without giving any notice of abandonment. But in the case of a constructive total loss the assured has the option to elect to treat the loss as a total loss or partial loss and hence he cannot recover for a total loss unless he has given due notice of abandonment. Where by reason of the perils insured against, the assured is permanently and irretrievably deprived not only of all present possession and control over the thing insured, but of all reasonable hope or possibility of ever ultimately recovering possession of it, it will be a case of absolute total loss. In such cases the question of notice of abandonment cannot arise because nothing remains to be abandoned. If there is anything to abandon abandonment must take place and in such cases the loss will be a constructive total loss. Such a loss generally takes place when the subject is not wholly destroyed but its destruction is rendered highly probable, or where its recovery though not utterly hopeless is exceedingly doubtful. Where the assured is deprived of the possession of his goods by a peril insured against and it is unlikely that he can recover the same or that the cost of recovering the goods or repairing the damage to the same would exceed the value of the goods themselves, then also it may be said that there is a constructive total loss. In all such cases of constructive total loss, the thing assured or at least a part of it is supposed to exist in specie and there is a possibility however remote of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it. The expression 'in specie' is to be understood in a business sense. Goods arriving in an unmerchantable condition are considered to have lost their species although they may not have changed to anything else and cannot be said to have ceased to exist. If the goods recovered are merchantable and capable of being used for the purposes for which goods of their species are ordinarily used it has to be taken that the goods have been recovered in specie and that there has been no absolute total loss or even constructive total loss.

Where the bales of yarn were under water only for a day, the yarn was recovered and was dried and was sold in auction and purchased for the purpose of making yarn rope, it cannot be said that making of yarn rope is not one of the purposes for which yarn is ordinarily used. It cannot therefore be said that if the yarn was not fit for being used for weaving purposes the yarn has changed its character or that it was not recovered in specie. With very little effect plaintiff could have made proper use of the yarn by putting it even for the purpose of weaving. All that had to be done was to have the yarn properly washed and dried within a reasonable time of its recovery from salt water. It cannot be said in such a case that the accident of sinking had resulted in an absolute total loss or even constructive total loss. (1895) 1 Com Cas 71, (1850) 9 C B 30 Rel. on. *(Paras 2, 3, 4)*

T. R. Subramonia Iyer, for Appellant — K. K Mathew, for Respondent 1.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Caces).

(1850) 9 C B 30: (19 L J C P 161) (Pr 3)
(1895) 1 Com Cas 71 (Pr 3)

SANKARAN, J.: Plaintiff's claim under a Marine Insurance Policy against the first defendant-company was dismissed by the lower Court and hence he has come up in appeal. On 11-2-1939 he had sent 25 bales of yarn from Cochin to Trivandrum in canal cargo boat No. 354/114. He had insured this yarn with the defendant-company for a sum of Rs. 4000 as per Policy No. 638 (copy Ex. Q) and Ex. B cover note. On the way to Trivandrum the boat sank in the Vambanadu lake at a spot near Thaikkattussery five or six miles south of Arukutty. The cargo was salvaged at plaintiff's expenses the next day and taken over to Trivandrum where it was sold in public auction. Out of the sale proceeds of B. Rs. 824 the expenditure incurred by the plaintiff for salvaging the cargo was appropriated by him and the balance credited towards the amount due under the cover note. The plaint claim is for the balance.

(2) On the questions of fact involved in this case there is no serious dispute between the parties. The sinking of the cargo boat due to rough weather, the salvaging of the cargo by the plaintiff at plaintiff's own expense and the subsequent sale of the cargo thus salvaged are all admitted by the defen-

dant-company. But the company has denied the allegation that the salvaging was done at their request or on their behalf and has also put the plaintiff to the proof of the expenditure incurred in that connection. The real dispute between the parties is about the question whether or not the sinking of the boat resulted in a total loss of the insured cargo. The insurance of the cargo in this case was subject to four conditions, the first of which stated that the policy was "to cover 'absolute total loss only' of the insured cargo due to sinking or burning of the vessel". Out of the two perils against which the cargo had been insured the first, namely the sinking of the vessel happened in this case. If such sinking has brought about a total loss of the insured cargo plaintiff's claim is bound to succeed. The question as to what would constitute a total loss has to be examined in the light of the fundamental principles governing that subject under the Marine Insurance Law. A discussion of these principles is contained Chap. VI of Arnold on the Law of Marine Insurance (Vol. II, 11th Edition). A loss in respect of insured goods may be either total or partial. Any loss other than a total loss is a partial loss. A total loss may be either an actual total loss or a constructive total loss. In the case of an actual total loss which is also known as absolute total loss, the assured is entitled to recover from the underwriter the whole amount covered by the policy without giving any notice of abandonment. But in the case of a constructive total loss the assured has the option to elect to treat the loss as a total loss or partial loss and hence he cannot recover for a total loss unless he has given due notice of abandonment. Where by reason of the perils insured against the assured is permanently and irretrievably deprived not only of all present possession and control over the thing insured, but of all reasonable hope or possibility of ever ultimately recovering possession of it, it will be a case of absolute total loss. In such cases the question of notice of abandonment cannot arise because nothing remains to be abandoned. If there is anything to abandon abandonment must take place and in such cases the loss will be a constructive total loss. Such a loss generally takes place when the subject is not wholly destroyed but its destruction is rendered highly probable, or where its recovery though not utterly hopeless is exceedingly doubtful. Where the assured is deprived of the possession of his goods by a peril insured against and it is unlikely that he can recover the same or that the cost of recovering the goods or repairing the damage to the same would exceed the value of the goods themselves, then also it may be said that there is a constructive total loss. In all such cases of constructive total loss the thing assured or at least a part of it is supposed to exist in specie and there is a possibility however remote of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it.

(3) The expression 'in specie' is to be understood in a business sense. Goods arriving in an unmerchantable condition are considered to have lost their species although they may not have changed to anything else and cannot be said to have ceased to exist. This was so laid down in 'Asfar & Co. v. Blundell', (1895) 1 Com Cas 71. In that case the ship had sunk in the Thames with a cargo of dates on board. The dates remained for three tides under water and when recovered were found to be saturated with Thames water and sewage and to have suffered from fermentation and putrefaction so as to be unfit for human food. The dates were however sold and exported for purposes of distillation. It was held that the goods had not arrived in specie within the true meaning of the expression and that they were not merchantable or capable of being used as dates. It was further held that the dates had become a mass of vegetable matter in a state of decomposition and that their nature had been wholly changed. The principle underlying this decision is that goods which on arrival are unmerchantable and incapable of being used for the purpose for which goods of their species are ordinarily used are not considered to have arrived in specie, although they may be still recognisable and may not have lost their shape and outward appearance and may not have changed to anything else. The necessary corollary is if the goods recovered are merchantable and capable of being used for the purposes for which goods of their species are ordinarily used it has to be taken that the goods have been recovered in specie and that there has been no absolute total loss or even constructive total loss. This view gains considerable support from the ruling in 'Navone v. Haddon', (1850), 9 C B 30. The facts of that case approximate very much to the facts of the present case. In that case the ship carrying 81 bales of waste silk from Leghorn to Liverpool was compelled by stress of weather to put into Gibralter for repairs and her cargo was necessarily unloaded. Some of the bales were found to be much damaged by salt water, but not one of the bales was so damaged as to make its whole contents useless for any merchantile purpose, the Court of Common Pleas held that it was not a case of total loss.

(4) The bales of yarn in the present case were under water only for a day as is evident from Ex. S certificate of protest recorded by the Principal Port Officer and Notary Public at Alleppey. Even though plaintiff would contend that he had intimated the second defendant about the sinking of the cargo boat there is no evidence to show that he had issued a notice of abandonment to the first defendant-company or to its agent the second defendant. It is also admitted by the plaintiff that the yarn was recovered and brought over to Cochin and got it dried there. Subsequently, they were taken to Trivandrum and sold in public auction. Ex. U notice of that auction sale clearly shows that the salvaged goods were advertised for sale as yarn and were in fact sold as such. P. W. 2 who purchased all the bales thus sold in auction admits that he purchased them for the purpose of making yarn rope. It cannot be said that making of yarn rope is not one of the purposes for which yarn is ordinarily used. It cannot therefore be said that if the yarn was not fit for being used for weaving purposes the yarn has changed its character or that it was not recovered in specie. P. W. 1 is the expert examined on behalf of the plaintiff. His evidence does not show that the yarn would become destroyed on account of its having immersed in salt water for a few days. All that he has stated is that if the yarn recovered from salt water is dried before it is washed tiny crystals would be formed in the fibre so as to affect its suitability for the purpose of weaving. It is clear from the evidence of the expert himself that such a danger could be easily averted by getting the yarn washed before it is dried. It may also be mentioned in this connection that P. W. 1 was giving evidence on the assumption that in this particular case the yarn was under salt water for three days while as a matter of fact it was recovered within twenty-four hours. With very little effort plaintiff could have made proper use of the yarn by putting it even for the purpose of weaving. All that had to be done was to have the yarn properly washed and dried within a reasonable time of its recovery from salt water. In view of all these facts and circumstances it cannot be said that the accident in this case had resulted in an absolute total loss or even constructive total loss so as to entitle the plaintiff to bring his claim within the express condition of the insurance policy. At best it can only be said that there has been a partial loss so

far as the plaintiff is concerned. But such loss is not covered by the policy in this case. The lower Court was therefore right in holding that plaintiff's claim in this case is unsustainable.

(5) Plaintiff has adduced a few documents to show that in similar other cases such claims have been settled by the first-defendant company. This case has to be decided on its own merits and not on the strength of the company's conduct in settling other claims. All relevant details regarding such claims are not also available in this case.

(6) Lastly it was urged on behalf of the appellant that in any view of the case plaintiff is entitled to get the cost of salvaging the goods. The company had put the plaintiff to the proof of such expenditure. Beyond giving a statement regarding the expenditure alleged to have been incurred by the plaintiff he has not adduced any reliable and independent proof in support of the same. Under such circumstances we do not see any reason to differ from the lower Court's view that plaintiff has failed to substantiate even this claim.

(7) In the result the decree of the lower Court is confirmed and this appeal is dismissed with costs. Interest on costs at 6 per cent.

D.H. *Appeal dismissed.*

[C. N. 21]

A. I. R. (39) 1952 Travancore-Cochin 60

KOSHI AND MATHEW MURICKEN JJ.

Ananchaperumal Nadar, Appellant v. Veerabhadra Pillai, Respondent.

Second Appeals Nos. 527 and 528 of 1124, D/- 23-12-1949.

(a) Travancore High Court Act, S. 9 — Case referred to third Judge — Case, if ought to be sent back to referring Bench.

Where there being a difference of opinion between Judges constituting a Bench, the case is referred to a third Judge, it is not necessary that after the third Judge has heard the case, it ought to be sent back to the referring Bench for final disposal. The practice is to draw up a decree in conformity with the majority opinion without the case going back to the referring Bench and the practice is in full consonance with the plain language of S. 9. (Para 2)

(b) Civil P. C. (1908), O. 20, R. 8 — Decree signed by succeeding Chief Justice.

Where the Chief Justice and another Judge heard an appeal but they ceased to be judges at the time of signing the decree there is nothing wrong in the Chief Justice who succeeds in signing the decree on their behalf. (Para 4)

Anno: C. P. C., O. 20 R. 8 N. 1.

T. K. Narayan Pillai, for Appellant.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('43) A I R (30) 1943 Lah 84: (I L R (1943) Lah 539 F B) (Pr 2)

26 T L J 1301 (Pr 3)

KOSHI, J.: These two second appeals arise out of proceedings in execution of the decree in O. S. No. 151 of 1100 on the file of the Nagarcoil District Munsiff's Court. The decree under execution was one passed by the Travancore High Court in S. A. No. 612 of 1111. Second appeal 527 is by the 3rd defendant and Second appeal 528 by the 1st defendant. The decree in Second appeal 612 gave relief in favour of the plaintiff only as against these two defendants and their objection to the executability of the decree has been found against by the two Courts below. They have hence preferred these Second appeals.

(2) The objection to the execution is founded on the following facts: Second appeal No. 612 of 1111 was heard by a Bench consisting of Sankarasubba Iyer and Lukkose JJ. They differed in their conclusion as to the disposal of the Second appeal. Sankarasubba Iyer J. was for confirming the decision of the lower appellate Court and dismissing the plaintiff's suit while Lukkose J. was for reversing the lower appellate Court and restoring the Munsiff's decree granting the plaintiff relief as against defendants 1 and 3. On account of this difference of opinion the case went before another Judge under S. 9 of the Travancore High Court Act. That Judge was the then Chief Justice Mr. Joseph Thaliath. The learned Chief Justice agreed with the decision of Mr. Justice Lukkose. In accordance with the majority opinion a decree has also been drawn up. But when the decree had to be signed both Joseph Thaliath Chief Justice and Lukkose J. had ceased to be Judges of the High Court. The decree is seen signed on their behalf by Krishnaswamy Iyer Chief Justice. The decree bears the date 20-5-1118. That is the date when Joseph Thaliath, Chief Justice, pronounced his decision, Luckkose J. retired on 27-4-1117 and the point of the objection was that after the third Judge who heard the case under S. 9 gave his decision the case ought to have gone back to a Bench for final disposal. We are not inclined to agree that S. 9 warrants this position. S. 9 reads thus:

> "In any case, Civil or Criminal, if the two Judges forming a Division Bench agree as to the decree, order or sentence to be passed, their decision shall be final. But if they disagree, they shall deliver separate opinions, and thereupon the Chief Justice shall refer, for the opinion of another Judge, the matter or matters on which such disagreement exists, and the decree, order or sentence shall follow the opinion of the majority of the Judges hearing the case."

There are no words in the section to indicate that the case should again go before the referring Bench. All that the section contemplates is that the decree shall follow the opinion of the majority of the Judges hearing the case. The decree drawn up purports to be one passed by Joseph Thaliath Chief Justice and Lukkose J. In other words it conforms to the requirements of the section. The decision in 'Royal Calcutta Turf Club v. Kishan Chand', A I R (30) 1943 Lah 84 relied on by the appellant's learned Advocate itself shows that similar provisions in force elsewhere have been understood differently by different High Courts. In some jurisdictions after the Judge to whom the case is referred gives his decision the case is sent back to the Bench which referred the case to him and where it is not possible to constitute the same Bench a different Bench is constituted. In other jurisdictions the practice that was followed here viz., to draw up a decree in conformity with the majority opinion without the case going back to a Bench is followed. That practice appears to us to be in full consonance with the plain language of S. 9. Moreover that has been the practice throughout in the Travancore High Court and the same practice obtained in the Cochin High Court as well as where a provision similar to S. 9 was in force. Vide S. 48 to Government of Cochin Act, 1113.

(3) It was contended for the appellant that however long the practice has been followed we should not uphold it unless it is warranted by law. We have said that in our opinion the practice is not unwarranted. Though the exact point raised here does not seem to have been raised before the dis-

cussion in 'Devasya v. Mathen', 26 T L J 1361 supports our view point fully. In answer to the argument that a single Judge cannot pass a decree we need only observe that the decree is not of a single Judge but of the majority of the Judges who heard the case. Both in substance and in form the requirements of the section have therefore been satisfied in this case.

(4) There is nothing wrong in Krishnaswamy Iyer Chief Justice signing the decree on behalf of his predecessor in office or for the other learned Judge with whom Joseph Thaliath Chief Justice agreed. O. 20, R. 8 C.P.C., provides that when a Judge has vacated office after pronouncing judgment but without signing the decree a decree drawn up in accordance with such judgment may be signed by his successor.

(5) These second appeals therefore fail and they will stand dismissed. There was no appearance before us on behalf of the respondent and we make no order for costs.

V.R.B. *Appeals dismissed.*

[C. N. 22.]

A. I. R. (39) 1952 Travancore-Cochin 61

GOVINDA PILLAI J.

Krishnan Karthavu, Petitioner v. Kumaraswami Nambudiripad and others, Counter-Petitioners.

C. R. P. No. 1226 of 1125, D/- 3-8-1950.

† *(Travancore) Revenue Recovery Act (1(I) of 1068), Ss. 2, 39 — Sale for arrears of revenue — Effect — T. P. Act (1882), S. 52.*

A sale held for arrears of revenue is valid and will extinguish prior encumbrances. Pending suits or decree based on mortgages or other charges created by a land-holder would not, in any way affect a revenue sale held under the Act for arrears of tax due from the land sold or from that land and other lands included in the same patta or Thandaper, and the auction purchaser gets the land purchased free of all encumbrances. 28 T L J 226, Rel. on; Observations in 1949 T L R 36 held obiter, 26 Cal 966 and AIR (26) 1939 Mad 256, Ref.

(Paras 3, 7)

Anno: T. P. Act, S. 48 N. 14, S. 52 N. 32.

P. Govindan Nair, for Petitioner — S. Bhoothilangam Iyer, for Counter-Petitioner No. 4.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('99) 26 Cal 966: (4 Cal W N 317) (Prs 5, 7)
('39) AIR (26) 1939 Mad 256: (181 Ind Cas 57) (Pr 7)
28 T L J 226 (FB) (Pr 3)
('49) 1949 T L R 36 (Prs 3, 5, 7)

ORDER: The application by the revision under O. XXI R. 97 C. P. C. for re-delivery of the property mentioned therein was dismissed by the lower Court by the order sought to be revised. He had purchased this property on 20-6-1114 in auction under the Revenue Recovery Act & secured possession on 19-4-1117. The decree in the present case was passed on 22-6-1113 allowing the plaintiff to realise certain sums of money charged on the properties scheduled therein. Item 7 there is S. No. 310/5 which is the property sold in revenue auction. In execution of this decree portion of the money was realised & for the balance item 7 was sold in Court auction on 19-8-1117 & purchased by the assignee-D. H. It was delivered over to the auction purchaser and the Amin filed his report to that effect on 16-10-1120. It is for the redelivery of this property that the petition was filed before the lower Court.

(2) The learned Munsiff dismissed the petition on the ground that it had not been proved that the revenue sale was for arrears of Sirkar Tax due from this S. No. 310/5. As such it was the view of the lower Court that the revision petitioner could rank only as a transferee pendente lite and that the decree and execution proceedings in this case would be binding on him.

(3) Ex. I and II would show that the revenue sale was for arrears of tax due under Thandaper No. 144 of Thuravoor Vadakku Pakuthy. Copy of this Thandaper No. 144 has been produced in this case and it is referred to by the Munsiff himself. That would show that the property in question in that Thandaper. That is the twelfth item in page 3 of that document. Copies of the Revenue Sale diary and the Mahazar prepared at the time of attachment were produced in this Court. Apart from these there is clear evidence to show that S No. 310/5 is in Thandaper No. 144 & the opposite side did not dispute this. It had been held by a Full Bench in 'Narayanan v. Naina Muhammathu', 28 T L J 226 that a sale held for arrears or revenue is valid and will extinguish prior encumbrances, even though it was held for recovery of arrears due on the land sold as well as other lands belonging to the defaulter. Thus the view of the Court below that the land sold in revenue auction could be free of all encumbrances only if such sale was for arrears of tax due on that land is not correct. The sale was for arrears of tax under a Thandaper for this and other properties and that sale will also be free of all encumbrances. It may also be mentioned that copy of the Thandaper produced would show that tax due from this property was also in arrears. Thus the order passed by the learned Munsiff is wrong and it has to be set aside.

(3a) But some difficulty had been created by an observation of a Division Bench in 'Janaki Amma v. The Dewan of Travancore 1949 T L R 36 that the doctrine of lis pendens applies both to voluntary and involuntary sales including revenue sales. The revenue sale in question was in 1114 when this charged decree was pending execution. The observation thus made in 1949 T L R would therefore indicate that the revenue sale is vitiated by lis pendens and that will not affect the rights of the auction purchaser in execution of the decree. This observation or dictum is against the decision of the Full Bench in 28 T L J 226. That holds that a revenue sale puts an end to all charges whether those charges had merged in a decree of Court or not. Otherwise, there would be no meaning for the provisions in Ss. 2 and 39 of Act I of 1068 that the land, the buildings upon it, & its products shall be regarded as security for the Public Revenue on such land, and that all lands brought to sale on account of arrears of revenue due thereon shall be sold free of all encumbrances. If the said observation in 1949 T L R 36 purports to lay down a proposition of law, I would with all respect, state that the law was not correctly stated and that it is opposed to the Full Bench ruling in 28 T L J 226. I would therefore prefer to follow 28 T L J 226.

(4) But it seems to me that the observation mentioned above was mere obiter dictum. That case also dealt with a revenue sale. The sale related to an item of property belonging to the plaintiff's tarwad and the revenue sale was conducted after notice to a junior member of the tarwad though that junior member had secured Patta to the property. It was also held there that the revenue sale was brought about by that junior member in collusion with the auction-purchaser and that the same would not be binding on the tarwad as the proper person to represent the tarwad was not a party to the revenue proceedings (Vide the findings at pp. 38 and 39 of the report). These findings were quite

sufficient to dispose of the matter before Their Lordships who decided the case. It was therefore unnecessary to invoke the aid of certain suits relating to the property pending at the time of the revenue sale. Thus the observation regarding the applicability of the rule of lis pendens was mere obiter dictum.

(5) I have also to mention here that the said observation was made on the authority of certain rulings of the Indian High Courts the earliest of which was 'Har Shankar v. Shaw Govind Shaw', 26 Cal 966. The other Indian rulings had only blindly followed this 26 Cal Case. This therefore necessarily leads me to consider to what extent the 26 Calcutta Case would support the observation in 1949 T L R 36. The facts of the Calcutta Case were as follows: J and A had certain shares in 2 annas 8 pie in Bhal Sabva. They had executed a mortgage for this share to one H who obtained a decree on the same on 31-8-1889. In execution the interest of 'J' and 'A' was purchased by the 1st plaintiff and another who transferred his right to plaintiff 2. This sale was confirmed on 28-3-1891. In the meantime, that is to say, on 28-3-1891, the ijmali kalam of a 2 anna 8 pie share fell into arrears, and the owners failed to pay the Government revenue, the result being that on the 30th September the said ijmali kalam was sold up and purchased by a certain person who subsequently transferred his interest to the defendants in that case. The question that was raised in that case was as to the relative rights of the plaintiffs and defendants under the circumstances mentioned above. Their Lordships at p. 970 decided the question of lis pendens thus:

"We need hardly state that the sale of the defendant was under the provisions of Ss. 13 and 34 of the Revenue Sale Law, so that he acquired the share 2 annas 8 pie thus sold, subject to the incumbrance which Jagadamba Prasad Singh had created in favour of Harbans Sahai, and subject also to the lien declared under the decree of 31-8-1889. That being so, it follows that the defendants, after the acquisition of the property by them under the Revenue Sale Law, were bound to discharge the mortgage existing in favour of Harbans Sahai before the sale actually took place, or before, at any rate, that sale was confirmed on 5-3-1892; but they failed to do so, and we think the learned Judge is perfectly right in holding that the principle of lis pendens applies, and that the plaintiff is entitled to relief in this case."

(6) It was because of the peculiar principle enacted by the Revenue Sale Law that the rule of lis pendens was applied in that case . This would become further clear by the following observations at page 972.

"It has been contended on behalf of the respondents that it was the duty of the plaintiffs to have saved the 2 anna 8 pie ijmali kalam from being sold for payment of the arrears. That might no doubt have been a wise course to pursue, but having regard to S. 54 of the Revenue Sale Law, it seems to us to be quite clear that the defendants, though they may be taken to have acquired under the sale the 2 anna 8 pie ijmali kalam, acquired it subject to the incumbrance that had already been created in favour of Harbans Sahai; and were bound in law to discharge that incumbrance; and the time they had to do so was the period between 30-9-1891, the date of their purchase, and 5-3-1892, the date when the sale was confirmed."

(7) A rule laid down on the specific provisions of law in an enactment could not be made applicable to a case arising under another enactment with different provisions. In my view, 26 Cal 966 could not be an authority to what is observed in 1949 T L R 36. I shall conclude this by referring to the ruling in 'Ponnuswami Chettiar v. Ellasari Obul Reddy', A I R (26) 1939 Mad 256. That was a case arising under the Madras Estates Land Act I of 1908. Under S. 5 of that Act the right of the land-holder to his rent is a first charge on the land. S. 125 of that Act provided that when the land was sold for arrears of rent in respect thereof, the purchaser takes free of all encumbrances except such as have been created with the land-holder's permission or have been created prior to the passing of the said Act. In that case the land was sold by the collector for arrears of rent and it was held that, by virtue of the provisions mentioned above, such sale was not affected by a pending suit on a mortgage executed by the ryot who was in default. The provisions in S. 5 and 125 correspond to Ss. 2 and 39, Revenue Recovery Act, so that this ruling will in principle apply to the Revenue Sales held under the latter Act. I am therefore of the view that pending suits or decree based on mortgages or other charges created by a land-holder would not in any way affect a revenue sale held under Act I of 1068 (Travancore) for arrears of tax due from the land sold or from that land and other lands included in the same patta or Thandaper, and that the auction-purchaser gets the land purchased free of all encumbrances.

(8) The order of the lower Court is thus set aside and this petition allowed with costs. The lower Court will take steps to re-deliver S. No. 310/5 to the revision petitioner. Advocate's fee will be Rs. 30/-.

D.H. *Revision allowed.*

[C. N. 23.]

A. I. R. (39) 1952 Travancore-Cochin 62

KUNHI RAMAN, C.J. AND SANKARAN, J.

Velayudha Kurup and another, Appellants v. Govinda Pillai and others, Respondents.

Second Appeal No. 242 of 1122(T), D/- 19-7-1950.

T. P. Act (1882), S. 100 — Charge — Creation of — Partition deed — Direction to sell part of property and utilize cash towards payment of debts — Charge if created.

The answer to the question whether a charge was created by a document or not, will depend upon the intention of the parties as evidenced by the words used by them in that document. Did they contemplate that some property mentioned in the document should be regarded as security for the payment of a sum of money. If such an intention can be gathered from the document taken as a whole and in the relevant clause relied upon by the parties concerned, then it may be easy to say that a charge has been created. (Para 5)

Where in a partition deed, specific direction was given that certain items of property should be converted into cash and the cash realized was directed to be utilized for discharging certain debts;

'Held' that no charge on the items of property directed to be sold was intended: 'Case law ref.' (Paras 4, 5)

Anno: T. P. Act, S. 100 N. 5.

N. K. Narayana Pillai, for Appellants — T. K. Narayana Pillai, for Respondents 7 to 10.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('30) A I R (17) 1930 P C 176: (5 Luck 365) (Pr 5)

('08) 32 Bom 386: (10 Bom L R 575) (Pr 5)

('40) A I R (27) 1940 Cal 93: (186 Ind Cas 843) (Pr 5)

1 T L J 183 (Pr 5)
22 T L J 441 (Pr 5)
24 T L J 395 (Pr 5)

KUNHI RAMAN C. J.: Defendants 6 and 7 are the appellants. The short point for determination in this second appeal is whether under the partition deed, Ex. 'A', which was executed by the members of the family of the plaintiff and defendants 1 to 5 a charge has been created over properties bearing survey Nos. 58 and 62 which form the sub ject-matter of this Second Appeal. The facts may be briefly stated. In the partition deed, Ex. 'A', which was executed by the members of the tarwad of the plaintiff and defendants 1 to 5, it was expressly recited that there were two debts to be discharged. One was a decree debt under the decree in O. S. No. 120 of 1101. That was a suit filed by a member of the Bar, Mr. T. K. Velu Pillai, for fees due to him for conducting a tarwad suit, O. S. No. 29 of 1089. The plaintiff in the suit from which this second appeal arises had put forward a claim for Rs. 640 as the total amount expended by him out of his own separate funds in connection with this litigation. The other members of the tarwad had admitted the correctness of this amount due to the plaintiff. They had also induced Mr. T. K. Velu Pillai to give up a portion of the amount due to him under the decree in O. S. No. 120 of 1101. In the family partition deed, there was a clause inserted to the effect that the properties bearing survey Nos. 58 and 62 were to be sold by defendants 1 to 5 and converted into cash. Out of the sale proceeds the decree debt was to be discharged and the debt due to the plaintiff was also to be paid. A total sum of Rs. 1500 was set apart for discharging both these obligations. There was another debt due to the plaintiff which does not form the subject-matter of this second appeal. In accordance with this clause in the partition deed, the properties were sold to defendant 6. Defendants 2 to 5 joined in this transfer but it was subsequently ratified by defendant 1 who did not sign as one of the vendors in the sale deed, Ex. V. Defendant 6 was directed to discharge the two obligations, namely to pay off the decree debt and to pay the plaintiff, with the amount retained in his hands. When he ascertained the amount payable for satisfying the decree, it was found that the whole amount entrusted to him had to be paid for that purpose. He paid the amount and got the decree struck off, full satisfaction having been entered. But there was no balance left in his hands for discharging the obligation in favour of the plaintiff. Defendant 6 assigned his rights in the properties purchased by him under Ex. V to defendant 7 pending the litigation. Therefore defendant 7 has not got any higher rights than defendant 6, although he has joined in this second appeal. The question turns upon the nature of the liability created by the partition deed, Ex. 'A'. If by the partition deed a charge was created over the two items which were purchased by defendant 6 from defendants 1 to 5, then the plaintiff will be entitled to enforce that charge and it would not be open to the appellants to say that owing to the whole amount entrusted to him having been utilised for discharging the decree debt, there is nothing left in his hands for paying the plaintiff. Therefore, the determination of the suit depended mainly upon the question as to whether a charge was created over survey Nos. 58 and 62 by the relevant clause in Ex. 'A' which directed a sale of these two items of properties.

(2) Both the Courts below have arrived at the conclusion that a charge has been created and they have decreed the suit in favour of the plaintiff.

(3) On behalf of defendants 6 and 7 who are the appellants in this second appeal, the learned counsel argues that this view taken by the Courts below is erroneous and that on a perusal of the partition deed, Ex. A, it would be clear that no charge was created over the two items of properties which form the subject matter of this litigation.

(4) To appreciate the contentions of the parties it is necessary to read the relevant clause of Ex. A which refers to these two items of properties. It is C.. VI: (The original Malayalam has been omitted. Its English translation is given in the foot note*: Ed.)

According to this clause, we have no doubt that the specific direction given was that the property should be converted into cash. Defendants 1 to 5 were authorised to convey the property after fixing a proper value for it. After conveying the properties and receiving the sale proceeds, that is to say, after converting the properties into cash, the duty was cast upon defendants 1 to 5 to pay off the two debts, namely, the decree debt in O. S. No. 120 of 1101 and the debt due to the plaintiff to the extent of Rs. 640. The learned counsel for the appellants argues that reading the document as a whole & appreciating the wording of Clause 6 in the light of the ideas conveyed by the document, it is not correct to hold that these two items, survey Nos. 58 & 62, were considered by the parties as security for the discharge of the pecuniary obligations mentioned in Clause 6. On a careful scrutiny of the entire document & the words used by the parties in Cl. 6, we are inclined to accept this contention as well founded. If the property was only designated as the property which should be used for discharging the two obligations there may be some point in the contention of the respt's. learned counsel that there was an intention to create a security. But that was not the idea conveyed by Clause 6. The specific direction that the properties should be converted into cash first will cut at the root of the contention that a security was intended to be created. After selling the properties & realising the sale proceeds, the cash realised was directed to be utilised in a particular manner. If a charge was created on the property, it would have been extremely difficult for the vendors to convey a clear title to any purchaser. People would have been reluctant to come forward & agree to purchase the properties saddled with such an obligation.

(5) Learned counsel for the respt. has invited our attention to a number of decided cases for the purpose of illustrating the circumstances in which a charge can properly be presumed to have been created. He has referred to 'Janardan v. Anant', 32 Bom 386, 'Aditya Prasad v. Ram Ratan Lal', AIR (17) 1930 P C 176, 'Bhola Nath v. Sarbamangala Debi', AIR (27) 1940 Cal 93, 'Abdul Karim v. Vava-

*"Since it is impracticable to partition the house property lying as one block and bearing Survey Nos. 58 and 62 and the buildings except the southern one and since all of us are not in a position to discharge the abovementioned debt, we have agreed that those properties and buildings be sold at a price agreed upon between us and with that money to discharge the debt of Rs. 1,600/- made up of decree debt in O. S. No. 120 mentioned in para 2 above and the debt of Rs. 640/- due to executant No. 1 and also to meet the expenses to the extent of Rs. 150/- for reconstructing the temple mentioned in para 6 and to meet the expenses of this deed to the extent of Rs. 100/- and the balance after meeting the above be divided according to the shares of each group and handed over to them and receipts obtained in their handwriting and excutant No. 2 Krishna Pillai, No. 4 Thanu Pillai, No. 7 Krishnan Nair, No. 13 Parameswaran Pillai and No. 20 Narayana Pillai, amongst us, have been entrusted to carry out the duties mentioned above and they have also agreed to act accordingly."

kunju', 1 TLJ 183; 'Maria v. Chakko', 22 TLJ 441 and 'Devasia v. Ouseph', 24 T L J 395. We have carefully gone through these decisions & we are not satisfied that there is anything in these decided cases which support the contention of the respt's. learned counsel with regard to the proper construction of Clause 6 of Ex. A. The summary of every decision on this point can be safely stated to be that the answer to the question whether a charge was created by a document or not, will depend upon the intention of the parties as evidenced by the words used by them in that document. Did they contemplate that some property mentioned in the document should be regarded as security for the payment of a sum of money? If such an intention can be gathered from the document taken as a whole and in the relevant clause relied upon by the parties concerned, then it may be easy to say that a charge has been created. But here far from mentioning the property as property out of which the debt should be discharged, there is the express direction that in the first instance the property should be converted into cash. That distinguishes the present case from all the cases that are cited & relied upon by the respondent's learned counsel. The majority of these cases were cases in which a liability was directed to be discharged out of the income of the property, for example if maintenance payable to a member of the family is directed to be paid from out of the income from a particular item of property, it may disclose an intention to create a charge. But in the present case, the wording of Clouse 6 satisfies us that there was no intention of saddling the property with such an obligation. On the other hand, the primary idea was that cash should be realised by selling the property. The direction for using the amount realised by sale of the property cannot be interpreted as conveying the idea that the property was saddled with a charge.

(6) Another interesting argument was addressed by the learned connsel for the respondent. He wanted to rely upon the vendor's lien which deft. 1 to 5. according to him, were entitled to in respect of unpaid purchase money & in respect of that lien, he wanted to contend that a charge can be enforced by the plff. There was no such contention urged in the Courts below so far as we are able to see. Moreover, if there is unpaid purchase money in the hands of the 6th deft. who was the vendee under Ex. V, it would be open to the plff. to resort to appropriate proceedings for enforcing his right against such vendor's lien. So far as we are able to see, there is no finding that there is such a lien which is capable of being enforced or that there is unpaid purchase money in the hands of deft. 6 subject to such lien. It is open to the plff. to resort to appropriate proceedings to enforce his right in case there is any such lien.

(7) If a charge has been created by Clause VI, then the plff. would certainly have been entitled to proceed against the property. But in view of our finding that there is no such charge created by Ex. V we are unable to recognise any right in the plff. in respect of this particular item of Rs. 640, which forms the subject-matter of the controversy in this second appeal. The second appeal is pressed only in respect of Rs. 640. The Court below have recognised the plff's right to another item of Rs. 150. The correctness of that finding is not questioned in this second appeal.

(8) In the result, the second appeal must be allowed with proportionate costs in respect of this item of Rs. 640. The personal decree against defts. 1 to 5 in respect of this sum of Rs. 640 & interest thereon is not in any way interfered with in this second appeal. It is only the finding that in respect of this item there is a charge created on the property purchased by deft. 6 & conveyed by him to deft. 7 that is pressed in this second appeal & it is only on that point that the second appeal is allowed here. The second appeal with regard to the balance is dismissed with proportionate costs.

V.B.B. *Order accordingly.*

[C. N. 24.]

A. I. R. (39) 1952 Travancore-Cochin 64

KOSHI AND GOVINDA PILLAI, JJ.

Gurunatha Avadhanikal, Appellant v. Velukanthaperumal Pillai, Respondent.

A. S. No. 249 of 1123 and C R P No. 565 of 1123, D/- 10-7-1950.

(a) Civil P. C. (1908), O. 40, R. 1 — Termination of custody of property.

With the confirmation of the sale and the delivery of the properties to the auction-purchaser the properties cease to be in the custody of the Court through its Receiver appointed in the execution proceeding. *(Para 3)*

Anno: C. P. C. O. 40, R. 1, N. 29.

(b) Civil P. C. (1908), O. 40, R. 1 — Unpaid creditor of Receiver — Rights of.

An unpaid creditor of the Receiver appointed in an execution proceeding is entitled to be subrogated to the position of the Receiver. If the Court can authorise a Receiver to encumber the estate for running the business the estate was engaged in prior to his appointment or to discharge a debt incurred by him in the course of management, there is no justice or equity in favour of the owner of the estate to resist a charge being created with respect to this debt. Further, the Receiver's acts within the authority of Receiver are the acts of the Court. The Court has a duty to see that a Receiver's creditor is satisfied and if it is not possible to do so otherwise than by encumbering the estate the Court has to do it. *(Para 4)*

Anno: C. P. C., O. 40, R. 1, N. 32, 38.

T. R. Subramania Iyer, for Appellant. M. Kumaraswamy Pillai, for Respondent.

Case referred to:

('41) AIR (28) 1941 Mad 593: (ILR (1941) Mad 675) (Pr 4)

JUDGMENT.: The appeal & the revision arise from an order passed by the learned Second Judge, Nagerciol awarding certain amounts to respondent in the appeal (counter-petitioner 1 in the revision) for works done by him with respect to an estate which was managed by a Receiver appointed by the Court. In O. S. 15 of 1100, on the file of the Nagercoil District Court, the revision petitioner had obtained a money decree against the appellant in A. S. No. 249 & in execution of that decree a Receiver was appointed to take charge & manage certain salt pans belonging to the J. D. The Receiver entrusted the task of manufacturing salt in those pans to one Kulathu Iyer under a written agreement & he transferred his rights thereunder to the respondent in the appeal. The respondent had to undertake some works for the proper upkeep of the pans & the present claim relates to the amounts spent by him for that purpose. The parties are agreed that the respondent had incurred some expenditure on account of such works, but they are at variance as to the quantum of the amount & as to how funds should be found for its repayment. The lower Court found that the respondent was entitled to the full amount of the claim he put forward & also gave a charge for the same on the estate. The estate comprises the A & B Schedule items consisting of one hundred & twenty & forty salt pans respectively. The D. H.,

who some time after the appointment of the Receiver had purchased the B Schedule pans in execution of his decree, & the J. D. who still remains the owner of the A Schedule pans take exception to this order. The former has preferred the revision & the latter the appeal against it.

(2) The first objection, as already indicated, relates to the question what amounts are really due. The lower Court has allowed the full amount claimed in the petition giving rise to the appeal & the revision viz., Rs. 1,162-10-9. Admittedly an amount of Rs. 559/- was made good by the Receiver before the present application was filed. The claim for Rs. 1,162-10-9, includes interest on the amounts actually spent & the detailed statement of the claim embodied in the petition shows that the total claim towards interest comes to Rs. 378-8-0. In the body of the order the lower Court had definitely found that the claim for interest cannot be sustained. It is therefore clear that the Judge happened to allow the full amount claimed in the petition inadvertently. The respondent had however preferred a memo of objections with respect to the disallowance of the interest but for reasons not explained to us that memo happened to be dismissed even before the appeal came up for hearing. There is therefore before us no objection to the lower Court's order disallowing the claim for interest. The mistake that has crept into the order has therefore to be corrected & consistently with the decision that Court came to with regard to the respondent's claim for interest we have to reduce the amounts awarded by Rs. 378-8-0. The balance of Rs. 784-2-9, alone, the respondent is entitled to realise from the estate. To this extent the appeal must in any view succeed. The revision petitioner did not appear to be very much concerned regarding the question what portion of the claim could be allowed.

(3) The next question is whether the charge the lower Court granted can be allowed to remain. In dealing with this it is convenient to take the salt pans comprised in the two schedules separately. The revision petitioner is concerned only with the B schedule & we shall deal with that first. In execution of his decree the forty pans comprised in that schedule were sold & delivered over to him as early as Mithunam 1110. The earliest application the respondent filed to recover these amounts was only on 26-7-1111. The pans were sold as unencumbered properties. At any rate, the sale was not subject to a charge for the amounts now claimed or for any other amounts due to the respondent. With the confirmation of the sale & the delivery of the properties to the auction-purchaser the properties ceased to be in the custody of the Court. Whatever equities the respondent might have had against those properties before their sale we think it too late now to create or declare a fresh charge over them. The lower Court's order making the B schedule pans also liable for the respondent's claim by creating a charge over them for the same has therefore to be vacated & we decide accordingly. The revision petition is therefore allowed, but we make no order for costs in it.

(4) The position of the A schedule pans with reference to the charge is, in our opinion, different. The lower Court's order as also the argument before us proceeded as if the present is a fresh or original action by an unpaid creditor of the receiver to enforce his claim against the estate that was at one time under the management of the receiver. In such an action the question might legitimately arise whether in enforcing payment of the debt the creditor could claim more than what he had himself bargained for. Such was the case in 'Subramania Ayyar v. Sethurayar', AIR (28) 1941 Mad 593, cited at the Bar. Here the true position is this. By fraud or force the receiver appointed in O. S. 15 of 1100 was ousted from possession by a receiver appointed in a subsequent suit, O. S. 5 of 1100. That was a suit instituted against the very same J. D., by a hypothecatee of these pans. Afterwards by consent of the parties the receiver in O. S. 15 of 1100 was discharged without any provision being made for payment of the debts incurred by him for & on behalf of the estate. As mentioned earlier it is not disputed the respondent's claim is a just claim which the receiver should have paid. Had the receiver claimed the amount at the time of his discharge the lower Court which appointed him would have felt bound to make due provision for payment thereof, if need be even by hypothecating the estate for whose benefit the debt was incurred. We fail to see why the position should be different because the receiver's creditor seeks payment now. An unpaid creditor of the receiver is entitled to be subrogated to the position of the receiver & if the Court could authorise a receiver to encumber the estate for running the business the estate was engaged in prior to his appointment or to discharge a debt incurred by him in the course of management, we cannot find any justice or equity in favour of the owner of the estate to resist a charge being created with respect to this debt. It would appear the respondent's claim remained unsatisfied because all the salt he manufactured was taken away by Govt. in enforcement of their paramount claim against the debtor who owed large amounts to them. He has benefited by such action of the Govt. in that his debt to them became considerably reduced. The lower Court was, therefore, not only legally competent to grant the charge but also morally bound to do so. The receiver acted within his authority in engaging a contractor & making him manufacture salt with his own capital. The receiver's acts within his authority are really the acts of the Court. The Court has a duty to see that a receiver's creditor is satisfied & if it is not possible to do so otherwise than by encumbering the estate the Court has to do it, & will do it. We cannot therefore find any real objection to the charge granted by the lower Court over the A schedule pans still owned by the debtor.

(5) One word we would, however, like to add. The charge can at best really be created only on the estate as it stood when the liability was incurred. Here it would appear the D. H. in O. S. 5 of 1110 held a hypothecation charge over these pans long before a receiver was even appointed in O. S. 15 of 1100. The lower Court, however, gave the charge in disregard to that circumstance & we would not have hesitated to modify it had the party aggrieved complained about it. The D. H. in O. S. 5 of 1110 had objected in the Court below for any charge being given but he has submitted to the lower Court's order. In the circumstance of the case we do not think we would be justified in stretching a point by granting relief in favour of a party who is neither before us nor has any complaint about the order. The appellant is only the owner of the equity of redemption & his interests must necessarily form the subject of the charge. The lower Court's order granting a charge in favour of A schedule pans without any reservation will stand.

(6) The appeal succeeds to the extent of reducing the amount of the claim to Rs. 784-2-9 & fails for the rest. The respondent will, however, be entitled to interest at 6 per cent per annum on the amount allowed from the date of the order of the lower Court, viz., 11-11-1121. In the circumstances of the case there will be no order for costs in the appeal either.

V.S.B.

Order accordingly.

[C. N. 25.]

A. I. R. (39) 1952 Travancore-Cochin 66

GOVINDA PILLAI, J.

A. Nesamony, Petitioner v. T. M. Varghese and another (State), Counter-Petitioners.

O. P. No. 11 of 1950, D/- 27-6-1950.

(a) Constitution of India, Art. 226 — Writs of mandamus and quo warranto — Distinction.

A writ of 'mandamus' is a peremptory order of the Court commanding somebody to do that which it was his clear legal duty to do. In such cases the applicant must have a legal right to the performance of such duty by the party against whom he made the application. He must, however, have made a demand for its performance, and compliance must have been refused before the writ would be issued. On the other hand, an information in the nature of 'Quo warranto' lies against a person who claimed or usurped an office, franchise or liberty to enquire by what authority he supported his claim in order that the right to the office or franchise might be determined. The two kinds of writs vary considerably in the remedy that can be allowed and in the operation of the same. (Paras 5, 6)

(b) Constitution of India, Article 226 — Writ of 'Quo Warranto' — Who can apply.

A member of a Legislative Assembly, apart from his right as a citizen to see that the Legislature acts and functions properly, has every right to know by what authority the Speaker functions if he bona fide thinks that the Speaker holds the office without authority. Such a person is therefore competent to file an application for the issue of a writ of 'quo warranto' against the Speaker of the Assembly. (Para 6)

(c) Interpretation of Statutes — Language doubtful — Harmonious construction.

The mind of the legislature is presumed to be consistent; and in case of a doubtful or ambiguous expression of its will, such a construction should be adopted as will make all the provisions of the statute consistent with each other and with the pre-existing body of the law. (Para 9)

Anno: C. P. C., Pre. N. 7.

(d) Interpretation of Statutes — Intention of Legislature.

In construing a statute it is not reasonable to presume that the Legislature intended to violate settled principles of natural justice or to destroy a vested right unless words or expressions indicating the contrary do in clear terms appear in the new statute. (Para 14)

Anno: C. P. C. Pre. N. 7.

(e) Constitution of India, Article 375 — Speaker of Legislature if an officer within Art. 375.

Though the Speaker is an officer of the Legislature he will not come within the category of officers mentioned in Art. 375 inasmuch as that article refers to authorities and officers of judicial, executive and ministerial departments and not to those of legislatures. (Para 17)

(f) Constitution of India, Articles 372 and 385 — Speaker of Travancore-Cochin Legislative Assembly — If can continue in office after coming into force of Constitution — Adaptation of Laws Order (1950) S. 2.

A person duly elected as the Speaker of the Travancore-Cochin Legislative Assembly, under Ordinance III of 1124 and who continued to hold the office till 26-1-1950 by virtue of the provisions in Ordinance VIII of 1124 will continue to function as such even after the coming into force of the Constitution since the existing laws in Travancore-Cochin which is a part B State, were allowed to continue by virtue of Art. 372 (1) of the Constitution. The absence of a provision in Art. 385 of the Constitution like the one contained in Art. 382 for the continuance of the Speaker of the Legislative Assembly in Part B States would not in any way affect the position. (Paras 17 and 18)

Manual T. Paikaday, for Petitioner. T. N. Subramonia Iyer, for Counter-Petitioners.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('14) 41 Cal 518: (AIR (2) 1915 Cal 91)	(Pr 5)
('24) 51 Cal 874: (AIR (12) 1925 Cal 48)	(Pr 5)
(1836) 5 Ad & El 613: (6 L J (NS) K B 23)	(Pr 6)
(1759) 2 Bur 869: (97 E R 607)	(Pr 6)
(1916) 1 K B 595: (85 L J K B 630)	(Pr 6)

ORDER.: The petitioner Sri A. Nesamony, Advocate & Member of the Legislative Assembly of the Travancore-Cochin State has filed this petition to issue a rule upon the counter-petitioner Sri T. M. Verghese holding the office of the Speaker of the said Assembly to show cause why an information in the nature a 'quo warranto' regarding the right under which he was holding this office should not be filed. If after hearing the petition the Court came to the conclusion that the counter-petitioner was holding his office as Speaker without any right or authority under law as provided for in the Constitution of India then it was prayed to declare the said office vacant & to pass consequential orders. The petitioner stated as follows:

(2) The body functioning immediately before the Constitution of India, as the Legislative Assembly of the Travancore-Cochin State, was the Legislative Assembly constituted under the Covenant entered into by the Rulers of Travancore & Cochin under date 29-5-1949. The person holding office as Speaker of that Assembly was the counter-petitioner who was a member thereof & elected to the said office by that assembly. He was accordingly exercising the power of Speaker till immediately before the commencement of the Constitution. On the commencement of the Constitution on 26-1-1950, the said Assembly had been empowered by Article 385 of the Constitution to exercise the powers & perform the duties of the House of Legislature for the State until certain specified contingencies happened. Although the said Assembly had been allowed to continue under the Constitution, the person holding the office immediately before the commencement of the Constitution as President of the said Assembly had not by any provision of the Constitution been allowed ipso facto to be Speaker of the House of Legislature unlike as it was expressly provided for in Clause 3 of Art. 382 of the Constitution in respect of the Legislatures functioning in the States in Para. A, Schedule 1 of the Constitution. According to the petitioner, therefore, on or from 26-1-1950, the counter-petitioner had no right or authority to be the Speaker of the Legislative Assembly of the Travancore-Cochin State under the Constitution. Nevertheless, the counter-petitioner had since the said date occupied & continues to occupy the Speaker's Chair & had exercised & still exercises the powers of the Speaker, more particularly on 6-3-1950 & subsequent dates when the assembly had been in session. This conduct on the part of the counter-petitioner was an illegal usurpation of a substantive, independent, public office in which the petitioner & all the citizens of this State were vitally interested inasmuch as it obviously had considerable effect & influence upon the rights & interests of the people & the general well-being of the State.

(3) It is on these allegations that the rule mentioned above was sought to be issued. Subsequently the petitioner had filed an affidavit to show that he was a member of the Legislative Assembly of the State & the leader of the Tamil Nad Congress Party therein.

(4) Since no rules had been framed so far to regulate the procedure to be adopted in motions of this kind, the rules framed by the Supreme Court adopting certain procedure to deal with such matters were accepted as guidance in regard to this petition. Under O. 35, Rr. 6 to 9, Supreme Court Rules, notice of this motion had to be given to the parties affected, as a matter of course. Notice was accordingly ordered to be given to the counter-petitioner. As it was considered proper to hear the State also in addition to the counter-petitioner notice of the petition was given to the Advocate-General on behalf of the State. In answer to the notice, the Advocate-General on behalf of the State & on behalf of the counter-petitioner appeared to oppose this petition. As is the usual practice no reply was filed by the counter-petitioner & his Advocate stated that he was prepared to argue on the merits of the petition accepting the statement of facts in the petition as correct. It has therefore to be taken that all the averments of facts made in the petition are correct & the argument proceeded on that basis.

(5) A preliminary objection was taken by the learned Advocate for the counter-petitioner that this petition was incompetent, as a person who had an interest in the subject-matter of the dispute alone could move for a rule of this nature & that the petitioner had no such interest. He stated that a defeated candidate in an election for the Speaker's place or a candidate holding some such interest could alone file a petition of this kind. The question of election did not arise in this case, for the petitioner's case itself was that while there should be an election to fill up the Speaker's place, the counter-petitioner was usurping that place without election & without authority. The learned Advocate for the counter-petitioner relied on 'In re Abdul Rasul', 41 Cal 518 & in the matter of 'J. M. Sengupta v. H. E. A. Cotton', 51 Cal 874 in support of the position that a person who was really affected could alone file a petition for a writ in the nature of mandamus. These two cases arose under S. 45, Specific Relief Act, I of 1877, & the petitions in those cases, if allowed, would have enabled the Court to issue a writ in the form of mandamus. A writ of mandamus is a peremptory order of the Court commanding somebody to do that which it was his clear legal duty to do. In such cases the applicant must have a legal right to the performance of such duty by the party against whom he made the application. He must, however, had made a demand for its performance & compliance must have been refused before the writ would be issued.

(6) On the other hand, an information in the nature of 'quo warranto' lay against a person who claimed or usurped an office, franchise or liberty to enquire by what authority he supported his claim in order that the right to the office or franchise might be determined. The two kinds of writs vary considerably in the remedy that could be allowed & in the operation of the same. As was held in 'R. v. Carmarthen Corporation', (1759) 2 Burr 869 and 'R. v. White', (1836) 5 Ad & E 613, a private relator may apply for an information against the several members of a corporation on grounds affecting their individual titles to show by what authority they respectively claimed to exercise their individual functions. In 'R. v. Cassel', (1916) 1 K B 595, it had been held that a private relator may apply for an information in cases which concerned the public Govt. & accordingly an information may be sought by a private relator against a Privy Councillor calling upon to show cause by what authority he claims to be a member of the Privy Council. It would therefore be seen that the rulings cited by the counter-petitioner will not apply to the facts of this case. The petitioner is a member of the Assembly of which the counter-petitioner is said to be the Speaker. Apart from his right as a citizen, to see that the Legislature acts & transacts properly, he as a member of that Legislative Body has every right to know by what authority the Speaker functions if he bona fide thinks that the Speaker holds the office without authority. He is therefore one competent to file this petition & I overrule the preliminary objection.

(7) Coming to the merits of the averments in the petition, it is the petitioner's case, that while provision had been made in Art. 382 in the Constitution of India for the continuance of the Speaker of the Legislative Assembly in Part A States as a Speaker of the Legislature that is to function under the provision of the Constitution, there was no corresponding provision in Article 385 in regard to the office of the Speaker in the Legislature of Part B States. He referred to Arts. 379, 382 & 385 of the Constitution. In Art. 379 (1) provision is made for the body functioning as the Constituent Assembly of the Dominion of India immediately before the commencement of this Constitution to be the provisional Parliament & to exercise all the powers & perform all the duties conferred by the provisions of this Constitution of Parliament. In Clause 5 of that Article it was provided that any person holding office immediately before the commencement of the Constitution as Speaker of the Constituent Assembly when functioning as the Dominion Legislature under the Govt. of India Act, 1935, was to be the Speaker on such commencement of the provisional Parliament functioning under Cl. (1). Corresponding provisions had been made in Cls. 1 & 3 of Art. 382 for the continuance of the House or Houses of Legislature of each State specified in Part A of Sch. 1 & the Speaker thereof. When we come to Art. 385 which makes provision for the continuance of the Legislatures in States in Part B of Sch. 1 the wording is entirely different. Art. 385 runs thus:

"Until the House or Houses of the Legislature of a State specified in Part B of Sch. 1 has or have been duly constituted & summoned to meet for the first Session under the provisions of this Constitution, the body or authority functioning immediately before the commencement of this Constitution as the Legislature of the corresponding Indian State shall exercise the powers & perform the duties conferred by the provisions of this Constitution on the House or Houses of the Legislature of the State so specified."

(8) The Travancore-Cochin State is a State mentioned in Part B of Sch. I, so that it is this Article that governs this State.

(9) At first sight it would appear that the Legislature made an intentional deviation from the provisions relating to the provisional Parliament & Legislatures of Part A States, when dealing with the Legislatures of Part B States. As observed at p. 118, in "Black on Interpretation of Laws" Edn. 11.

"The mind of the Legislature is presumed to be consistent; & in case of a doubtful or ambiguous expression of its will, such a construction should be adopted as will make all provisions of the Statute consistent with each other & with the pre-existing body of law."

(10) In Maxwell on "Interpretation of Statutes" Edn. 9 at p. 163 it was stated as follows:

"An author must be supported to be consistent with himself, &, therefore, if in one place he has

expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect, the work of the Legislature is treated in the same manner as that of any other author & the language of every enactment must be constructed as far as possible in accordance with the terms of every other statute which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a Statute by construction when the words may be "capable of proper operation without it. It cannot be assumed that Parliament has given with one hand what it has taken away with another."

(11) Thus the absence of a provision in Art. 385 for continuance of the office of the Speaker in the Legislative Body of Part B States could be taken to have been intentional on the part of the Legislature if we do not look into the circumstances under which the Constitution itself was evolved.

(11-a) The Constituent Assembly had its existence by virtue of S. 8, Indian Independence Act, 1947. The Legislatures in Part A States which were originally known as Provinces had been constituted under S. 18, Govt. of India Act 1935. These two Acts were therefore the foundation for the Legislative bodies that existed before the Constitution came into force & which are referred in Arts. 379 & 382, Constitution of India. These two Acts of 1935 & 1947 were repealed by Art. 395 of the Constitution. Thus, in order to continue the Legislative Bodies formed under these two repealed statutes definite & specific provisions had to be made in the Constitution itself. The Legislatures relating to Part B States which were originally called Native or Princely States were not governed by either of the two Acts mentioned above. The Govt. of India Act of 1935 would have applied to the Indian States only if they had acceded to the Federation envisaged in that Act. These States had not joined the federation & so they had their own Legislative bodies or authorities to pass the necessary law for them. Thus the Part B States stood on an entirely different footing from the Part A States.

(12) The States of Travancore & Cochin had their separate Legislatures. These two States were integrated by a covenant entered into by the Rulers of the two States & concurred in & guaranteed by the Govt. of India. In Art. 10 of that Covenant it was provided that there shall be a Legislature for the United State consisting of the Raj Pramukh & the Legislative Assembly. It was further provided that all persons who immediately before the appointed day, i.e., 1-7-1949 are members of the Representative Body of Travancore or the Legislative Assembly of Cochin, shall, on that day become members of the Legislative Assembly of the United State. Art. 11 gave powers to the Raj Pramukh of the United State to make & promulgate Ordinances for the peace & good Government of the United State or any part thereof. Ordinance No. 3 of 1124 was accordingly promulgated to regulate & control the Travancore & Cochin Legislative Assembly. Ss. 5 to 9 provided for the election of the Speaker to this Assembly. Another Ordinance 8 of 1124, was promulgated to make temporary provisions for the working of the Assembly & for certain matters consequential & incidental thereto until other provisions were made by the Legislature. The Speaker elected under Ordinance 3 of 1124 was to be declared the first Speaker of the Assembly. Cl. (c) of S. 6 mentions the contingencies under which the member holding the office as Speaker shall vacate his office. The Speaker could vacate his office only by his ceasing to be a member of the Assembly by resignation, or by removal for want of confidence by a resolution of the Assembly passed by a majority of all the then members. As seen from the petition, the counter-petitioner had been elected as Speaker under Ordinance 3 of 1124 & he continued to hold that office by virtue of the provisions in Ordinance 8 of 1124. It was also admitted in the petition that his holding office as a Speaker till 26-1-1950 was legal & valid. The body or authority functioning immediately before the commencement of the Constitution as the Legislature of the State was the Legislative Assembly created by Covenant & continued by Ordinances 3 & 8 of 1124. It is this Legislature that is referred to in Art. 385 of the Constitution as the body or authority functioning as the Legislature in the State.

(13) By Article 372 (1) of the Constitution explained & amplified by Adaptation of Laws Order 1950, the existing laws in Part B States were allowed to continue. Existing law referred to in Art. 372 is defined in S. 2 (1) of this Order. It is divided under three categories; existing Central Laws, existing Provincial Laws & existing State Laws. Cl. D of S. 2 (1) defined existing State laws to mean an Act, Ordinance or other legislative enactment by whatever name called which immediately before the appointed day was a law in force in an Indian State corresponding to the whole or any part of a B State & was passed by the Legislature or other competent authority of such an Indian State, or was made under the Extra Provincial Jurisdiction Act of 1947 & includes any rule, Order, Bye-law or other instrument so in force which was made under any such Act, Ordinance or legislative enactment. Ss. 18 to 21 provide for the adaptations of the existing State laws. In the supplementary provision contained in S. 22, it was laid down as follows:

"Save as is otherwise provided by this Order all powers which under any law in force in India or any part thereof were immediately before the appointed day vested in or exercisable by any person or authority shall be continued to be so vested or exerciseable under other provision is made by some Legislature or authority empowered to regulate the matter in question."

(14) So far as the Ordinance which enabled the formation of the legislative Assembly of the Travancore-Cochin State, no modification had been made in the adaptation of the laws Order or to any of the Orders passed by the President of the Republic of India under Cl. 2 of Art. 372, or Cl. 1 of Art. 392, Constitution of India. In the case of the Central Parliament & the Legislatures in Part A States, the parent Bodies were those which came into existence on the authority of the Govt. of India Act of 1935 & the Indian Independence Act of 1947. When these two were repealed they were no longer in force & they too do not come under the definition of existing law defined in S. 2, Adaptation of Laws Order 1950. There is thus the difference between the Legislatures allowed to function in Part A States & those in Part B States. There was therefore the necessity to provide for the continuance of the Houses of the Legislature & the officers therein with all their paraphernalia in Part A States whereas no such necessity existed in the case of the Legislatures in Part B States. The old order in Part B States was therefore allowed to continue except as modified by the Constitution of India. Thus, by the provision in Art. 385, until the House or Houses of the Legislature of a State specified in Part B of Schedule I, has or have been duly constituted, the present Legislature is allowed to continue. In construing a Statute it is not reasonable to presume that the Legislature intended to violate settled principles of natural justice or to destroy a vested right unless words or expressions indicating the contrary do in clear terms appear in the new Statute. Thus since the existing

State law was allowed to continue, the Legislative Assembly constituted under such law & the Speaker elected as provided for in that law will continue to function & since there is nothing in the Constitution of India to indicate that these old orders were not allowed to continue, the contention that the Speaker vacated his office from the date on which the Constitution of India came into effect could not be accepted.

(15) An argument was advanced on behalf of the counter-petitioner that all officers in existence before 26-1-1950, should be allowed to continue & the Speaker being an officer of the Legislature would continue to hold office automatically without any specific provision of the same. There can be no doubt that the Speaker is an officer of the Legislature though he should necessarily be a member of the Legislative Assembly to get himself elected. As a Speaker he has a special status and separate existence apart from the Assembly over which he presides. Though the Constitution (Removal of Difficulties) Order No. 11 of 1950 kept in abeyance Proviso 2 to Art. 178, & Arts. 8, 9 & 94 of the Constitution and substituted Part I of Art. 178 the framing of the Constitution will show that the Speaker is an officer of the Legislature & that even if the Assembly is dissolved he can continue in office until the next Assembly begins to function.

(16) The duties of the Speaker as in the case of the Speaker of the House of Commons are as various as they are important. He presides over the deliberations of the House, & enforces the observance of all rules for preserving order in its proceedings, he puts every question & declares the determination of the House. As "mouth of the House" he communicates its resolutions to others, conveys its thanks & expresses its censure, its reprimands or its admonitions. He is, in fact, the representative of the House itself, in its powers, its proceedings & its dignity. See p. 177 of Sir T. Erskine May's Parliamentary Practice, Edn. 12.

(17) Thus the Speaker is an officer of the Legislature but to me it would appear that he will not come under the category of the officers mentioned in Art. 375 of the Constitution relied upon by the Advocate-General. Art. 375 reads as follows:

"All Courts of civil, criminal & revenue jurisdiction, all authorities & all officers, judicial, executive & ministerial throughout the territory of India, shall continue to exercise their respective functions subject to the provisions of this Constitution."

It refers only to authorities & officers of judicial executive & ministerial departments & not to those of the Legislatures. I could not therefore accept this argument.

(18) After a careful consideration of the several provisions of the Constitution of India & the subsecuent orders passed by the President by virtue of the powers vested to him under the provisions of the Constitution, it does not appear to me that the absence of a provision in Art 385, Constitution of India for the continuance of the Speaker of the Legislative Assembly of Travancore-Cochin State would in any way affect his continuance as such. The provisions relating to the same in Arts. 379 & 382 were necessitated because of the repeal of the Acts of 1935 & 1947 referred to already. I do not therefore find any ground to confirm the rule issued. It is therefore discharged and this petition is dismissed with costs. Advocate's fee will be assessed at Rs. 100/- (One hundred.)

K.S. *Petition dismissed.*

[C. N. 26.]

A. I. R. (39) 1952 Travancore-Cochin 69

KOSHI AND GOVINDA PILLAI, JJ.

Irael Arulaprakasom, Defendant-Appellant, v. Inpamuthu Nakami, Plaintiff-Respondent.

Appeal Suit No. 170 of 1950, D/- 27-10-1950.

Limitation Act (1908), Art. 182 (5) — Step-in-aid — Decree in suit in 'forma pauperis' — Execution by State to realise Court-fees — If step-in-aid in execution by plaintiff.

In a suit in 'forma pauperis' 'A' was given a decree against 'B' for mesne profits and costs besides a share in the properties and the state was given a charge on the decree obtained by 'A' for Court-fees. The State attached 'A's' right and then executed the decree to realise the amount due to them.

'Held' the Sirkar was enabled to file the execution application by virtue of the decree obtained by 'A' so that the application of the State to execute the decree though it was after attachment of 'As" right over the same, could be taken to be a step-in-aid of execution and would save limitation so far 'A' was concerned. (Para 2)

Anno: Limitation Act, Art. 182, N. 128.

T. S. Krishnamoorthi Iyer, for Appellant; M. Madhavan Nair and Balagangadharan Nair, for Respondent.

GOVINDA PILLAI, J.: Deft. 4 is the appellant. The plff. in the case obtained a decree for recovery of possession of one-third of the plaint schedule properties with past & future mesne profits & also costs. The plff. had filed the suit in 'forma pauperis' & so the State was given a charge on the subject-matter of the suit for the Court-fees due to them. The decree was passed on 21-1-1113 The State by two execution applications of 18-4-1115 & 17-3-1118 realised the amount due to them towards Court-fees. Subsequently, on 12-12-1124, the present execution application by the plff. was filed to execution the decree. That was the first execution application filed on behalf of the plff. The question is whether the execution taken by the State for the realisation of the Court-fees would save limitation so far as the plff's petition was concerned.

(2) The plff. was given a decree against the deft. for mesne profits & costs besides a share in the properties. The State had a charge on the decree obtained by the plff. In order to realise the Court-fees due by virtue of this charge the state attached the plff's. rights & then executed the decree to realise the amount due to them. The Sirkar was enabled to file the execution application by virtue of the decree obtained by the plff. so that the application of the State to execute the decree though it was after attachment of the plaintiff's right over the same could be taken to be a step-in-aid of execution. This will save limitation so far as the plff. was concerned, & in case he took steps within 6 years after the disposal of the State's execution application of 1118 the petition will be within time. The second execution application of the State was disposed of only on 10-6-1122 so that the present execution application filed by the plff. on 12-12-1124 is within time. The order of the lower Court, is therefore correct & hence confirmed. The appeal is dismissed with costs.

D.R.R. *Appeal dismissed.*

[C. N. 27.]

A. I. R. (39) 1952 Travancore-Cochin 70

KUNSHI RAMAN, C. J., AND SANKARAN J.

Kesava Pillai Kunjan Pillai, Appellant v. State.

Criminal Appeal No. 31 of 1125, D/- 14-6-1950.

Evidence Act (1872), S. 32 — Dying declaration and first information report by deceased — Admissibility — Travancore Evidence Act (VII (7) of 1117), S. 32.

A dying declaration which refers to what took place at the time of the incident between the accused and the deceased, although may not come under the first part of Cl. (1) which pointedly refers to the cause of death, it will come under the category of a statement made by a person who dies subsequently, as to any of the circumstances of the transaction which resulted in his death, within the meaning of S. 32 Cl. (1) and will be admissible.

The first information report given by the deceased will come under the second part of Cl. (1) of S. 32 in the same manner in which the dying declaration can be brought under the provision of law.

(Paras 4, 5)

Anno: Evi. Act, S. 32 N. 7, 8, 9.

T. R. Atchutha Warrier, for Appellant — Public Prosecutor A. Sankara Pillai, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('01) 25 Bom 45: (2 Bom L R 331) (Pr 3)

('43) A I R (30) 1943 Cal 465: (45 Cri L J 71) (Pr 3)

JUDGMENT: The accused 1 is the appellant before this Court. He and his two sons were charged with the offence of murder and they were tried in the Additional Sessions Court at Trivandrum in Sessions Case No. 5 of 1125. The learned Judge reached the conclusion that the charge has not been proved against the first accused under S. 301, but under S. 326, Travancore Penal Code, for stabbing the deceased with a knife which has been produced as M. O. III. He also found that no case has been made out against the two sons of the first accused, who were accused 2 and 3 in the Court below, and he has acquitted them. The first accused was sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs. 50/- and in default of payment of the fine, to undergo simple imprisonment for one month more.

(2) The incident took place on 15-4-1123 when the deceased was passing along a public road at 8 P. M. He and the appellant accosted each other, and a quarrel ensued as a result of certain offensive words used by each other. It culminated in a hand-to-hand fight between the two. At the time the quarrel began, they were on the public road on the side of which there is what is described as a channel, (more correctly a brook), running along a side of the road, but on a lower level. There was very little water in the brook at the time of the occurrence. According to the evidence for the prosecution, it was a fairly dark night, and the witnesses who have spoken to the incident state that in the course of the hand-to-hand fight the deceased jumped to the side of the road, what is described by the learned Public Prosecutor as the slope of the road. Some other witnesses say that the deceased jumped to the bed of the brook or channel At that stage, the accused seems to have used a pen-knife for stabbing the deceased. The stabbing was not too severe or dangerous. There was one stab wound inflicted on the chest which must have penetrated the lung on the left side of the body. The deceased was taken to the Police Station by 2-45 A. M. on 16-4-1123. There he made a statement which has been incorporated as part of the First Information Report. At 10-30 A. M. on the same day, when he was in the Government Hospital at Chirayinkil, a dying declaration was recorded by a competent Magistrate. From there he seems to have been moved to the General Hospital at Trivandrum where he was received as an in-patient. He survived for 4½ months after the stabbing, and ultimately died on 1-9-1123 during the period he was an in-patient in the General Hospital at Trivandrum. It was stated that from the hospital he was allowed to go home at his own request, but that was only for a temporary period, and he was brought back again to the hospital. The medical evidence of the Doctor who gave the wound certificate and the doctor who performed the post mortem examination, discloses that the stab wound in the chest had healed by the time death took place. But a perforation had to be made in the vicinity of that wound for allowing puss which had accumulated in that region to be drained out, and this offensive matter in the body seems to have produced a toxic infection which culminated in the death of the victim.

(3) The learned Counsel appearing for the appellant in the first place commented very strongly on this aspect of the case and he contends that the death was not the result of the stab wound. He also wants to argue that the dying declaration should not have been admitted in evidence in this case in view of the fact that the statement recorded by the Magistrate has no reference to the cause of death. On this question of law, which is the first argument addressed on behalf of the appellant, two decisions have been cited by learned counsel. Those are the cases reported in 'Abdul Gani v. Emperor', A I R (30) 1943 Cal 465 and 'Imperatrix v. Rudra', 25 Bom 45. In both these cases, the facts seem to be substantially different from the facts of the present case. In the case reported in 'Abdul Gani v. Emperor', the victim of the attack was injured on the 9th of January. He was sent to a hospital on the same day and his dying declaration was recorded on the same day. He was discharged from the hospital on the 30th January. Six or seven days after he was discharged from the hospital, he contracted fever and died as the result of the attack. In the case reported in 'Imperatrix v. Rudra', the deceased did not die as a result of the stab wound inflicted on him by the accused, but he died of pneumonia. An attempt was made to show that pneumonia was aggravated by the stab, but that was not established. The finding was that there was no evidence to show that the death was caused or accelerated by the wounds received as a result of the attack made by the accused in that case. It will thus be seen that in both the above cases there was a distinct finding that the cause of the death was something entirely different from the attack made on the victim by the accused. In the present case however, it is not possible to assert that the death was not the result of the stab wound inflicted on the chest of the victim. No doubt the man survived for a period of 4½ months after he was admitted as an inpatient in a hospital. But the death was the result of a complication that arose as the result of the stab.

(4) The learned counsel for the appellant wants to rely upon the wording of S. 32, Travancore Evidence Act, which corresponds to S. 32, Indian Evidence Act. The relevant clause of the section is Cl. (1) which refers to a statement made by a person as to the cause of his death. But that is not the only case contemplated by Cl. (1). The second part of Cl. (1) goes on to refer to "any of the circumstances of the transaction which resulted in his death". Therefore when a statement is made by a person as to any of the circumstances of the

transaction which resulted in his death, that statement is admissible in evidence in a case in which the cause of the death is a point in issue. In the present case we are satisfied that the facts fully warrant the assumption that the dying declaration, which refers to what took place at the time of the incident between the accused and the deceased, contains a statement which will come within the second part of Cl. (1) of S. 32. Although it may not come under the first part of Cl. (1), which pointedly refers to the cause of death, it will come under the category of a statement made by a person who dies subsequently as to any of the circumstances of the transaction which resulted in his death, within the meaning of S. 32 Cl. (1), Evidence Act. The first objection raised on behalf of the appellant must therefore be overruled.

(5) It is next argued on behalf of the appellant that the Court below has taken the First Information Report given by the deceased to the Police Officer on 16-4-1123 and which has been marked as Ex. A (2), as substantive evidence in this case and that this also is an illegality. The learned counsel argues that it can only be regarded as a First Information Report which may be used as corroboration of a statement subsequently made by a person who made it and that it was wrong on the part of the Court below to have relied upon it as substantive evidence. Here again, the learned Public Prosecutor contends that he would rely upon the provisions of S. 32 Cl. (1), Evidence Act. The statement will come under the second part of Cl. (1) of S. 32 in the same manner in which the dying declaration can be brought under the provision of law. This legal objection also is therefore not sustainable.

(6) The next argument of the appellant's learned counsel relates to the oral evidence at the trial. It is contended by him that there are material discrepancies in the evidence of the various witnesses examined at the trial. (After considering the evidence their Lordships held that the discrepancies were not material. The judgment then proceeds:)

(7) On perusing the judgment of the trial Court and the relevant portion of the evidence read to us by the learned counsel appearing for the appellant and by the learned Public Prosecutor on behalf of the State, we are not prepared to say that the conclusion reached by the learned trial Judge is incorrect or that it calls for interference in appeal. The trial Court seems to have arrived at a conclusion that is substantially correct on the entire evidence placed before it at the trial. We therefore see no reason to interfere with the conviction and sentence passed on accused 1 and dismiss this Criminal Appeal.

G.M.J. *Appeal dismissed.*

[C. N. 28.]

A. I. R. (39) 1952 Travancore-Cochin 71

KOSHI AND GANGADHARA MENON, JJ.

Narayana Kurup Govinda Kurup, Petitioner v. Chandy Chandy and another; Counter-Petitioners.

C. R. P. No. 852 of 1124, D/- 5-10-1950.

Travancore-Cochin Court-fees Act (VI (6) of 1087), S. 4 (5) (d) and Schedule II, Article VIII (7) — Suit to avoid Melpattom — No prayer for possession — S. 4 (5) (d) applies — Computation of Court-fee.

A suit to avoid a melpattom as an unauthorised alienation without praying for possession is one for avoiding an alienation with respect to a limited interest in the property and as such is governed by S. 4 (5) (d), as a suit for declaration without a consequential relief. Article VIII (7), of Schedule II does not apply to such a case. In such a case, it is for the plff. to declare the market-value of the subject-matter of the suit and it is only in case of dispute that the computation prescribed by the section has to be followed. Where the 'land or garden' in suit is the lease-hold interest created by the impugned alienation and not the land as such, the annual gross profits which the alienee's interests would yield, should form the basis of computation. A. S. 206 of 1125 (Tra-C), Relied on. (Paras 1, 2)

K. N. Narayanan Nair, for Petitioner; K. K. Mathew, for Counter-Petitioners.

Case referred to:

(1125) Court-Fee Ref. in A. S. 206 of 1125 (Trav-C) (Pr 2)

ORDER.: The point for decision in the Civil Revision Petition is whether the lower Court's order directing the plffs. to pay court-fee according to the provisions of S. 4 (5) (d), Travancore Court-Fees Act VI (6) of 1087 is wrong. The said provision enacts that to obtain a declaratory decree or order, whether or not consequential relief is prayed for the amount of fee payable shall be computed according to the market-value of the subject-matter & that such value, in cases of dispute, shall be taken to be ten times the annual gross profits of such land or garden where it is capable of yielding annual profits minus the assessment paid, if any, to the Sirkar. The suit in this case is for avoiding a melpattom granted by deft. 3 and one Kesava Kurup (Plff's. Karanawan) to defts. 1 & 2 on the ground that that alienation is unauthorised. The plffs. valued the suit as one incapable of valuation and accordingly paid a fixed Court-fee of Rs. 10 as provided in Art. VIII (7) of Sch. II, Court-Fees Act. In our opinion, the lower Court was right in its view that the suit to avoid an alienation with respect to a limited interest in the property did not fall within the purview of the said Article. As the plaint did not seek recovery of possession the suit is to all intents & purposes a suit for a declaratory relief where no consequential relief is prayed for & the Court-fee payable is that provided by S. 4 (5) (d). The lower Court's order is therefore right.

(2) A point was however raised that the lower Court has meant that ten times the annual gross profits of the plaint property should be taken to be the amount for which Court-fee has to be levied. We do not think that the apprehension is well-founded. In the first place it is for the plff. to declare the market-value of the subject-matter of the suit & it is only in case of dispute that the computation prescribed by the section has to be followed. Secondly, the 'land or garden' in this suit is the lease-hold interest created by the impugned alienation & not the land as such. See Court-Fee Reference in A. S. No. 206 of 1125. That annual gross profits the alienee's interests would yield should form the basis of computation. The Sirkar Tax as also the Jenmi dues will have therefore to be deducted to ascertain the annual gross profits of the 'land or garden' in the suit out of the total gross profits in case a dispute arises as to the market-value of the subject-matter. When a limited interest carved out of the property forms the subject-matter of the suit gross profits will have to be ascertained in the manner indicated.

(3) The lower Court will call upon the plffs. to suitably amend their plaint stating the market-value of the 'land or garden' & in case of dispute follow the direction hereinbefore contained.

(4) With these observations the revision petition will stand dismissed. No costs.

(5) Order accordingly.

D.R.R. *Revision dismissed.*

[C. N. 29.]

A. I. R. (39) 1952 Travancore-Cochin 72

KUNHI RAMAN, C.J., AND SUBRAMANIA IYER, J.

Thomas Jacob, Appellant v. Thoma Varkey and another, Respondents.

A. S. No. 378 of 1124, D/- 15-11-1950.

Civil P. C. (1908), O. 21, Rr. 6 and 90, S. 144 — Certificate of non-satisfaction — Defect in — Effect — If ground for setting aside execution sale — Certificate subsequently rectified — Case if attracts S. 144.

The jurisdiction of the Court to which a decree is sent for execution arises from the order of transfer and does not depend upon the transfer being accompanied by a certificate of non-satisfaction though such a certificate is directed to be sent by the Code of Civil Procedure. 20 Mad 10 Ref.

Hence, the circumstance that the certificate of non-satisfaction disregarded the fact that the decree had been partly satisfied, is no ground for setting aside the execution sale. (Para 13)

The fact that the certificate is rectified by the order of the High Court subsequent to the sale does not make the case analogous to a case for which specific provision is made under S. 144. (Para 13)

Anno: C.P.C., S. 144, N. 2; O. 21, R. 6, N. 2

N. K. Narayana Pillai, for Appellant; T. R. Subramania Iyer; for Respondents.

Cases referred to:

('32) AIR (19) 1932 Cal 303: (59 Cal 647) (Pr 11)

('97) 20 Mad 10 (Pr 13)

SUBRAMANIA IYER, J.: This appeal arises in connection with the delivery of the properties sold by the District Court, Kottayam, in execution of the decree in O. S. 123 of 1103 on the file of the Alleppey District Court. This litigation has had a rather chequered career. The respondent obtained the said decree for recovery of possession of certain items of immovable properties as also for arrears and future rent in respect thereof against one Thomas who was the 1st defendant in the case. There were five other defendants in the suit but against them no decree was given. The decree was passed on 3rd Makaram 1107. In execution of that decree certain items of immovable properties belonging to the 1st defendant were attached and sold on 23rd Vrischigom 1108 for Rs. 2,500/- and purchased by the decree-holder himself. The 1st defendant died in Dhanu 1108. Thereafter the counter-petitioners 9 to 16 were brought in as his legal representatives. Counter-petitioners 10 and 16 raised objections to delivery of the properties purchased as aforesaid by the decree-holder, claiming that those properties belonged to them having been given to them under a deed of settlement by the deceased 1st defendant in the year 1106, i.e., before the attachment in the above case. That matter was enquired into and it was found that the claim was true and that the settlement was not liable to be attacked as one in fraud of creditors which was the stand taken by the decree-holder. The result was that the decree-holder got nothing by the sale. There was, however, no proceeding to have the sale set aside.

(2) In the year 1116, the decree was transferred by the Alleppey District Court to the District Court at Kottayam for execution. The transfer was made after notice under Order XXI, Rule 20 of the Travancore Civil Procedure Code (Order XXI, Rule 22, Indian C.P.C.,) "and of transfer." These notices were served and the date of hearing was on 29th Kanni 1116. The order for transfer was made on 30th Kanni 1116 and was actually dispatched on the 1st of Thulam 1116. In the certificate of non-satisfaction which was sent along with the said transfer no mention was made of any amount having been realised towards the decree. The Kottayam District Court, in due course, attached certain properties of the deceased 1st defendant and settling the sale proclamation after notice to the parties under Order XXI, Rule 63 (Rule 66, Indian C.P.C.) sold the properties on 9th Meenam 1116 for Rs. 1,600. The decree-holder himself was the purchaser. Counter-petitioners 7 and 9 who had appeared in connection with the drawing up of the sale proclamation, but had not filed any objection to the draft furnished by the decree-holder, though time was taken twice or thrice in that behalf, applied to have the sale set aside on the grounds, 'inter alia' that the sale was bad inasmuch as it was held pursuant to the decree transmitted by the Alleppey District Court which passed it with a certificate of non-satisfaction, disregarding the fact that the decree had been satisfied to the extent of Rs. 2,500/- by the sale of properties held by the Alleppey Court and that the price for which the properties were sold was too low. The learned District Judge of Kottayam upon the evidence in the case including the report of the Commissioner who inspected the properties as ordered by the Court came to the conclusion that the second complaint regarding the inadequacy of the price was unfounded and the price fetched when the property was sold was fair. On the first ground the learned Judge found in favour of the applicants and set aside the sale. The decree-holder-purchaser filed A. S. No. 507 of 1118 in the High Court of Travancore against this order and the High Court set aside the order and confirmed the sale. The High Court concurred with the District Judge in the view that the price for which the property was sold was fair. The High Court also agreed with the District Judge in his view that there was in fact satisfaction of the decree to the extent of Rs. 2,500/- on account of the sale held by the Alleppey District Court before it transmitted the decree for execution to the Kottayam District Court though that sale was really fruitless. The High Court observed that so far as the purchaser is concerned, the sale having been held and having been confirmed, will stand until set aside in some manner allowed by the law. The sale not having been set aside, it subsisted with the consequence that satisfaction to the extent of the price of sale also subsisted. This circumstance however did not in the view of the High Court vitiates the sale held by the Kottayam Court because notwithstanding the aforesaid partial satisfaction of the decree there yet remained a part of the decree for execution and realisation. The High Court passed its judgment on 18th Karkadagom 1118.

(3) The 4th defendant in the case and some other parties had obtained a decree in O. S. 311 of 1103 on the file of the Meenachil Munsiff's Court against the decree-holder in O. S. 123 of 1103 and in execution attached the latter decree on 15th Thulam 1118. On that date, the sale of properties had already taken place the sale having been held on 9th Meenom 1116. The applications for setting aside the sale were pending, orders thereon having been passed by the District Judge of Kottayam setting aside the sale only on 15th of Vrischigom 1118. The order of the High Court confirming the sale was passed as already mentioned in Karkadagom 1118. One of the attaching creditors one Abraham Chandi by name applied for delivery of possession of the properties so'd, claiming title

thereto on account of the aforesaid attachment of the decree. The application was C.M. P. 3196 of 1119. That was dismissed by the learned District Judge of Kottayam as in his view the attachment of the decree will not operate to create a right over the properties sold and purchased by decree holder before the attachment. Against this order, Appeal No. 279 of 1119 was filed before the Travancore High Court which was dismissed in Mithunam 1120.

(4) Meanwhile, the decree-holder applied to the Kottayam Court for retransmission of the decree to the Alleppey Court for further execution as a new application would get barred after Makaram 1119 by which time the decree would get 12 years old. The decree was accordingly retransmitted and the decree-holder applied afresh for execution in the Alleppey District Court crediting only Rs. 1,600/- which was the amount realised by the execution of the decree in the Kottayam District Court. The legal representatives of the deceased 1st defendant objected to the above execution and contended that satisfaction of Rs. 2,500 by the sale of properties held by the Alleppey Court in Vrischigom 1118 should also be entered. They also applied in the District Court of Alleppey for correction of the certificate of non-satisfaction sent along with the order transmitting the decree for execution to the Kottayam District Court by inserting satisfaction to the extent of Rs. 2,500. The District Court of Alleppey directed credit to be given for Rs. 2,500 as realised by the sale but was not inclined to direct a correction of the certificate. Against this, Appeals Nos. 372 and 510 of 1122 were filed in the High Court of Travancore by the decree-holder and the 9th counter-petitioner respectively. The former appeal was dismissed and the latter appeal allowed by the High Court. The result was that the certificate of non-satisfaction of the decree accompanying the transfer of the decree for execution to the Kottayam Court was corrected by inserting satisfaction to the extent of Rs. 2,500. These appeals were disposed of by the High Court in Vrischigom 1123.

(5) The decree-holder purchaser could not even then get possession of the properties as he had to overcome yet another hurdle which was offered by an order of injunction passed by the District Munsiff of Meenachil in O. S. No. 296 of 1119 on his file restraining delivery of the properties. That suit was by certain creditors of the deceased 1st defendant for administration of his estate with a prayer inter alia for setting aside the sale of the properties which is the subject-matter of these proceedings. The plaint was returned by the Munsiff for presentation to the proper Court, as according to him, it was beyond his jurisdiction. C.R.P. 103 of 1119 (Travancore High Court) was filed by the plaintiff therein against the order returning the plaint, which was dismissed by the High Court in Kanni 1124.

(6) In Thulam 1124 the decree-holder purchaser applied for delivery of possession. Notice on this was ordered. Thereupon the 9th counter-petitioner who is the appellant filed C.M.P. 2883 of 1124 in Vrischigom praying for setting aside the sale on the ground that before the date of sale in Meenom 1116 the entire decree had been satisfied if regard be had to the realisation of Rs. 2,500/- on account of the sale of properties by the Alleppey District Court which amount had been directed to be credited in the certificate of non-satisfaction by the High Court in A. S. 510 of 1122. The decree-holder purchaser filed his objection as C. M. P. 3250 of 1124. It is the order passed by the District Judge of Kottayam in C. M. P. 2885 and 3250, dated 7-6-1124, that has led to this appeal. Stay of delivery of properties was ordered by the High Court pending disposal of the appeal.

(7) The above detailed narration of facts is necessary for a proper understanding and adjudication of the point that arises for decision in the appeal.

(8) The learned counsel for the appellant did not contend that the District Judge of Kottayam had no jurisdiction to sell the properties. He only contended that regard being had to the rectification of the certificate of non-satisfaction as ordered by the High Court, though there would be a balance decree debt still recoverable, that balance would not be Rs. 1,500/- as stated in the order of the Court below but would be only Rs. 500/- or thereabouts. That being so, he contends that his client is entitled to restitution and the question for consideration of the Court is what form the restitution is to take. He contended that this case is analogous to the case of a sale in execution of a decree which is modified in appeal pending which a sale is held by Court. In such a case he contends that though the sale may not be without jurisdiction, the Courts have allowed restitution in the shape of setting aside the sale and restoration of the property with mesne profits subject to the payment by judgment-debtor of whatever balance is found to be due if it bears a small proportion to the price of sale. If the excess realised by the sale is small, restitution takes the shape of a direction to the purchaser to pay back that excess. These principles, according to him are applicable to the case in hand and if they are applied, the sale has to be set aside with a direction for payment of whatever balance amount may be found to be due. It was also contended on behalf of the appellant that the transfer of the decree by the Alleppey District Judge to the Kottayam District Court was without notice to his client and that though exception to the sale was taken by his client and the setting aside of the sale was sought on that ground, it was not an objection which his client could have at that time taken because the certificate of non-satisfaction as it stood then precluded his doing so and that the subsequent order of the High Court rectifying the certificate enables his client to seek relief based thereon.

(9) The complaint that the appellant had no notice of the transfer of the decree by the Alleppey Court to the Kottayam Court before the transfer was made is not well founded. The records show as already mentioned that notice was sent and served and that it was after notice and after hearing to consider the question that the order for transfer was made.

(10) The Kottayam District Court as transferee Court issued notice to the appellant and others for drawing up the proclamation of sale of the properties attached. The appellant and the 7th counter-petitioner took time to file objections, but none were filed and the proclamation was settled and in due course the sale took place on 9th Meenam 1116.

(11) In connection with the sale, the Court is seen to have taken a written agreement from the decree-holder-purchaser that the sale may be set aside on the judgment debtors' depositing the sale price by 30th Edavom 1116 even if the sale happened to be confirmed before that date. See the agreement dated 9-8-1116 written on E.P. 99/116 and signed by the decree-holder and his advocate. Neither the appellant, nor any other party wanted to take advantage of this concession. On the other hand, the appellant (9th counter-petitioner) and 7th counter-petitioner applied on 20th Edavom 1116 by C.M.P. Nos. 4750 and 4754 respectively to

have the sale set aside as already mentioned. We say this because the learned Counsel for the appellant contended that if the decree amount had been shown as the real amount due his client would have paid the same and averted the sale. It has to be mentioned that except the argument at the Bar there is no case set up nor is there any evidence given to the effect that had the decree amount been shown as the balance due after the satisfaction of Rs. 2,500, the appellant or any other party would have paid it up. Indeed under the circumstances no such case could have been set up. In 'Doyal Sirkar v. Tari Deshi', AIR (19) 1932 Cal 303, where certain properties were sold in execution of a decree for costs for Rs. 49 pending in appeal which reduced the amount to Rs. 36, Rankin, C. J., said at page 307:

"There is no evidence at all to show that the judgment-debtors could, or would, have saved the first jote had the debt been treated as being Rs. 40 instead of Rs. 50. He did nothing to save the second jote on the footing that Rs. 15 was still due. The question is whether we are entitled to say that for Rs. 5 the judgment-debtors could have saved the second jote. What a person would have done is a matter not always capable of conclusive proof and if the judgment-debtors or either of them had given evidence of the fact that for Rs. 5 they would have saved the second jote, I should have been desirous of believing them. They gave no such evidence however and I am not satisfied that they gave any real attention to this matter of the execution sale so as to know what the first jote fetched and to be in a position if possible to save the second. So far from being satisfied that the second jote would not have been sold if the original decree had been for the correct amount, I am of opinion that the amount by which that sum was in excess is no part of the circumstances which brought about the sale of both the jotes."

The evidence in that case showed that two jotes were sold that the first jote fetched Rs. 35 only and the sale of the second jote was for realisation of the balance.

(12) This would be the position even if the present were a case of modification of a decree in appeal pending which a sale is held by the Court passing the decree.

(13) The jurisdiction of the Court to which a decree is sent for execution arises from the order of transfer and does not depend upon the transfer being accompanied by a certificate of non-satisfaction though such a certificate is directed to be sent by the Code of Civil Procedure. See 'Abbubaker v. Mohideen', 20 Mad 10. We have observed already that it was not contended that the Kottayam Court had no jurisdiction. If the Court had jurisdiction to sell the properties, there is no ground made out for setting aside that sale as no circumstance vitiating it is disclosed. The learned Counsel for the appellant contended that this is a case analogous to the case of a sale and purchase by the decree-holder in execution of a decree pending appeal wherein the decree is modified. We consider that this case is not analogous to a case for which specific provision is made in the Civil Procedure Code in Section 144 (Indian Code), i.e., Section 108 (Travancore C.P.C.). Even if this case is one to which the said section is directly applicable, we find that no ground is made out for setting aside the sale by way of restitution.

(14) The appeal should, therefore, be dismissed with costs.

(15) KUNHI RAMAN C. J.— I agree.

V.B.B. *Appeal dismissed.*

[C. N. 30.]

A. I. R. (39) 1952 Travancore-Cochin 74

KOSHI, J.

Punnen, Petitioner v. Varkey George, Counter-Petitioner.

C. R. P. No. 510 of 1950, D/- 9-10-1950.

(a) *Civil P. C. (1908), O. 34, R. 1 — Attaching D. H., whether necessary party — T. P. Act (1882), S. 91.*

In so far as an attacking D. H. has no right to redeem the hypothecation bond he has no 'locus standi', in a suit brought to enforce the hypothecation bond; he is not a necessary party to the litigation. But he may in certain cases be permitted to intervene and be made a proper party to the suit for the purpose of safeguarding his rights, i.e., to see that the interest of his J. D., which might be sold under the mortgage-decree to be passed is correctly determined. AIR (25) 1938 Mad 293, Foll. (Para 2)

Anno: C. P. C. O. 34, R. 1, N. 6, Pts. 12, 13.
T. P. Act, S. 91, N. 25.

(b) *Civil P. C. (1908), O. 1, R. 10 — Addition of deft. — Revision.*

The lower Court does not act with material irregularity if it adds a person as a deft. on his own application not only to avoid multiplication of litigation but also to prevent a possible abuse of the process of the Court. 21 Coch L R 165, Doubted. (Para 3)

Anno: C. P. C. O. 1, R. 10, N. 43.

T. K. Joseph, for Petitioner; K. P. Abraham, for Counter-Petitioner.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

21 Coch L R 165 (Pr 6)

('38) AIR (25) 1938 Mad 293: (178 Ind Cas 595) (Pr 1)

ORDER.: This is an application to revise an order impleading a new deft. on his own application in a suit to enforce an hypothecation bond. The newly added deft. had attached the hypotheca in execution of a money decree obtained by him & it is in that capacity that the lower Court allowed him to be impleaded. Plff. 4 who is the present owner of the rights under the bond put in suit objects to the order. Hence this revision.

(2) The petitioner's learned Counsel contended that in so far as the attaching D. H. had no right to redeem the hypothecation bond he has no 'locus standi' in the present suit & that he was not therefore a necessary party to this litigation. The proposition is unexceptionable so far as it goes, but in the circumstances of the instant case I am not inclined to think that he is not a proper party or that the lower Court exercised a discretion vested in it improperly when it allowed deft. 9 to come on the record. As observed by Venkataramana Rao, J., in the case reported in 're Narapa Reddi Seshareddi', AIR (25) 1938 Mad 293, an attaching creditor may in certain cases be permitted to intervene & be made a proper party to the suit for the purpose of safeguarding his rights, i.e., to see that the interest of his J. D. which might be sold under the mortgage decree to be passed is correctly determined." The comments made in the third edition of Mulla's T. P. Act, p. 550 concerning the now deleted Cl. (f) of S. 91 would seem to favour this view.

(3) The order under revision would not only avoid multiplication of litigation but also prevent a possible abuse of the process of the Court. If

the newly added deft's. contention that plff. 4, the petitioner before this Court, is a mere name-lender for deft. 1, the debtor, & that the transfer of the rights under the bond was obtained with the debtor's money & for his benefit, the further prosecution of the suit is a clear abuse of the Court's process & would even amount to play a fraud on the Court itself. Deft. 3 has raised this identical contention & I am not able to appreciate what useful purpose would be served by the Court striking off the name of the additional deft. at this stage and then proceed behind his back with the trial of the question which he seeks to have settled once for all in this litigation itself. Probably the Court's time & energies will have to be spent again on a future occasion if the present additional deft. seeks to have the question agitated in a suit of his own.

(4) Further it would appear (vide the affidavit filed by the present respondent to get himself impleaded) that deft. 1 was by an order of the High Court allowed to pay the decree debt due to the additional deft. in instalments spreading over a long number of years. If in the meanwhile the property itself is allowed to be sold away for a prior debt & that collusively as alleged, it would be putting the order of the High Court to a purpose to which it was never intended. That order was passed in substitution of an order appointing a receiver for the suit properties.

(5) In view of all these I cannot find my way to interfere with the lower Court's order under revision.

(6) Before c oncluding, reference has to be made to a case cited before me by the petitioner's learned Counsel, viz., 21 Coch. L R 165. In that case the Cochin Chief Court had interfered with an order of the Dist. J., of Anjikaimal impleading an additional deft. in circumstances very similar to the present. In the first place that was an appeal against an order & not on revision. The Code of Civil Procedure in force in Cochin (then as now) allowed an appeal against an order striking out or adding the name of a person as plff. or deft. In this, Cochin Code differs from the Travancore & Indian Codes of Civil Procedure. Secondly all the reason the learned Judges give for their order is that in the circumstances the better course is to leave the applicant to pursue his remedy, if any, in a separate suit. In an earlier part of the order the learned Judges had themselves expressed the doubt whether any fresh suit would lie at the instance of the applicant in that case. With respect I venture to observe that I fail to appreciate the wisdom of the Court relegating a litigant before it to a fresh proceeding about whose maintainability the Court is itself not satisfied. In the result the petition fails & it will stand dismissed with costs.

V.S.B.

Order accordingly.

[C. N. 31.]

A. I. R. (39) 1952 Travancore-Cochin 75

KUNHI RAMAN, C.J. AND SUBRAMANIA IYER, J.

Cheriyan Joseph, Petitioner v. The Right Reverend Dr. James Kalacherry and another, Counter-Petitioners.

C. M. P. No. 88 of 1125, D/- 28-11-1950.

† *Contempt of Court — Suit against Vicar by Parishioner — Vicar forwarding Bishop's letter to plff. that he would be excommunicated if he did not withdraw the suit — Action whether contempt of Court.*

Where the Vicar of a church forwarded a letter from his Bishop to a parishioner asking the latter to withdraw his suit against the Vicar and other persons for declaration that certain resolution passed by the yogam was null and void and for permanent injunction, and it was found that the Vicar was not in any way responsible for the contents of the letter and had simply forwarded it in obedience to the Bishop's order:

'Held' that the Vicar's action did not amount to contempt of Court:

Further that the threat to assert one's legal rights against another if he chose to continue an action started by him, would not amount to contempt. (1916) 1 Ch 300, Relied on. AIR (22) 1935 All 117, dist. (*Paras 5, 6*)

T. K. Narayana Pillai, for Petitioner; K. C. Chacko, for Second Counter-Petitioner.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('35) AIR (22) 1935 All 117: (57 All 573) (Prs 2, 5, 6)

(1916) 1 Ch 300: (85 L J Ch 326) (Pr 6)

KUNHI RAMAN, C.J.: This is a petition presented on behalf of the plff. in O.S. No. 156 of 1124 on the file of the Additional District Munsiff's Court of Alleppey for taking action for contempt of court against the respondents who are two in number. The first respondent is described as the Bishop of the Diocese within whose jurisdiction the petitioner resides. The second respondent is the Vicar of the St. George's Church of Pachakara, Koyilkukku Pakuthy, Ambalapuzha Taluk. The petitioner describes himself as a parishioner of this Church. He had filed a suit for a declaration that an edavaka Yogam stated to have been held on 26-6-1946 was not validly held & that the resolutions passed at that yogam are null & void & not binding upon the Church aforesaid or the parish in which the petitioner resides. He prayed for a permanent injunction to restrain the defts. from acting in pursuance of such resolutions. The respondent 1 is deft. 4 to that action. The respondent 1 is not a party thereto. Pending the suit, the petitioner says that he applied for a temporary injunction to restrain the defts. from enforcing the purport of the resolutions. Notice was ordered to the respondents who filed their objections in Court on 4-5-1124. On 5-4-1124 the plff. says he received a communication from respondent 2 which purports to be a true copy of an order made by respondent 1. The document is filed with the petition. On receiving this communication, the petitioner sent a registered letter to respondent 1 asking for information as to whether he had issued an order as set forth in the communication & also pointing out that if he had done so, the object of that order would be to defeat the administration of justice. To this no reply was sent by respondent 1. The petitioner alleges that the communication which he received contains a threat to ex-communicate the petitioner & to claim damages from him in case he does not withdraw his suit forthwith. The petitioner submits that this letter & the subsequent ex-communication of the petitioner are calculated to interfere & obstruct the course of justice. The object of this step taken by the respondents, according to the petitioner, was to cow down the petitioner into submission & compel him under threat of ex-communication to abandon the suit which he had filed & which he was entitled to prosecute. After the petitioner was excommunicated, the defts. to the action seem to have filed an objection to the petitioner continuing

to prosecute the suit, because he had no locus standi to do so after he was ex-communicated from the church. According to the petitioner these acts of the respondents amount to contempt & he charges both the respondents with contempt of court.

(2) The respondent 1 is reported to be dead. He seems to have died soon after the petition was filed & before the date fixed for hearing. Therefore, so far as he is concerned no question arises for determination in this petition which is not pressed as against him. Mr. T. K. Narayana Pillai, the learned Counsel for the petitioner, however, wants to press the case against respondent 2 who is the Vicar of the Parish where the petitioner resides. Reliance was placed by the learned Counsel on the case reported in 'Rajender Singh v. Uma Prasad', AIR (22) 1935 All 117. There, an application for contempt was made against a litigant & his counsel. When a suit was pending to which the petitioner in that case was a party, a lawyer's notice was sent by the advocate in which he was informed that unless within a week of the receipt of the notice an unqualified apology was tendered & certain averments contained in the pleadings were withdrawn by the petitioner & unless he paid a sum of Rs. 10,000/- as damages, civil & criminal proceedings would be instituted against him by the party alleged to be in contempt. The question for consideration was whether the sending of the notice amounted to a contempt of the Subordinate Judge's Court, Dehra Dun, where the suit was pending. There the learned Judges held that it being the right of every deft. to take every legitimate plea & submit his defence to the Court for its consideration, a person who tries to deter a deft. from pressing his pleas would be liable to be proceeded against for contempt. It is pointed out in that case that it is the duty of the Court to protect defts. from being cowed down into submission & under pressure of threat & menace being made to abandon pleas which they can legitimately raise in a pending action. The following sentences in the judgment are relied on:

> "The present case is one where an attempt was made to put pressure on the deft. to withdraw a plea which had been taken in the written statement, duly filed in Court, which was the subject of consideration by the Subordinate Judge of Dehra Dun. We think there can be no doubt that such an action amounted to a direct interference with the administration of justice in preventing the deft. from pressing his defence & putting forward the plea which might, if established, prove fatal to the suit & in that way an indirect attempt was made to exclude the plea taken on behalf of the minor from the consideration of the Court."

(3) The Court took the view that the litigant & his Counsel who sent this notice which was objected to were both in contempt. Since the litigant expressed unqualified apology for his conduct he was exonerated. On behalf of the Counsel it was alleged that he was acting professionally on behalf of his client & that, therefore he could not be held to be guilty of contempt. But this argument was repelled & the Court held that the Counsel had in such circumstances to exercise his own judgment & discretion & not to take shelter under the plea that he acted blindly and allowed himself to be dictated to by his client. The learned Judges say:

> "It is a novel proposition that even though the sending of the notice amounted to contempt, the counsel who sent it is protected because he was acting as counsel. A counsel's capacity is not inviolable & his privilege cannot possibly extend to interference with the administration of justice. Counsel are expected to help in the administration of justice & not to be an impediment thereto."

Ultimately in view of the explanation submitted by the counsel that he committed the act unwittingly and unintentionally & he also expressed his unqualified regret for the same, he was let off lightly by being made to pay the costs of the proceeding. Mr. Narayana Pillai contends that in the present case respondent 2 stands in the position of the counsel in the Allahabad case & that he cannot claim exemption from punishment for the reason that he had only forwarded a letter which respondent 1 had directed him to forward to the petitioner.

(4) In considering this question, it is necessary to refer to the contents of the letter. The letter starts by stating that the petitioner had already incurred the displeasure of the church & that he had been deprived of certain ecclesiastical privileges by the order No. 751, dated 5-4-1945 passed by the Bishop. It then recites that instead of showing repentence, he had filed the civil suit without any adequate reason against respondent 2 & others in their official capacity thereby causing unnecessary loss & expense to the church. Respondent 1, therefore, directed respondent 2 to inform the petitioner that in case he does not withdraw the suit forthwith respondent 1 would ex-communicate him. If he did not withdraw the suit, respondent 1 gave authority to respondent 2 to incur all necessary expense for defending the action out of church funds & also stated that after the suit was over, the amount of expenditure incurred by the church in defending the action would be recovered from such person as was found to be responsible for having brought about such unnecessary expenditure. What respondent 2 did was to take a copy of this letter & forward it to the petitioner. He did not add any words of his own with regard to the contents of that letter.

(5) The case of respondent 2 differs from the case of the advocate in the Allahabad case AIR (22) 1935 All 117, relied upon by the petitioner's learned counsel. This is a case in which there is absolutely no evidence to show that respondent 2 was responsible for the contents of the letter or that he suggested the idea to respondent 1 of sending such a communication to the petitioner. The fact that respondent 2 happened to be deft. 4 in the suit filed by the petitioner, cannot by itself be sufficient to presume that he was instrumental in having this letter sent. On the other hand, the contents of the letter indicate that it was conceived by respondent 1 & that he was acting in the exercise of his legitimate right of safeguarding the interests of the church. We are not prepared to assume as the petitioner's learned counsel wants us to assume that respondent 2 was responsible for the despatch of this letter. He was legally bound to obey the commands of his Bishop and all that he did was to comply with the direction given to him by the Bishop in as innocuous a manner as possible. Therefore, in our judgment, respondent 2 cannot be taken to task for obeying an order sent to him by respondent 1.

(6) It is then urged that respondent 2 cannot take shelter under such a plea if the letter by itself amounts to a contempt, inasmuch as it is intended to interfere with the course of justice. Here again, we are not prepared to accept the contentions of the learned counsel for the petitioner. The facts seem to us to be more similar to the case reported in 'Webster v. Bakewell Rural District Council'. (1916) 1 Ch 300. There it was

held that the threat to assert one's legal rights against another if he chose to continue an action started by him, would not amount to contempt. In the present case also the threat held out by respondent 1 was that the petitioner had already incurred a censure by the church & that if he persisted in asserting his rights in the suit filed by him in the Court of the District Munsiff of Alleppy respondent 1 would exercise the lawful right of ex-communicating the petitioner for the wrongful acts done by him. Therefore we are not prepared to say that this case is similar to the case dealt with in 'Rajender Singh v. Uma Prasad', AIR (22) 1935 All 117; it is as already stated more like the case reported in 'Webster v. Bakewell Rural District Council (1926) 1 Ch 300 & respondent 2 has not incurred any liability for contempt for mechanically forwarding a copy of that letter to the petitioner. In these circumstances. the petition must be dismissed. But this is a case in which the parties should be directed to bear their own costs.

D.R.R. *Petition dismissed.*

[C. N. 32.]

A. I. R (39) 1952 Travancore-Cochin 77

KOSHI AND GOVINDA PILLAI, JJ.

Pavunny Ouseph, Appellant v. The Registrar of Trade Marks, Respondent.

Civil Miscellaneous Appeal No. 106 of 1950, D/- 11-9-1950.

(a) Trade Marks Act (1940), Ss. 15 (2) and 84 — Cochin Trade Marks Act (19 (XIX) of 1119), S.15 (2) — Trade Marks Rules (1122), R. 30 — Limitation for filing notice of opposition — Starting point.

The four months' period prescribed by R. 30 read with S. 15 (2) for filing the notice of opposition to the registration of a trade-mark should be counted from the date of despatch of the Trade Marks Journal containing the advertisement to the subscribers and not from the date when it is got printed or few copies or cuttings distributed among the subordinate offices of the Trade Marks Registry or among the applicants for registration. The reason is that the object of advertisement will be served only when the journal is distributed among the subscribers or otherwise made available to the public. (Para 4)

(b) Trade Marks Act (1940), S. 76 — Cochin Trade Marks Act (19 (XIX) of 1119), S. 72 — Trade Marks Rules, R. 85 — Whether an order of Registrar refusing to reject as out of time an opposition to an application for registration of a trade-mark is a decision within meaning of S. 72 or R. 85 ('Quaere.') (Para 6)

(c) Civil P. C. (1908), O. 41, R. 20 — Effect of non-joinder.

In an appeal against the order of the Registrar refusing to reject as out of time an opposition to an application for registration of a trade-mark, the person who gave the notice of opposition is a necessary party and an appeal without him on the record is not duly constituted. (Para 6)

Anno: C. P. C. O. 41, R. 20, N. 10; Trade Marks Act S. 76 N. 1.

N. S. Lakshminarayana Sarma, for Appellant; T. N. Subramonia; Advocate-General for Respondent.

KOSHI, J.: This is an appeal against an order of the Registrar of Trade Marks (Cochin), refusing to reject as out of time an opposition to the appellant's application for the registration of a lable containing the words "The Kalan Ayurvedic Pharmacy." The appellant's application for registration was made in January 1946 & after the necessary preliminary investigations, the Registrar of Trade Marks directed the application to be advertised as accepted, under S. 15 (1), Cochin Trade Marks Act, 19 of 1119. Under the Trade Marks Rules, 1122 the advertisement is to be made in the Trade Marks Journal. The appellant's application was advertised at p. 2 of 1949 May issue of the said Journal. S. 15 (2) of the Act provides that any person may, within the prescribed time from the date of the advertisement of an application, give notice in writing in the prescribed form to the Registrar of opposition to the application. Rule 30, Trade Marks Rules 1122 prescribes that the time within which a notice of opposition to the registration of a trade mark may be given, shall be four months from the date of advertisement of the application for registration, in the journal. On 24-11-1949 one K. K. Pavunny, Proprietor, Kalan Ayurvedic Oushadhasala filed notice of opposition to the appellant's application with the authorities & due notice was given to the appellant of the same as required by S. 15 (3). His counter statement was also called for. The appellant, while giving intimation to the Registrar that he will within the time allowed by law file his counter, raised a preliminary objection that the opposition was filed long out of time & that he was therefore under S. 16 of the Act entitled to have his application registered. This preliminary objection was overruled by the Registrar & the operative portion of the order overruling it reads as follows:

> "In view of the late publication of the Trade Marks Journal the opposition filed by Mr. K. K. Pavunni was considered to be in time. Your petition is therefore hereby dismissed. You are requested to file your counter statement at an early date."

The present appeal is against this order. The sole respt. to the appeal is the Registrar of Trade Marks. The person who gave notice of opposition is not made a party to the appeal.

(2) The appeal is opposed on behalf of the Registrar by the learned Advocate-General. An affidavit sworn to by the Administrative Officer, Trade Mark Registry, Bombay, is filed in Court to explain how 1949 May issue of the Trade Marks Journal happened to be published late & not when the said issue was actually published. According to that affidavit in the years 1948 & 1949 there was considerable delay in the printing of the journal & though 1949 May issue was not printed in June (1949) its publication was delayed until 9-8-1949 as the March issue was received from printers only in July 1949. The affidavit further shows that copies of the May issue along with those of April, June & July issues were despatched to subscribers only on 9-8-1949. The appellant has, no doubt, filed a counter-affidavit, but it does not contain any material on the strength of which we would be justified in not accepting as true the facts set out in the affidavit filed on behalf of the respt. An intimation which the appellant received from the Additional Registrar of Trade Marks, Cochin State, under date 20-7-1949 was produced to show that the publication of the journal was made earlier than the date mentioned in the Administrative Officer's affidavit. That intimation is in these terms:

> "The above application has been advertised as accepted at p. 2 of the Trade Marks Journal, Vol. No. III, dated 1-5-1949. Cuttings of the above advertisement from the journal are enclosed for ready reference."

(3) This, in our opinion, does not in any sense go against or disprove the facts set out in the

affidavit referred to. That printing was over as early as middle of June is admitted in that affidavit. It was the despatch of the issue to the subscribers that was delayed till August 1949. There was nothing preventing the Office of the Trade Marks Registry from sending a few cuttings or even a few copies of the journal to the Additional Registrar of Trade Marks, Cochin State, at Trichur. The fact that the appellant got one or two cuttings of the advertisement on or about 20th July will not show that the advertisement required of by law had taken place at least then or earlier.

(4) The object of advertising that an application for the registration of a Trade Mark has been received by the Registrar is obviously to let the public know about it & to invite opposition to it, if any. That object will be served only when the journal is distributed among the subscribers or otherwise made available to the public & not when it is got printed or few copies or cuttings distributed among the subordinate offices of the Trade Marks Registry or among the applicants for registration. The relevant file called for at the instance of the appellant from the Office of the Additional Registrar of Trade Marks, Trichur, shows that it has all along been the practice of the Trade Marks Registry to count the four months' time prescribed by R. 30 from the date of despatch of the journal containing the advertisement to the subscribers. This practice commends itself to us as embodying a common sense interpretation of the rule prescribing the period of time within which opposition should be filed. There is therefore, in our opinion, no merit whatever in the present complaint against the Registrar's refusal to regard the opposition as out of time. When the publication of the advertisement was only on or about 9-8-1949, the time for giving notice of opposition extended up to 8-12-1949 & a notice filed in November 1949 can by no stretch of imagination be held to be not within time.

(5) The appellant sought to make out that what the Registrar did was to exercise his power to extend the time & that in so doing he has failed to comply with the provisions of the relevant rule, namely, R.. 77. There is really no extension of time at all in this case. What has happened is that the Registrar decided that the four months' period allowed by R. 30 should be taken to have commenced only when the particular issue containing the advertisement was despatched to the subscribers. This is in conformity with the practice the Trade Marks Registry was all along following. The file referred to earlier shows that in view of this the Registrar did not even think it necessary to go into the grounds mentioned in the notice of opposition for extending the time to file it. There is therefore no point either in this argument.

(6) The appeal must hence fail, but before parting with it we owe it to the learned Advocate-General to mention that he raised two preliminary objections to the maintanability of the appeal. One was that it was not properly constituted as to parties & the other was that the order complained of was not a "decision" within the meaning of S. 72 of the Act or R. 85 as to entitle the party aggrieved by the order to prefer an appeal to this Court. The latter raises a very wide question & as we felt that there is absolutely no substance in the appeal we have thought it unnecessary to express any opinion about it here. As for the former objection, we have no hesitation to state that the person who gave notice of the opposition is a necessary party & an appeal without him on the record is not one properly constituted. However, in view of S. 72 (2), we are not, as at present advised, prepared to say that the Registrar is not a proper party. With these few words regarding the preliminary objections raised before us, for reasons stated earlier, we dismiss the appeal with costs. Advocate's fee Rs. 50/-

K.S.

Appeal dismissed.

[C. N. 33.]

A. I. R. (39) 1952 Travancore-Cochin 78

GANGADHARA MENON AND JOSEPH VITHAYATHIL JJ.

Ouseph Abraham, Appellant v. Varki Varki and others, Respondents.

Second Appeal No. 542 of 1124(T), D/- 10-7-1951.

(a) Limitation Act (1908), Art. 182 — Travancore Limitation Act, Art. 166 — Rights and liabilities under decree separate and several — Application by one party if enures for benefit of other.

When the rights and liabilities under a decree are separate and several an application by one party will not enure to the benefit of the other. (Para 6)

Hence where under a decree in a suit for redemption of mortgage the liability of the defendant is to surrender possession of the property on receipt of the mortgage amount and the value of improvements and that of the plaintiff to pay the costs of the defendant, the liability cannot be said to be a joint liability. Hence an execution application by defendant for costs does not enure for the benefit of the plaintiff: Case law Rel. on; A I R (1) 1914 Bom 288 Dist. (Para 6)

Anno: Lim. Act Art. 182 N. 81a.

(b) Limitation Act (1908), S. 19 — Travancore Limitation Act, S. 19 — Acknowledgment by one of several persons jointly liable.

An acknowledgment made by one of several persons jointly liable under a decree otherwise than as agent of his co-judgment-debtors, cannot operate to save limitation as against any of the judgment-debtors other than the person making the acknowledgment: 27 All 575 Foll. (Para 8)

Anno: Lim. Act S. 19 N. 54.

(c) Limitation Act (1908), Art. 182 — Travancore Limitation Act. Art. 166 — Redemption decree — Redemption only on payment of mortgage amount and value of improvement — Starting point for recovery of possession.

Where under the decree the plaintiffs get the right to redeem the properties only on payment of the mortgage amount and the value of improvements, the period of limitation for recovery of possession of the properties does not run from the date of deposit of those amounts. Art. 182 applies to execution of decrees for redemption: 32 T L J 304, 17 T L J 767 and 6 T L J 141 Foll.; A I R (32) 1945 All. 10 Expl. (Para 10)

Anno: Lim. Act, Art. 182 N. 13.

T. K. Joseph, for Appellant; K. P. Abraham, for 1st Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('05) 27 All 575: (2 All L J 287) (Pr 8)
('18) 40 All 206: (A I R (5) 1918 All 330) (Pr 6)
('45) A I R (32) 1945 All 10: (I L R (1944) All 717) (Pr 10)
(1898) 22 Bom 998 (Pr 6)
('14) 38 Bom 47: (A I R (1) 1914 Bom 288) (Pr 7)
('03) 30 Cal 761: (8 Cal W N 251) (Pr 6)
('18) 22 Cal W N 192: (A I R (5) 1918 Cal 929) (Pr 6)

('25) 85 Ind Cas 657: (AIR (13) 1926 Cal 267) (Pr 6)
('34) AIR (21) 1934 Lah 637 (2): (153 Ind Cas 238) (Pr 6)
(1119) S A 484 of 1119 (Trav) (Pr 4)
('43) 1943 TLR 257 (Pr 6)
('43) 1943 TLR 1004 (Pr 6)
6 TLJ 141 (Pr 10)
17 TLJ 767 (Pr 10)
32 TLJ 304 (Pr 10)

JUDGMENT: The 1st plaintiff in O. S. No. 313 of 1102 of the Meenachil Munsiff's Court pending execution in the Ettumannor Munsiff's Court is the appellant in this case. The question that arises for consideration in this second appeal is whether the execution application filed by the plaintiffs is barred by limitation. The decree is one for redemption. The original mortgagee was the 1st defendant. The mortgage right was sold in Court auction in execution of a decree against the 1st defendant and it was purchased by one Padmanabha Pillai who assigned the right to one Anna the wife of the 2nd defendant and the mother of the 3rd defendant. After the death of Anna, defendants 2 and 3 sub-mortgaged the mortgage right to the 4th defendant. The 5th defendant is an assignee of the sub-mortgage right in respect of some of the properties. The 6th defendant took an assignment of the mortgage right from defendants 2 and 3 subject to the sub-mortgage. After the decree the 4th defendant surrendered possession of the properties in his possession to the 6th defendant.

(2) The first Court decree was passed on 3-2-1107. It provides for redemption of the decree schedule properties from the defendants on deposit of the mortgage amount and value of improvements by the plaintiffs. The plaintiffs are also made liable for the costs of the defendants. In appeal filed by the 4th defendant the value of improvements awarded to him by the trial Court was enhanced and the 4th defendant and the plaintiffs were awarded costs proportionate to their success in the appeal.

(3) The appellate decree was passed on 20-1-1109. On 13-8-1111 the 4th defendant filed an execution application for realising the costs due to him from the plaintiffs after setting off the amounts due to the plaintiffs. In reply to the objection filed by the plaintiffs to the execution application the 4th defendant filed a statement on 4-10-1112. In that statement, the 4th defendant admitted that the decree in the case was subsisting on that date.

(4) On 17-6-1116, the decree-holder applied for the first time for delivery of possession of the properties on payment of the mortgage amount and value of improvements. Defendants 4, 5 and 6 objected to the execution application and contended that the application was barred by limitation. These objections were disallowed by the trial Court. The 6th defendant alone appealed from that order as A. S. No. 187 of 1119. The District Court held that the application was barred by limitation. In second appeal filed by the decree-holders ('as S. A. 484 of 1119') the High Court set aside the orders of the lower Courts and remanded the case for fresh disposal. After the remand defendants 8 and 9 who are the legal representatives of the deceased 5th defendant also filed an objection to the execution of the decree. The trial Court again held that the execution application dated 17-6-1118 is not barred by limitation. In appeal filed by the 6th defendant the District Court reversed this finding and held that execution is barred by limitation. The first plaintiff has filed this second appeal from that order.

(5) It is argued by the learned Advocate for the appellant that the execution application dated 17-6-1118 is not barred by limitation for three reasons. One is that the period of limitation for this application should be calculated from the date of the disposal of the execution application filed by the 4th defendant on 13-8-1111 which was disposed of only on 29-10-1112 and that this execution application filed within 6 years from that date and within 12 years from the date of the appellate decree is not barred by limitation. The second is that the statement filed by the 4th defendant on 4-10-1112 amounts to an acknowledgment of the liability under the decree and that this application filed within six years from that date is saved from limitation. The third is that limitation for recovery of possession of the properties will begin to run only from the date of deposit of the mortgage amount and value of improvements by the plaintiffs.

(6) With regard to the first ground, the argument is that the application filed by the 4th defendant on 13-8-1111 for the realisation of costs due to him under the decree is an application for execution of the decree and that under Art. 166 Cl. 5 of the Travancore Limitation Act an application for execution of the decree filed within six years of the disposal of a former execution application is not barred by limitation. It is true that under that clause an execution application filed within six years from the date of disposal of a prior execution application is not barred. But that clause has to be read along with Explanation I to Art. 166. According to that explanation when the decree has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in Cl. 5 of the Article shall take effect in favour of only such of the said persons or their representatives as it may be made by; and when the decree has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. In the present case, the decree allowing the plaintiffs to redeem the properties on payment of the mortgage amount and value of improvements and awarding costs to the 4th defendant is clearly a decree passed severally in favour of the plaintiffs and the 4th defendant, distinguishing portions of the subject-matter as payable or deliverable to each. The liability of the 4th defendant under the decree to surrender possession of the properties on receipt of the mortgage amount and value of improvements and that the plaintiffs to pay the costs of the 4th defendant cannot be said to be a joint liability. It is a case of distinguishing portions of the subject-matter of a decree being made payable or deliverable by the plaintiff and the 4th defendant. In the circumstances we do not think that the execution application filed by the 4th defendant for costs enures to the benefit of the plaintiffs. In 'Jeddi Subbaraya v. Ramrao', 22 Bom 998, it was held that in the case of a decree passed partly in favour of plaintiff and partly in favour of the defendant application for execution by one party would not prevent limitation running against the other. This decision was followed by the Travancore High Court in 'Kaki Muthaliaru v. Sankara Pillai', 1943 TLR 257 although the actual question decided in that case was whether in the case of a decree passed partly in favour of the plaintiff and partly in favour of the defendant an execution application filed by the defendant would amount to an acknowledgment of that

part of the decree which was in favour of the plaintiff. 'Dhirendra Nath v. Nischintapore Co', 22 Cal W N 192 is another case in which the same view was held by the Calcutta High Court; and this decision was followed by the Travancore High Court in 'Parameswaran Pillai v. Joseph', 1943 T L R 1004. Reference may also be made to the decision in 'Ghulam Mahiddin v. Dambar Singh', 40 All 205; 'Birendra Chandra v. Tulsi Charan', 85 Ind Cas 657; 'Troylokya v. Jyoti Prakash', 30 Cal 761; 'Hafiz Md. Abdulla v. Amrao Singh', A I R (21) 1934 Lah 637 (2). In all these cases it was held that when the rights and liabilities under a decree are separate and several an application by one party will not enure to the benefit of the other.

(7) The learned Advocate for the appellant relied on a decision of the Bombay High Court i.e., 'Bacharaj Nyachalchand v. Babaji Tukaram', 38 Bom 47, in support of his position. That was a case in which separate reliefs were granted under the decree to the plaintiff and to the defendant. The plaintiff was allowed to redeem the mortgage property on payment of a particular sum of money by annual instalments. The decree also provided that on failure to pay any two instalments the plaintiff's right to redeem would be forceclosed and the defendant would be entitled to be placed in possession of the property. The decree was passed on the 3rd July 1900. On the 20th July 1905 the plaintiff made an application to the Court which was consented to by the defendant for certifying the payments of two instalments. No other payments were made by the plaintiff. On the 14th December 1907, the defendant applied to foreclose the decree. The question that arose for consideration was whether the application made by the plaintiff on the 20th July 1905 would save limitation for the application made by the defendant. If was held that both as an acknowledgment of the decree and also as a step in aid of execution it would save limitation. The reason given by their Lordships for holding that the application of the plaintiff was a step in aid of execution of the decree that would enure to the benefit of the defendant is that it should be treated as a joint application by the plaintiff and the defendant. This decision therefore does not support the position taken by the appellant in this case. We have no doubt that the application made by the 4th defendant on 13-8-1111 will not enure to the benefit of the plaintiffs so as to save limitation for their execution application.

(8) The next question is whether the statement filed by the 4th defendant on 4-10-1112 amounts to an acknowledgment of the decree in favour of the plaintiffs under S. 19 of the Travancore Limitation Act. We agree with the lower Courts in their view that this statement amounts to an admission of liability under the decree. The words "The amount the plaintiffs are entitled to get under the decree" in paragraph 4 of the statement leave no room for doubt that the 4th defendant acknowledged liability under the decree. But the question for consideration is whether that acknowledgment will bind the 6th defendant and keep the decree alive so far as he is concerned. As stated above the 4th defendant was only a sub-mortgagee of the mortgage right. Under S. 19 of the Travancore Limitation Act the acknowledgment of liability in respect of a property or right has to be made by the party against whom such property or right is claimed or by some person through whom he derives title or liability. The 6th defendant has not derived title to the mortgage right through the 4th defendant. It was argued by the learned Advocate for the appellant that since the 6th defendant got possession of some of the mortgage properties from the 4th defendant after the date of the decree the former must be deemed to have derived liability to surrender these properties to the plaintiffs through the 4th defendant. We do not think that there is any force in this contention. The 6th defendant derived his right to the mortgage properties and the liability to surrender the same through defendants 2 and 3. Under the decree he was liable to surrender possession of the properties to the plaintiffs. His subsequent recovery of possession of some of the properties from the submortgagee did not create any fresh liability on him to surrender possession of those properties to the plaintiffs. So in no sense can it be said that the 6th defendant derived title or liability in respect of the mortgage right through the 4th defendant. Therefore the acknowledgment made by the 4th defendant in his statement dated 4-10-1112 cannot bind the 6th defendant and will not save limitation, as against the latter. As held by the Allahabad High Court in 'Asham-ul-lah v. Dakhini Din', 27 All 575 an acknowledgment made by one of several persons jointly liable under a decree, otherwise than as agent of his co-judgment-debtors, cannot operate to save limitation as against any of the judgment-debtors other than the person making the acknowledgment.

(9) We are, therefore, of opinion that neither the execution application filed by the 4th defendant on 13-8-1111 nor the statement filed by him on 4-10-1112 will give the plaintiffs a fresh starting period of limitation for executing the decree against the 6th defendant.

(10) The third argument advanced by the learned Advocate for the appellant is that under the decree the plaintiffs get the right to redeem the properties only on payment of the mortgage amount and value of improvements and that therefore the period of limitation for recovery of possession of the properties can run only from the date of deposit of these amounts. Reliance was placed for this position on a ruling of the Allahabad High Court i.e. 'Jugal Singh v. Lochan Singh', A I R (32) 1945 All 10. That was a case in which on the death of a Hindu widow the nearest reversioner brought a suit for possession of the property alienated by the widow. The suit was decreed but the Court ordered that the reversioner would get possession of the property only on payment of particular sum. No time was fixed for payment of particular sum. No time was fixed for payment of the amount. One of the points raised in appeal was that the plaintiff was bound to deposit the amount within three years from the date of the decree. Malik J. observed that in such cases neither Art. 181 (Art. 165 of the Travancore Act) nor Art. 182 (Art. 166 of the Travancore Act) would apply and that the decree-holder could make the deposit and apply for delivery of possession of the property within 12 years from the date of the decree or within such period which falls short of the period necessary for the judgment-debtor to acquire an independent title to the property. Mathur J. the other Judge who took part in the decision was of opinion that the question did not arise for consideration in the appeal. We do not think that it is necessary for the purpose of this case to canvass the correctness of the opinion of Malik J. on the point. The present case is one of redemption of a mortgage and we have no doubt that Art. 166 of the Travancore Limitation Act (Art. 182 of the Indian Act) applies to execution of decree for redemption. Reference may be made to the ruling reported in 'Kochumman v. Karthiyayani Pillai', 32 T L J 304 'Krishnan v. Narayanan', 17 T L J 767 and 'Narayanan Krishnan v. Kumaran Krishnan', 6 T L J 141.

(11) For the above reasons we hold that the execution application filed by the decree-holders on 17-6-1118 is barred by limitation as against the 6th defendant. We therefore dismiss the Second Appeal with costs.

G.M.J. *Appeal dismissed.*

[C. N. 34.]

A. I. R. (39) 1952 Travancore-Cochin 81

KUNHI RAMAN, C. J. AND SANKARAN J.

Lakshmikutty Amma and others, Appellants v. Cheruchikutty and another, Respondents.

Second Appeal No. 105 of 1124 and C. R. P. No. 85 of 1124, D/- 28-6-1951.

(a) *Civil P. C. (1908), O. 21, R. 90 — Case falling under R. 90 — Negligence or carelessness on part of judgment-debtor.*

Where the case falls distinctly under O. 21, R. 90, gross negligence or carelessness on the part of the judgment-debtor will not debar him from the right to have sale set aside. A I R (32) 1945 P C 67, Foll. (Para 4)

Anno: C. P. C., O. 21 R. 90 N. 41.

(b) *Civil P. C. (1908), O. 21, R. 90 — Setting aside of sale partially.*

It is not a correct proposition of law to say that when a sale of immovable properties has taken place and properties were all clubbed together at that sale, it is not competent for a Court to set aside the sale of one of those items without setting aside the sale of the remaining items. Further it is only the party who proves that there was fraud or material irregularity in the sale of the particular property in which he is interested that can ask for relief. Moreover according to the proviso to R. 90 mere proof of fraud or material irregularity will not be sufficient for obtaining relief. It must also be established to the satisfaction of the Court that the applicant has sustained substantial injury by reason of the irregularity or fraud. When three properties are clubbed together and sold in one lot at a Court sale and it is established that there has been fraud or material irregularity in the sale of one of these items, and if the above requirements have been established only in respect of one item, it would be a travesty of justice, being in direct contravention of an express provision of law, to set aside the sale of other items also when relief is afforded to the party interested in one item 'Case law discussed'. (Para 6)

Anno: C. P. C., O. 21 R. 90 N. 43a.

P. N. Subramania Iyer and J. Ranganatha Kaimal, for Appellants; S. Narayana Iyer, for Respondent No. 1 T. K. Narayana Pillai, for Respondent No. 2.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('45) A I R (32) 1945 P C 67: (I L R (1945) Mad 601) (Pr 4)

('20) AIR (7) 1920 Cal 349: (21 Cri L J 577) (Pr 7)

('37) 41 Cal W N 224 (Pr 7)

('45) A I R (32) 1945 Cal 434: (49 Cal W N 159) (Pr 7)

('51) 55 Cal W N 196: (A I R (38) 1951 Cal 291) (Pr 7)

('36) 59 Mad 438: (A I R (23) 1936 Mad 121) (Pr 7)

('33) 12 Pat 181: (A I R (20) 1933 Pat 223) (Pr 7)

KUNHI RAMAN, C. J.: An interesting question of law is raised in this second appeal and civil revision petition which arise out of the same transaction. Before dealing with it we shall record our views on the merits of the case. In execution of the decree in O. S. 1480/1108 on the file of the District Munsiff of Irinjalakuda three items of properties among others were brought to sale and the sale was duly confirmed. At that stage M. P. 705/1121 was presented by the assignee of the third item who had got herself impleaded in the execution proceedings. This was for setting aside the sale. The sale of the property took place on 27-6-1120. The petition to set aside the sale was filed on 4-3-1121. Prima facie therefore the petition not having been filed within 30 days is barred by limitation. But the contention of the petitioner in the Courts below was that the sale was vitiated by fraud and material irregularity. According to her the sale proclamation was not duly published as required by law. She was not given any notice of the sale. On the other hand, by the fraud practised by the decree-holders knowledge of the sale was kept back from her. When she came to know about the fraud and the sale, she filed the petition within 30 days of such knowledge. She urged in the Courts below that although by the decree the third item was ordered to be sold free of encumbrance and out of the sale proceeds a sum of Rs. 2000 odd was directed to be paid in the first instance to her, this material fact was not disclosed in the sale proclamation. Therefore she pleaded that there was fraud in publishing and conducting the sale. All the three items fetched a price of Rs. 300 at the Court sale. Over the third item alone there is now a subsisting encumbrance of about Rs. 3000/-. She contended in the Courts below that if this encumbrance had been disclosed in the sale proclamation and if she had obtained notice of the sale she would have come forward to prevent the sale of the third item for any amount less than Rs. 3000/- which was due to her. She could have realised this debt by purchasing the property. It is also contended that the Court had inherent jurisdiction to set aside the sale in view of the fact that the price realised by the sale was grossly inadequate. A commissioner was appointed for valuing the third item alone within a year after the sale and his report is that it would be worth Rs. 6000. It was contended that making due provision for rise in the price of immovable property in any event the third item would be worth not less than Rs. 3000. There were very strong contentions which could not be overruled and both the lower Courts have found on the evidence placed before them, that a case has been made out for setting aside the sale. The finding of the lower appellate Court is that there was material irregularity in publishing and conducting the sale and that it is liable to be set aside.

(2) The District Munsiff although he arrived at the same conclusion with regard to the validity of the sale, held that the application to set it aside since it was presented more than 30 days after the sale was barred by limitation and for that reason he dismissed it. This finding has been reversed by the lower appellate Court. In his judgment, the learned Judge does not in so many words say that as a result of the fraud of the decree-holders the sale was kept out of the knowledge of the assignee of the third item of property who applied for setting aside the sale. But on reading his judgment, we entertain no doubt that that was the conclusion reached by him. He consequently held that the petitioner who applied for setting aside the sale came to know about the sale only when the amin went to the spot to effect delivery of the third item on 28-2-1121. The petition having been filed on 4-3-1121 was therefore not barred by limitation.

(3) The appellant in the second appeal and the petitioners in the Civil Revision Petition are the decree-holders who brought the three items to sale and purchased all the three items for the ridiculously low value of Rs. 300/-. On their behalf the findings of the Court below that the sale is vitiated by fraud and material irregularity and that the owner of the third item was prevented from knowing about the sale by the fraud practised by the decree-holders are attacked in second appeal. We have carefuliy gone through the relevant records and we are satisfied that there is no ground for interference with these findings.

(4) On behalf of the appellants, stress is laid upon the finding of the District Munsiff that there was gross negligence or carelessness on the part of the person who wants to have the sale of the third item set aside and that had she exercised reasonable deligence she would have been in a position to know of the defects in time to cure them. This contention found favour with the District Munsiff but the lower appellate Court was not inclined to agree. In this connection, we should like to refer to the decision of the Judicial Committee of the Privy Council reported in 'Marudanayagam Pillai v. Manickavasakam Chettiar', A I R (32) 1945 P. C. 67. The view was expressed by their Lordships in this case that when the case falls distinctly under R. 90 of O. 21 of the Code of Civil Procedure. "However dilatory and unsatisfactory the conduct of the appellant may have been, he has not on the facts found debarred himself from the right to have the sale set aside." We are referring to this decision incidentally because apart from this view the material placed before us discloses that there was no reason to charge the second respondent with negligence or dilatory conduct.

(5) There is however another contention urged on behalf of the appellants who are the decree-holders and who have purchased the three items of properties which were sold in one single lot. The order made by the lower appellate Court appears on the face of it to imply that the sale of all the three items and not merely of item No. 3 in respect of which a petition was put in for setting aside the sale should be set aside and the sale vacated. On their behalf, it is stressed by their learned counsel that the party interested in items 1 and 2 which were also purchased by the decree-holders had applied for setting aside the sale of these items and it was finally decided that he was not entitled to that relief. The conditions which should be fulfilled before a Court can set aside a sale were not fulfilled in the case of items 1 and 2. The owner of these items is impleaded as respondent to this appeal. He appears by learned counsel. On his behalf it is strenuously contended that since all the three items were sold in one lot, if the sale of item No. 3 is vitiated by fraud and material irregularity, relief cannot be given to the owner of that item alone. The sale must either be set aside in its entirety in respect of all the three items or it must be held to be good in its entirety in respect of all the three items. There cannot according to this argument be any partial relief afforded to the person who is interested in item No. 3 of the properties brought to sale without offording similar relief to the persons interested in items 1 and 2.

(6) We must state in the first place that it is not a correct proposition of law to say that when a sale of immovable properties has taken place and properties were all clubbed together at that sale, it is not competent for a Court to set aside the sale of one of those items without setting aside the sale of the remaining items. It is enough to refer by way of illustration to a case in which three properties are brought to sale in a single lot in execution of a decree and after the sale it is discovered that the judgment-debtor had no saleable interest in one of those items. It is open to the purchaser at the sale to apply under Order XXI Rule 91 of the Indian Code of Civil Procedure (corresponding to Order XXI Rule 87 of the Cochin Code of Civil Procedure) to set aside the sale of that particular item. The question however is whether when three properties as in the present case are clubbed together and sold in one lot at Court-sale and it is established that there has been fraud or material irregularity in the sale of one of these items, is it incumbent upon the Court to set aside the sale of all the three items, the transaction being one and indivisible or can relief be granted to the party who establishes that there was fraud or material irregularity in respect of the item in which he is interested? Speaking broadly we take the view that fundamentally it is only the party who proves that there was fraud or material irregularity in the sale of the particular property in which he is interested that can ask for relief. Moreover according to the proviso to rule 90 more proof of fraud or material irregularity will not be sufficient for obtaining relief. It must also be established to the satisfaction of the Court that the applicant has sustained substantial injury by reason of the irregularity or fraud. These and the above requirements have been established in the present case only in respect of item No. 3 which was clubbed together with items 1 and 2 and sold for Rs. 300 at the Court-sale. In respect of items 1 and 2 not only is there no evidence about fraud or material irregularity or consequent substantial injury but the person interested in these items had already brought his grievance to the notice of the Court and the application for setting aside the sale of these items has been dismissed. In such circumstances, it would be a travesty of justice being in direct contravention of an express provision of law to set aside the sale of these items also when relief is afforded to the party interested in item No. 3.

(7) The question raised is not novel. It had arisen for consideration in the High Court of Calcutta and the view taken by the Calcutta High Court in two of such cases accords with the conclusion that we have reached on the material placed before us in present case. The latest decision of the Calcutta High Court which was cited at the Bar is reported in 'Manmatha Nath v. Jiaul Huq' 55 Cal W N 196 where the facts seem to be very similar to the facts of the present case. It is enough to read the head-note of this decision which pointedly refers to the question of law raised in the present case :

> "Generally a sale should be set aside or confirmed in its entirety, but this proposition is subject to certain qualifications, as for instance, the bar of limitation 'res judicata', etc.
>
> Where therefore six rules were obtained from the High Court by six judgment-debtors against an order passed on an application by one of them under O. 21, R. 90 of the Code of Civil Procedure for setting aside the entire sale and it was found that of the remaining five judgment-debtors three had made such applications but failed and two had made no such application at all, notwithstanding that a notice under O. 21, R. 66, had been served on them and at the time of the present proceedings, such applications were time-barred.

Held: That the sale would be set aside only to the extent of the share of the present applicant under O. 21, R. 90 of the Code.

That the sale would stand confirmed as regards the shares of the three judgment-debtors whose previous applications had been unsuccessful.

That the sale would not be set aside in respect of the shares of the two judgment-debtors who had not up till now made a proper application under O. 21, R. 90 of the Code for setting aside the sale stating when they had had knowledge of the sale and meeting the bar of limitation.

Moreover, these two judgment-debtors could not come in and get the sale set aside in respect of their shares in view of the provisions of proviso (ii) to O. 21, R. 90 of the Code."

A similar decision is reported in 'Amullya Krishna v. Dilip Kumar', 41 Cal W N 224. In that case also some of the judgment-debtors applied for setting aside a sale under Order 21, Rule 90. Their application was dismissed. Subsequently an application made by another judgment-debtor was allowed and the view taken by the Court was that the entire sale should not be set aside. It should stand confirmed as regards the share and interest of the judgment-debtors whose application had previously failed. The Madras High Court has also taken a similar view in the case reported in 'Narasimhamurthy v. Official Receiver', 59 Mad 438. In that case a contention was urged that in a case like the present it is wrong to set aside the sale in part and confirm it in part. That contention was based upon the case reported in 'Chhaterbijai Singh v. Damodar Das', 12 Pat 181. But the learned Judges of the Madras High Court were not prepared to accept the view which was in contravention of the provisions of O. 21, R. 90. We should in this connection refer also to two other decisions of the Calcutta High Court which are relied on by the learned Counsel for the party interested in Items 1 and 2 that were sold. They are 'T. R. Pratt v. Emperor', AIR (7) 1920 Cal 349 and 'Shila Pal v. Comilla Banking Corporation', AIR (32) 1945 Cal 434. The Court held in both these cases that a sale which is affected by the defects mentioned in Rule 90, O. 21, cannot be set aside in part there the sale was a single sale and not a sale of properties in different lots. With respect we are not prepared to accept the divergent view expressed in these cases.

(8) In the result in the second appeal and the civil revision petition we hold that the sale that is vitiated by fraud and material irregularity and which has resulted in substantial loss to the owner in the sale of Item No. 3 in the list of properties that were put up for sale and it is only the sale of Item No. 3 that can be set aside and not the sale of Items 1 and 2 with regard to which a futile attempt was made to avoid the sale by the owner at a previous stage of the proceedings. The second appeal must be dismissed with costs in respect of Item No. 3 and allowed in respect of Item Nos. 1 and 2. The Civil Revision Petition must also be allowed in respect of Items 1 and 2. We must mention here that the only person who is injuriously affected by the partial setting aside of the sale is the decree-holder who has purchased all these three Items for Rs. 300/-. On his behalf his learned Counsel says that he would adhere to the bargain so far as the consideration is concerned, although he is deprived of Item No. 3 which was included in the sale. Therefore no directions are necessary in respect of the price of Rs. 300/- paid by the decree-holder purchaser which will be regarded by his consent as the price for Items 1 and 2, the sale of which has not been interfered with in this second appeal and civil revision petition. The next question relates to the costs to be awarded to the parties. The first respondent in the second appeal is the person who put forward a contention in respect of item No. 3 sold at the Court sale and which has been accepted by us. Therefore the first respondent is entitled to her costs of the second appeal from the appellant. Since the second respondent's contentions have not been accepted in second appeal he shall pay costs to the appellant. In the civil revision petition the respondent shall pay the petitioner's costs.

D.H. *Order accordingly.*

[C. N. 35.]

✻ A. I. R. (39) 1952 Travancore-Cochin 83

KUNHI RAMAN, C. J. AND SUBRAMANIA IYER J.

Bombay Company Ltd. Alleppey, Petitioner in No. 4/1951 v. State and others.

O. P. Nos. 4, 5, 19, 23, 24, 34, 35, 71, 83, 88, 89 and 90 of 1951, D/- 10-1-1952.

†✣ *Constitution of India, Art. 286(1)(b) — Sales taking place in series of transactions preceding export or import of goods — Levy of sales-tax on — Validity — Sales-tax — Travancore-Cochin General Sales Tax (Act (XI (11) of 1125 M E), S. 26.*

Under Art. 286 (1) (b) (which is incorporated as S. 26 of Travancore Sales Tax Act), while the goods are in the course of import into the territory of India or while goods are in the course of export out of the territory of India, if a sale takes place, sales tax cannot be levied. The words "in the course of" in Cl. (b) make the scope of this clause very wide. It is not restricted to the point of time at which goods are imported into or exported from India. The series of transactions which necessarily precede export or import of goods will come within the purview of this clause. Therefore, while in the course of that series of transactions the sale has taken place, such a sale is exempted from the levy of sales tax. The sale may have taken place within the boundaries of the State. Even then sales tax cannot be levied if the sale had taken place while the gooas were in the course of import into India or in the course of export out of India. (Para 3)

The object of Art. 286 of the Constitution is to ensure that sales taxes which may be imposed by the various States in this country do not interfere with imports and exports and interestatal trade and commerce which are ultimately matters of national concern affecting the whole country and are beyond the purview of the powers vested in individual States. That is the reason why restriction is imposed by Art. 286 upon the power of individual States to legislate in respect of sales tax and to levy such tax in particular instances. (Para 8)

In the case of exports, all C. and F., C. I. F. and F. O. B. contracts, made with the intention of exporting, fall within the purview of Art. 286(b), though the sales in those cases had been completed before the exports commenced, and are exempt from tax. (Para 14)

M. K. Nambiar and N. Varadaraja Iyengar, for Petitioners in O. P. 4 of 1951; Advocate General T. N. Subramania Iyer, for the State.

KUNHI RAMAN, C. J.: The prayers in all those petitions are for the issue of writs of certiorari and prohibition under Art. 226(1) of the Constitution of India for the purpose of quashing the orders passed by the Sales Tax authorities of the State. The State is impleaded as the common respondent with the authority concerned as additional

respondent. The contention of the petitioner in each of these petitions is that the levy of the Sales Tax is illegal being in contravention of the provisions of Art. 286 of the Constitution of India. This contention seems to us to be superfluous in view of the fact that the article is bodily incorporated in the local Sales Act as S. 26 and, therefore, the question resolves itself into whether the levy of the sales tax is opposed to the provisions of this section. The main point arising from the arguments in each of these applications relates therefore, to the construction of Art. 286 which is incorporated as S. 26 of the Sales Tax Act. The case of petitioners is that the transactions in respect of which the sales tax has been imposed by the second respondent are exempted under these provisions from the imposition of such a tax.

(2) It would be convenient in the circumstances to consider the scope of the provisions of Art. 286 with the object of deciding whether its provisions would be attracted to save the transactions from the imposition of sales tax. Article 286 is worded as follows:

"286 (1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place:

(a) outside the State; or

(b) in the course of import of the goods into, or export of the goods out of, the territory of India.

Explanation: for the purposes of sub-cl. (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) * * *

(3) * * * "

It is not necessary to read Cls. (2) and (3) of the article which do not apply to the facts of these cases.

(3) It will be seen from the wording of Cl. (1) of the article that two classes of sales are exempted from the imposition of sales tax. The first is a sale which has taken place outside the State, subject to the limitation imposed by the explanation. The second is a sale that has taken place in the course of the import of the goods into or the export of the goods out of the territory of India. The important words to remember in this clause are the words 'in the course of'. While the goods are in the course of import into the territory of India or while the goods are in the course of export out of the territory of India, if a sale takes place, sales tax cannot be levied. The words "in the course of" make the scope of this clause very wide. It is not restricted to the point of time at which goods are imported into or exported from India. The series of transactions which necessarily precede export or import of goods will come within the purview of this clause. Therefore, while in the course of that series of transactions the sale has taken place, such a sale is exempted from the levy of sales tax. The sale may have taken place within the boundaries of the State. Even then sales tax cannot be levied if the sale had taken place while the goods were in the course of import into India or in the course of export out of India. We are stressing this point because both parties in what we may describe is the cashew-nut cases entered into a lengthy discussion as to the exact point of time when the sale became completed and as to the exact place where the goods were when the sale became a completed transaction.

(4) For the purposes of these cases we are satisfied from the facts that have been brought to our notice both by the affidavits that have been filed and by the able arguments addressed by learned counsel who appeared on behalf of the parties and of the State, that it is not necessary to investigate whether the sale took place outside the boundaries of the State. It is the other contention urged on behalf of the petitioners in these original petitions that is material namely that the sale and purchase took place while the goods were in the course of import into India or export from India.

(5) From the official report of the debates on the Constitutent Assembly when Art. 286 was passed, it is clear that the expression "in the course of" occurring in Cl. (i) (b) of Art. 286 was chosen by the framers of the Constitution advisedly. After the discussion, the Hon'ble Member who was responsible for piloting the Constitution gave an assurance that if better phraselogy was found to be necessary, he would see that the wording was altered. But there was no alteration and therefore, it may be assumed that in the opinion of the framers even after the discussion in the Constituent Assembly, the words that are to be found in the article would convey the meaning they wished to convey as clearly as possible. Some of the members of the Assembly stressed the fact that the expression "in the course of" occurring in Cl. (b) would furnish "a loop-hole to businessmen to escape taxation" and that it would lead to loss of income to various States. There was an attempt made to substitute the words "at the initial stage of import into India" and "at the ultimate stage of export out of India" but it did not find favour with the majority of the members who attended the session of the Assembly.

(6) The following extract from the speech of one of the Hon'ble members who suggested an amendment to this article may be read with advantage. After reading Cl. (b) of the Article the member said:

"Now, this gives a great loophole to the businessman to escape taxation. In all cases of export, there are various transactions before the commodity is actually exported from the country. But under this clause, all these transactions — the intermediate transactions which take place — are exempted from sales-tax. I could have understood the position if it was that at the point of export, that is to say, the last transaction, wherefrom it is actually exported, the sales-tax will not be realisable at that point. But this clause as it stands means that all the transactions that take place in the course of sending the goods outside the territory of India will be exempted from sales-tax.

Now, how can you check the nature of these transactions? A buys a commodity saying that he will export it. But he does not export it, but sells it to B, and B purchases it saying that he will export it, and in this manner the commodity passes on from one hand to other and from one province to another without payment of any tax, and it may be that in the end it is not exported at all. How can you check up this process? There will be a lot of difficulty and confusion, if this clause is passed as it stands. So my humble submission is that here, export and import should be, clearly defined, and we must say that export means the last transaction and import means the first transaction, and only at the point of these two transactions commodities will be exempted from sales-tax and at no other point."

This suggestion was not accepted by the Assembly which passed the article as it now stands. It may be mentioned here that at the time of the discussion the number of the article was 264A.

(7) The object of the Legislature in introducing this restriction on the levy of a sale-tax by the different States is evidently to see that trade and commerce of the whole country are not in any way adversely affeced by the imposition of a sales-tax. In discussing the meaning of the term "exports" there is a cogent observation to be found in the Encyclopaedia Britannica, Vol. VIII which may well be quoted at this stage. The term 'Exports' is explained as:

"a term used to describe goods sent out of a country by its trader to the individual trader who sells it abroad, an export represents individual profit which he receives by the process of exchange. The individual act of exportation made for personal gain is, however, of the greatest national and public importance."

The machinery for carrying out exports and imports is then described in the following words:

"A very extensively organised machinery and methods employed in export trade have been evolved in the course of centuries to enable a trader in one country to sell to, or buy from, a trader in another country. The enabling process has consisted mainly in overcoming difficulties created by space and time in regard to selling, buying, distribution and methods of payment and credit. There are two principals to an export transaction, though neither need have definite knowledge of the other. One is the manufacturer, producer or factor with goods to export; the other is the wholesale distributor in the importing country. Between them exists the export machine consisting of various intermediaries and services, by means of which buyers can maintain effective touch with all sources of supply, while manufacturers are enabled to supply in many scattered markets the needs of customers whom they could never otherwise reach, whose requirements they could never discover, and whose credentials they could not test. The machine performs this comprehensive task by co-ordinating three distinct lines of effort, the first of which is selling, buying and distribution, the second transport by rail and steamship, and the third finance and insurance."

(8) Reference may now be made to the lists which refer to articles in respect of which the power of imposing tax can be exercised. It will be seen from entry 54 in List II the power of imposing taxes on sale or purchase of goods other than newspapers belongs to the State. But according to Entry No. 83 in List 1, taxes on imports and exports and in statal trade and commerce (Entry 42 in List 1) are exclusively subjects vested in the Union of India. The object of Article 286 of the Constitution is to ensure that sales taxes which may be imposed by the various States in this country do not interfere with imports and exports and interstatal trade and commerce which are ultimately matters of national concern affecting the whole country and are beyond the purview of the powers vested in individual States. That is the reason why restriction is imposed by Article 286 upon the power of individual States to legislate in respect of sales tax and to levy such tax in particular instances.

(9) In view of the provisions of Order XXVII (a) of the Code of Civil Procedure we ordered notice to the Attorney-General of India before arguments were heard in these petitions. The notice was served but the learned Attorney-General had no representation to make in these cases.

(10) Having considered the general aspects of the question and the circumstances in which the provisions of Article 286 (i) (b) will apply, we shall now proceed to deal with the facts of a typical case in this batch of original petitions, to consider whether the transactions which were taxed by the imposition of a sales tax were in the course of import or export within the meaning of this article.

(11) The facts of the case in O. P. 5/1951 furnish a good illustration. The transaction in this case may be divided into two main classes. Cashewnuts are imported in large quantities from East Africa to this State. There is a decorticating factory in Quilon where the shells are removed and the kernels collected. Out of the shells cashewnut oil is squeezed out by machinery. The kernal is processed and converted into wholesome edible nuts and both the nuts processed in this manner and the oil are exported to foreign countries. The goods arrive by steamer in this State. The purchase is made by assignments of bills of lading while the goods are on the high seas. The merchant in the State pays money into the hands of his bankers who pass on the necessary amount for satisfying the claim on the endorsement of bills of lading. There is a contention raised on behalf of the petitioner that the fact that the money is paid into the branch of a bank in this State does not necessarily mean that the purchase is made inside the State. It is contended that the purchases are effected when the goods are on the high seas. But, as already pointed out, it is not necessary to go into this question since we are satisfied that the transactions took place while the goods were in the course of import.

(12) The intention of merchants like the petitioner is not to import goods into this country for local consumption but to treat the goods by a special process which seems to be available only in this State or available at a moderate cost in this State and after putting the goods through that process to export the goods to foreign countries.

(13) In addition to the nuts imported in this manner from East Africa local purchases of cashewnuts are also made and the nuts treated in the same manner. After the nuts have undergone the special treatment in the factories or mills they are exported. In the case of these nuts which are exported out of the State to foreign countries, we have no doubt whatsoever that the transactions which are made the subject of the levy of sales-tax are exempted from such a levy by the provisions of Article 286 (2) ((1) (b)?)which is the same as Section 26 of the Act. The local purchases are all made for the purpose of export. As contended on behalf of the petitioner, the purchase is only an integral part of the process of exporting.

(14) The account books relied upon by the taxing authorities indicate the prices realised on importing or exporting such goods. On such prices sales-tax cannot be levied. It was urged before the sales-tax officers that the term "in the course of" should be construed as including the succession of activities beginning with the contract of sale and ending with the completion of the export. It was argued that all C & F., C. I. F., and F. O. B. contracts fall within this category and are exempt from tax, since such sales are essentially made with the intention of exporting. The officers however held that since the sales in question had been completed before the export commenced the petitioner could not claim exemption under Art. 286 (1) (b) of the Constitution. In our judgment the sales fall within the purview of Articles 286 (1) (b) of the Constitution of India and the petitioner is

entitled to claim exemption from sale-tax. From the date the article came into force, he is entitled to claim this privilege. Therefore, the prayer in the petition for the issue of a writ of certiorari is granted in respect of transactions subsequent to the date on which the article came into force.

(15) It is urged in the affidavits that the petitioner has a remedy by way of revision to the Board of Revenue. But even if he has such a remedy, as has been recognised by the Supreme Court of India, the jurisdiction of this Court to issue a writ of certiorari is not excluded or lost.

(16) We are, therefore, satisfied that a case has been made out for the issue of a writ of certiorari for quashing the proceedings of the original and appellate tribunals which have sanctioned the levy of the sales-tax on sales which are exempted from the levy of such a tax. The petitioner shall get refund of any amounts which have been paid to or collected by the State. The petitioner shall also be entitled to the costs of this original petition and Advocate's fee which we fix at Rs. 250/-.

(17) In respect of the other petition, it is enough to set forth the following statement to show what the goods are that were imported & exported: (After setting forth the statement the judgment proceeded:) There were two other original petns. of a similar nature (O. P. Nos. 79 of 1951 & 94 of 1951). Since the learned counsel appearing in those cases had taken time for arguing the petitions, we deferred delivering the judgments in these original petitions in the hope that a common judgment may be delivered in all applications which are of a simliar nature. It now transpires that the learned Counsel appearing in these two cases is unwell and at his request two more weeks have been granted to him. In the circumstances, we do not propose to wait for hearing the arguments in these two petitions also to be over before pronouncing this judgment. Applying the principle which we have recognised, the transactions in these cases which we are now dealing with are exempted from the levy of sales-tax and there will, therefore be orders granting the writs prayed for to the petitioners therein with costs and Advocate's fee which we fix at Rs. 250/- in each case. We may add that we have not referred in this judgment to the details which were mentioned in the course of argument which are not material in dealing with the question of law which has arisen in these petitions. We have also not mentioned the points that were conceded on behalf of the State by the learned Advocate-General. Leave to appeal to the Supreme Court is granted under Article 132 (1) of the Constitution as prayed by the learned Advocate-General.

V.B.B. *Petition allowed.*

[O. N. 36.]

A. I. R. (39) 1952 Travancore-Cochin 86

KOSHI AND GOVINDA PILLAI, JJ.

Lekshmi Amma Kunji Amma, Appellant v. Narayana Pillai, Respondent

Second Appeal No. 30 of 1951, D/- 23-7-1951.

Limitation Act (1908), Arts. 138, 142 and 144 — Art. 138 only applies where auction-purchaser has never obtained possession — Delivery of possession to auction purchaser. — Effect of.

Article 138, Limitation Act, has no application to a suit when the auction-purchaser has obtained through Court actual or constructive delivery of the property. The reason is that when an auction-purchaser after obtaining actual or symbolical delivery brings a fresh suit to recover the property from the possession of the judgment-debtor or from one holding the same, under the latter, his suit is 'qua owner' and not 'qua auction-purchaser. (Para 4)

A suit by an auction-purchaser for declaration of his title and recovery of possession from the judgment-debtor brought more than 12 years from the date of confirmation of the sale but within 12 years from the date of actual delivery of possession to him is not barred by limitation as the actual delivery of possession interrupts adverse possession of the judgment-debtor and gives a fresh start of limitation. 26 Trav LJ 53; AIR (11) 1924 All 844; AIR (14) 1927 Mad 849 and AIR (19) 1932 Pat 145, Ref. (Pr 9)

Anno: Limitation Act; Art. 138, N. 7, 8; Arts 142 & 144 N. 65.

T. K. Narayana Pillai, for Appellant; S. Narayanan Potti, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('17) AIR (4) 1917 P C 197 (2): (43 Ind Cas 268) (Pr 7)
('21) AIR (8) 1921 All 9: (43 All 520 FB) (Pr 5)
('24) AIR (11) 1924 All 844: (79 Ind Cas 1047) (Pr 7)
('88) 12 Bom 678 (Pr 4)
('01) 25 Bom 275: (2 Bom LR 1021) (Pr 4)
('12) 36 Bom 373: (14 Ind Cas 447 FB) (Pr 5)
('27) AIR (14) 1927 Mad 849: (105 Ind Cas 243) (Pr 7)
('22) AIR (9) 1922 Pat 197 (2): (23 Cri L J 321) (Pr 6)
('32) AIR (19) 1932 Pat 145: (11 Pat 165) (Prs 4, 8)
('46) AIR (33) 1946 Pat 202: (24 Pat 717) (Pr 4)
('36) 26 Trav L J 53 (Pr 6)
26 Trav L R 239 (Pr 6)
29 Trav L R 166 (Prs 5, 6)
33 Trav L R 67 (Pr 6)

KOSHI, J.: Two points were urged before us in this second appeal by the defendant (defendant 2) in a suit for delcaration as to title and for recovery of possession of an item of immovable property.

(2) The plaintiff-respondent purchased the property at the Court auction sale held in execution of the decree in O. S. 2249 of 1102, on the file of the District Munsiff's Court, Trivandrum. The tarwad of the defendants in that suit held the property on kanom tenure and the appellant, a member of that tarwad, was defendant 4 in the suit. That suit was one instituted by the jenmi of the property to recover arrears of michavaram and other dues. The purchase the plaintiff-respondent made at the execution sale was confirmed on 6-5-1104. What was put up for sale was, of course, only the kanom right of the tarwad. Ex. A, delivery receipt shows that the Court delivered the property over to the auction-purchaser on 25-2-1113. Meanwhile on 20-2-1112 there was a partition in the tarwad of the defendants in O. S. 2249 and among other items the suit property was allotted to the share of the appellant. The execution sale was completely left out of account in effecting the partition. On the same day the partition deed was executed the appellant executed an otti deed in respect of the plaint property in favour of defendant 1 and the appellant's case is that defendant 1 continued to be in possession thereafter, no actual transfer of possession having taken place under Ex. A. The plaintiff instituted this suit in 1118 alleging that the two defendants to it had trespassed upon the property in 1117 and claimed a declaration as to his title and also sought to recover possession. Soon after the suit was instituted defendant 1 surrendered the

property to the appellant, defendant 2. The trial Court discountenanced the case of trespass but at the same time upheld the validity of the execution sale and gave a decree in favour of the plaintiff to recover possession. On appeal by the present appellant before the Trivandrum District Court, the learned temporary Second Judge set aside the Munsiff's decision and remanded the case for a trial 'de novo.' The plaintiff took the matter before the High Court in C.M.A. No. 147 of 1124 and by the decision given there, on 15-3-1950, to which one of us was a party, the order remanding the case to the trial Court was set aside and the District Court was directed to re-hear the appeal and dispose of it according to law. The present second appeal is against the revised decision of the District Court by which Munsiff's decree in favour of the plaintiff was affirmed.

(3) The two points raised before us in the second appeal were: (i) Whether under the execution sale in O. S. No. 2249 of 1102 the plaintiff had obtained a valid title to the property? and (ii) Whether the suit was barred by limitation? To appreciate the appellant's arguments on point (i) it is necessary to state a few more facts. The appellant's brother one Sivarama Pillai, deceased, was the son-in-law of the plaintiff-respondent. During his life-time, he was in possession of the tarwad properties and the appellant's case is that michavaram and other dues forming the subject of the suit in O. S. No. 2249 were payable by Sivarama Pillai, that the execution sale was brought about collusively to defeat the tarwad and that Sivarama Pillai was the real purchaser, the respondent only lending his name to the purchase. The learned Counsel for the appellant also stated that the partition in the appellant's tarwad referred to earlier was effected some seven days after Sivarama Pillai died, that Sivarama Pillai's wife is a party to it, that the moving figure beind the partition arrangement was her father, the present respondent, and that the conduct of the parties in treating the suit property as a partible item showed either that the respondent did not want to stand by his purchase or that there was fraud on his part in including this item among the properties allotted to the appellant. As for the first part of the contention under this head there is absolutely no material to show that the respondent's purchase was for and on behalf of Sivarama Pillai or that it was made with Sivarama Pillai's money either. It would also appear that the validity of the sale has been the subject of more than one Court proceedings in all of which the appellant was worsted and in our opinion it is too late in the day now to seek to resuscitate the controversy. There is no material either to substantiate the second part of the contention raised under this head. The evidence in the case does not show that the respondent had any active part in bringing about the partition in the appellant's tarwad. If one of the items set apart to the appellant's share was not tarwad property when the partition was effected it is up to her to seek her remedy in appropriate proceedings. But that cannot be pleaded in defence to the plaintiff's action founded on his title derived from the execution sale in O. S. No. 2249 of 1102. The first ground urged in the appeal is therefore without any substance.

(4) The second ground is based on certain misapprehensions regarding the facts of the case. The appellant's counsel contended that as the suit was brought only in 1118 (6-6-1118), more than fourteen years after the confirmation of the sale on 6-5-1104 the suit for declaration as to title and recovery of possession was time barred. When the suit includes the recovery of possession also a twelve years' period is admittedly available to the plaintiff, but the dispute here is when that period started. According to the appellant Article 138 (Art. 126 of the Travancore Limitation Act) is the applicatory provision while the respondent would have it that he has twelve years from the date of the delivery in his favour on 25-2-1113. In other words according to him Art. 142 or 144 (Art. 130 or 132 of the Travancore Limitation Act) applies to the case. Article 138 of the Indian Limitation Act applies to a suit by a purchaser at a sale in execution of a decree when the judgment-debtor was in possession at the date of the sale and it provides a period of twelve years for such suits from the date when the sale becomes absolute. On the face of the language of the Article it has no application to a suit when the auction-purchaser has obtained through Court actual or constructive delivery of the property. This position is well established by authority. See 'Agarchand Gumanchand v. Rakhma Hanmant', 12 Bom 678; 'Gopal v. Krishna Rao', 25 Bom 275 at P. 280; 'Ram Prasad v. Bindeshwari Prasad', AIR (19) 1932 Pat 145 and 'Balagobind Prasad v. Lila Kuer', AIR (33) 1946 Pat 202. When an auction-purchaser after obtaining actual or symbolical delivery brings a fresh suit to recover the property from the possession of the judgment-debtor or from one holding the same, under the latter, his suit is 'qua owner' and not 'qua auction-purchaser.' Here Ex. A has intervened between the confirmation of the sale and the suit for possession.

(5) The appellant's Counsel added a rider or qualification to his contention that Article 138 applies to the case. What was urged was that this was a case in which the auction-purchaser while entitled to actual possession asked for or obtained only constructive or symbolical possession and that inasmuch as a form of delivery not appropriate to the case was resorted to the entire delivery proceedings was a nullity. According to the appellant instead of obtaining actual possession under O. XXI, R. 95 possession was obtained only under R. 96. When delivery was sought judgment-debtor No. 4 (the appellant) or a person who claimed the property (defendant 1) under her was in possession. There is no doubt a school of thought which takes the view that in such cases the starting point is the date of the confirmation of the sale and not the date of the delivery. See 'Mahadev Sakharam v. Janu Namji', 36 Bom 373 and 'Jang Bahadur v. Hanwant Singh', AIR (8) 1921 All 9. The balance of judicial opinion however is in favour of the view that even symbolical or constructive delivery when the judgment-debtor is in actual possession would interrupt the running of time against the auction-purchaser and that such delivery would give a fresh cause of action or furnish a fresh starting point. See U. N. Mitra's Law of Limitation, 1950 Edn. Vol. II pp. 837-841 and also 'Chaithu Muhammathu v. Meeravu Athulla', 29 Trav. L R 166. We do not however have in this case to decide which among the two schools of thought represents the correct view on the question. Ex. A clearly shows that there is absolutely no scope here for this controversy as under it actual or direct possession was given to the auction-purchaser. The auction-purchaser passes the receipt to the Amin of the Court on that basis and the Amin's report is also to the effect that the auction-purchaser was put in actual possession of the property. The appellant's learned Counsel was therefore seeking to raise in this case a controversy not warranted by the documentary evidence in the case.

(6) A further point was raised that assuming Ex. A purported to give actual possession, posses-

sion had as a matter of fact not changed hands under it and that therefore the so-called delivery does not extend the period of limitation by a further period of 12 years. The trial Court had found that the trespass alleged was not true and the appellate Court when the case came before it on the second occasion proceeded to judgment without giving a decision on it. Counsel's argument was that as the alleged trespass was found against, notwithstanding Ex. A possession continued to be with defendant 1 and that when twelve years had expired after the purchaser obtained title a suit by him to recover possession was barred by time. As pointed out by C. Raman Tampi, J., in 'Devasya v. Aiyappan', 26 Trav L J 53 the argument betrays a lack of proper understanding of the principles of the provisions of the Civil Procedure Code regarding the delivery of properties through Court in execution or pursuant to a sale certificate. After referring to the two forms of delivery as contemplated by Order XXI, Rules 35 and 36, (Trav.) the learned Judge went on to say as follows:

"In both these cases the officer entrusted with the execution of the warrant is bound to make a report to the Court either that it has been executed or that it has not been done owing to particular reasons (vide Rule 23 of Order 21.) If a report is made by the Amin that the procedure prescribed by Rules 33 and 34 has been carried out, it must be presumed that delivery has been effected of the property. Rules 92 and 93 of Order 21, relate to delivery of properties purchased in execution of a decree. In the case of properties in the occupancy of the judgment-debtors or of some person claiming under him the purchaser should be put in actual "possession. In the case of properties in the possession of a tenant or other person not bound by the decree, delivery has to be effected by a copy of the warrant being affixed in some conspicuous part of the property or by delivering it to the party entitled to its possession. The delivery contemplated under Rules 34 and 93, as distinguished from the delivery contemplated under Rules 33 and 92 is styled "symbolical delivery." In the case of "symbolical delivery" the property cannot be actually delivered over. But in the case of Rr. 33 and 92 the delivery contemplated is effected by putting the party in actual possession. The expression "formal delivery" used by the learned Judge is unknown to the provisions of the Civil Procedure Code. In the present case, there is no question of symbolical delivery, as on the date of the order of delivery evidenced by Ex. F the defendants 1 and 2 were in actual possession. So the delivery here was in pursuance to Rule 33 of Order 21. In 'Narayanan Narayanan v. Udayan Raman', 26 Trav L R 239, a similar question was considered. There a decree-holder sold and purchased a mortgage right of the defendants in that suit and in execution the decree-holder was put in possession of the property sold. On the ground that the defendants therein trespassed on the property after delivery a suit was brought by the auction-purchaser for recovery of the property. Delivery was refused on the ground of limitation. The finding there was that the defendants were not in actual possession of the property on the date of the alleged delivery. As the suit was brought more than 12 years after delivery it was held that the suit was barred by limitation. The law on the delivery of properties in execution was considered in that case. It was held that symbolical delivery of possession was good against the defendant, and if he still continued in actual possession he may be evicted in a separate suit. Here again I have to respectfully state that the words "symbolical delivery of possession" cannot be applied when the defendant was in actual possession. But anyhow the decision is an authority for the proposition that, in either case of actual possession or symbolical possession, a suit brought within 12 years of delivery of possession is not barred by limitation. Another case in relation to this question is the one in 'Chaithu Muhammathu v. Meeravu Athulla', 29 Trav. L R 166. There the property was sold in execution and purchased by the decree-holder. The auction-purchaser obtained delivery through Court. But before the date of the delivery defendant had transferred the property to another person. Alleging that the defendant trespassed on the property plaintiff brought a suit for recovery of the property. The trial Court dismissed the suit but the District Judge on appeal allowed the suit on the ground that, though the defendant was not in possession on the date of delivery, the plaintiff was entitled to recover the property within 12 years on the strength of the symbolical possession obtained by the plaintiff. In that case also, the law bearing on the question of delivery of possession in execution was elaborately considered. It was held that a suit brought within 12 years is not barred by limitation or adverse possession whether it was actual possession contemplated by the provision in the Civil Procedure Code corresponding to the present Rule 33 of Order 21, or symbolical possession contemplated by the provision corresponding to the present Rule 34 of Order 21. 'In re: Raman Velayudhan', 33 Trav. L R 67 it was a prosecution under Section 440 of the Penal Code for an alleged trespass on a land delivered in execution. That was a case in which the property was actually delivered. Raman Menon, C. J., said as follows: "The effect of delivery in execution of a decree for immoveable property in the mode prescribed by law is to vest legal possession in the decree-holder as between himself and the person or persons against whom the decree has been passed. If, therefore, after the delivery the judgment-debtor remains or goes on the property without the permission of the decree-holder he commits trespass." In 'Ram Krishna v. Emperor', AIR (9) 1922 Pat 197, it was held that when the Amin puts the auction-purchaser in possession of the property and the formalities of law are complied with the delivery is complete and thereafter the possession of the judgment-debtor is that of a trespasser."

(7) Much to the same effect are the observations of Daniels, J., made in 'Harpal Kurmi v. Mohan Kurmi', AIR (11) 1924 All 844. There, as in this case the warrant of delivery purported to convey actual possession. The finding of the Court was that notwithstanding the same the defendants never really gave up possession. The question for decision was whether delivery of possession under the decree interrupted adverse possession and gave a fresh starting point for limitation. The decision was that it did and in coming to that conclusion the learned Judge observed:

"Here the 'dakhalnama' purported to give actual possession, which was the appropriate mode of relief though in the sequel it proved that the procedure adopted was not really effective. This must often be the case. An Amin goes down to the spot and hands over possession to the decree-holder the judgment-debtor keeping away. As soon as the Amin and the decree-holder have gone the judgment-debtor quietly resumes possession. It would be "destructive of all respect for law and authority of the Court if it were held that in such cases the judgment-debtor could

treat the delivery of possession as a nullity and claim to be in adverse possession from the date of his original entry on the land. The suit has been rightly decided by the Courts below and I dismiss the appeal with costs."

This case was decided by a Single Judge, but the learned Judge's observations have been quoted with full approval by a Division Bench of the Madras High Court (Waller and Madhavan Nair, JJ.,) in 'Kamayya v. Mahalakshmi', AIR (14) 1927 Mad 849. There, it was a case where the circumstances warranted actual possession being taken pursuant to a decree for possession but it so transpired that what was effected was no more than a formal delivery of possession. The decree-holder waited for nearly twelve years after that and then sued for possession. The defendants had remained in possession both before and after the delivery, for a total period of about twenty years and the question was whether the suit was barred by limitation. The decision went against the view taken by the Bombay and Allahabad Full Bench cases referred to earlier but what is important for our present purpose is that the observations Daniels, J., made in 'AIR (11) 1924 All 844' (at 845) & quoted above have been quoted with full approval. This Madras case refers to a number of decisions which take a view different from the view taken by the Bombay and Allahabad Full Benches. It interprets that view as running counter to the view the Privy Council took in 'Sri Radhakrishna v. Ram Bahadur', AIR (4) 1917 PC 197.

(8) Before concluding we think it worthwhile to refer in more detail to one of the decisions already mentioned viz., AIR (19) 1932 Pat 145. There the possession the auction-purchaser obtained was only constructive even though he was entitled to obtain actual possession. But Wort, J., one of the learned Judges who took part in the decision of that case, thought that an immaterial circumstance. The reason he gives for that really appeals to us and we shall quote here the relevant passages from his judgment:

"Now the only question therefore that really arises in this case is whether the adverse possession ran from 12th December 1908, the date of the sale or March 1912 when the sale was confirmed or 22nd January 1915 when the writ of delivery was taken out by the plaintiffs. Quite clearly it was not on 12th December 1908 which was merely the date of the sale, confirmation of the sale having taken place three years later as I have stated in 1912. The real competition is between the date of the confirmation of the sale in 1912 and the writ of delivery of possession in 1915.

Now quite apart from authority, it seems to me clear that in any sense of the word the title of the defendants cannot be said to be adverse until such a time arrived when the plaintiff attempted to enforce his rights under the sale. That clearly was in January 1915. Once having decided that point, the matter, in my judgment, becomes clear and the only conclusion at which I can arrive is that the learned District Judge was right in saying that the plaintiffs were within time when they brought their action in 1927."

Mohammad Noor, J., who was the other Judge who participated in the decision of that case discussed the whole question at greater length. The contention was that during the entire period the defendant was in possession, that is since the purchase of the plaintiff in 1908, up till the institution of the suit in 1927, the possession of the defendant was adverse to the plaintiff. The concluding portion of the learned Judge's judgment can with advantage be quoted here:

"Now when once the Court put the plaintiff's predecessor-in-interests in possession of the property and the defendant continued in possession of it in spite of this delivery of possession, it is then and then only that the possession of the defendant becomes adverse. The plaintiff could not have gone and taken possession of the property either at the sale or even after the confirmation of it unless the Court put him in possession and therefore in my opinion the possession of the defendant was adverse from the date of the delivery of possession....."

(9) The argument the suit was barred by time is therefore equally unsustainable as the appellant's first point. This Court had expressed the same view at an earlier stage of the case in C.M.A. No. 147 of 1124. The judgment in that case states:

"The Court sale if good had put an end to the title of defendant 2 and her tarwad to the property.....If the sale be held good the delivery even though nominal had perfected the plaintiff's title to the property and to give relief to him on the strength thereto a decision in his favour as to trespass was really unnecessary."

(10) The second appeal fails in the result and it will stand dismissed with costs.

K.S. *Appeal dismissed.*

[C. N. 37.]

A. I. R. (39) 1952 Travancore-Cochin 89

SUBRAMANIA IYER J.

Moosakutty Hajee, Petitioner v. Pylotu Joseph, Respondent.

Civil Revn. Petn. No. 1011 of 1950, D/- 16-7-1951.

Civil P. C. (1908), S. 13(a) — Decree obtained against foreigner — Foreigner becoming citizen of India by act of State — Execution of decree.

The point of time that has to be regarded in considering the question of executability is not the time at which the decree was passed, but the time when it is sought to be executed because, notwithstanding the existence of any obstacle to execution at the time the decree was passed, if that obstacle is removed by the time the execution of the decree is sought, that obstacle cannot operate as it is only its continued existence that can stand in the way of execution. Thus, an ex parte decree obtained against a non-resident foreigner at the time the decree was passed can be executed against him if at the time the execution is taken out he has become a citizen by virtue of an act of State. 'AIR (38) 1951 Bom 125 (F B), Foll. (*Para 4*)

Anno: C. P. C., Ss. 13 and 14 N. 9.

N. K. Job, for Petitioner; V. U. Joseph, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('51) AIR (38) 1951 Bom 125: (53 Bom LR 398. FB) (Pr 4)

('95) 22 Cal 222 (PC) (Pr 4)

ORDER: The petitioner before this Court is a trader doing business within the jurisdiction of the District Munsiff's Court at Tellichery in the province (State) of Madras. The respondent is also a trader residing and doing business in Trichur, Cochin State. The respondent purchased certain articles from the petitioner at Tellichery on credit. The petitioner filed Small Cause No. 344 of 1948 in the Court of the District Munsiff of Tellichery for the balance due to him from the respondent. The respondent did not appear at the hearing and the decree passed against him was ex parte. That decree was transferred to the

District Munsiff's Court, Trichur for execution. The respondent objected to the execution and the Court passed the following order:

"Heard. This being a decree of foreign Court, I don't think the execution can be allowed. Objections upheld. Dismissed — 12-7-1950."

This is the order which is sought to be revised.

(2) At the time that the decree was passed, the respondent was not subject to the jurisdiction of the Court that passed it, having been a non-resident foreigner and not having submitted himself to that Court's jurisdiction. The Court, however, could entertain the suit and pass the decree as the cause of action for the suit arose within its jurisdiction. The decree was therefore good for internal purposes, though not for international purposes, that is to say, it could be executed within the jurisdiction of the Court which passed it as also anywhere within the jurisdiction of the Dominion of India against any property of the judgment-debtor or even against the judgment-debtor personally if such execution be available within the territory of the Dominion of India. It could not, however, have been executed outside the Dominion of India by proceeding against the person or property of the judgment-debtor. There was an agreement between the Government of India and the Cochin State for reciprocal execution of decrees. Had the respondent submitted to the jurisdiction of the Court at Tellichery, that is, had he appeared and contested the suit and had there been a decree after contest, it could have been transferred to the Court at Trichur where the respondent was residing and executed against him personally or against his property. This not having happened and the decree having been one passed ex parte against a non-resident foreigner at the time that it was passed, that is, in the year 1948, the decree could not have been executed, against the respondent personally or against his properties, in the Court of Trichur. The order passed by the Court below would have been right had it been passed in the year 1948.

(3) The contention raised on behalf of the decree-holder petitioner is that the change that has been brought about by the Constitution of India enables the execution of the decree against the respondent in the Court at Trichur. It is contended that Travancore and Cochin which were independent States, became a single State on account of their integration and that the integrated State of Travancore-Cochin is one of the States specified in Part B of the First Schedule to the Constitution of India and that the consequence of the Constitution of India is that the States of Madras and Cochin which were formerly independent States, became dependent States. Articles 1 and 5 of the Constitution read as follows:

"1. (1) India, that is Bharat, shall be a Union of States.

(2) The States and the territories thereof shall be the States and their territories specified in Parts A, B and C of the First Schedule.

(3) The territory of India shall comprise:

(a) the territories of the States;

(b) the territories specified in Part D of the First Schedule; and

(c) such other territories as may be acquired.

5. At the commencement of this Constitution, every person who has his domicile in the territory of India and

(a) who was born in the territory of India; or

(b) either of whose parents was born in the territory of India; or

(c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement,

shall be a citizen of India".

From these articles it is clear that the respondent is a citizen of India as he has his domicile in the State of Travancore-Cochin which is within the territory of India as defined in Article 1. The respondent having become a citizen of India, ceased to be foreigner so far as the Court at Tellichery is concerned as it is situate in the State of Madras within the territory of India. That Court therefore, ceased to be a foreign Court so far as the respondent is concerned. If, therefore, a decree is passed by the Court at Tellichery against the respondent resident at Trichur, Travancore-Cochin State, after 26-1-1950, that is the date of the Constitution of India, the decree could have been transferred to and executed by the Trichur Munsiff's Court against the respondent personally or against his properties there, even though the decree had been passed ex parte against him.

(4) The question is whether the decree in this which was passed before 26-1-1950, which could not have been executed at Trichur before that date, became so executable on account of the operation of the Constitution of India. The reason why the decree could not have been executed at Trichur at the time it was passed was that Trichur was in the Cochin State which was then an independent State whose subjects were not amenable to the jurisdiction of the Court at Tellichery which passed the decree, but the Cochin State ceased to be an independent State and the respondent ceased to be a foreigner so far as the Court at Tellichery is concerned on account of the Constitution of India, with the result that the only obstacle that there was to the execution of the decree in the Cochin State ceased to exist and the decree became executable. A similar question arose for the consideration of the Bombay High Court in 'Bhagwan Shankar v. Rajaram Bapu', AIR (38) 1951 Bom 125. That was also a case of a decree passed ex parte by the Court at Sholapur against a resident of the State of Akalkot which was then an independent State, whose subjects were not amenable to the jurisdiction of the Court at Sholapur. Subsequently, the Akalkot State got itself merged in Sholapur. The question was whether the decree passed by the Court at Sholapur which was not executable against the judgment-debtor at the time it was passed, became so executable on account of merger of the Akalkot State in Sholapur. It was held that the decree would be executed. The contention of the judgment-debtor was that he had a vested right in the shape of an immunity from execution of that decree which he should not be deprived of. This contention was answered by saying that the change is one brought about by an act of State about which it is not competent for him to object. I am in respectful agreement with the Full Bench decision of the Bombay High Court in the aforesaid case which applies to the facts of the present case. The circumstance that, whereas in the said decision of the Bombay High Court it was a case of a merger of a State with another, whereas here it is a case of two States which were originally independent becoming dependent, makes no difference for the application of the principle. Chagla, C. J., comments upon the use of the word 'void' by the Privy Council in the leading case of 'Gurdyal Singh v. Raja of Faridkot', 22 Cal 222 that when a decree is valid for any purpose, it can hardly be said to be "void" if that expression is meant to convey the idea of an absolute nullity which on

the very hypothesis, it is not. It may be said to be a defective decree in that it had not then behind it the sanction for its operation beyond the territory of the Court within which it was situate. The decree in question could have been executed, as already stated, anywhere within the territory of the Dominion of India. The consequence of the Constitution of India is to enlarge the territory of India by including within it the territory of the State of Travancore-Cochin. The point of time that has to be regarded in considering the question of executability is not the time at which the decree was passed, but the time when it is sought to be executed because, notwithstanding the existence of any obstacle to execution at the time the decree was passed, if that obstacle is removed by the time the execution of the decree is sought, that obstacle cannot operate as it is only its continued existence that can stand in the way of execution. The order in question having been passed on 12-7-1950 when the only obstacle to the execution had ceased to exist, the order passed by the Court below refusing execution cannot be supported and has to be set aside.

(5) This case is a simple one as there is no contention raised on behalf of the respondent that the decree was one that ought not to have been passed for any reason for which the claim or action could be resisted and the respondent would have had to confess the judgment had he appeared in the Tellichery Court in answer to the summons. For instance, there was no contention that the claim is untrue or that it has been discharged, or that the plaintiff is not entitled to sue or that the claim is barred by limitation or for any other available ground. A case where such pleas are or have to be put forward may present a different aspect and difficult questions for consideration. The defendant not subject to the jurisdiction of a Court where he is sued, need not have appeared and contested if he was content not to have the execution outside the territory of the country in which the Court is situated. That may be a justification for him for not having appeared there and contested. When subsequently the obstacle in the way of execution of a decree passed ex parte is removed by an act of State, the question as to whether the defendant should be given an opportunity to raise his contentions in the suit and if so, when, in what manner, and on what conditions, will be matters for consideration. It may be that in certain cases if liberty to defend the action be not granted to the defendant, serious hardship will be caused, about which he might legitimately complain on the ground that he was not at fault in not having entered appearance and defended the action in the forum wherein it was presented.

(6) The respondent raised a contention that though the decree is one passed in exercise of the small cause jurisdiction of the Court at Tellichery, the value of the decree being over Rs. 100/- which is the limit of the small cause jurisdiction of the Trichur Munsiff's Court, the order passed by the Court below must be regarded as one passed on the original side and therefore a revision before this Court is not maintainable. It is not clear from the record what jurisdiction the Munsiff actually exercised and no authority has been cited before me to the effect that under the circumstances the only jurisdiction that could have been exercised is one under the original side. I am not inclined to uphold this objection.

(7) This Civil Revision Petition should therefore be allowed with costs.

V.S.B. *Revision allowed.*

[C. N. 38.]

A. I. R. (39) 1952 Travancore-Cochin 91

KUNHI RAMAN C. J. AND SUBRAMANIA IYER J.

B. Meerakutty and others, Appellants v. K. Meerakutty and others, Respondents.

A. S. No. 390 of 1122 (Tr.), D/- 14-3-1951.

(a) *Civil P. C. (1908) S. 96(3) — Decree on compromise — Some of signatories resiling, before decree — S. 96(3), if attracted (Travancore Civil P.C., S. 76 (3))*

If a Court is found to have based the decree on compromise, then notwithstanding the fact that before the date of the decree some or all the parties to the compromise have resiled therefrom, would not be a reason why the provisions of S. 96(3) should not be attracted. 'A I R (19) 1932 P C 251, Rel. on. (Nagpur view to contrary not approved.) (*Para 1*)

Anno: Civil P. C., S. 96 N. 15.

(b) *Civil P. C. (1908), O. 41 R. 2 — New point — Point not raised in Court before, nor raised in memo of appeal cannot be raised in appeal.* (*Para 2*)

Anno: Civil P. C., O. 41, R. 2, N. 7.

(c) *Civil P. C. (1908), O. 23, R. 3 — Suit in respect of trust — Compromise decree — Some of defendants interested in trust not signing compromise — Compromise is still binding on trust. ('obiter').*

'Obiter': A compromise in a suit in respect of a trust entered into on behalf of the institution that is the trust, by some representatives of that institution may bind the institution. The mere fact that some parties interested who are defendants in the case have not signed the compromise petition may not make the decree passed on compromise any the less binding upon the institution. (*Para 3*)

Anno: Civil P. C., O. 23 R. 3 N. 20 and 34.

P. Narayana Pillai, for Appellants; P. Govindan Nair, for Respondents.

Case referred to:

('32) A I R (19) 1932 P C 251: (139 Ind Cas 545) (Pr 1)

SUBRAMANIA IYER, J.: This is an appeal filed against the decree, based on a compromise, passed by the Court below. The petition for compromise filed in the Court below was signed by the plaintiffs as also by defendants 1, 3, 5, 7 and 8. The appellants before this Court are defendants 1 to 4, 6, 8 and 9. Of these defendants, 1, 3 and 8 are signatories to the compromise petition. It is stated that these signatories resiled from the compromise subsequent to the filing of the petition in Court. Regarding the other appellants, except the 9th defendant, their names were struck off the array of parties by the Court below. Mr. Govindan Nair on behalf of the respondents takes a preliminary objection that the decree being one passed on a compromise S. 76(3) of the Travancore Code of Civil Procedure (corresponding to S. 96(3) of the Indian Code), prohibits this appeal. The answer to this objection given by Mr. Narayana Pillai on behalf of the appellants is that in a case where certain signatories to the compromise petition have resiled from the compromise, the provisions of S. 76(3) will not be attracted. The question as to whether, when there is a compromise and the Court acts upon it and passes a decree on the compromise the signatories to the compromise should continue to abide by the terms of the compromise until the decree is passed in order that the prohibitory provision of S. 96(3) should be attracted, has come up

for consideration of the Indian High Courts. All the High Courts except the Nagpur High Court have taken the view that if a Court is found to have based the decree on compromise, then notwithstanding the fact that before the date of the decree some or all the parties to the compromise have resiled therefrom, would not be a reason why the provisions of S. 96(3) should not be attracted. It is not necessary to refer to the decisions in detail. Suffice it to say that this view gains support from the decision of the Privy Council reported in 'Zahirull Said Alvi v. Leachhmi Narayan', A I R (19) 1932 P C 251, though this question did not directly arise there for decision. We are in respectful agreement with the view expressed by the majority of the High Courts in India and taking that view, we hold that this appeal is not maintainable as it is prohibited by S. 76(3) of the Travancore Civil P. C.

(2) Mr. Narayana Pillai on behalf of the appellants raised another contention that in cases where the compromise comprised not merely matters which are the subject-matter of the suit but those beyond the scope of the suit, an appeal is competent. Whether the compromise in this particular case does not comprise matters foreign to the litigation is not considered by the Court below nor is a ground in this regard taken by the appellant in the appeal memorandum. We are not therefore inclined to allow the appellant to argue the point. Yet another point taken by Mr. Narayana Pillai on behalf of the appellants is that the 9th defendant was not a party to the compromise and therefore the appeal so far as he is concerned, should be regarded as maintainable. The 9th defendant filed a written statement in the Court below and he was agreeable to a decree being passed in favour of the plaintiffs. It is in terms of that plaint that the compromise appears to have been filed and the decree was passed. Assuming however that the 9th defendant feels that he may be prejudiced by that decree Mr. Govindan Nair, appearing on behalf of the respondents plaintiffs is agreeable to have the name of the 9th defendant struck off the file as was done in the case of certain other defendants in the case. We direct that the name of the 9th defendant appellant be struck off the array of parties.

(3) The litigation being one relating to a trust and the individual defendants not having separate or individual rights in the subject-matter of the suit i. e., in matters dealt with in the compromise, even if some members be not signatories to the compromise petition, a compromise entered into on behalf of the institution, that is th Trust by some representatives of that Institution may bind the Institution. The mere fact that some parties interested who are defendants in this case have not signed the compromise petition may not make the decree any the less binding upon the Institution. It is however not necessary in this case to give a definite decision upon this matter. The appeal should therefore be dismissed with costs, subject to the direction given above that the name of the 9th defendant-appellant be struck off the array of parties.

Appeal dismissed.

R.G.D.

[C. N. 39.]

A. I. R. (39) 1952 Travancore-Cochin 92

KOSHI AND MATHEW MURICKEN, JJ.

Beevathuma and others, Plaintiffs-Appellants v. Lekshmi Ammal, Respondent.

A. S. No. 92 of 1124, D/- 3rd Vrischigom 1125.

(a) T. P. Act (1882), S. 58 — Usufructuary mtge. and lease back — Effect.

A usufructuary mtge. was accompanied by lease back of even date. The lease deed provided that the lessee should pay a net pattam of Rs. 180 on the date of 30th of 'Makarom' every year. The mtge. deed provided that the mtgee. could demand mtge. money in any year in the month of 'Kunbhom' and that the mtgor. could likewise seek redemption only during 'Kunbhom' of any year. The lease deed contained a provision that on the happening of certain events such as non-payment of rent, etc., the mtgee. could resume possession of the mortgage property.

Held that the usufructuary mtge. and the lease did not form part and parcel of one and the same transaction and the mtgee. could not demand interest from 30th of 'Makarom' 1121, rent due up to which was duly paid, till the tender of mtge. money and the mtgee. relying on a recital in the mtge. deed and the lease deed that the amount of Rs. 180/- represented the interest on the mtge. money and treating the transaction as simple mtge. (Para 6)

Anno: T. P. Act, S. 58, N. 35.

(b) Precedents — Duty of Subordinate Cts.

There is a duty on the part of the judiciary to keep themselves informed of the current decisions of at least the High Ct. to which they are subordinate. (Para 6)

Anno: C. P. C., Preamble N. 15.

(c) Civil P. C. (1908), S. 151 — Mistake of Ct.

No party can be made to suffer for a mistake committed by the Ct. (Para 8)

(d) T. P. Act (1882), S. 84 — Refusal of tender — Costs of redemption suit — Civil P. C. (1908), S. 35.

In a redemption suit the mtgor. is normally not entitled to his costs, but the deft.-mtgee. refusing to accept a proper tender by mtgor. is also not entitled to costs of the suit. Where both the parties are at fault the order will be that both parties will bear their own costs. (Paras 9, 10)

Anno: T. P. Act, S. 84 N. 16; C. P. C., S. 35 N. 7.

Paul P. Mampalli, for the Appellants; A. S. Krishna Iyer, for the Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

(1900) 22 All 149: (27 Ind App 58 PC) (Pr 4)
('33) AIR (20) 1933 PC 178: (14 Lah 466) (Pr 4)
('05) 27 All 313: (1 All L J 715) (Pr 4)
A. S. No. 31 of 1123 (Cochin) (Pr 4)
5 Coch L R 262 (Prs 4, 6)
15 Coch L R 65 (Prs 4, 6)
19 Coch L R 282 (Pr 5)
37 Coch L R 147 (Pr 4)
('47) AIR (34) 1947 Mad 106: (231 Ind Cas 295) (Pr 6)

JUDGMENT: The plffs. are the applts. The suit out of which the appeal arises was to redeem a usufructuary mtge. they executed in favour of the deft. on 17-1-1115 for an amount of Rs. 3,000/-. The mtge. was accompanied by a lease back of even date in favour of the plffs. which provided that the lessees should pay a net pattom of Rs. 180/- on the 30th of Makarom every year. The mortgage document provides that the mtgee. can demand the mtge. money any year in the month of Kumbhom & that the plffs. can likewise seek redemption only during Kumbhom of any year. The lease-deed contains a provision entitling the mortgagee to determine the lease if & when certain specified events happen and resume possession of the mtged. properties but like the mtge. deed it provides that

change of possession can take place only during the month of Kumbhom. The term used is 'Ucharilpettai Kumbhom' meaning thereby after the harvest and in the month of 'Kumbhom'. The harvest is in 'Makarom' & that is why the rent is made payable by the 30th of that month. It is common ground that the rent due up to the 30th Makarom 1121 has been duly paid & that in 'Kumbhom' of that year the plffs. had approached the deft. with a view to redeem the mtge. by payment of the mtge money. The parties are however at variance as to whether there was a proper tender. The lower Ct. took the view that there was no such tender & while allowing redemption, held that besides the principal mtge. money of Rs. 3,000/- the deft. was also entitled to get interest thereon from 1-7-1121 till the date the mtge. money is paid into the Ct. and also directed the plffs. to pay the deft. her costs in the suit and to bear their own. The plffs. have preferred this appeal against that part of the decree which makes them liable for interest and costs.

(2) The lower Court's decision proceeds on the assumption that the plaintiffs have not paid the mortgage money into the Court but that is a controversial matter and it is more convenient to advert to it later. We shall first refer to the facts and circumstances which lead to the institution of the suit. Mention has been made that rent till 30th of Makarom 1121 has been duly discharged. There is some dispute between the parties whether the rent paid for 1115 and 1116 is the rent for two full years or only the proportionate rent for 1115 (17-1-1115 to 30-6-1115) and the full rent for 1116. In view, however, of the common case of the parties that there were no arrears due in Kumbhom 1121 we do not think it necessary to attempt to resolve that dispute. The endorsement on the lease-deed under date 2-7-1121 shows that the rent due up to 30-6-1121 has been paid. This payment was soon followed by a registered notice, Ex. III, dated 18-7-1124, calling upon the defendant to appear at the Nemmara Registry Office on the 22nd of that month and receive the mortgage money after giving the acquittance. The defendant sent a reply to this on 21-7-1122, expressing her inability to appear at the Registry Office on the date mentioned in the plaintiffs' notice on account of her ill-health and expressing readiness to accept the amount in case it is paid at her residence on any day between 26th and the last day of the month. The plaintiffs' case is that this reply notice (Ex. A) was received by them on the 28th and that pursuant to their notice (Ex. III) they had appeared at the Registry Office on the 22nd with the money, but had to return home without effecting payment as the defendant had not turned up. The further case is, that on receipt of the deft's. notice (Ex. A) they went to her residence with the money on the 28th itself, but that she declined to accept payment on some lame excuses. On the next day, that is on 29th Kumbhom 1121, they filed O. P. No. 10 of 1121 before the Trichur Dist. Ct. & paid the mortgage money into that Ct. as provided under S. 88 of the Cochin Transfer of Property Act. Notice of that appln. was served on the deft. only in Chingom 1122 & when the petition was taken up for hearing on the 17th Chingom it was represented on her behalf that as the principal mtge. money alone was deposited & as more amounts were due she was not willing to accept the amount in deposit in full discharge of the mtge. The learned J. directed the present plffs. who were the petitioners before him to seek their remedy in a proper suit for redemption. The plffs. accordingly filed the suit out of which this appeal arises the next day, i.e., 18-1-1122.

(3) In the suit the deft. denied the plffs'. having made any tender of the mtge. money at any time before the deposit in Ct. under S. 88, T. P. Act. That tender, however, is not valid even apart from the question whether all amounts due were deposited in that it took effect only in Chingom 1122 when the deft. got notice of it. According to the mtge. document redemption can be claimed only in the month of Kumbhom & if the above were the only tender alleged, without further discussion we would have confirmed the lower Ct.'s decision. Though the deposit made under S. 88 alone is made the subject of an issue as to tender the parties had really joined issue as to whether there was any valid tender prior to it. Evidence was led by both sides as to whether the plffs. were present or not at the Registry Office on the 22nd Kumbhom with the mtge. money & whether they had approached the deft. with the same at her residence on the 28th. The lower Ct. has elaborately considered these questions & found against the plffs. with respect to their readiness & willingness to pay the money on either occasion. The point that was seriously debated before us was whether there was not a valid tender before the money was paid into the Ct. on 29-7-1121. The learned Advocate who represented the applts. before us readily conceded that unless such a tender could be found, the appeal must fail. The resp's. learned Advocate did not complain that there was no issue with respect to any tender prior to the deposit in Ct. In these circumstances we do not feel precluded from considering whether there was a proper tender or not on the 22nd or the 29th of Kumbhom 1121. As on the facts & circumstances of the case we do not find our way to agree with the lower Ct. that the plffs. did not offer the mtge. money to the deft. at her residence on the 28th we do not think it necessary to consider whether the plffs. or their representatives were at the Registry Office on the 22nd. However much we may be inclined to accept the evidence lead by the plffs. to show that they were present at the Registry Office on the 22nd we are not prepared to say that the lower Ct. acted wrongly in rejecting that evidence when the plffs. did not choose to examine in support of their case the Dist. Registrar who they say was appraised of the presence at his office ready & willing to pay the deft. the mtge. money due to her.

(4) Before we consider the evidence as to the tender on the 28th, it has first to be decided whether that to constitute a valid tender the plffs. were, as found by the Ct. below, bound also to offer to pay the interest from 1-7-1121 up to the date of the tender along with the principal amount of the mtge. On this question the lower Ct's. decision has gone against the plffs. as that Ct. took the view that though in form the suit mtge. was one with possession it was in effect only a simple mtge. & that therefore the deft. was entitled to interest on the mtge. money up to the date of its repayment. As the usufructuary mtge. was accompanied by a lease-back of even date the lower Ct. thinks the two documents form part & parcel of one & the same transaction & that notwithstanding the lease-back the parties intended that the one should give & the other receive interest as if the whole transaction was a simple mtge. This inference is drawn from the expressed recital in the mtge. document that the amount of Rs. 180/- that would remain in the hands of the mtgee. out of the profits after deducting the land revenue assessment, Jenmi's dues & Purapad represents the interest on the mtge. money at 6 per cent per annum & a similar recital in the lease-back that the rent reserved under it viz., Rs. 180/- represents the interest on the mtge. money. We need only observe here that in so doing

the learned Judge was going in the teeth of the expressed terms of the documents & that it was not on principle or authorities open to him to say that a mode of operation different from the one which the documents spoke was intended by the parties. When the lease-deed provides that on the happening of certain events such as non-payment of rent, etc., the mtgee. could resume possession of the mtged. property, it is idle to contend that the parties intended the two documents to form part & parcel of one & the same transaction & that the terms of the two instruments cannot in law have their full & free operation. See 'ERAMU v. Moidu', 5 Coch L R 262; 'SANKUNNI NAYAR v. Bappu', 15 Coch L R 65; & 'RENGANATHA PRABHU v. Raman Vaidyan', 37 Coch L R 147 & 'KOCHUPENNU v. Kunjukavu Kunjamma', A. S. No. 31 of 1123, Cochin High Ct. & 'FEROZ SHAH v Sohbat Khan', AIR (20) 1933 P C 178. In 'SANKUNNI NAYAR v. Bappu', 15 Coch L R 65, the following instructive passage occurs at p. 66 of the report:

"If the intention of the parties was that the mtge. & the lease should run concurrently I do not understand why they did not say so. The provision for surrender soon after harvest would tend to show that the lessor mtgee. wished to be in a position if need arose to lease the property to some one else. This case would seem to resemble more the case in 'KHUDA BAKHSH v. Ali-un-nissa', 27 All 313, than the several cases in which a mtge. and lease-back were held to be a single transaction. In that case, the mtge. was for 5 years, but the lease-back was for 4½ years more or less."

In 37 Cochin L R 147 the learned Chief Justice Krishnaswami Iyengar remarked thus:

"Nor can I see any justification for treating pattom as interest simple because it is fixed in a lease-back of property comprised in a usufructuary mtge. For certain purposes such a mtge. and a lease-back may be regarded as forming parts of one & the same transaction, but that is no reason for holding that the pattom payable under the lease-back is interest properly so-called. To do so would be tantamount to reading the usufructuary mtge. & the lease-back as a simple mtge. providing for interest at a certain rate. The parties have the right to decide what shall be the nature of the contract between them and what shall be its terms & so long as there is nothing illegal or against public policy in it, it is not open to a Ct. of law to ignore it and spell out a transaction totally different in character & incidents. The pattom payable under Ex. 'B' must therefore be regarded as pattom proper & not as interest."

Next we may usefully quote here the head-note to the decision in AIR (20) 1933 P C 178. It reads:

"A mtge. executed by 'A' in favour of 'B' was for a term of 10 years, & was in form a mtge. with possession. Possession was not in fact taken by the mtgees. but by a second document of even date, the mortgaged land was leased to 'A' for the same term at a rent which may be taken to represent the yearly interest on the mtge. debt. Mutation was duly recorded in the Govt. records on the basis of the mtge. in the names of the mtgees. There had been previous transaction between the parties of a similar character. 'B' sued 'A' for possession after ten years in his capacity as mtgee.

'Held' that there was no reason to construe the mtge. as other than a possessary mtge., as it clearly purported to be, & that the terms of the lease having expired, the mtgee. was entitled to possession. Evidence to show that the mtge. was in reality a simple mtge. according to the intention of the parties was inadmissible under S. 92, Evidence Act, & no presumption could be drawn from the previous transactions: 'BALKISHEN DASS v. Legge', 22 All 149, Rel. on.

In A. S. No. 31 of 1123 an F. B. of the Cochin High Ct. followed the two last mentioned cases & with reference to the contention that the mtge. & the lease-back in that case formed one transaction Sir C. V. Ananthakrishna Iyer, C. J., who delivered the leading judgment said as follows:

"It is no doubt true that the rent fixed in Ex. 'G' (lease-back) was the interest due on the mtge. amount at the rate fixed by the parties, the Government revenue payable on the properties & also the purappad due to the jenmi; so long as Ex. 'G' was in force, the mtgee.-lessor could not get anything more. If it was intended that the lessor in such a case should not have the right to eject the lessee & take advantage of that circumstance to enjoy the whole income of the properties which are, as it is said, greatly in excess of the interest etc., due care should have been taken to insert proper conditions in the lease; for example, the term of the lease may be stated as co-extensive with the mtges. and that the lessee could not be turned out so long as the rent was paid. Also provision might have been made for notice to quit being given, say, of four or six months, so that the mtgor. may arrange for the payment of the mtge. amount. Other provisions could have been made in Ex. 'G' so that the mtgor. may have proper opportunity to prevent the mtgee. from enjoying the excess profits accruing from the properties. But in the absence of any such provision, the lessee could not complain that he was turned out by the lessor-mtgee. with an ulterior motive."

(5) In the face of these decisions, we consider it unfortunate that the learned Judge should have arrived at the conclusion that the mtgee. was entitled to interest till date of re-payment of the mtge. money on the strength of an argument based on analogical reasoning founded on certain observations by one of the learned Judges in the case reported in 'KRISHNA MENON v. Sankaranarayanan', 19 Coch L R 282. The learned Judge would have done well to notice Narayana Menon J.'s observations in that case which read thus:

"In my view though the usufructuary mtge. & the lease-back are very closely connected, they are not parts of one & the same transaction, in the sense that they together amount in effect only to a simple mtge. or that the rights & liabilities under them do not arise separately or give rise to distinct causes of action separately enforceable. For these latter purposes, the two should be regarded as distinct transactions. No doubt, if there was absolute failure of consideration for the mtge. to any extent, there would be occasion for abatement to that extent, of the rent payable under the lease. But that result is due not to the two together forming only one 'and' the same transaction, but to the defect on the merits, of the claim for the whole rent on account of the close connection between the two transactions. In this case however, we cannot in the known circumstances, hold that there has been as yet any failure of consideration for the usufructuary mtge."

(6) The mtge.-deed provides that the mtgor. can seek redemption only in the month of Kumbhom after the Makaram harvest is over. The lease-deed provides payment of pattom on the 30th of Makarom every year & when the mtgor. seeks redemption in the specified month after discharge

of all arrears, we fail to see what amounts in addition to the principal mtge. money the mtgee. could claim as the price of redemption. If the transaction had continued to be in force, rent would have become due only on 30th Makarom 1122 & where the option to redeem is sought to be exercised in Kumbhom 1121, it is difficult to comprehend how the mtgee. could claim interest for the days intervening between 30-6-1121 & the date of the proposed repayment of the mtge. money in Kumbhom 1121. The decision in 15 Coch L R 65, goes to the extent of saying that when a usufructuary mtge. is accompanied by a lease-back & they form distinct transactions, (as in this case), the mtgor. is entitled to redeem on payment of the principal mtge. amount alone leaving the mtgee. to seek other remedies for the rent if any due to him under the lease. A passage from the judgment in that case has already been quoted & in this context the head-note to that case & another passage from the body of the judgment may also with advantage be quoted:

The head-note reads:

"A usufructuary mtge. was executed on the 7th Edavom 1077 & provided for redemption on the 7th Edavom 1078. A lease-back which was also executed on 7th Edavom 1077 was for a term ending with the next ucharal.

Held that the mtge. & lease were two distinct transactions & the mtgor. was entitled to redeem the properties on payment of the principal money alone leaving the mtgee to seek remedies for the rent due to him under the lease."

In the body of the judgment it is seen observed:

"The mtge. is redeemable on payment of the principal money alone, & the mtgee. must seek other remedies for his rent."

The claim that though the mtge. money is offered to be paid back in Kumbhom, the mtgor. should further pay interest on the money accruing due after 30th Makarom is therefore absolutely unfounded & clearly unsustainable in law. It is rather unfortunate that the learned Judge missed noticing the above Cochin cases. We think it also appropriate to point out as Somayya, J., did in 'RAGHAVA v. Theyyunni', AIR (34) 1947 Mad 106 at p. 108, that there is a duty on the part of the Judiciary to keep themselves informed of the current decisions of at least the High Ct. to which they are subordinate. The result is that the parties have been put to heavy expense & trouble to obtain a proper decision on a question which was well-settled, so long ago as the decision in '15 Coch L R 65, if not in 5 Coch L R 262.

(7) The further question is whether there has been a proper tender on 28-7-1121. It is necessary to recapitulate the relevant facts here. On the 18th the plffs. sent a regd. notice asking the mtgee. to appear at the Registry Office to receive the mtge. money & give acquittance. On the 21st the mtgee. sent a notice saying that owing to ill-health she could not appear at the Registry Office, but would receive the amount in case it is paid at her residence between the 26th & the last day of the month. This notice the plffs. received on the 28th & P.W. 2, plff. 3. & P.W. 4, one Narayanan Ezhuthachan gave evidence that they went to the deft.'s. residence with the money on the 28th itself, & that they had to return without making the payment as the deft. & her husband wanted some more amount to be paid towards the transaction than the principal mtge. money itself. On the 29th we find O. P. No. 10, filed in the Trichur Dist. Ct. & the principal mtge. money deposited along with it. The question is whether in these circumstances, the evidence of P.Ws. 2 & 4 that the mtge. money was tendered to the deft. at her residence cannot be accepted. No doubt the defts'. husband as D.W. 2 denies that P.W. 2 or P.W. 4 went there with the money. We have carefully gone through the oral evidence in the case & in the light of the facts & circumstances adverted to above, we cannot bring ourselves to accept D. W. 2's testimony in preference to the evidence of P.Ws. 2 & 4. The plffs. belong to Neemmara & unless they had with them at least on the 28th the necessary amount they could not have deposited the mtge. money in the Ct. at Trichur the next day. If they had the money with them on the 28th when they got Ex. A notice, there is no reason why they should not have taken the money to the deft. We find very little difficulty to believe P.Ws. 2 & 4 when they say the deft. & her husband wanted some amount by way of interest. Ex. A itself suggests it though not expressly & the contention both in the Ct. below & before us was that the deft. was as of right entitled to claim interest till date of repayment. D.W. 2 is the only witness who was examined before the learned Judge who decided the case. All other witnesses were examined by his predecessor. P.W. 4 is in fairly well-to-do circumstances & nothing has been elicited in his cross-examination why he should bear false testimony against the deft. We would accordingly reverse the lower Ct.'s finding that there was no tender on the 28th & hold there was one & that it was valid & proper. The result is as a proper tender was made the price of redemption has to be fixed at Rs. 3,000/-, the principal money under the mtge. & the lower Cts. decision that the deft. is entitled to interest from 1-7-1121 till date of payment will stand set aside.

(8) In an earlier part of this judgment it was stated that there is dispute whether the mtge. money can be regarded as having been deposited in Ct. at all for our present purposes. Ex. 'B' is a copy of O. P. No. 10 & Ex. C is the Ct's. order dated 17-1-1122 relegating the plffs. to a suit. On 21-2-1122 the plffs. applied to the Ct. by means of M. P. 627 of 1122 to transfer the amount deposited in O. S. No. 10 to the credit of the suit. The Ct. passed its order on 5-3-1122 rejecting the appln. & directing the party to make the appn. in O. P. No. 10. The plffs. made a further appln. as directed in M. P. 781 of 1122 on 15-3-1122 & on the very same day the Ct. passed its order allowing the transfer. It would, however, appear that this order was not implemented as is the practice by a communication to the Controller of Accounts to effect the necessary adjustments in the books relating to civil Ct. deposits. The result has been that when the deft. applied for the amount on 23-6-1122 (M.P. 1857/1122) the Ct. rejected it on the ground that no such amount was in deposit in the suit. The three orders referred to have been passed by three different Judges & the fourth Judge who disposed of the suit proceeds as if no amount has been deposited, that the plffs. are yet to make the deposit & that the deft. would be entitled to interest till such deposit is made. The money was paid into the Ct. on the 29th of Kumbhom soon after the tender out of Ct. For reasons better known to the deft., the notice of the appln. & deposit was served on her only in Chingom & she then refused to accept the amount. The plffs. immediately filed the present suit. As soon as the deft. appeared steps were taken to have the amount transferred to the credit of the suit & the Ct. ultimately sanctioned it. The question is whether in these circumstances the plffs. can be made to suffer for a default on the part of the Ct. to implement its order by the usual communication to the Controller of Finance & Accounts. No party can be made to suffer for a mistake committed by the Ct. & if it is a question of who among two innocent parties

should suffer, we have, in the circumstances of the case, no hesitation to hold that it certainly cannot be the plffs. A reading of the deft's. appln. for the amount (M. P. 1857) would show that it was intended as a mere eye-wash & that she was pretending ignorance as to where the money was. All that she wanted by that appln. was to make it appear she was not at fault in any respect. She was not much concerned what order the Ct. passed on her appln. If the Ct. had issued notice of that appln. to the plffs. the whole matter would have been cleared up then & there. The delay caused for service of notice of O. P. No. 10 is suspicious and the contents of the petn. M. P. 1857 of 1122 show the deft. in her true colours. Even after a copy of M. P. 781 of 1122, the plffs.' appln. in O. P. No. 10 to transfer the amount to the credit of the suit & a copy of the order thereon allowing the transfer were produced & marked as Exs. in the case (Exs. D and E respectively) no step was taken to bring the money to the credit of the suit & if the Ct. below had cared to read these papers, it would not have proceeded to pass a decree in the suit as if the plffs. were in default to deposit the mtge. money. In all the circumstances of the case the only reasonable & legitimate conclusion we can come to is, that the tender out of Ct. was follld. by deposit in Ct. & the deft. cannot claim anything more than Rs. 3,000/- from the plffs. as the price of redemption.

(9) The other question that remains to be decided is as to costs. The lower Ct. directed the plffs. to bear their own costs & pay the deft. her costs. The deft.'s refusal to accept the tender is sufficient to disentitle her to the costs of the action & we decide accordingly.

(10) The next question is what our order should be regarding the plffs'. costs. In a suit for redemption the mtgor. is normally not entitled to his costs. But in this case the deft's. misconduct in refusing to accept payment of the mtge. money lead to the suit. However, the fact remains that because the plffs. did not follow the usual course of withdrawing the money from the O. P. proceeding & redepositing the same in the suit the deft. was disabled from getting the money while the suit was pending. No doubt if the deft. had made a bona fide appln. setting out the true facts, the Ct. would not have rejected her appln. in the manner it rejected M. P. 1857. Nevertheless the money has been lying idle in Ct. all these years & the plffs. cannot fully be exonerated from all blame. We would therefore confirm the lower Ct's. order that the plffs. should bear their own costs in the suit.

(11) In the result, in modification of the lower Ct's. decision, we hold the deft. is entitled to Rs. 3,000/- alone & no more as price of redemption nor will she be entitled to her costs in the Ct. below. The plffs. will suffer their costs in that Ct. but but they will be entitled to the costs of this appeal from the deft. The deft. is at liberty to draw the amount in deposit in O. P. No. 10 of 1121 & the lower Ct. will do the needful to enable her to draw the amount without further delay. Decree accordingly.

Order accordingly.

D.H.

[C. N. 40]

A. I. R. (39) 1952 Travancore-Cochin 96

GANGADHARA MENON AND JOSEPH VITHAYATHIL, JJ.

Raman Nair Gopalan Nair, Appellant; Lekshmi Amma Bharathi Amma and another, Respondents.

A. S. No. 106 of 1123, D/- 4-9-1951.

(a) Transfer of Property Act (1882), S. 52 — Applicability — Revenue Sale.

The principle underlying Section 52 relating to 'lis pendens' does not apply to cases of revenue sale for arrears of tax due on a property. 1949 Trav. L R 36 Dissent from; 1950 Ker L T 322; AIR (26) 1939 Mad 256 and AIR (16) 1929 Rang 175, Rel. on. (Para 5)

Anno: T. P. Act, S. 52, N. 32, Pt. 1.

(b) Civil P. C. (1908), S. 11 — "Might" — Right acquired pending suit.

A party is not bound in law to put forward a claim in a suit on the basis of a right acquired by him during the pendency of the suit. AIR (36) 1949 Mad 586 (F B), Rel. on. (Para 6)

Anno: C. P. C., S 11, N 36, Pt 9.

(c) Civil P. C. (1908), S. 47 (2) — Right acquired pending suit — Executing Court's right to grant relief.

If party to the decree can file a fresh suit on the basis of a right acquired by him during the pendency of the suit the Court executing the decree can treat a proceeding under S. 47 as a suit and grant appropriate relief to the party. (Para 7)

Anno: C. P. C., S. 47, N. 82.

M. K. Parameswara Kurup, for Appellant; S. Narayanan Potti, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('66-68) 3 Mad H C R 207 (Pr 6)
('03) 26 Mad 230: (12 Mad L J 368) (Pr 4)
('14) 37 Mad 49: (AIR (1) 1914 Mad 590) (Pr 4)
('39) AIR (26) 1939 Mad 256: (181 Ind Cas 57) (Pr 4)
('49) AIR (36) 1949 Mad 586: (1949-1 Mad L J 593 FB) (Pr 6)
('29) AIR (16) 1929 Rang 175: (7 Rang 113) (Pr 4)
('50) 1950 Ker L T 322 (Trav) (Pr 3)
28 Trav L J 226 (FB) (Pr 3)
('49) 1949 Trav L R 36 (Pr 3)

JUDGMENT.: The 2nd plaintiff in O. S. No. 51/1104 of the Quilon District Court is the appellant in this case. The appeal is from an order in execution. The suit was for partition. When the plaintiffs applied for delivery of possession of the properties allotted to their share in the final decree the present respondent put in an obstruction petition in respect of 20 cents in the decree Schedule C item No. 20. It was contended that this plot was sold in revenue auction on 10-8-1109 for arrears of Sirkar Tax and was purchased by the 70th defendant in the case who sold it to the obstructor on 11-10-1110. The lower Court allowed the obstruction petition and the appeal is filed from that order.

(2) The suit was filed in 1104 and the preliminary decree passed on 27-1-1110 and the final decree on 27-5-1110. The revenue auction was on 10-8-1109, i.e., before the date of the preliminary decree. The points urged in this appeal by the learned advocate for the appellant are the following (1) The revenue sale is affected by 'lis pendens' (2) the 70th defendant who was the revenue auction-purchaser was bound to put forward his claim in respect of the property in the suit itself and that therefore the present plea of his assignee is barred by 'res judicata' and (3) the execution Court is not competent to go behind the decree which awards the disputed plot to the plaintiffs.

(3) With regard to the first point the learned Advocate for the appellant relies on a ruling of the Travancore High Court reported in 'JANAKI AMMA v. The Dewan of Travancore', 1949 Trav L R 36. That was a suit instituted to set aside a revenue

sale on the ground that it was vitiated by material irregularities. The revenue sale took place during the pendency of a suit for partition. It was held in that case that the 'karnavan' of the 'tarwad' was not a party to the revenue proceedings and that the sale was therefore invalid and not binding on the 'tarwad.' It was also held that the revenue sale was vitiated by 'lis pendens'. This question came up for consideration in a later case reported in 'KRISHNA KARTHA v. Kumaraswami', 1950 Ker L T 322. In that case Govinda Pillai J. observed thus:

"The observation thus made in 1949 T L R would therefore indicate that the revenue sale is vitiated by 'lis pendens' and that it will not affect the rights of the auction-purchaser in execution of the decree. This observation or dictum is against the decision of the Full Bench in 28 Trav LJ 226. That holds that a revenue sale puts an end to all the charges whether these charges had merged in a decree of Court or not. Otherwise there would be no meaning for the provisions in Ss. 2 and 39 of Act 1 (1) of 1068 that the land, the buildings upon it and its products "shall be regarded as security for the public revenue on such land and that all lands brought to sale on account of arrears of revenue due thereon shall be sold free of all encumbrances. If the said observation in '1949 Trav. L R 36 purports to lay down a proposition of law, I would with all respect state that the law was not correctly stated and that it is opposed to the Full Bench ruling in '28 Trav L J 226'. I would therefore prefer to follow '28 Trav L J."

(4) We do not think that the fact that there was a suit for partition pending when the property was sold for arrears of tax will in any way affect the validity of the revenue sale. The result of holding otherwise would be that the Government would not be entitled to proceed against a property forming the subject matter of a suit for arrears of tax due thereon. Reference may be made in this connection to a decision of the Madras High Court reported in 'PONNUSWAMI CHETTIAR v. Obul Reddy', A I R (26) 1939 Mad 256. That was a case in which the revenue sale took place before the date of the final decree in a mortgage suit. His Lordship Wadsworth J. observed thus in that case:

"It is well established that such a sale for arrears of land revenue is not affected by lis pendens. Vide 'VELLAPPAYAL AMBALAM v. Kuruppiah Pillai', 37 Mad 49 and the observations in 'KADIR MOHIDEEN v. Muthukrishna', 26 Mad 230 at p. 236. I have no hesitation in holding that the sale by the Collector for arrears of rent of the land on which those arrears were due to the land-holder is not affected by a pending suit on a mortgage executed by the ryot who is in default."

To the same effect is the ruling in 'ABDUR RAUF v. N. P. L. S. P. Chettiar Firm', AIR(16) 1929 Rang 175. In that case the mortgagee who had given no notice of his mortgage to the Municipal Corporation filed a suit on his mortgage. In the meanwhile the property was sold under Burma Land and Revenue Act, S. 47, by the Corporation after due notice to the mortgagor for arrears of property tax. It was held that the property was sold free from the mortgage. Their Lordships observed thus in that case:

"The learned trial Judge based his judgment in the main on the doctrine of 'lis pendens'. We do not consider that the doctrine applies to this case at all. It would indeed be a dangerous extension of the doctrine to hold that neither Government nor a local body could recover its taxes or rates from a defaulter so long as a law suit was pending between the defaulter and some of his other creditors."

(5) We have no doubt that the principle underlying S. 52 of the T. P. Act relating to 'lis pendens' does not apply to cases of revenue sale for arrears of tax due on a property.

(6) The second point for consideration is whether the claim is barred by 'res judicata'. The 70th defendant who was a 'pro forma' party in the case purchased the property in revenue auction on 10-3-1109. The suit was as stated above instituted in the year 1104. At the time of the institution of the suit the 70th defendant had no claim to put forward in respect of the plot in dispute. He could not therefore raise this plea at that time. The question for consideration is whether the defendant in a suit is bound to put forward a plea on the basis of a cause of action which arises during the pendency of the suit. This question was considered by a Full Bench of the Madras High Court in 'SITA AMMA v. Kotareddi', AIR (36) 1949 Mad 586. It was held in that case that when a right accrues to a party in respect of the subject-matter of a suit after the institution of the suit he is not bound to rely on that right in that suit. Following the decision in 'ARICHANDRAN DEO CARU v. Ramanna Chandri', 3 Mad H C R 207, their Lordships observed thus in that case:

"It has been a well recognised principle of law that a plaintiff who acquires a fresh claim during the pendency of his suit or afterwards can bring another suit on the fresh cause of action."

If a party who acquires a fresh right during the pendency of the suit wants to claim a relief in the suit on the basis of that right he will have to seek an amendment of the pleading and the Court is not bound to allow the amendment. Therefore it cannot be said that a party is bound in law to put forward a claim in a suit on the basis of a right acquired by him during the pendency of the suit. We are therefore of opinion that the claim based on the revenue sale was not one which the 70th defendant was bound to put forward in the suit. The plea of his assignee cannot therefore be said to be barred by 'res judicata'.

(7) With regard to the third point, namely whether the Court executing the decree is competent to go behind the decree, we are of opinion that so long as the claim is not barred by 'res judicata' the Court is competent to go into the question under S. 47 C.P.C. If a party to the decree can file a fresh suit on the basis of a right acquired by him during the pendency of the suit the Court executing the decree can treat a proceeding under S. 47 as a suit and grant appropriate relief to the party. The lower Court was therefore competent to consider the claim put forward by the assignee of the 70th defendant and grant him appropriate relief.

(8) For the above reasons we confirm the order of the lower Court and dismiss this appeal with costs.

V.R.B. *Appeal dismissed.*

[C. N. 41.]

A. I. R. (39) 1952 Travancore-Cochin 97

GOVINDA PILLAI AND GANGADHARA MENON JJ.

Kesavan Raghavan, Petitioner v. Eapen Mathew Respondent.

C. R. P. No. 1088 of 1950, D/- 27-11-1950.

(a) Debt Laws — Travancore Debt Relief Act (II of 1116) — Order fixing amount due to secured creditor — Act does not provide for appeal by unsecured creditor — Appeal may be treated as revision. (Para 2)

(b) *Debt Laws — Travancore Debt Relief Act (II and III of 1116), Ss. 16, 18, 19, 12, 3(1), 4 to 6 — Jurisdiction under S. 16 invoked — Petition found maintainable — Procedure for Court to adopt — Ss. 3(1), or 4 to 6, if impose restrictions in applying Ss. 18 and 19.*

When once the jurisdiction of the Court is invoked under S. 16 and the petition is found to be maintainable under that section the Court has to settle all the debts of the petitioner by applying Ss. 18 and 19 of the Act. In thus applying Ss. 18 and 19, there is no restriction imposed on account of the provisions of Ss. 3 (1) or 4 to 6. This is so by virtue of the provisions of S. 3(2). Therefore the classes of debt mentioned in S. 4 become debts to which the Act applies when the Court determines the amount of each debt under S. 18 of the Act. Hence, when the Court applies the provisions of the Act embodied in S. 18 and determines the amount of each claim, the provisions of S. 12 are attracted ond it has to determine the amount in accordance with the provisions of that section. (Paras 6, 7, 9)

(c) *Debt Laws — Travancore Debt Relief Act (II and III of 1116) Ss. 3(2) and 4 — Which prevails — (Interpretation of statutes — Incompatibility in Sections of same Act.)*

Section 4 does not override the provisions of S. 3 (2) which are imcompatible with the intention expressed in S. 4. Section 4 expresses the general intention. Section 3 (2) however expresses in a particular intention in the application of Ss. 18, 19, 20 and 23 of the Act, namely, that those Sections shall apply notwithstanding anything contained in S 3 (1) or Ss. 4 to 6 of the Act. It is an established rule that when an Act contains general provisions and also special provisions of this sort the general provisions are not to control or repeal the special provisions. The particular intention is to be considered an exception to the general one. Therefore even if the intention expressed in S. 3(2) is considered incompatible with that expressed in S. 4, the former has to prevail: (1876) 4 Ch. D. 395, Relied on. (Para 8)

M. Madhavan Nair, for Petitioner; M. Abraham, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('47) 1947 Trav L R 563 (Pr 6)
(1876) 4 Ch D 395: (46 L J Ch 105) (Pr 8)

ORDER: This is a matter arising out of a proceeding under S. 16 of the Travancore Debt Relief Act (Acts II and III of 1116). The 7th counter petitioner the appellant before us is an unsecured creditor. The respondent is a secured creditor who has obtained a decree in O. S. 1360 of 1110. The Court below by its order dated 3-4-1950 fixed the amount due to the respondent at Rs. 4135-7-0. The appeal is directed against this order.

(2) The learned Advocate for the respondent raised a preliminary objection that no appeal lies. Act II of 1116 does not provide for any appeal from orders of this nature. Therefore there is considerable force in the objection taken by the learned Counsel. The learned Advocate for the appellant however prays that the appeal may be treated as a revision petition. We think that this prayer may be granted. The appeal is therefore treated as a revision petition.

(3) The main point urged by the appellant is that the Court below overlooked the provisions of S. 12 of the Debt Relief Act in fixing the amount due to the 1st counter-petitioner. But it is contended for the respondent that the appellant is precluded from raising the point in appeal as he is concluded by the admission made by him in the lower Court. The learned Advocate for the appellant argues that the observation in the order of the learned Judge that the amount claimed by the 1st counter-petitioner is not objected to by the other parties is not correct. It appears from the records that all that the learned Advocates for counter-petitioners 2, 5, 6, 7 and 11 stated in writing was that they had no objection to the amount due to the 1st counter-petitioner being paid to him. They did not say what that amount was. Nor did they give up the right to have that amount determined in due course of law. No admission as to the amount due to the 1st counter-petitioner can therefore be drawn from the statement in question. Hence the lower Court was wrong in having fixed the amount without determining the same through proper investigation as if the claim put forward by the first respondent was not objected to by the other parties.

(4) The question then arises whether the Court below was bound to apply the provisions of S. 12 in determining the amount under S. 18 of the Act. The point does not appear to have come up for consideration before in any decision of this Court. The decree-debt in O. S. 1360 of 1110 is admittedly a liability arising out of a sale of immovable property in respect of the balance of purchase money for which the vendor has lien on the property sold as provided under S. 4(1) of the Debt Relief Act. Section 4 enacts that nothing in the Act shall affect debts and liabilities falling under the several heads mentioned therein. It is therefore contended that the decree-debt in question is one of the classes of debts excluded from the purview of the Act and that the provisions of S. 12 the operation of which is restricted to debts to which the Act applies cannot be invoked in determining the amount under S. 18 of the Act. The learned Advocate for the appellant however contends that by virtue of S. 3(2) of the Act the provisions of Ss. 18, 19, 20, 21 and 23 of the Act apply to all classes of debts whether incurred before on or after the 23rd Dhanu 1112 notwithstanding anything contained in S. 3(1) or Ss. 4 to 6 and that the provisions of the Act have therefore to be applied without the limitation imposed by S. 4 in determining the amount under S. 18. Hence he argues that the provisions of S. 12 become applicable when the amount of a debt payable is determined under S. 18 of the Act.

(5) The Act evidently is intended to afford relief, to the debtors in respect of certain classes of debts. One of the ways by which the aim is to be achieved is by allowing the debt to be discharged by payment in instalments in the manner and to the extent provided under Ss. 8 and 9 of the Act. Section 3(1) however restricts the application of the above sections to debts incurred before 23rd day of Dhanu 1112 and subsisting on the commencement of the Act subject to the provisions of Ss. 4 to 7. Further relief in the matter of discharge of such debts is afforded by S. 11 which directs that in determining the amount of a decree debt for purposes of payment under Ss. 8 and 9 interest payable shall be as provided in S. 11 notwithstanding anything contained in S. 31 of the Civil P. C. or any other law, contract, decree or order of Court to the contrary and also by S. 12 which enjoins that future interest from the date of commencement of the Act on any debt to which the Act applies shall be limited to four per cent. only.

(6) Still another way of affording relief to debtors is that embodied in Ss. 16 to 21 of the Act. Any individual who is unable to pay his debts in instalments as provided under Ss. 8 and 9 of the Act may invoke the jurisdiction of the Court under

Section 16 of the Act for a full settlement of his debts. No doubt the section imposes certain restrictions; one such restriction being that at least one of the debts must be such as would have been capable of being discharged under Ss. 8 and 9 as was held in '1947 Trav L R 563'. But when once the jurisdiction of the Court is invoked under S. 16 and the petition is found to be maintainable under that section the Court has to settle all the debts of the petitioner by applying Ss. 18 and 19 of the Act. In thus applying Ss. 18 and 19, there is no restriction imposed on account of the provisions of Ss. 3(1) or 4 to 6. This is so by virtue of the provisions of S. 3(2) which provides:

"Notwithstanding anything contained in Sub-s. (1) or Ss. 4, 5 and 6 the provisions of Ss. 18, 19, 20, 21 and 23 shall subject to the provisions of S. 7 apply to all classes of debts whether incurred before, on or after the 23rd Dhanu 1112."

Therefore the classes of debts mentioned in S. 4 become debts to which the Act applies when the Court determines the amount of each debt under S. 18 of the Act.

(7) Section 12 of the Act provides:

"No future interest exceeding simple interest calculated at four per cent. per annum in the case of paddy debts shall be chargeable from the date of the commencement of the Act on any debt to which this Act applies."

Hence when the Court applies the provisions of the Act embodied in S. 18 and determines the amount of each claim, the provisions of S. 12 are attracted and it has to determine the amount in accordance with the provisions of that section.

(8) It is contended that S. 4 excludes the classes of debts mentioned therein from the purview of the Act, inasmuch as it expressly provides that nothing in the Act shall affect debts and liabilities falling under the heads mentioned therein and that therefore S. 4 of the Act overrides the provisions of S. 3(2) which are incompatible with the intention expressed in S. 4. Section 4 expresses the general intention. Section 3(2) however expresses a particular intention in the application of Ss. 18, 19, 20 and 23 of the Act, namely, that those sections shall apply notwithstanding anything contained in S. 3(1) or Ss. 4 to 6 of the Act. It is an established rule that when in an Act you find general provisions and also special provisions of this sort the general provisions are not to control or repeal the special provisions. Vide 'TAYLOR v. Corporation of Oldham', (1876) 4 Ch D 395. Where in a Statute "a general intention is expressed and also a particular intention which is incompatible with the general one the particular intention is considered an exception to the general one." (Vide Maxwell on the Interpretation of Statutes, 9th Edition, page 176). Therefore even if the intention expressed in S. 3(2) is considered incompatible with that expressed in S. 4, the former has to prevail.

(9) We are therefore of the view that on an application under S. 16 when the Court determines the amount of each claim under S. 18, the provisions of S. 12 of the Act are also attracted and that it has to determine the amount in accordance with the provisions of S. 12 also.

(10) The order under appeal cannot therefore stand. We set it aside and direct the lower Court to fix the amount due to the 1st counter-petitioner in accordance with law and in the light of the observations made above. The appeal which is treated by us as a revision petition is allowed as indicated above with costs.

R.G.D.

Petition allowed.

[C. N. 42.]

A I. R. (39) 1952 Travancore-Cochin 99

KUNHI RAMAN C. J. AND SANKARAN J.

T. V. Krishna Iyer, Appellant v. The Official Liquidator, the Cape Comorin General Traffic Co. Ltd., Respondent.

A. S. No. 57 of 1124, D/- 3-7-1951.

Companies Act (1913), S. 230(1)(b) — 'Wages' — Payment of bonus — Contract Act (1872) S. 25(2) — Travancore Companies Act, S. 285.

The word 'bonus' does not come under the category of 'wages'. To recognise the employees of a company in respect of bonus as preferential creditors within the meaning of S. 230 is certainly not warranted. The payment of bonus will not come under S. 25(2) of the Contract Act also as the employees have rendered services in return for wages payable to them and not voluntarily. (Para 2)

Anno: Companies Act, S. 230 N. 2; Contract Act S. 25 N. 8.

T. N. Subramania Iyer, Advocate General, for Appellant; C. M. Kuruvilla, for Respondent.

KUNHI RAMAN, C. J.: A share-holder in a company which is in liquidation under an order passed by this Court is the appellant. The official Liquidator of the company appears as the respondent, through his learned counsel Mr. Kuruvilla. The Company was interested in salt pans in the vicinity of Nagercoil. O. P. 3/1116 was presented for the winding up of that company. That application seems to have been transferred from the District Court Nagercoil to the file of the erstwhile Travancore High Court and re-numbered as O. P. 1 of 1122. A single Judge of the erstwhile Travancore High Court dismissed that O. P. on 9-7-1948. There was an appeal presented to the appellate side of the erstwhile Travancore High Court from this decision. The appeal was filed on 25-12-1123 accompanied with a petition for stay. The directors by their learned counsel took notice of that application and stay of proceedings was ordered. The judgment in the appeal was delivered on 23-4-1124 corresponding to 8th December 1948. In the meantime on 30-12-1123 the directors of the company had passed a resolution sanctioning a bonus of six months' salary to every employee of the company. The total amount calculated on this basis would come to Rs. 10,812. It will be seen that this resolution was passed subsequent to the filing of the appeal and the order staying proceedings. The official liquidator of the company made an application to the District Court of Nagercoil to which the case was transferred by the erstwhile Travancore High Court for supervising proceedings in liquidation praying that the resolution passed by the directors sanctioning a bonus to the employees may be given effect to and the employees may be recognised as creditors of the company entitled to preferential treatment. That application was granted by the learned District Judge. From the order made by the Court below the present appeal is brought to this Court by one of the share-holders.

(2) It is contended on behalf of the respondent that the bonus that was sanctioned under the resolution passed by the directors would come under the category of wages payable to workmen. The Court below had accepted this contention. The reason given is that the word 'wages' as defined in the Travancore Payment of Wages Act 1116 would include bonus or other additional remuneration payable for regular attendance, good work or conduct of the person employed and consequently it would not be unreasonable to construe the word 'wages' occurring in the Travancore Companies Act corresponding to the Indian Companies Act as including 'bonus'. This reasoning is entirely

fallacious. This would be evident if reference is made to the opening words of the relevant section of the Travancore Payment of Wages Act which make it clear that the words defined in that section are to be understood in the sense of the definition, for the purpose of that Act. When it is a definition restricted in its scope to the particular Act, it cannot be regarded as a general definition that would apply to the term which occurs in other Acts of the legislature. Therefore, it is not possible for us to uphold the view taken by the Court below that the word 'bonus' will come under the category of 'wages' in the Companies Act. It appears from the records that on the date this resolution was passed there were creditors who were claiming payment of more than six lakhs of rupees by the company, according to the documents filed in the court below. The exact amount payable to the creditors has not yet been ascertained. To sanction a bonus exceeding Rs. 10,000 would certainly result in detriment to the creditors of the company. The resolution was passed at a time when the matter was pending on the appellate side of the erstwhile Travancore High Court and ultimately the company was directed to be wound up by that Court. To recognise the employees of the company in respect of bonus as preferential creditors within the meaning of S. 230 of the Indian Companies Act corresponding to S. 285 of the Travancore Companies Act is certainly not warranted. The learned counsel for the liquidators wanted to rely upon S. 25 of the Indian Contract Act sub-s. (2) by contending that the promise to pay bonus will come under the category of compensation agreed to be paid for service rendered in the past. This clause of S. 25 cannot be applied to the present case because it contemplates cases in which services have been voluntarily rendered. Here the workmen have rendered services in return for the wages payable to them and if they have only discharged their duties as required by the agreement entered into by them with the employees no extra compensation promised to them will come within the meaning of S. 25, sub-s. (2) of the Indian Contract Act. This is clear from the decided cases which are all collected together in the commentary of Pollock and Mulla on the Indian Contract Act, pp. 182 and 183, 7th Edition.

(3) In these circumstances, we have no hesitation in allowing this appeal and setting aside the order made by the Court below.

(4) We are leaving the question open as to whether when the list of creditors is ultimately settled the employees in whose favour a bonus has been sanctioned by the directors may come forward and prove their claims just like ordinary creditors. The main question then will be whether they are not persons to whom gifts have been promised.

(5) The appellant will be entitled to costs of this appeal payable out of the assets in the hands of the liquidators; Advocate's fee Rs. 200/-.

Appeal allowed.

D. H.

[C. N. 43.]

A. I. R. (39) 1952 Travancore-Cochin 100

KUNHI RAMAN C. J.
AND SUBRAMANIA IYER J.

Krishna Iyer, Appellant v. Mohammed Hussain and others, Respondents.

A. S. No. 42 of 1124 (T), D/- 22-9-1950.

(Travancore) Companies Act (9 of 1114), S. 245 — Aggrieved person — Civil P. C. (1908), S. 96.

Where the District Judge disallows an objection on behalf of the appellant to the jurisdiction of the Court to deal with a petition for reconstruction of the Company in liquidation but the District Judge dismisses the petition for considering a scheme for reconstruction, the decision is in favour of the appellant although one of the findings was opposed to his contention. He cannot, therefore, be regarded as an aggrieved person who is competent to file an appeal from the order. (Para 1)

Advocate General, T. N. Subramania Iyer for, Appellant; K. P. Abraham, for Respondents.

KUNHI RAMAN C. J.: The 4th additional counter-petitioner appearing by the learned Advocate General is the appellant. The appeal is from an order made by the learned District Judge of Nagercoil in O. P. No. 2 of 1124. There was a petition for the winding up of what is known as the Cape Comorin General Traffic Company which was pending in the Court of the learned District Judge. In the exercise of the extraordinary original jurisdiction of this Court, that petition was transferred to the file of this Court. It was heard before a single Judge who dismissed it. On appeal, a Bench of two Judges of this Court reversed this decision of the single Judge and directed a compulsory winding up of the company, appointing an Advocate practising at Trivandrum as the Official Liquidator and orders the records of the case to be sent back to the Nagercoil District Court "which will supervise the work of liquidation." While the liquidation proceedings were pending in the Court below, there was an application made on behalf of some of the share-holders of the company in liquidation for the reconstruction of the company. When this petition was taken up for disposal by the Court below, an objection was raised on behalf of the appellant in this Court to the jurisdiction of the Court to deal with that petition. The contention urged was that the order for compulsory liquidation having been passed by the High Court, since the records were only transmitted to the District Court for supervising the winding up, an application for reconstruction of the company could not legally be maintained in the Court of the District Judge. This argument was repelled by the order made by the Court below on the 12th of July 1949. In that order the question of jurisdiction alone was dealt with and the matter was directed to be posted to a later date for considering the question as to whether the proposal for reconstruction could be accepted and whether a direction could be given that the matter should be placed before the share-holders for consideration. On the 20th of July 1949, after hearing arguments, the learned Judge arrived at the conclusion that the proposals for a reconstruction were not acceptable inasmuch as there was a certain amount of vagueness about the proposed scheme and he, therefore, disallowed the prayer in the petition for referring the scheme framed by some of the share-holders to a general meeting of the share-holders. It will thus be seen that although the question of law that was urged by the appellant here was not decided in his favour by the learned District Judge, the final order made by the Judge dismissing the petition for considering a scheme for reconstruction is an order in favour of the appellant. The appellant cannot, therefore, be regarded as an aggrieved person who is competent to file an appeal from the order to this Court. We need only refer to the provisions of S. 245 of the Travancore Companies Act, IX of 1114. According to this section an appeal from an order of decision made in the matter of the winding up of a company is subject to the same conditions subject to which appeals may be filed from an order or decision of the same Court in cases within its ordinary jurisdiction. Provision for filing appeals from decisions in its ordinary jurisdiction is to be found in S. 76 of the Travancore Civil

P. C. which corresponds to S. 96 of the Indian Civil P. C. From the facts narrated, it will be seen that the decision of the Court below is in favour of the appellant although one of the findings of the Court below is opposed to the contentions raised on behalf of the appellant. It is not permissible in the circumstances for the appellant to come up here on appeal from such an order, he being not a party adversely affected by the order.

(2) The appellant's apprehension seems to be that in view of the finding that the Court below has jurisdiction to entertain applications for the reconstruction of the company, there may be complications arising in the shape of fresh applications for reconstruction. It is stated that there is already an application filed which has been numbered as O. P. No. 4 of 1924 which has been stayed by the Court below on the application of the appellant. It is stated by the learned Advocate-General appearing for the appellant, that these applications are part of a scheme for postponing the closing of the liquidation proceedings. The company is acting under a lease for 50 years for working certain salt pans in the vicinity of Nagercoil. It is stated that only seven more years remain out of the period for which the lease is granted. The complaint of the appellant is that one of the powerful share-holders who is also a Director and who has control over the majority of the votes among the share-holders, is putting up different individuals for bringing forward schemes for reconstruction with the ultimate object of frustrating the order made by this Court directing compulsory liquidation of the company. It is not possible for this Court at this stage to say whether these apprehensions are well founded. But in case the fear is reasonable, it will be open to the appellant to apply for a transfer of any application which in his view is filed as a part of the dilatory tactics resorted to by the share-holder who, according to him, is behind the scenes. Such applications would be considered on the merits. We wish to make it clear that the appellant will not in the circumstances be prejudiced or adversely affected by the finding recorded by the Court below that it has jurisdiction to deal with applications of this description. If the appellant applies for transfer of such applications, then there will be no reason for him to be afraid of the jurisdiction of the Court below being invoked with the object of postponing the liquidation proceedings. So far as the present appeal is concerned, we are not satisfied that it is maintainable. Unfortunately, there is no provision here for applying for directions in a matter of this description. In the absence of such a provision, we can only dismiss this appeal. There will, however, be no order for costs.

V.B.B.

Appeal dismissed.

[C. N. 44.]

A. I. R. (39) 1952 Travancore-Cochin 101

GOVINDA PILLAI J.

Narayana Panicker, Petitioner v. P. Kumaran Nair and others, Counter-Petitioners.

O. P. No. 4 of 1950, D/- 25-7-1950.

Constitution of India, Art. 226 — Certiorari — Writ of — Other remedy open.

Where a distinct remedy is open to a party aggrieved by an order of an inferior Court, it is an abuse of the process of the Court to approach the High Court for issue of a writ of certiorari. This is not, however, an inflexible rule and in exceptional cases the High Court may interfere if it is shown that before resort was made to such other remedy the mischief sought to be avoided would be committed. (The Court refused to quash the proceedings under S. 103, Travancore Criminal P. C.). (Para 2)

K. P. Abraham, for Petitioner; N. Padmanabha Panicker, S. Bhoothalingam Iyer and Government Pleader, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('32) AIR (19) 1932 Mad 171: (136 Ind Cas 319) (Pr 2)

('32) AIR (19) 1932 Mad 321: (137 Ind Cas 868) (Pr 2)

('42) AIR (29) 1942 Mad 348: (203 Ind Cas 607) (Pr 2)

ORDER: The 2nd counter-petitioner in M. C. 1 of 1950 on the file of the First Class Magistrate, Kottayam has filed this petition for the issue of a writ in the nature of certiorari and to quash the proceedings started by the Magistrate. The petitioner is also the 5th defendant in O. S. 100 of 1107 of the Alleppey District Court. There was a receiver appointed for the collection of the profits from the properties over which the plaintiffs in the said case were declared to be entitled to one-half. That receiver was stated to have taken possession of the properties and leased out some of them to the 3rd counter-petitioner in this case. This lessee as the 2nd counter-petitioner and the plaintiff in O. S. 100 of 1107 as the 1st petitioner had filed petitions against the 5th defendant and others complaining against the acts of the petitioner in their attempt to trespass upon the properties leased out by the receiver to them. Pursuant to such petition, the police investigated the case and filed a report before the Magistrate for starting proceedings under S. 103, Criminal P. C. against the 5th defendant and others. The Magistrate did so and it is against the proceedings thus started that this petition to quash the proceedings had been filed. The receiver is the 1st counter-petitioner. The plaintiff in O. S. 100 of 1107 is the 2nd counter-petitioner and the lessee of the receiver is the 3rd counter-petitioner.

(2) It was admitted by both sides that a preliminary decree for partition had been passed in O. S. 100 of 1107 by the District Court of Alleppey and that this decision had been confirmed by the High Court. The plaintiff in the case is entitled to one-half of some of these properties. Though the preliminary decree was confirmed in 1118, no progress had been made to divide the properties so as to enable the Court to pass a final decree. The plaintiff therefore applied to appoint a receiver to take the yield from the properties. The District Court allowed the petition and appointed a receiver. Defendants 3, 5 to 14 and 19 took up the matter in appeal to the High Court. The appeal was dismissed on 17-1-1124. The complaint is against the receiver thus appointed by the civil Court. The receiver stated that he had taken possession of the properties and leased them in auction with the sanction of the Court. That there was a sanction by the District Court to auction the properties for purpose of cultivation is admitted. But it was contended that such sanction was given without notice to the defendants. Whatever that might be the sanction was given by a competent Court and until that sanction is revoked it is binding on all the parties to the proceedings. The receiver leased out

some of the properties in Chingom 1125. The defendants who apparently did not like this arrangement began to create trouble and so it was stated on behalf of the counter-petitioners that the lessees moved the police for taking appropriate action against the persons who were bent upon creating trouble. The Magistrate had on the report of the police and on proper grounds initiated proceedings against the persons said to be creating trouble affecting public peace. It cannot be said that the Magistrate is incompetent to start proceedings in this way. I cannot understand how a petition of this nature could be sustained. If the aggrieved parties thought that the Magistrate was acting without jurisdiction they had other appropriate remedies open to them. Where a distinct remedy is open to a party aggrieved by an order of an inferior Court, it is an abuse of the process of the Court to approach the High Court for issue of a writ of certiorari. The rulings in 'IN RE SOMASUNDARA MUDALIAR', AIR (19) 1932 Mad 171; 'GOVINDASWAMI v. RAMALINGASWAMY', AIR (19) 1932 Mad 321 and 'SUNDARA RAO v. MADRAS CORPORATION', AIR (29) 1942 Mad 348, would lay down that this is the proper rule to be applied when a writ of this nature is sought for. This is however not an inflexible rule and in some cases it had been held that though another remedy was provided for yet the Court would interfere if it was shown that before resort was made to such other remedy the mischief which was sought to be avoided would be committed. At any rate, no exceptions would arise in this case for, it could not be said that the party would in any way be prejudiced if he moves the matter in the proper way sanctioned by law. It has now become a fashion with some people to rush up to the High Court for issue of one of the High Prerogative writs when they feel a sort of righteous indignation against the administration of the State. Provision for these writs had been made with the object of protecting the fundamental rights of the citizens and not to harbour really delinquent persons. The present petition is an ill conceived one and I dismiss it with costs. Advocate's fee Rs. 25/- to the counter-petitioner who appeared by separate Advocates. The State also will get their costs from the petitioner.

K.S. *Petition dismissed.*

[C. N. 45.]

A. I. R. (39) 1952 Travancore-Cochin 102

SANKARAN AND GOVINDA PILLAI, JJ.

Krishna Menon, Petitioner v. Ouseph Michael. Cr. Petitioner.

C. R. P., No. 51 of 1125, D/- 12-9-1950.

(a) Civil P. C. (1908), O. 21, R. 100 — Cochin Civil P. C., O. 21, R. 97 — Applicant must satisfy Court that he was in possession of the property on his own account and not on account of any of the judgment-debtors and that his claim for possession of property is supported by good faith — Failure to prove either — He is not entitled to recover possession under O. 21, R. 97. (Para 3)

Anno: C. P. C., O. 21 R. 100 N. 1, 2.

(b) T. P. Act (1882), S. 52 — Doctrine of lis pendens — Doctrine applies equally to involuntary transfers effected through the aid of Court. 25 Cal 179 (P C), Rel. on. (Para 4)

Anno: T. P. Act, S. 52 N. 31.

(c) Civil P. C. (1908), O. 21, R. 102 — Cochin Civil P. C., O. 21, R. 99 — Scope — Rule applies to voluntary as well as involuntary transfer of possession by judgment-debtor. (Para 4)

Anno: C. P. C., O. 21 R. 102 N. 1.

(d) Civil P. C. (1908), O. 21, R. 102 — Cochin Civil P. C., O. 21 R. 99 — Scope.

The transfer contemplated by the rule need not necessarily be by the judgment-debtor direct to the third party complaining of the dispossession by decree-holder. Any transfer of possession by the judgment-debtor directly or at his instance or for which he has been responsible would come within the scope of R. 99. (Para 4)

Anno: C. P. C., O. 21 R. 102 N. 1.

T. S. Venkiteswara Iyer, for Petitioner; M. W. Isac, for Cr. Petitioner.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('88) 25 Cal 179: (24 Ind App 170 P C) (Pr 4)
('39) AIR (26) 1939 Cal 709: (ILR (1939) 2 Cal 63) (Pr 4)
('17) 42 Ind Cas 523: (AIR (5) 1918 Mad 673) (Pr 4)

ORDER: The decree-holder in O. S. 300 of 1101 on the file of the Munsiff's Court at Ernakulam, who is the counter-petitioner in M. P. 2398 of 1123 of the same Court, has filed this application seeking a revision of the order passed by the lower Court on M. P. 2398. As per the redemption decree passed in his favour in O. S. 300 of 1101, he obtained delivery of the decree-properties through Court on 3-10-1123. 34 cents of property comprised in Survey No. 1246 was also involved in that suit and was delivered over to the petitioner on 3-10-1123. The present controversy relates to this item of property. The petitioner in M. P. 2398 claimed to be in independent possession of this property in his own right and contended that he was wrongfully dispossessed by the decree-holder in O. S. 300 of 1101. On these allegations, he filed M. P. 2398 under O. 21, R. 97 of the Cochin Civil P. C. (corresponding to O. 21, R. 100 of the Indian Code) and prayed for delivery of the property. The decree-holder opposed that petition and contended that it was unsustainable and entirely lacking in good faith. It was also contended that the person seeking re-delivery is only a representative-in-interest of the 9th defendant in O. S. 300 of 1101 and as such he is concluded by the orders passed in that case. The executing Court overruled these objections and held that M. P. 2398 is sustainable. It is this order that is sought to be revised.

(2) Before proceeding to consider the points raised in this Revision Petition, it is necessary to state how the contending parties trace their claim to the possession of the property in dispute, i.e. 34 cents of property comprised in Survey No. 1246 of Vaduthala Desom. As already stated, the decree and the execution proceedings in O. S. 300 of 1101 are all in favour of the decree-holder who is the revision petitioner. One Kotheril Achutha Menon had obtained possession of this property under an Adimachirthu granted to him from the Cherupalli Swaroopam. While he was thus in possession of the property, he granted a usufructuary mortgage in respect of this property, as well as other properties in favour of one Vareeth about the year 1080. Subsequently Achutha Menon's rights devolved on the plaintiff in O. S. 300 of 1101 and accordingly the plaintiff instituted that suit for redeeming the mortgage. The 1st defendant's son was also impleaded as the 9th defendant in the suit as a person in enjoyment of the property under the 1st defendant. The trial Court's decree for redemption passed in the year 1101 was confirmed

by the High Court in the year 1105. When the decree-holder attempted to get possession of the property by executing the decree, the 9th defendant and others raised a contention that the 34 cents of property covered by Survey No. 1246 was Poramboke land at the absolute disposal of the Government and that it was assigned in favour of the Cherupalli Swaroopam in the year 1095 and that this property was not included in the mortgage relied on the decree-holder. That dispute was finally set at rest by the decision of the Cochin High Court in S. A. 46 of 1122. That decision is to the effect that the property in dispute was also included in the mortgage which formed the basis of the decree in O. S. 300 of 1101 and that the decree-holder was entitled to recover possession of the same in execution of the decree. It was on the strength of that decision that he was put in possession of the property through Court on 3-10-1123. In the meantime, the 9th defendant in the case executed a lease deed in respect of the same property in the year 1109 in favour of the Cherupalli Swaroopam. On the strength of that lease deed, the Swaroopam sued the lessee for arrears of pattom and obtained the decree in O. S. 40 of 1122 of the Ernakulam Munsiff's Court. In execution of that decree, the leasehold right of the defendant was sold in Court auction and it was purchased by one Varkkey Augustine, who obtained possession of the property on 2-2-1123. The petitioner in M P. 2398 of 1123 claims to have obtained an assignment of the rights of this Varkkey Augustine and to have obtained possession of the property from him on 26-9-1123.

(3) The two points urged on behalf of the revision petitioner are that the petitioner in M. P. 2398 is only a representative in interest of the 9th defendant in O. S. 300 of 1101 and that all the proceedings under which he claims to have obtained possession of the property are vitiated by the rule of 'lis pendens'. The case of the petitioner in M. P. 2398 is that on the date of his dispossession by the decree-holder in O. S. 300 of 1101, he was in possession of the property on his own account and not on account of or under the judgment-debtors in that case. It is on the strength of such a plea that he has complained about his dispossession and has applied under O. 21, R. 97 of the Cochin Civil P. C. for restoring his possession of the property. If the executing Court is satisfied that he was in possession of the property on his own account or on account of some person other than the judgment-debtors, it is bound to restore his possession of the property under O. 21, R. 98. Thus, the essential conditions to be established by the petitioner in M. P. 2398 are that he was in possession of the property in his own account and not on account of any of the judgment-debtors in O S. 300 of 1101 and that his claim for possession of the property is supported by good faith. As already pointed out, it is the leasehold right which defendant 9 in O. S. 300 of 1101 is stated to have acquired in the year 1109 and which was sold in Court auction as per the decree in O. S. 40 of 1122 that is relied on by the petitioner in M. P. 2398 as the basis of his claim for possession of the property. Long before defendant 9 assumed the position as a lessee, of the property in the year 1109, the present revision petitioner had instituted O. S. 300 of 1101 with the 9th defendant also on the party array, for recovery of possession of the very same property, on redemption of the mortgage which the 1st defendant, who was the father of defendant 9 had executed in favour of the predecessor-in-interest of the plaintiff. The contention put forward in that case that defendant 9's possession of the property was under the defendant-mortgagee, was upheld by the Court and a decree for redemption of the property was passed. Defendant 9 is undoubtedly concluded by that decree. His attempt in resisting delivery of the property in favour of the decree-holder also failed when it was decided in S. A. 46 of 1122 that this property was also included in the mortgage and that the decree-holder was entitled to recover possession of the same. It was long after the decree for redemption had become final that defendant 9 executed the lease deed in favour of Cherupalli Swaroopam in respect of the same property in the year 1109. At that time he was bound in law as the judgment-debtor in O. S. 300 of 1101, to surrender possession of the property to the decree-holder. By executing the lease deed in favour of the Cherupalli Swaroopam, defendant 9 was virtually transferring possession of the property to the Swaroopam and accepting it back as a lessee under the Swaroopam. The circumstances under which such a transaction was entered into clearly indicate that it was devoid of all good faith and that it was only an attempt to defeat the decree-holder in O. S. 300 of 1101. The possession with the Cherupalli Swaroopam claimed on the strength of the lease deed executed by defendant 9 could only be the possession obtained from the judgment-debtor in O. S. 300 of 1101. By executing the lease deed, the legal character of defendant 9's position as the judgment-debtor in that case could not be altered. His lease-hold right in reality and substance was nothing other than his right to the possesion of the property as the judgment-debtor. It was the right to such possession that was sold in Court auction in O. S. 40 of 1122 and purchased by Varkkey Augustine and subsequently transferred to the petitioner in M. P. 2398. Thus the possession claimed by him is essentially the possession of defendant 9 judgment-debtor in O. S. 300 of 1101. It follows, therefore, that he was really the representative in interest of the defendant 9 and was in possession of the property not on his own account, but only on account of defendant 9 when the decree-holder in O. S. 300 of 1101 recovered possession of the property from him on 3-10-1123 and that he is not entitled to claim for its restoration of his possession under O. 21, R. 97.

(4) The rule of 'lis pendens' also stands against the petitioner in M. P. 2398 in respect of his claim to the possession of the property in dispute. The right to the possession of the property in question was directly and specifically raised in O. S. 300 as early as in the year 1101 and the decree in that case directed that the plaintiff should be put in possession of the property. The petitioner in M. P. 2398 is stated to have obtained possession at a time when the decree in O. S. 300 of 1101 was in force. Such a transfer was brought about as a result of defendant 9's dealing with the property as a lessee under Cherupalli Swaroopam. The transfer brought about in favour of the petitioner in M. P. 2398 under such circumstances clearly comes within the mischief of the doctrine of 'lis pendens'. The lower Court appeared to have proceeded on the basis that defendant 9 was not made a party to O. S. 300 of 1101 at the time of the institution of the suit, but was only impleaded in execution as the legal representative of the defendant 1. But, as a matter of fact, defendant 9 was impleaded as a party to the suit even at its commencement and this fact is conceded on behalf of the petitioner in M. P. 2398 also. It cannot also be said that the operation of the rule of 'lis pendens' is restricted to voluntary transfers. It is now settled law that involuntary transfers effected through the aid of Court are also affected by the rule of 'lis pendens'. We do not think it necessary to refer to the numerous decisions in support of this position. It is

sufficient to point out that the decision of the Privy Council in 'MOTILAL v. KARABULDIN', 25 Cal 179 is definitely in favour of the position that involuntary transfers under the process of Court are also affected by the rule of 'lis pendens'. No doubt the rule of lis pendens as enunciated in S. 52 of the T. P. Act cannot apply with all its implications to proceedings under Rr. 96 to 99 of O. 21, Cochin Civil P. C., where the question of title to the property does not arise for consideration, but only the right to the possession of the property has to be determined. All the same, it is clear from O. 21, R. 99 of the Cochin Civil P. C. (corresponding to O. 21, R. 102 of the Indian Code) that the right to possession agitated in execution proceedings has to be determined subject to the rule of 'lis pendens'. Order 21, R. 99 lays down that

> "nothing in Rr. 96 and 98 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person."

There is no reason to limit the application of this rule to the voluntary transfer of possession by the judgment-debtor. The transfer of possession by him may be voluntary or involuntary. The emphasis laid by O. 21, R. 99 is upon the stage at which the transfer of possession is effected and not upon the manner in which such transfer is effected. It is obvious that the object of the rule is to prevent the successful and effective execution of the decree for the possession of the property involved in the suit being defeated by any act of the judgment-debtor subsequent to the institution of the suit, which might result in an intermediate transfer of possession of the property to a third party. In this view of the matter, there can be no justification for putting a narrow construction on the expressions used in R. 99. The transfer contemplated by the rule need not necessarily be by the judgment-debtor direct to the third party complaining of the dispossession of the decree-holder. Any transfer of possession by the judgment-debtor directly or at his instance or for which he has been responsible would come within the scope of R. 99. If it were otherwise, the object of the rule could be very easily defeated by the judgment-debtor by resorting to successive transfers as in the present instance. Even though the petitioner in M. P. 2398 claims to have obtained possession of the property from the auction purchaser in O. S. 40 of 1122, it is clear that such possession takes its origin from the transfer of possession effected by defendant 9 in O. S. 300 of 1101 when he executed the lease deed in the year 1109 in favour of the Cherupalli Swaroopam. Thus the initial transfer of possession of the property was by the judgment-debtor in O. S. 300 of 1101 and it was on the strength of such transfer that the subsequent involuntary transfer through Court by the execution of the decree in O. S. 40 of 1122 was effected. The rule of 'lis pendens' adopted in O. 21, R. 99 applies to such an involuntary transfer also. It follows, therefore, that the possession obtained by the petitioner in M. P. 2398 in the manner already stated could not be put forward as a shield against the claim of the decree-holder in O. S. 300 of 1101 for recovery of possession of the property and that the executing Court was only acting properly and legally in putting the decree-holder in possession of the property. The complaint under O. 21, R. 97 against each dispossession of the petitioner in M. P. 2398 is clearly unsustainable in view of the provision contained in O. 21, R. 99. The rulings in 'KANAKASABAI MUDALIAR v. RAJAGOPAL NAIDU', 42 I C 523 and in 'BEPIN CHANDRA v. HEM CHANDRA', AIR (26) 1939 Cal 70 are also in support of this view.

(5) In the result we uphold the objections urged against the sustainability of M. P. 2398 of 1123. Accordingly, this revision petition is allowed with costs and in reversal of the order of the lower Court, M. P. 2398 of 1123 is dismissed.

K.S. *Revision allowed.*

[C.N. 46.]

A. I. R. (39) 1952 Travancore-Cochin 104

KUNHI RAMAN C. J. AND SANKARAN J.

Snaku Vava Appellant v. Kavukutty Nambishtathiri, Respondent.

A. S. No. 469 of 1951, D/- 3-7-1951.

Travancore Holdings Stay of Execution Act (VIII of 1950) — Transfer of property with a provision for redemption after 12 years by discharging the amount paid — Transaction held mortgage and not lease — Mortgagor held not entitled to protection of Act — T. P. Act (1882), Ss. 58, 105. **(Para 2)**

Anno: T. P. Act, S. 105 N. 6; S. 58 N. 4.

N. Padmanabha Panicker, for Appellant ; K. N. Narayanan Nair, for Respondent.

KUNHI RAMAN, C. J.: The defendant is the appellant. The matter arises in execution of a decree directing the defendant to deliver possession of the subject-matter of this appeal to the plaintiff. It is contended on behalf of the appellant that he is entitled to protection under the Holdings Stay of Execution Act VIII of 1950.

(2) On behalf of the plaintiff respondent it is contended that the Act has no application to the present case because the transaction here was a mortgage or in any event a mortgage coupled with a lease. According to the provisions of Act VIII of 1950:

> "holding means immovable property held under a single transaction by which a leasehold right in the property is created and possession of the property is transferred by one person in favour of another."

Ex. I (a) is the document under which the relationship between the appellant and the respondent was created in the present case. The document was read out to us by the appellant's learned counsel. There is no doubt that it is a mortgage. There is provision made for redemption of the mortgage after the expiry of 12 years. If as is contended on behalf of the appellant the amount that was paid under the document can be regarded as premium payable under a transaction which is really a lease there will be no provision for repaying that amount. On the other hand, in the present case there is provision for redemption by discharging the amount paid by the appellant under the transaction evidenced by Ex. I(a). Taking the provisions of the document into consideration we are satisfied that the view taken by the Court below that the transaction is not a lease and that the appellant is not entitled to protection under Act VIII of 1950 is correct. The appeal must therefore be dismissed with costs.

(3) In the document Ex. I(a) there is provision made for the mortgagee to remove the superstructure put upon the property by him. This has not yet been done. The appellant's learned counsel wants two months' time to remove the superstructure. The respondent is willing that he may be permitted to remove it as accordinng to the document he is entitled to that right. The appel-

lant shall have two months' time for removing the superstructure according to the terms of the document by which the suit transaction was created.

R.G.D. *Appeal dismissed.*

[C.N. 47.]

A. I. R. (39) 1952 Travancore-Cochin 105

KOSHI AND GOVINDA PILLAI, JJ.

Anantha Raman Pillai Chidambaram Pillai, Appellant v. Arunachalam Panikker Saravana Panikker, Respondent.

A. S. No. 492/1124 (T), D/- 27-8-1951.

(a) *Registration Act (1908), S. 30 (2) — Sale-deed registered by Sub-Registrar at Head-quarters of District — Substantial portion of property not within District — Validity of registration — (Travancore Registration Act, S. 23.)*

Where only one of the six items of the properties sold was within the registration Sub-District of Trivandrum where it was registered by the Sub-Registrar and such item was a mango-tree:

'Held that in view of the circumstances that it was a Sub-Registrar at the Head-Quarters of a District who registered the document and that he could have validly done it, without regard to the situation of the property to which the document related to any part of Travancore, it could not be held that the registration was invalid. 'Case law discussed. (Para 10)

Anno: Reg. Act, S. 30, N. 4, Pts. 2 and 3.

(b) *Transfer of Property Act (1882), S. 53 (1) — Transfer with intent to delay or defraud creditors — Validity of, as between parties or persons claiming through them.*

Where a document is executed to defeat or delay creditors, as between the parties thereto, the document is valid and it must remain valid for all times. The executant cannot impugn it on the ground that he executed it to defeat or delay creditors. That bar is not one personal to the executant alone. It would extend to all those who claim the properties through him as also to persons claiming under such persons. (Para 22)

Anno: T. P. Act, S. 53, N. 8, Pt. 2, N. 9

(c) *Words and Phrases — 'Inam' — Meaning.*

The word 'inam' does not necessarily indicate an absolute grant. It has to be understood with reference to the context and the accompanying words. (Para 18)

(d) *Deed — Construction — Husband giving properties to wife to be enjoyed by her for life time — Reconveyance.*

A document stated that as the executant had taken a second wife, as he had no children by the first wife, the donee, and as the latter was always dutiful to him he thought it appropriate that he should make a grant or gift to her for her maintenance. The properties mentioned in the document were given to the donee by way of 'inam' to be enjoyed by her for her life-time without subjecting the same to any alienation. Some time later, the wife executed a reconvenyance of the properties in favour of her husband. It stated that the previous deed was only a maintenance grant but words to the effect that the husband should enjoy the property absolutely also occurred in it.

'Held' that the first document could not be construed as anything more than a maintenance grant in favour of the wife and by the latter document it was not intended that any right over the properties should inhere in the wife, thereafter. (Para 19)

(e) *Transfer of Property Act (1882), Ss. 91 and 92 — Volunteer paying of mortgage — Extinguishment of mortgage — Suit for redemption by true owner of equity of redemption.*

Where a person who has absolutely no title to the property mortgaged sells it, the purchaser's position is no more than that of an intruder between the mortgagee and the true owner of the equity of redemption and he will not be entitled to the equitable doctrine of subrogation by paying off the mortgage. The payment of the mortgage money cannot extinguish the mortgage. The true owner of the equity of redemption can bring a suit for recovery of possession without offering to pay any mortgage money to the purchaser. If, instead, he brings a suit for redemption without seeking to raise the question of the purchaser's 'bona fides' and offers to pay him off, it cannot be said that he has misconceived his remedy. AIR (18) 1931 Mad 110 and AIR (24) 1937 Mad 451, Rel. on. (Paras 19, 21 and 22)

Anno: T. P. Act, S. 9, N. 16 Pt. 1, N. 17 Pt. 1.

Advocate-General, T. N. Subramonia Iyer, for Appellant; T. S. Krishnamoorthi Iyer, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('74) 2 Ind App 7: (14 Beng L R 226 P C) (Pr 17)
('14) AIR (1) 1914 P C 67: (41 Ind App 110 PC) (Prs 6, 10)
('21) AIR (8) 1921 P C 8: (48 Ind App 127 PC) (Pr 6)
('34) AIR (21) 1934 P C 157: (61 Ind App 286 PC) (Pr 6)
('36) AIR (23) 1936 PC 91: (63 Ind App 169 PC) (Pr 6)
('48) AIR (35) 1948 PC 3: (1947 All L J 620 PC) (Pr 18)
('51) 64 Mad L W 547: (AIR (38) 1951 S C 139) (Pr 17)
('24) AIR (11) 1924 All 834: (78 Ind Cas 1026) (Pr 21)
('91) 18 Cal 556 (FB) (Pr 8)
('05) 3 Cal L J 165 (Pr 8)
('24) AIR (11) 1924 Cal 348: (70 Ind Cas 583) (Prs 8, 9)
('31) AIR (18) 1931 Cal 478: (58 Cal 133) (Prs 8, 9)
('37) 41 Cal W N 854 (Pr 9)
('46) AIR (33) 1946 Cal 465: (227 Ind Cas 449) (Pr 10)
('31) AIR (18) 1931 Mad 110: (130 Ind Cas 506) (Pr 19)
('36) AIR (23) 1936 Mad 308: (161 Ind Cas 999) (Pr 21)
('37) AIR (24) 1937 Mad 451: (172 Ind Cas 47) (Pr 21)
32 T L R 258 (Pr 6)

KOSHI, J.: This is an appeal against a decree for redemption of a usufructuary mortgage. On 29-1-1103, Lekshmanaperumal Pillai, who was the owner of the two items of immovable properties described in the plaint, usufructuarily mortgaged them to one Valampuri Chettiar for a consideration of 19,000/- Fs. Defendant 1 is the son and heir of the mortgagee. Ex. H is a copy of the usufructuary mortgage. Nine years afterwards on 15-12-1102, Lekshmanaperumal Pillai sold the mortgaged properties together with four others items to one Vaidyalingom Pillai Subramonia Pillai for Rs. 300/-. Ex. C is that sale-deed. Of the six items comprised therein five items including the two in the plaint belong to Agasteeswaram Taluq within the registration Sub-district of Nagercoil

and they were all outstanding in the possession of mortgagees. The sixth item was a mango tree standing on S. No. 511 of Vanchiyoor Pakuthy in Trivandrum Taluq.

Subramonia Pillai, the vendee under Ex. C, sold his right thereunder to Kalyanasundaram Pillai Balasubramonia Pillai as per Ex. D, dated 22-7-1117 for a consideration of Rs. 400/- and the latter in his turn sold the two plaint items to the plaintiff under Ex. E dated 5-10-1120. The consideration therefore was 28,000/- Fs. of which 19,000/- Fs. were reserved with the plaintiff to redeem the outstanding mortgage under Ex. H and the balance (9,000 fanams) was paid in cash before the Sub-Registrar when the document was registered. On the strength of the title so obtained the plaintiff brought the present suit for redemption. It was resisted by Defendant 2, but the trial Court gave the plaintiff a decree as prayed for in the plaint and Defendant 2 has hence brought this appeal.

(2) We must now proceed to state what claim Defendant 2 had put forward with respect to the plaint properties and also indicate what defences he had raised to the suit. Lekshmanaperumal Pillai died in 'Kumbhom 1116 without leaving any children. He had left behind two widows Valliammal and Annalekshmi Ammal. The latter died in 'Edavom' 1116 and the former as the sole surviving heir of Lekshmanaperumal Pillai executed a sale-deed in favour of Defendant 2 in respect of 9 items of properties that belonged to Lekshmanaperumal Pillai and the two plaint items were included in that sale-deed. This was on 11-4-1117 and the document evidencing the sale is Ex. xiii. It contains no reference to the sale Lekshmanaperumal Pillai had himself effected under Ex. C with respect to the two plaint properties and the other items comprised in that sale-deed. Practically all the items comprised in Ex. xiii were outstanding under mortgages created by Lekshmanaperumal Pillai himself, and sufficient funds were left with Defendant 2, the vendee thereunder, to redeem the mortgage over the plaint items in favour of Valampuri Chettiar.

Accordingly Defendant 2 brought a suit before the Nagercoil District Court against Defendant 1 in O. S. 4 of 1121 to redeem the said mortgage. The plaintiff's attempt to intervene in that suit was unsuccessful as Defendant 2 (the plaintiff there) resisted it and the Court directed the plaintiff to have his remedy, if any, worked out in a fresh suit. On the same day as that Order (Ex. 111) was passed viz., 2-7-1121, the Court also passed a decree in that suit permitting Defendant 2 to redeem the properties on payment of the mortgage money. The present suit was instituted three days afterwards on 5-7-1121 but Defendant 2 has since taken possession of the properties in execution of the redemption decree in his favour. According to Defendant 2 he has become the owner of the plaint properties and there is no subsisting mortgage over them. Ex. C, the sale-deed Lekshmanaperumal Pillai executed with respect to the plaint and other properties, is stigmatised by him (Defendant 2) as a mere sham or pocket instrument, or in any event, as a document executed with a view to delay or defraud creditors. Its validity was challenged by him also on the ground that it has not been registered in accordance with the Travancore Registration Act 11 (xi) of 1087 and was, therefore, invalid and inoperative.

(3) Regarding item 2 in the plaint Defendant 2 had raised a further contention. That contention was that Lekshmanaperumal Pillai himself had no alienable right over it when he executed Ex. C. Not long after he married his second wife, Lekshmanaperumal Pillai had made a gift of six items of properties to his first wife Valliammal and item in that gift-deed, Ex. A, dated 17-10-1089 ,is plaint item 2. Afterwards in 1093 Valliammal reconveyed plaint item 2 to Lekshmanaperumal Pillai, but according to Defendant 2 while under Ex. A an absolute estate was conferred on Valliammal the reconveyance under Ex. B (13-8-1093) was only of life estate in favour of the husband. Defendant 2 would therefore have it that in any view Lekshmanaperumal Pillai had no alienable interest in item 2 and that the limited interest created under Ex. B automatically ended with his death. Valliammal was according to him the absolute owner of plaint item 2 when Ex. xiii was executed by her in his favour. The plaintiff's case on the other hand is that Ex. A conveyed only a life estate to Valliammal and that whatever interest she got under it over item 2 in the plaint she conveyed that interest to her husband. Which of these rival contentions is true or acceptable, we will consider in its appropriate place.

(4) The various defences raised to the suit were all negatived by the learned trial Judge and he passed a decree in favour of the plaintiff permitting him to redeem Defendant 2 by paying him the mortgage money. In lieu of mesne profits claimed by the plaintiff he was allowed six per cent interest on the mortgage money from the date notice of the deposit thereof was given to Defendant 2. The learned Advocate-General who represented the appellant repeated in this Court all the contentions his client had raised before the trial Court and also objected that no interest should have been allowed to the plaintiff until after the date of the trial Court's decree. The plaintiff-respondent had preferred a memorandum of cross-objection claiming mesne profits in place of the interest awarded. The learned Advocate-General after stating the facts of the case started his arguments with an objection that the form of the action brought by the plaintiff was wrong in that the suit ought to have been a title suit for recovery of possession, and not one for redemption, of the mortgage. The argument was that the mortgage had got extinguished when his client paid off the mortgagee and that in view of that event the plaintiff could only ask for possession and not redemption of a non-existent mortgage. Though the point was placed before us in the nature of a preliminary objection to the maintainability of the suit, we think it more appropriate to deal with it at a later stage.

(5) We shall now proceed to discuss one by one the various points raised before us, but before doing so we shall first mention them. They are: (i) Whether Ex. C the sale-deed is invalid and inoperative by reason of any defect regarding its registration; (ii) Whether the said document was a mere sham or pocket instrument, or in any event, whether it was invalid as a document executed to delay or defeat creditors; (iii) Whether Lekshmanaperumal Pillai had no alienable interest in plaint item 2; (iv) Whether the suit for redemption is misconceived and whether the action should have been for recovery of possession on the strength of the plaintiff's title and (v) Whether redemption should be allowed in favour of the plaintiff and if so, on what terms.

(6) The first point raises an important question regarding the law of registration of documents relating to immoveable properties. Ex. C was registered at the office of the Sub-Registrar, Trivandrum. The first five items were admittedly not within that registration Sub-District. The sixth item as mentioned earlier was a mango tree on a Trivandrum property alleged to belong to Lekshmanaperumal Pillai. The appellant's case with regard to the registration of this document

is that a mango tree on a Trivandrum property was fraudulently inserted with a view to evade the provisions of the Registration Act, that the registration is hence invalid and the document inoperative. Section 20 of the Travancore Registration Act (a provision which corresponds to S. 28 of the Indian Registration Act) enacts as follows:

"Save as in this Part otherwise provided, every non-testamentary document relating to immovable property mentioned in Sections 10 and 11, shall be presented for registration in the office of a Sub-Registrar within whose Sub-district the whole or any portion of the property to which such instrument relates is situate."

Admittedly the sale-deed Ex. C was compulsorily registerable and the learned Advocate-General argued that its registration at the Office of the Sub-Registrar, Trivandrum, was invalid for two reasons. The first reason given was that a standing mango tree did not constitute immoveable property as that term is defined in, or understood by, the Registration Act and that its inclusion, therefore, assuming its existence to be real, did not confer jurisdiction on the Sub-Registrar at Trivandrum to register the sale-deed in question. Secondly, it was stated that granting for the sake of the argument that a standing mango tree was not moveable but immoveable property under the Registration Act, it was really "fictitious" property in the sense that expression is used in the Privy Council cases in 'HARENDRA LAL ROY v. HARIDASI DEBI', AIR (1) 1914 P C 67:41 Ind App 110; 'MATHURA PRASAD v. CHANDRA NARAYAN', AIR (8) 1921 PC 8: 48 Ind App 127; 'COLLECTOR OF GORAKHPUR v. RAM SUNDAR MAL', AIR (21) 1934 PC 157: 61 Ind App 286; and 'VENKATA RAMA RAO v. SOBHANADRI APPA RAO', AIR (23) 1936 P C 91:63 Ind App 169, bearing on the concerned point regarding registration. It was contended that Lekshmanaperumal Pillai had no right or title to the Trivandrum property mentioned in the document, that there was no such mango tree in existence and that in any view the parties never intended the mango tree mentioned to form one of the items of the transfer. Incidentally it was also mentioned that the view taken by the Travancore High Court in the Full Bench Decision in '32 TLR 258', required reconsideration in the light of the above-mentioned Privy Council decisions.

Mr. T. S. Krishnamurthi Iyer, the learned Counsel for the respondent, besides strenuously opposing these arguments made a new approach to the question by invoking the aid of S. 23 of the Travancore Registration Act (corresponding to S. 30 of the Registration Act in India) and contended that whether the sixth item, viz., the mango tree on the Trivandrum property is treated as included in the deed or not the registration was valid. If this contention be sound an enquiry as to whether the mango tree forms moveable or immoveable property or whether its inclusion was fraudulently made in order that it might do duty for a property situated in Trivandrum would seem to us to be a thoroughly irrelevant and purposeless enquiry. We shall therefore first direct our attention to consider how far the provision in S. 23 would lead us to hold that Ex. C is a validly registered document.

(7) Section 23 of the Travancore Registration Act is in these terms:

"The Sub-Registrar at the Head-quarters of a district may receive and register any document referred to in Section 20, without regard to the situation, in any part of Travancore of the property to which the document relates."

Its counterpart in the Indian Registration Act, viz., S. 30 runs as follows:

"(1) Any Registrar may in his discretion receive and register any document which might be registered by any Sub-Registrar subordinate to him.

(2) The Registrar of a district including a Presidency town may receive and register any document referred to in S. 29 without regard to the situation in any part of the State of the property to which the document relates."

Admittedly the Sub-Registrar at Trivandrum was Sub-Registrar at the Head-quarters of the registration district of Trivandrum and he was therefore competent to receive and register any document referred to in S. 20 without regard to the situation, in any part of Travancore, of the property to which the document relates. 'Prima facie' Ex. C has therefore to be held to be validly registered even ignoring altogether item 6 thereof as a property included in it. An argument was however raised before us that there was nothing to show that in registering Ex. C the Sub-Registrar of Trivandrum exercised the discretion vested in him under S. 23. On the other hand, it was pointed out that the Sub-Registrar registered the document because there was a Trivandrum property included in it and that hence no occasion arose for him to apply his mind to invoke the wider jurisdiction conferred on him under S. 23. In other words the argument was that Ex. C was registered under S. 20 and not under S. 23.

(8) The point raised by the learned Advocate General is one that has received consideration in reported decisions and we shall first refer to a decision of Sir George Rankin, C. J. (C. C. Ghose, J. concurring) reported in 'NILABJABARANI v. NANDARANI', AIR (18) 1931 Cal 478. In that case it was held that having regard to S. 87 of the Indian Registration Act (a provision corresponding to Section 81 of the Travancore Registration Act) the fact that the Registrar did not state that he was acting as Registrar pursuant to discretion under S. 30 did not make the registration invalid and ineffective.

(9) In view of the importance of the question and in view of the fact that Sir George Rankin's decision has since been accepted by the Calcutta High Court as an authoritative exposition of the law bearing on the point we think it appropriate to incorporate here the best part of the judgment in that case:

"In this case, the defendant appeals from a decree, whereby a certain 'kabala' has been set aside. It appears that the consideration and 'bona fides' of the document were attacked unsuccessfully before both the Courts below; but, in the end, the plaintiff succeeded in getting a decree, setting aside the 'kabala' on the ground that the registration thereof under the Registration Act has been invalid. It seems that, at Berhampore, there was a Sadar Sub-Registrar, whose office has been amalgamated with that of the office of the Registrar, and there is another Sub-Registrar at Berhampore, who is under the same Registrar, but in a different sub-district. There were 33 plots in this document and the first plot was in the jurisdiction of the Sadar Sub-Registrar, whose office was amalgamated with that of the Registrar of the district. Upon evidence it has been held that this plot has no real existence and the other plots, being really situated within the jurisdiction of the Sub-Registrar of Berhampore, that is to say, not the Sadar Sub-Registrar but the other one, and, it having been registered by the Sadar Sub-Registrar, the document is said to be invalidly registered and ineffective."

"As to that the question which arises has reference to the provisions of S. 30, Registration

Act, that any Registrar may, in his discretion, receive and register any document which might be registered by any Sub-Registrar subordinate to him, and it may be pointed out that, in this case, the Courts have come to the conclusion that, because the Sadar Sub-Registrar has not stated that he was acting as Registrar pursuant to a discretion under S. 30, the fact that he was entitled to act as Registrar does not make the registration valid."

"It appears to me that this contention is not really supported by authority. In the well-known case of 'BAIJ NATH v. SHEO SAHAY', 18 Cal 556 (F B) the main question was whether the property had been substantially misdescribed. Sir Comer Petheram, C. J., who took the view that the misdescription was not material, considered the question whether the registration by the officer, who was the Sub-Registrar and the Registrar, was not good in the circumstances. He pointed out that by S. 51 one set of books only should be kept when the two offices had been amalgamated and that the registering officer 'acts precisely in the same way if he registers a document in his discretion as Registrar as he would do if he registered it as Sub-Registrar.' Consequently, in the case before him the document was registered in an office and in a set of books which had been constituted and provided for registration of documents of this kind and, in those circumstances, the learned Chief Justice refused to hold the registration to be void. Again, in the case of 'JOGESWAR NARAIN SINGH v. RAI RADHA RAWN', 3 Cal L J 165 it was contended that the Sub-Registrar ought to have stated plainly in the registration endorsement that he registered the bond in the capacity of Registrar and reference was made to the case 'BAIJ NATH TEWARI' to which I have referred. The comment made is that there was no expression of opinion by the Full Bench to support the contention that the Sub-Registrar ought to have stated plainly that he was discharging one of the Registrar's functions. But, in that case, having regard to the fee charged, it was held that the Sub-Registrar was acting under S. 30."

"Upon the whole, it appears to me, in view of S. 87, Registration Act, that this instrument, which has been found to be an instrument for consideration, is not shown to be invalid. The Registration Act has to be strictly construed; but there is a point at which it is unnecessary to multiply technicalities. In my judgment, in this case, the registration may be held to be valid."

We may state here that we have not omitted to notice that a contrary view was expressed earlier by Mookerjee and Chotzner, JJ. in 'KEDAR NATH v. BIDHU BHUSHAN', AIR (11) 1924 Cal 348. There the facts were similar and the learned Judges preferred to follow the view Piggot and Ghose JJ., gave expression to in '18 Cal 556 F B than to the view Petheram C. J. took in that case and which Sir George Rankin followed in 'AIR (18) 1931 Cal 478. The decision now mentioned is not referred to in the latter case.

(9a) The decision in 'NILABJABARANI v. NANDARANI', AIR (18) 1931 Cal 478 was followed in two later cases and in view of the discordant note struck earlier in 'KEDAR NATH v. BIDHU BHUSHAN', AIR (11) 1924 Cal 348, we think it proper to refer to the two later cases also in some detail. The first of them is reported in 'PREMSUKH v. MANGAL CHAND', 41 Cal W N 854. The case was first decided on the Original side of the Calcutta High Court by Ameer Ali J. Issue 3 in the case was:

"Is the mortgage of 26th November, 1932, invalid for want of proper registration, on the ground that the inclusion of the Calcutta property was in fraud of the law of registration?"

The scope of the provisions in Ss. 28, 30 and 87 came up for consideration and having regard to the fact that the fee leviable for registration under S. 28 alone and not the higher fee due under S. 30 was paid it was contended for the defendant that the officer concerned had not invoked his wider powers. The learned Judge did not accept the contention and in repelling it observed,

"It is suggested that the procedure under Ss. 28 and 30 are different and that this document was registered under S. 28. There is however nothing to establish this and having regard to the fact that Calcutta property or no Calcutta property, the Registrar had jurisdiction to register the document, in my view the point in issue No. 3 must fail."

This view was affirmed on appeal by Costello and Panckridge, JJ. The former said:

"In my opinion, however, the facts of this case are of no importance whatever upon the pure question of registration, because I have come to the conclusion that the learned Judge was quite right in taking the view that whether there was Calcutta property or no Calcutta property comprised in the mortgage, the Registrar of Assurances of Calcutta, in registering the document, must be taken to have acted within the four corners of the authority conferred upon him by the provisions of S. 30 of the Registration Act, 1908. There is no necessity for us to endeavour to ascertain whether he acted under the powers conferred on him by subsec. (1) or under the powers conferred on him by sub-s. (2)."

The learned Judge then refers to the decision in 'AIR (18) 1931 Cal 478' and after quoting a large part of Sir George Rankin's judgment in that case wound up the discussion thus by referring to S. 87:

"Even if therefore, it was the case that the Registrar of Assurances, Calcutta, ought to have charged a large fee than he actually did nevertheless by the saving provisions of S. 87 of the Registration Act, the registration would still hold good. I am of opinion, therefore, that on the question of registration the decision arrived at by the learned Judge was right."

What the other learned Judge, Panckridge J., said on this point was:

"It is admitted, however, that on the face of it he had such power under S. 30, sub-s. (2). If he had the power to register, and did in fact register, there was to my mind effective registration, and it is quite immaterial under what particular provision of the statute he purported to act or thought he was acting."

In view of the decision the learned Judges arrived at as above it became unnecessary in that case to pursue the enquiry whether the Calcutta property included in the suit mortgage was really fictitious in the sense of Privy Council decisions.

(10) The next case to be referred to in this connection is the decision in 'CHANDI PROSAD v. HRISHIKESH SHAH', AIR (33) 1946 Cal 465. There again the document was registered at Calcutta while the bulk of the properties to which the document related lay outside the city of Calcutta. A Calcutta property was also included in it. The question arose whether the Calcutta property included in the document was real or fictitious and whether its inclusion was not to evade or defraud the provisions of the Registration Act.

The relevant Sections (Ss. 28, 30 and 87) of the Indian Registration Act were all considered and it was held that where the law permitted registration of a document in the intended jurisdiction independent of the inclusion of any item of property in it, it could not be said that the parties intended by such inclusion to commit a fraud on the law of registration. Biswas and Chakravarti JJ., who heard the case have referred in their judgments to all the Privy Council cases dealing with the question. It is highly instructive and also interesting to notice how the learned Judge repelled the appellant's argument that the case before them was governed by the Privy Council decisions. Biswas J. said:

"Mr. Sannyal has tried to invoke the authority of these decisions in support of his argument in the present case. The initial difficulty with which he is faced is that the foundation for a case of fraud on the law of registration is altogether wanting. In all the cases which were before the Judicial Committee, it was assumed or found that the document in question could not be registered in the particular district or sub-district where it had been actually registered except for the fact that some property was included in it which was supposed to lie within that district or sub-district, in other words, the basic assumption of these judgments was that a particular property was included in the document because the document could not otherwise be registered at a particular place. Where, however, the law permits the registration of a document in the intended jurisdiction, independent of the inclusion of any item of property in it, it is difficult to see how it can be said that the parties intended by such inclusion to commit a fraud on the law of registration.

"In the case before us, the mortgage deed comprised two properties which were situated in Bhowanipur, which was within the jurisdiction of the Alipore Sub-Registry. Item 3 of property was a Calcutta property. It is said that because of the inclusion of this item 3 of property in the mortgage deed it was possible to get it registered by the Registrar of Assurances in Calcutta. Section 30, Registration Act, however, shows that the Registrar of Presidency Town may receive and register any document referred to in S. 28, without regard to the situation in any part of British India of the property to which the document relates."

Chakravartti, J., dealt with the question more elaborately and the relevant portion of the judgment is as follows:

"I would go further and say that even if we were to suppose that the parties, while not intending that the property at Shyam Square Lane should form part of the security in a real sense, yet included it in the deed under the mistaken notion that no registration could otherwise be had in Calcutta, the position would not, in my view, be different. The intended fraud would not be a fraud in fact, for the law of registration is what is contained in the Registration Act and not what someone erroneously supposes it to be. What the Judicial Committee laid down is that if the parties by including in a deed an item of property with which they were not really dealing obtained its registration at a particular place where it could not otherwise have been registered, there is a fraud on the law of registration and "no registration obtained by means thereof can be valid". In the case I have assumed, registration would not be obtained by means of fraud, but it would be obtained lawfully, by reason of the fact that the registering officer happened to be the Registrar of Calcutta and the Registration Act happened to contain amongst its provisions S. 30(2). It is, however, not necessary to pursue this point further, because, as I have said, there is no evidence of fraud and I am unable to see why an unnecessary fraud should be inferred merely from the circumstance that the property is one of a somewhat inconsequential character.

But it was contended that the registration in the present case was not made under S. 30(2), but under S. 28, as would appear from the notes made on the deed of the fees levied. This argument, in my view, proceeds on a total misconception of the scope and effect of the two sections. Section 28 of the Act lays down the general rule that every document shall be presented for registration in the office of the Sub-Registrar within whose sub-district the whole or some portion of the portion to which such document relates is situated. Section 30 confers some special powers on District Registrars and Registrars of Presidency Towns who are empowered to register any document relating to property in British India, irrespective of where such property may be situated. The two sections do not provide for two different modes of registration and do not warrant the view that if an officer, especially empowered under S. 30(2), registers a deed comprising property no part of which is situated within his own registration district, such registration shall be valid only if the registration is impliedly or in substance under S. 30(2), and shall be invalid if the registration is under S. 28.

As far as I understand the Act, there is no such thing as registration under one section rather than under another. It is true that the Registration Manual provides for additional fees to be levied in cases where a District Registrar or the Registrar of a Presidency Town registers a document comprising property, no part of which is situated within his registration district. But that requirement has nothing whatever to do with his jurisdiction to register a deed and it cannot be supposed that when such an officer registers a deed on receipt of the lower fee, he somehow contracts into a Sub-Registrar and exceeds his authority if he exercises the larger powers. The authority conferred by S. 30(2) is absolute and in my view it is in no way affected by the Registrar charging the lower fee chargeable in cases where some part of the property is situate within his jurisdiction. The levying of a lower fee may be an irregularity and, if it is an irregularity, it may be curable under S. 87 of the Act. But it is a complete mistake to suppose that the matter has any bearing whatever on the jurisdiction of the Registrar to make the registration in such circumstances.

The matter may be looked at from another point of view to which I have already referred, although somewhat indirectly. The point which we are considering is whether the registration was valid. Under the law it is equally valid, whether the questioned property is treated as included in the deed or not. In such circumstances, any enquiry as to whether the property was an essential factor, going into the making of the transaction, or was introduced simply in order that it might do duty for a piece of property situated in Calcutta, seems to me to be an utterly irrelevant purposeless enquiry. Even without the addition of this particular property, the deed might be validly registered where it was.

But it was contended that such too was the position in 'HARENDRA LAL v. HARIDASI

DEBI', 41 Ind App 110 (P C) where also the deed was registered in Calcutta and yet the Judicial Committee held that since the only property shown as situated in Calcutta had no existence, the registration was void. With reference to that decision, it may be pointed out that the officer who registered the deed is referred to in the judgment as the Sub-Registrar and it is quite plain that their Lordships were not dealing with the position of a Registrar of a Presidency Town upon whom special powers have been conferred under S. 30(2) of the Act. It was pointed out to us that the deed was registered in the year 1895 and by a Notification dated 1892, the Local Government had amalgamated the offices of the Sub-Registrar of Calcutta and the Registrar. However that may be, it is perfectly clear that even if the Sub-Registrar of Calcutta was, at the relevant time, also the Registrar, that matter was not brought to the notice of their Lordships and they proceeded on the basis that the deed could not have been registered in Calcutta unless some property situated in Calcutta and forming a real part of the transaction was included in the deed. That decision, in my opinion, cannot be regarded as negativing a view which their Lordships never considered.

My conclusion, therefore, is that where, as here, the registration was by an officer vested with special powers under S. 30(2), the existence of some property within the registration district of that officer is immaterial and accordingly no intention to commit a fraud on the law or registration could be inferred from the mere fact that some property of an inconsequential character, or even not intended to form a real part of the security, was included in the deed. Nor can there be a fraud on the law of registration if such an item of property is deliberately included for, by such inclusion, jurisdiction is not conferred and the registration also, in my view, cannot be held to be void, because the document happens to comprise some property of such character."

In the case before us there is no evidence that the Trivandrum property was a non-existent one or that it did not belong to Lekshmanaperumal Pillai. No doubt the appellant averred in his written statement facts relevant to bring the registration of Ex. C within the mischief contemplated by the Privy Council decisions. No attempt was however made to prove those averments. Anyhow in view of the circumstance that it was a Sub-Registrar at the Head-quarters of a District who registered the document and that he could have validly done it, without regard to the situation of the property to which the document related to any part of Travancore, we cannot persuade overselves to hold that the registration was invalid. The special duties enjoined on a Sub-Registrar by S. 59 of the Travancore Registration Act (which do the duties of Ss. 64 and 65 of the Indian Registration Act) make sufficient safeguards for all matters of publicity which it is the object of registration to afford. In this view of the law we consider it unnecessary to deal with the question whether a mango tree would constitute moveable or immoveable property under the Registration Act and whether its inclusion in Ex. C was fraudulent and to evade the law of registration. The first point argued by the appellant's learned Counsel has therefore to be decided against the appellant and we so decide.

(11) Before proceeding to the next point it has to be mentioned that Ex. D, the sale deed Subramania Pillai executed in favour of Balasubramona Pillai, was also registered at the office of the Sub-Registrar, Trivandrum. The first five items in Ex. C which are all in Agasteeswaram Taluk are included in Ex. D as well and for the sixth item some other mango tree on a different survey number of Chengazhasseri Pakuthy of the Trivandrum Taluk is seen included in it. There is no allegation or proof that the said item of property in Ex. D is fictitious; however what we have said with respect to Ex. C applies equally to Ex. D and we cannot therefore find that there is any infirmity attaching to its registration either.

(12) The first part of the second point is whether Ex. C is a mere sham or pocket instrument.

(His Lordship discussed the evidence and held that Ex. C was not sham but valid and operative document. His Lordship proceeded:)

(13-15) Next we have to deal with the second part of point 2 which happens to be the second part of issue 3 as well.

(His Lordship after discussing the evidence held that Ex. C was not executed with a view to delay or defeat creditors. His Lordship proceeded:)

(16) There is also another aspect to this branch of the case. Assuming the document was executed to defeat or delay creditors, as between the parties thereto the document was valid and it must remain valid for all times. Lekshmanaperumal Pillai could not have impugned it on the ground that he executed it to defeat or delay creditors. That bar is not one personal to the executant alone. It would extend to all those who claimed the properties through him as also to persons claiming under such persons. In other words both Valliammal and her alienee, the present appellant were equally precluded from challenging the validity of Ex. C on the ground now under consideration.

(17) Having found that Ex. C to be a valid and operative document we have next to examine whether Lekshmanaperumal Pillai had on its date no alienable interest over item 2 in the plaint. This is the third point arising for decision in the appeal. We have mentioned that originally this property belonged to Lekshamanperumal Pillai, that he had executed a gift deed (Ex. A) with respect to it and other properties in favour of his first wife Valliammal and that she had subsequently reconveyed this item to the donor himself as per Ex. B. The question for our decision is what was the nature of the interest Lekshmanaperumal Pillai conveyed to Valliammal under Ex. A and what right or interest did the reconveyance confer on Lekshmanaperumal Pillai. The argument on this part of the case covered a very wide range and our attention was invited to cases beginning from 'MAHOMED SHAUMSOOL v. SHEWUKRAM', 2 Ind App 7 (P C) and ending with the recent pronouncement of the Supreme Court of India in 'RAM GOPAL v. NAND LAL', 64 Mad L W 547.

(18) To us the language of Ex. A appears to be plain and unambiguous and reading it as a whole we are unable to construe it as anything more than a maintenance grant in favour of the wife. There are no sufficient dispositive words in it to create an estate of inheritance. On the other hand it states that as the properties mentioned in it were given to the donee by way of 'inam' (gift) they shall be enjoyed by her for her life-time without subjecting the same to any alienation. The dispositive words and the limitation attached to the grant occur in one and same sentence. It is not a case where after creating an absolute estate of inheritance a repugnant clause is introduced. The sentence has to be taken as one and indivisible and a limited grant alone was intended to be con-

veyed thereunder. The word 'inam' does not necessarily indicate an absolute grant. It has to be understood with reference to the context and the accompanying words.

In the preamble to the document it is stated that as he has taken a second wife, as he had no children by the donee and as the latter was always dutiful to him he thinks it appropriate that he should make a grant or a gift to her for the purpose mentioned viz., her maintenance. It purports to make a provision for the wife's maintenance in consonance with what would be her rights under the general principles of Hindu law. Of the cases brought to our notice the language of this gift deed resembles the language of the gift in 'SURAYYA v. GANGADHARA', A I R (35) 1948 P C 3, where the son was making a provision for his widowed mother and the relevant extract from the gift deed occurring on page 6 of the report is more or less in the same terms as the relevant words of Ex. A in this case. It is however unnecessary to minutely scan the words of Ex. A as in our opinion the reconveyance under Ex. B has been of whatever interest Valliammal got under Ex. A. No doubt it states that Ex. A was only a maintenance grant but words to the effect that the husband should enjoy the property absolutely also occur in it.

We do not for a moment attach any importance as to the sense in which the parties are seen to have interpreted Ex. A in the deed of reconveyance but reading the latter document as a whole and giving the words employed there, their plain and ordinary meaning it is impossible to hold that it was intended that any right over this property should inhere in Valliammal thereafter. In fact that reading of Ex. B is in itself sufficient for the decision that when Ex. C was executed Lekshmanaperumal Pillai was the absolute owner of the property. Assuming the appellant's interpretation that Ex. A created an estate of inheritance the effect of Ex. B was to nullify it completely. Lekshmanaperumal Pillai was therefore the absolute owner of the two plaint items both when he created the mortgage sought to be redeemed here and when he transferred those two items together with other properties to Subramonia Pillai as per Ex. C.

(19) Now we come to the point whether the plaintiff's suit should have been for recovery of the properties on the basis of his title as owner. When Valliammal executed Ex. XIII in favour of the appellant she had absolutely no title to the properties Lekshmanaperumal Pillai had sold under Ex. C and she had hence nothing to convey to the appellant with respect to these properties. The appellant's position therefore is no more than that of an intruder between the motgagee and the true owner of the equity of redemption over the mortgaged properties. Decided cases go to the extent of saying that a person in the position of the appellant will not be entitled to the benefit of the equitable doctrine of subrogation. The Madras decision is 'PICHAIYAPPA v. GOVINDARAJA', AIR (18) 1931 Mad 110, & the discussion on page 565. of Mulla's Transfer of Property Act (3rd Edn. 1949), can with advantage be referred to in this connection. The Madras case is referred in Mulla's text book as an illustration of the proposition that if the purchase is invalid, the purchaser is a volunteer and there is no right of subrogation. The facts of the case as stated in Mulla's Commentaries would show that the present is a case on all fours with that case. This is how the facts of the Madras case are set out on page 565 of the said book:

> "A mortgages property to B in 1912 and then sells the equity of redemption to C in 1918. After A's death his widow in 1920 purports to sell the property to D who retains part of the consideration and pays off B's mortgage. D had acquired no interest in the property by his professed purchase from A's widow. His payment was that of a volunteer and he was not subrogated to the rights of the mortgagee."

In this view of the law the plaintiff could very well have brought a suit for recovery of possession without offering to pay any mortgage money to the appellant. That however is not the form of action chosen and we are only concerned with the question whether not having chosen that higher remedy the lesser relief asked for has to be denied to the plaintiff.

(20) It looked to us rather strange that the appellant should raise this argument. In a case where a person in his position redeems the mortgaged properties and continued in possession for a period of twelve years or more a plausable defence of adverse possession may be open to such a person and if it succeeds the plaintiff may have to be nonsuited. Where the redemption suit is however instituted even before the appellant took possession of the mortgaged properties pursuant to the decree in his favour, the argument cannot, as far as we can see, be of any avail. Whatever that be we have to examine how far a suit for redemption can be held to be not maintainable on the ground urged by the learned Advocate General that the redemption effected by the appellant had extinguished the mortgage altogether.

(21) On our reading of the facts of the case we have said that the appellant was a mere intruder between the mortgagee and the plaintiff, the true owner of the equity of redemption. It is only when there is a fusion of the interests of the mortgagee and the mortgagor in one and the same person that there can be an extinguishment of mortgage. When the appellant has derived no interest in the mortgaged properties in virtue of the sale by the widow the appellant's payment of the mortgage money cannot extinguish the mortgage. If his action in paying up the mortgage money was 'bona fide' he became at best subrogated to the position of the mortgagee. In this case, the plaintiff did not choose to set up a case that the appellant was not entitled to the right of subrogation, and by no stretch of imagination can it be held that the appellant's position is anything higher than that of a mortgagee as to entitle him to defeat the mortgagor's claim for redemption.

The principle referred to above as to extinguishment was recognised in a similar case reported in 'KELU v. CHEKKARA CHEPPAN', AIR (24) 1937 Mad 451. There a person took a release of a mortgage right assuming that he was the 'karnavan' of the 'tarwad which had granted the mortgage. Two bodies of persons claimed to be members of that 'tarwad' and there were rival 'karnavans' also. The release of the mortgage was taken by one of the rival claimants for karnavanship and afterwards when the other 'karnavan' brought a suit to redeem the mortgage against the mortgagee and the 'karnavan' who had taken the release, it was found that the plaintiff was the real 'karnavan' and that he was therefore entitled to a decree for redemption. In repelling the argument as to extinguishment of the mortgage by release taken by the rival 'karnavan' Beasley, C. J. and Horwill, J. who heard the case said:

> "When a person who is not a mortgagor, under a mistaken claim, pays off a mortgage debt, he cannot extinguish it; for he has no right to do so. The only person who can extinguish a mort-

gage is the person who is entitled to redeem that mortgage and merge the mortgage in his own rights of mortgagor or mortgagee. Whatever therefore might have been the intention of defendant 1, he did not in fact extinguish the mortgage and was entitled, if he paid off the mortgage in the 'bona fide' belief that he was entitled to do so, to subrogation of the mortgagee's rights."

A redemption was held to be admissible under the circumstances of that case and for our part we are unable to apply a different rule in this case where the plaintiff does not seek to raise the question of the appellant's 'bona fides' at all, but offers to pay him the money he had deposited in Court pursuant to the decree in his favour in O. S. 4 of 1121. The case in 'AIR (24) 1937 Mad 451' was an appeal from the decision of Wadsworth, J., reported in 'VEETIL KELU v. CHAKKARA CHAPPAN', AIR (23) 1936 Mad 308, and the appellate decision reversed the decision of Wadsworth, J. The learned Advocate-General invited our attention to the decision in 'BIJAI BHADUR v. PARMESHWARI RAM', AIR (11) 1924 All 834, which Wadsworth, J., followed. That case was also decided by a Single Judge and in view of the Division Bench ruling in 'AIR (24) 1937 Mad 451, we do not feel called upon to comment much on those decisions. Those decisions only say that a person who redeems a mortgage on the erroneous assumption of the powers of the mortgagor cannot be regarded as a transferee of the mortgagee. In these cases the question was one of adverse possession and as mentioned earlier there is no scope for that plea in the present suit. The present suit was brought even before the appellant took possession of the mortgaged properties.

(22) Apart from the fact that there is no extinguishment of the mortgage, it has also to be borne in mind that when the plaintiff sought to intervene in the prior litigation he was asked to seek his remedy in a fresh suit. That order happened to be passed on the opposition raised by the appellant. The plaintiff's object in seeking to intervene there was to ask for a redemption decree in his favour and to be told that an event which happened after he instituted this suit should debar him from obtaining that relief is something which we cannot accede to. Nor can the appellant be permitted to take inconsistent positions in the two suits. There is, therefore, no merit in the argument that the plaintiff misconceived his remedy in bringing the present suit for redemption.

(23) This brings us to the last point in the case. Our discussion so far has made it clear that in our opinion the lower Court's decision granting redemption in favour of the plaintiff has to be affirmed. The plaintiff has offered to pay the mortgage money and in fact paid that in Court. The dispute between the parties as to the terms of the redemption is only regarding the claim for mesne profits. The lower Court allowed the plaintiff to receive interest at 6 per cent in lieu of mesne profits. Interest is to run from the date the appellant had notice of the deposit of the mortgage money in Court. The Court has not however specified what that date is. Both sides have complained against the lower Court's decision on this part of the case. The plaintiff's complaint is that he should have been allowed mesne profits at the rate claimed by him while according to the appellant even interest should not have been allowed until after the lower Court passed its decree.

(24) The suit was instituted on 5-7-1121 and the plaintiff applied for a challan to deposit the mortgage money along with the filing of the plaint. The deposit was also soon made. That was followed by an application for the appointment of a receiver (15-7-1121) and on notices being given to the appellant about the deposit as also of the application for the appointment of a receiver the latter notice was accepted while the former was returned as refused (30-7-1121.) The lower Court rejected the application for the appointment of a receiver but on appeal the High Court appointed the Official Receiver of Nagercoil as 'interim' Receiver and that officer, who forthwith took possession of the mortgaged properties, continued in possession thereof till 16-6-1122 when pursuant to the order dismissing the plaintiff's civil miscellaneous appeal the appellant took possession of them through Court.

We cannot agree with the learned Advocate-General's argument that there was no proper tender of the mortgage money to the appellant. He was aware of it at least when the receiver petition was heard and disposed of by the trial Court, if not earlier when he is said to have refused to accept the notice issued to him from the Court regarding the deposit. The appellant could be paid the mortgage money only if he had paid it to the mortgagee and we cannot therefore find anything wrong in the plaintiff stating in his plaint that as between the mortgagee and the present appellant the mortgage money he paid into the Court should be disbursed to the party rightly entitled to it. As mentioned the appellant obtained delivery of the properties on 16-6-1122 after being fully aware that he was at liberty to draw the mortgage money from Court in case he was so minded. We cannot therefore find any justification to refuse to grant mesne profits to the plaintiff from that date, viz., 16-6-1122.

(25) As for the period anterior to it our decision is that the plaintiff is not entitled to get anything more than what the receiver had realised by way of rent. The trial Court dismissed the application for the appointment of a receiver on 16-8-1121 and the High Court's 'interim' order was on 20-8-1121. The receiver took possession of the properties immediately afterwards and remained in possession till 16-6-1122. Whatever money the receiver had collected or was bound to collect will go to the plaintiff. If the lower Court has already disbursed it to the appellant it will be recalled or an amount sufficient to cover it will be deducted from the mortgage money in Court deposit. If the receiver has yet not paid into the Court all the amounts due by or from him the plaintiff will take appropriate steps to bring all such amounts to Court for payment out to him.

(26) Next we have to deal with the rate of mesne profits. On the pleadings in the case there is no scope for any argument on this question. The plaintiff stated in paragraph 15 of the plaint that the properties would fetch annually profits to the tune of 25 'kottas' of paddy and the present appellant in paragraph 25 of his written statement admitted in clear terms that the plaintiff's estimate of the profits was correct. At the Bar this admission was really overlooked. The attempt the Advocate-General made was to reduce the rate of the profits to 16 3/4th 'kottas' per year as held in O. S. 4 of 1121. There the present appellant as plaintiff had claimed 25 'kottas' annually against which the defendant (the mortgagee) stated that the annual profits would not exceed 16 3/4th 'kottas.' There was no evidence in the case as to what profits the properties would yield and the Court rested its decision on the defendant's admission. The position is different here. Besides, it is also seen that the Official Receiver had leased out these properties for an annual rent of 25 'kottas' of

paddy. In these circumstances we cannot find any justification to reduce the plaintiff's claim for mesne profits at the rate of 25 'kottas' of paddy a year and we hold that from 16-6-1122 until the plaintiff gets possession of the mortgaged properties he will be entitled to mesne profits at that rate. Price of paddy will be according to the controlled rates in force in each of the relevant years. For the period anterior to 16-6-1122 provision has been made in the preceding paragraph.

(27) The Memorandum of Objection preferred by the plaintiff will stand disposed of as indicated above.

(28) Subject to the modifications mentioned above we affirm the lower Court's decision and dismiss the appeal with costs. There will be no order for costs on the Memorandum of Cross-objection.

V.R.B. *Appeal dismissed.*

[C. N. 48.]

A. I. R. (39) 1952 Travancore-Cochin 113

(FULL BENCH)

KOSHI, GOVINDA PILLAI AND JOSEPH VITHAYATHIL, JJ.

Ukkan Chakku Thomas, Petitioner v. Thomokutty and others, Counter-Petitioners.

Criminal M. P. No. 149 of 1125, D/- 18-10-1951.

Contempt of Courts Act (1926), S. 2(3)—Other remedy open.

In a case where the party really aggrieved has an alternative remedy there is no sufficient justification for three Judges of the High Court devoting their time and labour in an enquiry to establish the necessary facts to warrant the committal of the respondents for contempt, especially when the Magistrate concerned or his immediate superior, the District Magistrate has not chosen to move the High Court. Whether there is another remedy available is a matter for the Court to consider when exercising its discretion whether to commit, or not, a person for contempt of Court. In cases where an alternative remedy is open it is with a view to award prompt punishment that proceedings for contempt are initiated:

Where the petitioner's complaint was that notwithstanding the prohibitory order under S. 144, Criminal P. C., the respondents actually held a meeting to which the members of the opposite faction were excluded with the active support of responsible police officers:

'Held' that the Magistrate concerned could have prosecuted the offenders under S. 188, Penal Code; that the purpose behind the petition was more to obtain a pronouncement of the High Court about the validity or otherwise of the meeting alleged to have been held in violation of the Magistrate's order than to uphold the dignity and prestige of the Court; and that this was not a 'bona fide' motion but one calculated to harass the respondents. AIR (32) 1945 P C 147, Rel. on. (Paras 3, 7)

Anno: C. C. Act, S. 2, N. 2, 6.

G. V. Ramanan, for Petitioner; T. S. Venkiteswara Iyer and C. S. Anantha Krishna Iyer, for Counter-Petitioners; T. R. Balakrishna Iyer, for Public Prosecutor, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('45) AIR (32) 1945 PC 147: (47 CriL J 61) (Pr 4)

('50) AIR (37) 1950 All 556: (52 Cri L J 1062 FB) (Pr 6)

('32) AIR (19) 1932 Cal 705: (33 Cri L J 945) (Pr 6)

('51) 52 Cri L J 1030: (AIR (38) 1951 Cal 489) (Pr 6)

('43) AIR (30) 1943 Nag 334: (45 Cri L J 407) (Pr 6)

('33) AIR (20) 1933 Pat 142: (34 Cri L J 770) (Pr 6)

('33) AIR (20) 1933 Pat 204: (12 Pat 172) (Pr 6)

KOSHI, J.: This is an application under Section 3 (1) of the Cochin Contempt of Courts Act, XXXII of 1111, invoking this Court's jurisdiction to commit the twenty-nine respondents herein for Contempt of the Court of the Second Class Magistrate, Trichur, on the ground that they held a meeting of the parishioners of the Trichur Chaldean Syrian Church in violation of an order passed by the said Court under Section 125 of the Cochin Criminal Procedure Code (Section 144 of the Indian Code) prohibiting any such meeting. The petition and the affidavit filed in support thereof show that during recent years there started serious dissensions among the parishioners of the said Church and that they are now divided into two hostile camps. The petitioner belongs to one faction while most, if not all the respondents belong to the opposite faction. When the respondents wanted to call together a meeting to decide certain questions affecting the church and issued the necessary notices in that behalf seven priests who apparently belong to the opposite faction petitioned the Second Class Magistrate, Trichur to prohibit the holding of the meeting and also wanted him that unless that was done there will be serious breach of the peace.

The Magistrate after calling for a report from the police issued an order under Section 125, Criminal Procedure Code, prohibiting the convening of the meeting. It is alleged that notice of that order was given to some of the parishioners and that a copy of the notice was affixed in a conspicuous place in the Church premises. The petitioner's complaint is that notwithstanding the prohibitory order, the respondents actually held a meeting to which the members of the opposite faction were excluded, it is alleged, with the active support of responsible police officers, stationed at Trichur. The Magistrate's order prohibiting the meeting was passed on 5-1-1125 and the meeting itself was to be held on the same day. This petition was filed on 16-3-1125 when more than two months had elapsed after the incident complained of.

(2) One of us before whom the petition first came up for hearing referred the matter to a Division Bench after obtaining a report from the Magistrate regarding the incident. The Division Bench before whom the petition was first posted directed notices to be issued on the petition to the respondents and to the State. After the respondents and the State entered appearance the petition came up for hearing before another Division Bench when the Public Prosecutor and Counsel for respondents raised a preliminary objection that under Section 3 (3) of the Cochin Contempt of Courts Act the matter had to be heard by a Division Court of three Judges. The petitioner's Counsel contended that the provision contained was impliedly repealed by Section 21 (vii) of the Travancore-Cochin High Court Act, V of 1125 and that under that provision it was competent for a Division Court of two Judges to hear the petition. As the point appeared to be important the petition was referred to a Full Bench for decision, and direction as to whether a Bench of three Judges

or a Bench of two Judges should hear the matter. In due course this Bench was constituted and when the petition came up for hearing before us there was a change in the personnel of Counsel appearing for the petitioner and Mr. Ramanan who now appears for the petitioner withdrew the argument that it was within the competence of a Division Court of two Judges to hear and dispose of the matter. All the Counsel appearing in the case now agree that a Bench of three Judges alone has competence to deal with the petition. In these circumstances we then and there intimated Counsel that we did not propose to decide the question of the implied repeal of Section 3 (3) of Contempt of Courts Act on this occasion but that we shall deal with the petition itself.

(3) At that stage, Mr. Ramanan wanted the petition to be posted for evidence to prove that all the 29 respondents openly defied the Magistrate's order and thereby brought themselves within the mischief of the Cochin Contempt of Courts Act. Regard being had to all the circumstances and the contents of the records called for from the Magistrate's Court we feel far from satisfied that we should further enquire into this matter. In a case where the party really aggrieved had an alternative remedy we cannot find sufficient justification for three Judges of this Court devoting their time and labour in an enquiry to establish the necessary facts to warrant the committal of the respondents for contempt, especially when the Magistrate concerned or his immediate superior, the District Magistrate has not chosen to move this Court. Before we proceed to set out further reasons why we have decided to exercise our discretion that way we must advert to a preliminary point.

(4) The Cochin Contempt of Courts Act is for all practical purposes the same as the Contempt of Courts Act, XII of 1926, passed by the Indian Legislature. Sub-section 2 of Section 2 of the Cochin Act corresponding to Sub-section 3 of Section 2 of its Indian counter-part enacts that the High Court shall not take cognizance of a Contempt of Court alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence under the Cochin Penal Code, Act I of 1059. Admittedly the act complained of in the present petition amounts to an offence under Section 174 of the Cochin Penal Code, a section corresponding to S. 188 of the Indian Penal Code.

The High Courts of Allahabad, Calcutta, Lahore, Patna and Nagpur have interpreted Sub-section (3) of Section 2 of the Contempt of Courts Act to mean that where under the Penal Code there is already a provision for punishing a contempt of Court as a contempt of Court the Contempt of Courts Act shall have no application. These High Courts say that the provision does not mean that when the act which has constituted the contempt of Court also constitutes an offence under the Penal Code, it may not be punished under the Contempt of Courts Act. In other words according to the High Courts above-mentioned the prohibition has reference only to cases where the Penal Code empowers the Court to punish for contempt as contempt. In the case reported in 'ALI MAHOMMED ADAMALLI v. EMPEROR', AIR (32) 1945 P C 147, the Privy Council left the question as an open one.

(5) Though attention of Counsel appearing in the case was invited to this aspect and it was even suggested that the provision referred to might serve as a bar to this Court taking cognizance of the alleged contempt nobody appeared to be inclined to take the hint. The petitioner's Counsel, no doubt, contended there was no bar. Even according to the limited meaning the High Courts mentioned above give to the provision quoted, this Court will have no jurisdiction to entertain this application if it is found that there exists in the Penal Code provision to punish the disobedience complained of as a Contempt of Court. The heading of Chapter X (Chapter IX in Cochin) of the Indian Penal Code where Section 188 (Section 174 in Cochin) occurs is "of Contempts of the Lawful Authority of Public Servants" and when the contempt here is the disobedience of the order of a Public servant functioning as a Court we fail to see how it could be held that there is no provision in the Penal Code to punish such contempt as contempt of Court. Contempts of the lawful authority of Courts of Justice, of officers of Revenue, of officers of police, and of other public servants are punishable under the said chapter.

(6) The decisions giving a limited meaning to Sub-section 3 of Section 2 of the Contempt of Courts Act in India are all referred to in a recent Full Bench decision of the Allahabad High Court reported in 'STATE v. BRAHMA PRAKASH', AIR (37) 1950 All 556, and except in one of the cases mentioned there 'JNANENDRA PRASAD v. GOPAL PRASAD', AIR (20) 1933 Pat 204, the view taken is what is set forth above. In fact in one of the cases referred to by the Allahabad Full Bench a Division Bench of the Calcutta High Court, 'DHARANIDHAR SINGHA v. SATISH CHANDRA', AIR (19) 1932 Cal 705, while stating that the argument that Sub-section 3 of section 2 prohibits cognizance being taken of any offence punishable under the Indian Penal Code is too wide, expressly stated that there was considerable force in the counter-argument that it is only contempts punishable as such under Chapter X of the Code (e.g., an offence punishable under Section 173, I.P.C.,) that are excluded from the purview of the Act.

No doubt the latter observation was made as 'obiter' but a recent Division Bench of the same High Court cited the above observation with approval and followed it. See 'NARESH KUMAR v. UMRAOMAL', 52 Cri L J 1030 (Cal.) In the Patna decision mentioned above AIR (20) 1933 Pat 204, the point was raised when the delivery of the judgment had almost concluded and the judgment discusses the point after entering conviction and pronouncing the sentence. The order regarding costs was also made before this discussion started. With respect we doubt whether it is only contempt of the Court of the character set forth in Sec. 228, I. P. C., that would come within the ambit of the prohibition. In another case reported in the same volume 'KAULASHIA v. EMPEROR', AIR (20) 1933 Pat 142, the same learned Judge had explained the prohibition in the sense the recent Full Bench decision of the Allahabad High Court and the decisions referred to there interpret it. If an offence of the character mentioned in Section 228 of the Penal Code alone was sought to be exempted nothing was easier for the Legislature than to so state it instead of employing such general terms as those that we find in the provision.

In a decision of the Nagpur High Court, Bose, J., (now of the Supreme Court of India) pointed out that the prohibition in Section 2 (3), Contempt of Courts Act, 1926 is not confined solely to the offence described in Section 228, Penal Code. In that case the act complained of constituted an offence under Section 186 of the Penal Code. See 'KISAN KRISHNAJI v. NAGPUR CONFERENCE OF SOCIETY', AIR (30) 1943 Nag 334. However as

Counsel have not chosen to urge this preliminary point and as there was no serious argument at the Bar about it we do not propose to rest our decision on the petition on the preliminary point or even decide it. As the point is important we thought it proper to mention it.

(7) It is settled on authorities that whether there is another remedy available is a matter for the Court to consider when exercising its discretion whether to commit, or not, a person for contempt of Court. This is recognised in the Privy Council decision referred to earlier and in even so many English cases which are all referred to on pp. 76 to 88 in the law of Contempt of Court and of Legislature, by Tek Chand (2nd Edn. 1949). Whether Sub-section 2 to Section 2 of the Cochin Contempt of Courts Act prohibits this Court from entertaining this application or not, that the Magistrate concerned could have prosecuted the offenders under Section 174 of the Cochin Penal Code admits of no doubt. He had brought this matter to the notice of the District Magistrate and for ought we know the latter officer did not think that any action was called for. Neither of them thought it necessary to move this Court under the Contempt of Courts Act. The petitioner belongs to one of the rival factions in the Church and it is the members of the opposite faction that are sought to be proceeded against here.

The petition, particularly paragraphs 5 and 6, show that the purpose behind the petition is more to obtain a pronouncement of this Court about the validity or otherwise of the meeting alleged to have been held in violation of the Magistrate's order than to uphold the dignity and prestige of the Court. As many as twenty-nine persons are made respondents to the application and an enquiry as to whether all these persons had knowledge of the prohibitory order must certainly entail much time, labour and money. The petition and the affidavit accompanying it show that responsible police officers had actively assisted the respondents to hold the meeting. There is no explanation why no action is sought to be taken against these officers. It is, therefore, clear that this is not a 'bona fide' motion but one calculated to harass the respondents. More than two years have expired after the incident took place and in cases where an alternative remedy is open it is with a view to award prompt punishment that proceedings for contempt are initiated. To borrow the language James, L. J., used on a similar occasion to further proceed with the enquiry would itself be contempt of Court as it would tend to waste public time.

(8) In the circumstances we think that the appropriate course for us is to discharge the notice and to dismiss this application without costs. We order accordingly.

D.H.

Application dismissed.

[C. N. 49.]

A. I. R. (39) 1952 Travancore-Cochin 115

KOSHI AND GOVINDA PILLAI, JJ.

Ouseph Thomas, Appellant v. Anna and others, Respondents.

Second Appeal No. 164 of 1123 (Tr.), D/- 15-6-1951.

Civil P. C. (1908), O. 21, R. 16 — Assignee-decree-holder benamidar for one of judgment-debtors — Whether can execute decree — (Travancore Civil P. C., O. 21, R. 14)

The decree was assigned to a person who was none other than the son-in-law of one of the judgment-debtors whose benamidar he was. The decree was purchased by assignee in his own name for the judgment-debtor's benefit and with the latter's money. The execution of the decree by the assignee-decree-holder was resisted by another judgment-debtor.

'Held that though O. XXI, R. 16, Civil P. C. (Travancore, R. 14) did not in terms apply to this case, on general principles there was nothing preventing one judgment-debtor from showing that the purchaser of the decree was a benamidar for another judgment-debtor. Order XXI R. 2 was no bar to prove such a case. The principle underlying was that one person could not combine in himself the character of the debtor and the creditor as well. To permit the assignee-decree-holder to execute the decree would only lead to multiplicity of litigation which it was always the policy of the Courts to prevent. (Para 2)

Anno: Civil P. C., O. 21, R. 16 N. 16.

P. Narayana Pillai, for Appellant; Manuel T. Paikeday, for Respondent No. 4.

Case referred to:

('47) 1947 TLR 603 (Pr 2)

JUDGMENT: This Second Appeal is by the assignee-decree-holder. The decree is one passed on foot of two hypothecation bonds executed by defendant 1 in favour of the plaintiff and it gave the plaintiff relief against the hypotheca as also personally against defendant 1. Defendants 2 to 5 are subsequent encumbrancers or purchasers. Three items are comprised in the bonds and in the decree. Defendant 4 who contested the assignee-decree-holder's right to execute the decree is the purchaser of items 1 & 2 after they were hypothecated to the plaintiff. The two lower Courts found that the assignee-decree-holder who is none other than a son-in-law of defendant 1 is a benamidar for him, the decree having been purchased in his name for defendant 1's benefit and with the latter's money. Execution was therefore disallowed and the assignee-decree-holder has preferred this second appeal.

(2) Before us the appellant's Counsel contended that even on the finding the appellant is a benamidar for defendant 1 he was not precluded from executing the decree against the hypotheca and that the decisions of the lower Courts to the contra are wrong. Reliance was placed in support of this argument on the decision reported in '1947 TLR 603'. That however is a converse case where the decree was acquired by the subsequent encumbrancer whom the decree had not personally made liable for the debt. There was therefore nothing illegal or inequitable in permitting execution in his favour. Here the appellate Court finds that defendant 1 effected a transfer of items 1 and 2 of the decree to defendant 4, soon after the execution of the second hypothecation bond in favour of the plaintiff without disclosing the encumbrances thereon under the two bonds & received as consideration for the sale full value of the properties. Ex. J in this proceeding is that sale deed. Mr. P. Narayana Pillai's argument that O. XXI, R. 16, Civil P. C. (Travancore R. 14) will not in terms apply to this case may for more reasons than one be sound. However on general principles or on the authority of decided cases there is nothing preventing one judgment-debtor from showing that the purchaser of a decree is a benamidar for another judgment-debtor. In fact decided cases expressly say that it is permissible and that O. XXI R. 2 is no bar to prove such a case. The principle underlying those cases would seem to be that one person cannot combine in himself the character of the debtor and the creditor as well. In this case to permit the appellant to execute the decree would only lead to multiplicity of litigation which it is always the

policy of the Courts to prevent. In this view of the matter it is unnecessary to attempt to reconcile the different views as to the true construction of O. XXI, R. 16 or how far that rule applies to this case.

(3) For the foregoing reasons no interference is, in our opinion, called for with the concurrent decisions of the two Courts below and we would accordingly dismiss the second appeal with costs.

R.G.D. *Appeal dismissed.*

[C. N. 50.]

A. I. R. (39) 1952 Travancore-Cochin 116

KOSHI AND SUBRAMANIA IYER. JJ.

Commissioner, Corporation of Trivandrum, Assessor v. Kamalasanan, Assessee.

Miscellaneous Ref. No. 1 of 1951, D/- 7-9-1951

† *Municipalities — Trivandrum City Municipal Act (4 of 1116), S. 3, Cl. 34 and Sch. II, Cl. XIV (I) — Dearness allowance is not liable to profession tax.*

Dearness allowance is not liable for assessment of Profession Tax under Act IV of 1116. (Para 5)

Dearness allowance was not contemplated at the time the Act was passed as it did not then exist, whereas other allowances were. It is not therefore safe or proper to interpret the word "pay" contained in the definition of "salary" in S. 3 Cl. (34) as to take in dearness allowance which was not in contemplation at the time. The interpretation of the law should be according to what it was meant to connote at the time it was made. (Para 4)

N. K. Narayana Pillai, for Assessor; M. Prabhakaran, for Assessee.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('92) 16 Bom 283 (FB) (Pr 3)
(1928) A C 143: (97 L J K B 342) (Pr 3)
(1929) A C 142: (98 L J P C 20) (Pr 3)
4 A T C 513 (Pr 3)
(1869) L R 4 H L 100: (38 L J E X 205) (Pr 3)
(1881-83) 1 Tax Cas 485 (Pr 3)

SUBRAMANIA IYER, J.: This is a reference made by the District Judge of Trivandrum, under Section 26 of the Trivandrum City Municipal Act, IV of 1116 (Travancore). The only question that is referred for the decision of the High Court is "whether Dearness Allowance is liable for assessment of Profession Tax" under the said Act. Profession Tax was levied by the Corporation under Class XIV (1), Schedule II of the said Act which provides:

	Maximum Rs.	Minimum Rs.
"(I) All persons holding any appointment upon a monthly salary which amounts to fifty or upwards but is less than one hundred rupees . . .	2	1."

If dearness allowance be not included, the assessee would be free from profession tax as his salary is only Rs. 45/- per mensem. The decision of the question depends upon the proper interpretation of the definition of the word "salary" which is given in Section 3, Clause (34) which reads thus:

"(34) "Salary" means pay and acting pay, or payment by way of commission and includes exchange compensation allowances, but not allowances for house-rent, carriage hire, or travelling expenses."

(2) It is clear from a perusal of the above definition that allowances came in for the consideration of the legislature and certain specified allowances were brought within the meaning of the term "salary" while certain others were expressly excluded. The dearness allowance in question was one that did not exist at the time of the Act, but was granted subsequent thereto on account of "the rise in the prices of articles of food stuffs and other necessaries of life." It is thus clear that the dearness allowance has not been, as it could not have been contemplated and expressly brought within the meaning of the term "salary."

(3) Learned Counsel for the corporation contended that the meaning given in the dictionary for the word "pay" is "whatever is paid as remuneration for services" and that dearness allowance being paid as remuneration for services, it comes within the meaning of the word "pay" contained in the above definition of "salary." He also contended that dearness allowance would be income liable to tax under the Income-tax Act. The following principles of interpretation which are well-known will furnish the answer to the question. In 'COMMR of INLAND REVENUE v. RYDE PER CO.', 4 ATC 513, Rowlatt, J. said:

"I agree that this case was not contemplated, but when one gets cases under the taxing law which cannot be contemplated, it does not do to make assumptions as to what they would have said had they contemplated the case."

"If a special definition of a word is given in the Act, it should be adopted if not repugnant to the context." 'QUEEN EMPRESS v. GOVIND', 16 Bom 283 (F B).

"The words of a statute should be understood in the sense they bore when the statute was passed." YORKSHIRE ETC. CO. v. CLAYTON', 1881-83) 1 Tax Cas 485.

"It is unsafe to refer to the definition clauses in other statutes": 'ADAMSON v. MELBORNE & METROPOLITAN BOARD OF WORKS', (1929) A C 142. "The crown does not tax by analogy but by statute. It is not for us to say, nor do we know what the legislature may or may not have meant apart from their words by which we are bound alike as to what they say and in what they do not. Words which impose a tax in general may receive a particular limitation, based upon the other portions of the Act or of a definition." Per Lord Sumner in 'ORMOND INVESTMENT CO. LTD. v. BETTS', (1928) A C 143, at p. 158.

"The argument that the subject falls within the spirit of the law if not within the words of the statute, cannot be accepted." (See 'PARTINGTON v. ATTORNEY GENERAL', (1869) L R 4 H L 100).

(4) Assuming dearness allowance would be taxable income within the provisions of the Income-tax Act which we are not called upon to decide in this case, that circumstance cannot be regarded as relevant in understanding the definition of the word "salary" in S. 3(34) of Act IV of 1116 (Travancore). Applying the above principles to the present case, it is clear that dearness allowance was not contemplated at the time the Act was passed as it did not then exist, whereas other allowances were. It is not therefore safe or proper to interpret the word "pay" contained in the definition of "salary" so as to take in dearness allowance which was not in contemplation at the time. The interpretation of the law should be according to what it was meant to connote at the time it was made. We consider the matter clear, and does not need any further discussion.

(5) We answer the question under reference in the negative and hold that dearness allowance is not liable for assessment of Profession Tax under Act IV of 1116.

(6) If the Legislature deems fit to make dearness allowance part of the salary for purposes of liability for Profession Tax, it is up to it to make appropriate amendments in the Act in that behalf.

(7) KOSHI, J.: I agree.

V.B.B. *Answer in the negative.*

[C. N. 51.]

A. I. R. (39) 1952 Travancore-Cochin 117

(FULL BENCH)

KUNHI RAMAN, C. J., GOVINDA PILLAI AND SUBRAMANIA IYER, JJ.

A. V. Thomas and Co., Ltd. Appellant v. M. P. Fernandez, Respondent.

A. S. No. 333 of 1121 (T), D/- 21-3-1951.

Evidence Act (1872), S. 92, Proviso (2) — Written contract — Contract to supply entire output of certain quality of produce in tea estate subject to certain reservation — Contract silent as to quantity to be supplied every month — Oral agreement as to — Admissibility.

All the terms and conditions of the contract agreed upon between the plaintiff and the defendant were reduced into writing. The plaintiff was a dealer in tea and the defendant was a company having charge of a tea estate. Clause (1) of the contract was to the effect that the whole produce of the estate coming under the category of Pasuppara A dust for 12 months should be supplied by the defendant to the plaintiff. Clause (ix) of the contract reserved liberty to the defendant to turn over a portion of the tea produced in the estate into leaf grades as and when they deemed it necessary in the interests of the company. The extent of the tea produced which could be thus turned over into leaf grades was not fixed and was left entirely to the discretion of the defendant. The plaintiff brought a suit against the defendant for damages for breach of contract alleging that under the contract the defendant was bound to supply a minimum of 20,000 pounds of tea dust every month, that these terms the defendant did not carry out, that there was deficiency to the extent of 1,17,000 pounds and that there was a loss of profit in respect of the quantity which was short-supplied. The written contract was silent as to the quantity to be supplied every month. The plaintiff relied upon the alleged oral agreement guaranteeing a minimum supply of 20,000 lbs. per month to the plaintiff. The question was whether oral agreement was admissible:

'Held' that Clause (1) of the contract providing for the sale of the entire output of Pasupara 'A' dust produced in the estate for 12 months had reference to whatever was produced as a dust, subject to the exercise of the discretion given to the defendant to make any portion of the tea produced into leaf grades. A fixation of the quantity of Pasupara 'A' dust to be supplied to the plaintiff would, therefore, be inconsistent with the express liberty given to the defendant under Clause (ix). Hence, the oral agreement was inadmissible in evidence. (Para 11)

Anno: Evidence Act, S. 92, N. 25.

N. Varadaraja Iyengar, for Appellant; T. K. Joseph, for Respondent.

Cases referred to:

('45) AIR (32) 1945 P C 144: (1945 All L J 272 PC) (Pr 13)

('47) AIR (34) 1947 Bom 293: (ILR (1948) Bom 91) (Pr 14)

('81) 6 Cal 328: (7 Cal L R 171) (Pr 15)

KUNHI RAMAN, C. J.: The defendant company is the appellant. The suit in the Court below was for damages for alleged breach of two contracts for the supply of tea. The plaintiff is a dealer in tea doing business at Quilon and the defendant company had charge of a tea estate which belonged to the Highland Produce Company, Limited. The defendant company acted as agents and secretaries of this tea estate.

(2) The suit is based upon an alleged breach of two distinct contracts relating to two kinds of dust tea. The first was called Pasuppara 'A' Dust and the second Pasuppara No. 2 Dust. The contract with regard to the second quality of goods was Ex. 'A' which was entered into on 4-8-1941. The trial Court has found that there was no breach relating to this contract and has dismissed the plaintiff's claim arising from this contract. Plaintiff has not appealed.

(3) With regard to the contract in respect of Pasuppara 'A' Dust the Court below has found in favour of the plaintiff and has passed a decree for Rs. 44,674-7-8 as damages for breach of the contract. It is from this decision that the present appeal is brought on behalf of the defendant company.

(4) The contract in respect of this quality of goods was entered into on 17-12-1941 and it was marked as Ex. 'M' at the trial. It related to the supply of tea during the year 1942. According to the plaintiff, under this contract the defendant appellant was bound to supply a minimum of 20,000 pounds of tea dust every month. These terms the defendant did not carry out. There was deficiency to the extent of 1,17,000 pounds. The plaintiff claimed damages on the basis of loss of profit in respect of the quantity which was short-supplied.

(5) The suit was filed in Quilon. According to the defendant-appellant's learned counsel the Court in Quilon had no jurisdiction because the contract was for the supply of goods at Alleppey. But it is seen from the judgment of the Court below and also from the evidence that as a matter of fact supply was made at Quilon and in the circumstances the question regarding jurisdiction is not seriously pressed, especially in view of the fact that it cannot be said that any damage was sustained by the defendant because of the suit having been filed in the Court in Quilon.

(6) The arguments of learned Counsel on both sides turned upon the terms of the said contract, Ex. 'M.' This contract is silent as to the quantity to be supplied every month. On behalf of the defendant it is contended that in view of the provisions of Section 91 of the Evidence Act according to which when a contract is reduced to writing oral evidence about its terms cannot be given and the document is the only evidence that can be relied upon by the party who wishes to prove its terms, the Court below erred in permitting the plaintiff to give oral evidence which he was precluded from doing under this section. That is the main point for decision in this appeal.

(7) The contenion of the appellant's learned counsel is that in the evidence given by the plaintiff he has stated in unequivocal terms that the

oral conversation regarding the terms of the contract took place before the contract was reduced to writing in the form of Ex. 'M.' But he stated further in his evidence that there is an assurance given about the minimum supply to be made every month . The terms of the contract are to the effect that the whole produce of the estate coming under the category of the quality of goods described in Ex. 'M' should be supplied by the defendant to the plaintiff subject to certain reservations made in favour of the defendant. For example, there is a provision, according to which the defendant could supply to others tea that was not reduced to tea dust but was retained in the shape of tea leaves. The quantity thus excluded from the scope of the contract was left to the discretion of the defendant company. There is also a provision that the defendant could supply a definite quantity of goods to persons outside the State within the territory of which the contract was entered into. The learned trial Judge has permitted the plaintiff to give evidence that there was an understanding that the minimum quantity of goods to be supplied every month under this contract during the whole of the year 1942 was 20,000 pounds per month. The plaintiff tried to substantiate this contention by producing sub-contracts entered into with other dealers which indicate that the basis of those sub-contracts was this assurance given on behalf of the defendant company that they would supply 20,000 pounds at least every month. The learned Judge also relies upon the fact that in the month of January of 1942 a few weeks after the contract was entered into, the plaintiff raised this question and there was no express denial on behalf of the defendant company of the averment contained in the plaintiff's letter that there was an obligation on the part of the defendant company to supply 20,000 pounds dust tea to him every month. It was only late in July 1942 that for the first time the defendant company thought of denying it.

(8) It is no doubt true that according to Section 91 of the Evidence Act, when the terms of a contract have been reduced to the form of a document no evidence shall be given in proof of the terms of such contract except the document itself unless it is a case in which secondary evidence of the contents of the document is admissible under the provisions of the Evidence Act. Section 92 amplifies this rule of law by setting forth that where the terms of a contract are reduced to the form of a document and that document has been proved according to S. 91

> "no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from, its terms:"

The contract in the present case merely contains an undertaking to supply to the plaintiff-respondent the produce of the estate of the particular variety specified in the contract. There is no assurance given in writing that this stipulation will comprise a monthly supply of at least 20,000 lbs. The plaintiff respondent was however permitted to call evidence to establish this stipulation and the question is whether this procedure adopted by the trial Court and the decision based upon the evidence given by the plaintiff on this question on which the contract is silent is justifiable in law.

(9) Section 91 of the Evidence Act provides:

> "91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
>
> "Exception 1.': When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.
>
> "Exception 2'.: Wills (admitted to probate in British India) may be proved by the probate.
>
> "Explanation 1.": This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one.
>
> "Explanation 2.": Where there are more originals than one, one original only need be proved.
>
> "Explanation 3.": The statement, in any document whatever, of a fact other than the facts referred to in this section shall not preclude the admission of oral evidence as to the same fact."

(10) The terms of the contract between the parties in this case have been reduced to the form of a document and the document itself has been produced in the case marked as Ex. 'M.' Reliance is placed by learned Counsel for the plaintiff-respondent upon Proviso (2) to Section 92 according to which

> "the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document."

The question is whether this proviso would apply to the facts of this case. Ex. 'M' was preceded by a personal conversation between the plaintiff and the representative of the defendant company. Ex. 'M' purports to be a record of all the terms and conditions agreed upon between the parties as a result of that conversation. The document was prepared in duplicate, one was signed by the defendant and handed over to the plaintiff and a copy thereof indicating the plaintiff's acceptance of the contract was signed by him and handed over to the defendant. It is thus a formal document prepared and signed by the parties after deliberation and discussion. Clause (ix) of Ex. 'M' reserves liberty to the defendant to turn over a portion of the tea produced in the estate into leaf grades as and when they deem it necessary in the interests of the company. The extent of the tea produced which can be thus turned over into leaf grades is not fixed and is left entirely to the discretion of the defendant.

(11) Clause (1) of Ex. 'M' providing for the sale of the entire output of Pasupara 'A' dust produced in the estate for 12 months has therefore reference to whatever is produced as dust, subject to the exercise of the discretion given to the defendant to make any portion of the tea produced into leaf grades. A fixation of the quantity of Pasupara 'A' dust to be supplied to the plaintiff would, therefore, be inconsistent with the express liberty given to the defendant under Clause (ix). If the oral contract guaranteed a supply of 20,000 lbs. per month, which would work out to 2,40,000 lbs. per year, nothing would be left from out of the total produce (estimated at 3 lakhs lbs.) as from out of it is reserved for sale directly by the defendant, 5,000 lbs. per month, that is 60,000 lbs.

per year under Clause (viii) of Ex. 'M'. The two together would exhaust the entire estimated produce of 3 lakhs, leaving nothing for the operation of Clause (ix), which gives liberty to the defendant to turn over part of the produce into leaf grade. The oral contract set up is thus not merely inconsistent with, but destructive of the express terms of the contract contained in Clause (ix) of Ex. 'M.'

(12) It is thus clear that the alleged oral agreement guaranteeing a minimum supply of 20,000 lbs. per month to the plaintiff, cannot be proved.

(13) In 'TWENTSCHE OVERSEAS TRADING CO. LTD. v. UGANDA SUGAR FACTORY, LTD', AIR (32) 1945 P C 144, where one 'T' company contracted to supply steel rails Krupp Section to 'U' Company with a carefully drawn specification defining precisely what were the goods called for by the contract which did not define what was to be the source of the goods and where, therefore, the contract was silent on the point, it was attemped to set up and prove an oral agreement that the goods to be supplied should be the manufacture of Ferrostaal, the Judicial Committee of the Privy Council declined to accept evidence of the oral contract. The relevant portion of the headnote runs thus:

"Collateral contracts must from their very nature be rare. A collateral agreement must be in every sense a complete legal contract, and the effect must be to vary or add to the terms of the contract. Such collateral contracts are viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of 'animus contrahendi' on the part of all the parties to them must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations if contracts unquestionably entered into by them and more especially would have effect of lessening the authority of written contracts by making it possible to vary by suggesting the existence of verbal collateral agreements relating to the same subject-matter."

"Held that to introduce into the specification the term that the goods should be the manufacture of Ferrostaal would be to vary the contract by defining what the contract had left open."

(14) In 'DINKERRAI LALIT KUMAR v. SUKHDAYAL RAMBILAS', AIR (34) 1947 Bom 293, where in a commercial contract to supply certain piece-goods, the written agreement did not provide for the time of delivery, an oral agreement was attempted to be set up specifying the time. The High Court of Bombay held:

"Once the parties reduce the terms of their contract into writing, the Court can only look at the writing alone in order to constitute what the terms of the contract were. The terms of the contract cannot be ascertained by allowing parole evidence as to what transpired antecedent to the contract or what the party did subsequent to the contract."

(15) When the written record purports to reduce to writing all the terms of the contract between the parties, and does not reserve any part of the earlier contract uncovered by the document, oral evidence would not be admissible. See 'G. M. CUTTS v. T. F. BROWN', 6 Cal 328.

(16) The plaintiff does not, in his plaint, set up a case that there was any separate oral agreement to attract the application of Proviso (2) to Section 92 of the Evidence Act. Paragraph 4 of the plaint sets up the details of the terms of the agreement, dated 17th December 1941, mentions the guarantee of a minimum supply of 20000 lbs. per month, refers to the liberty to the defendants to turn over a portion of the tea produced in the estate into leaf grades and proceeds to say that it was further mutually understood that the quantity to be turned over into leaf grades was not to affect the minimum agreed upon viz., 20,000 lbs. of 'A' dust per mensem. Paragraph 5 of the plaint reads thus:

"On 17-12-1941, defendant sent a letter to plaintiff confirming the terms of agreement in respect of Pasupparai 'A' Dust referred to supra. The said letter is filed herewith."

It is clear from these two paragraphs of the plaint that the plaintiff had no case of any separate oral agreement. It would also be clear that the plaintiff had no case that any of the terms of the contract agreed upon between the parties was omitted to be recorded in the letter. The circumstances that the guarantee of a minimum supply of 20,000 lbs. per month would be inconsistent with the liberty given to the defendant to turn over a portion of the produce into leaf grades is recognised and a further agreement is set up that the said liberty is subject to the guarantee regarding the minimum supply. Here the plaintiff has overshot the mark. The estimated annual yield being 3 lakhs lbs. though it is stated to be over that, the so-called excess should, for this purpose be taken to be nominal (the total being 3 lakhs lbs.) out of which the defendant is admittedly entitled, by virtue of Clause (viii) of Ex. 'M', to appropriate 60,000 lbs. for direct sale to the defendant's customers, there would be a balance only of 2,40,000 lbs. and if the plaintiff is given a guarantee of supply to the extent of 20,000 lbs. per month, for 12 months that would consume the entire balance with the result that the liberty reserved to the defendant in Clause (ix) of Ex. 'M' to turn over a portion of the tea produced into leaf grade would be rendered nugatory.

(17) Under these circumstances the plaintiff cannot rely upon any separate oral agreement or a term in the agreement guaranteeing a minimum supply of 20,000 lbs. per month because, no such oral agreement is set up. Assuming it was meant to be set up by the allegation in paragraph 4 of the plaint, it would be inconsistent with Clause (ix) of the written contract. On both these grounds the alleged oral agreement would be inadmissible in evidence.

(18) The only point of the plaintiff is that the defendant has violated the alleged term of the contract relating to the minimum supply of 20,000 lbs. per month. Out of the estimated quantity of 3 laks lbs., the plaintiff deducts 60,000 lbs. regarding which liberty for sale is given to the defendant as also the quantity supplied by the defendant, arrives at a balance of 1,17,000 lbs. on which at the rate of 8 as. per pound damages are assessed.

(19) In the view that we take about the inadmissibility of oral evidence of the alleged guarantee of supply of 20,000 lbs. per month, it is unnecessary to discuss the oral evidence adduced in the case. It may however be mentioned that the admitted payment of price in excess of the agreed rate upon 7,500 lbs. as evidenced by Ex. 'O' would be a strong circumstance against the truth of the oral agreement set up. The explanation offered on behalf of the plaintiff by his Advocate for making this extra payment has not appealed to the Court below nor does it appeal to us as acceptable. Ex. 'O' is sought to be used against the defendant as probabilising the case of the guaranteed supply of 20,000 lbs. per month. No doubt the word used "excess supply" in Ex. 'O' is inartistic and leads to comment. When the plaintiff is entitled to the supply of the entire output of

Pasuparai 'A' Dust at a particular rate, his payment of excess price on the supply made cannot be explained except on the ground that such supply related to tea which the defendant could have turned into leaf but diverted into dust at the request of the plaintiff. Ex. XXVII and XXVIII, invoices for 2,500 lbs. and 5,000 lbs. respectively in respect of those diverted dust appear to probabilise the version of the defendant.

(20) Another circumstance already adverted to is that if the alleged guarantee of 20,000 lbs. per month be true, then there would be nothing left from out of the total produce in the estate for being turned into leaf grade according to the discretion of the defendant as expressly provided in Clause (ix) of Ex. 'M.' This circumstance would show that the alleged oral agreement could not be true. It is, therefore, unnecessary to discuss the oral evidence as to the minimum guarantee. It is enough to say that in the light of the circumstances appearing in the case, oral evidence tendered on behalf of the plaintiff on this point cannot be accepted.

(21) The Court below comments upon the delay of the defendant in repudiating the oral agreement alleged by the plaintiff which is mentioned in certain subsequent correspondence. In the light of the circumstances and probabilities of the case above-mentioned, this delay does not seem to us to be material and cannot lead to any inference adverse to the defendant.

(22) The learned Counsel for the respondent submitted in the course of argument that even if the case of the plaintiff regarding a minimum guarantee of 20,000 lbs. be not found in favour of the plaintiff, he is entitled to be compensated for short delivery as, according to him, the total produce of 'A' Dust in the estate has not been delivered to him. The accounts regarding the production and supply were placed before us and the evidence regarding supply made to certain parties on account of the plaintiff was also pointed out. On a calculation the balance that might be found not delivered is negligible.

(23) Mr. Varadaraja Iyengar on behalf of the appellant-defendant contended that the only claim in the plaint is for violation of the alleged guarantee of supply at the rate of 20,000 lbs. a month and that no alternative case has been set up complaining that the entire produce of 'A' Dust in the estate has not been delivered to the plaintiff and that is the reason why the attention of the parties has not been directed to this point. A perusal of the plaint would make it clear that the only basis of the claim made by the plaintiff is the violation of the alleged agreement to supply 20,000 lbs. per month and that no claim is made on account of short delivery of the total produce in the estate found in the absence of the alleged guarantee of monthly supply. We are thus unable to find on this point in favour of the plaintiff-respondent.

(24) In the result the appeal is allowed with costs in both the Courts.

Appeal allowed.

G.M.J.

[C. N. 52.]

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(FULL BENCH)

KUNHI RAMAN, C. J., SUBRAMANIA IYER AND JOSEPH VITHAYATHIL, JJ.

Moran Mar Basselios Catholicos and another, Petitioners v. The Most Rev. Mar Poulose Athanasius and others, Counter-Petitioners.

Review Petn. No. 42 of 1122 (Tr.) in A. S. No. 1 of 1119 (Tr.), D/- 21-12-1951.

(a) Travancore-Cochin High Court Ordinance (2 of 1124), Ss. 8, 25 and 26 — Judgment under S. 11, Travancore High Court Act 4 of 1099, by Full Bench — Review by Full Bench of present High Court — Jurisdiction — Travancore High Court Act (4 of 1099), S. 11.

In the case of a judgment passed under S. 11 of the Travancore High Court Act, IV of 1099, by a Full Bench, after the repeal of that Act by United State of Travancore-Cochin High Court Ordinance, if a review of that judgment is admitted, an effective judgment can be passed by a Full Bench of the present Travancore-Cochin High Court, and S. 11 of the Travancore High Court Act, IV of 1099, is no bar to the review being admitted. There is no provision in S. 25 of the Ordinance, for submitting the judgment passed by the Full Bench to the Raj Pramukh for his confirmation. It is not necessary to consider whether His Highness the Raj Pramukh has got the right to confirm a judgment passed under S. 11 of the Travancore High Court Act, IV of 1099, in view of the repeal of that Act by Ordinance 2 of 1124. (Para 12)

(b) Civil P. C., (1908), O. 47, R. 1 (i) — Travancore Civil P. C., O. 45, R. 1(i) — "Any other sufficient reason" — Meaning.

The phrase "any other sufficient reason" means a reason at least analogous to those specified in the rule immediately previously, namely excusable failure to bring to the notice of the Court new and important matter or evidence or mistake or error apparent on the face of the record. AIR (9) 1922 P C 112, Foll. (Para 13)

Anno: C. P. C., O. 47, R. 1 N. 16.

N. P. Engineer, E. J. Philippose, P.I. Simon and M. Abraham, for Petitioners; Achururam, K. P. Abraham, T. K. Joseph and K. T. Ninan, for Counter-Petitioners.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('22) 49 And App 144: (AIR (9) 1922 P C 112)	(Pr 13)
41 T L R 1 (F B)	(Pr 2)
45 T L R 116	(Pr 2)
('46) 1946 T L R 683 (F B)	(Pr 4)
('48) 1948 T L R 1	(Pr 10)
('49) 1949 T L R 303 (F B)	(Pr 11)
(1904) A C 515: (91 L T 394)	(Prs 5, 8)

JOSEPH VITHAYATHIL, J.: This is a petition filed on behalf of respondents 1 and 2 under O. 45, R. 1 of the Travancore Code of Civil Procedure corresponding to O. 47, R. 1 of the Indian Code, to review the judgment passed in A. S. No. 1 of 1119 by a Full Bench consisting of three Judges of the erstwhile Travancore High Court. For a proper appreciation to the points raised in this review petition it is necessary to have an idea about the history of the controversy between the parties. The plaint properties belong to the Malankara Jacobite Syrian Church. According to the plaintiffs, the Patriarch of Antioch is the ecclesiastical head of this church while according to the defendants he is only the spiritual head. The position of the Patriarch in relation to the Malankara Jacobite Syrian Church was declared by the Royal Court of Final Appeal, Travancore, in 1064, in the 'EXT DY', which resulted in the formation of the Marthomite Church in Malabar. It was held in that case

"that the ecclesiastical supremacy of the See of Antioch over the Syrian Church in Travancore has been all along recognised and acknowledged by the Jacobite Syrian community and their Metropolitans, that the exercise of that supreme power consisted in ordaining either directly or by duly authorised delegates Metropolitans from time to time to manage the spiritual matters of the local church, in sending Marone (holy oil) to be used in the churches in this country for baptismal and other purposes and in general supervision over the spiritual Government of the Church; that the authority of the Patriarch has never extended to the Government of the temporalities of the church which, in this respect, has been an independent church, and that the Metropolitan of the Syrian Jacobite church in Travancore should be a native of Malabar consecrated by the Patriarch of Antioch or by his duly authorised delegate and accepted by the people as their Metropolitan to entitle him to the spiritual and temporal Government of the local church." (Ext. DY, page 147).

This was a representative suit and both the parties in this case admit that this decision is binding on them.

(2) The power of the Patriarch in relation to the Malankara Jacobite Church again came up for consideration before a Full Bench of the Travancore High Court in the case reported in 41 TLR 1 which was an interpleader suit filed by the Secretary of State for India in 1083. That suit was occasioned by the ex-communication of Metropolitan Mar Cheevarghese Dionysius by Partriarch Abdulla II in 1086 and the appointment of Mar Kurilose as Malankara Motropolitan in his place. Mar Gheevarghese Dionysious contended that the ex-communication was invalid and that he continued to be the Malankara Metropolitan and Metropolitan Trustee. The suit was filed for a decision on the question as to who were the rightful trustees entitled to receive the interest on a fund invested with the East India Company in 1808 by the then Metropolitan of the Malankara Jacobite Syrian Church . The question that had to be decided in the suit was whether the ex-communication of Mar Gheevarghese Dionysious by the Patriarch was valid or not. The Full Bench held that

"the Patriarch of Anitioch possesses the power of ordaining and excommunicating Episcopes and Metropolitans by himself, namely, in his own right and that it is not necessary for him to convene a Synod of Bishops and proceed by way of Synodical action in order to enable him to exercise these powers, the person ordained being, of course, a native of Malabar and accepted by the people."

It was also held that the Canon, Ext. XVIII (Ext. B P in this case) and not Ext. A (Ext. 26 in this case) is "the version of the Canon Law that has been recognised and accepted by the Malankara Jacobite Syrian Christian Church as binding on it". The learned Judges also held that

"by virtue of the powers of general supervision over the spiritual Government vested in the Patriarch as its ecclesiastical head under the judgment, Ext. R (Ext. DY in this case) he could exercise that authority by awarding such spiritual punishment as he thinks fit in case of mismanagement ro misappropriation of church properties, which, apart from their temporal character, have also a spiritual side."

They, therefore, held that Mar Gheevarghese Dionysius lost his status of Malankara Metropolitan and Metropolitan Trustee by reason of the ex-communication. About two years after this judgment was pronounced and after two of the Judges had retired an application was filed by defendants 1 to 3 in that case to review the judgment. The application for copy of the judgment was missing from the office of the Travancore High Court for about two years and it is reported that it was sent to the office by Anchal (Post) by an unknown person. The delay in filing the review petition was explained on this ground. The review was admitted subject to the condition that the findings recorded as to the authenticity of the Canon, as to the power of the Patriarch to excommunicate without the intervention of the Synod and as to the absence of an indirect motive on the part of the Patriarch in exercising the power of excommunication should be taken as binding on the parties. On re-hearing the appeal it was held that the ex-communication did not satisfy the requirements of natural justice and that it was, therefore, invalid. The judgment after review is reported in '45 T L R 116'.

(3) After the ex-communication of Mar Gheevarghese Dionysius by Patriarch Abdulla, the former invited to Malabar Abdul Messiah who was Patriarch of Antioch but whose Firman had been withdrawn by the Sultan of Turkey. According to the plaintiffs, Abdul Messiah had been Synodically deposed and was not functioning as Patriarch, while according to the defendants he continued as Patriarch till his death. Abdul Messiah declared the ex-communication of Mar Gheevarghese Dionysius invalid and issued a kalpana, Ext. 80, establishing Catholicate in Malankara. Mar Ivanious and Mar Philixinos were the first two Catholicos. The first defendant was installed Catholicos in 1104. Mar Gheevarghese Dionysius continued as the Malankara Metropolitan and Metropolitan Trustee along with his two trustees, defendants 2 and 3 in this case. After the death of Mar Gheevarghese Dionysius in 1109 the first defendant and the Edavakai Metropolitans on his side convened a meeting of the Malankara Association in the M. D. Sominary, Kottayam 11-5-1110 for electing the Malankara Metropolitan; and the first defendant was elected Malankara Metropolitan in that meeting. As Patriarch Ephraim had issued a monition, Ext. Z, to his followers not to associate themselves with the first defendant and his partisans, who were treated as aliens to the Church, representatives of churches which stood by the Patriarch did not attend that meeting. In that meeting, the defendants and their partisans, who are called the Catholicos' Party, adopted the constitution, Ext. AM, for the church. The first plaintiff and the Edavagai Metropolitans who were loyal to the Patriarch, and who were called the Patriarch's Party, convened a meeting of the representatives of the churches that stood by the Patriarch at Karingassira on 6-1-1111, and the first plaintiff was elected Malankara Metropolitan in that meeting and plaintiffs 2 and 3 were elected his co-trustees.

(4) In 1113 the plaintiffs filed this suit for a declaration that they are the lawful trustees of the Malankara Jacobite Syrian Church, that the defendants have no right to retain possession of the plaint properties which belonged to that church, for recovery of possession of the properties with mesne profits and for other incidental reliefs. The plaintiffs sued in their personal capacity also as beneficiaries under the trust and obtained the permission of the Court under O. 1, R. 8 of the Code of Civil Procedure to sue on behalf of and for the benefit of, all the Members of the Malankara Jacobite Syrian Church. The basis of the suit was that the defendants were not only disqualified and unfit to be trustees of the Malankara Jacobite Syrian Church for various

reasons mentioned in the plaint, but had voluntarily separated themselves from the Church and constituted a new church with a constitution, Ext. AM, repudiating the authority of the Patriarch. The defendants contended that they were the lawful trustees of the Malankara Jacobite Syrian Church; that they were not in any way disqualified to be the trustees, that they did not secede from the church, that the plaintiffs had gone out of the Church by claiming for the Patriarch powers which he did not possess, and that the meeting in which the plaintiffs were elected trustees was not validly convened. The trial Court held that defendants 1 to 3 were the lawful trustees of the Malankara Jacobite Syrian Church and dismissed the suit with costs. The plaintiffs appealed from that decision. The appeal was heard by a Full Bench consisting of Krishnaswami Aiyar C. J., Nokes & Sathyanesan JJ. The judgment of the Full Bench is reported in '1946 T L R 683'. It will be with reference to the pages of this report that the judgment will be referred to in this order.

(5) Mr. Justice Nokes and Mr. Justice Sathyanesan allowed the appeal, holding that the plaintiffs and not the defendants were the lawful trustees of the Malankara Jacobite Syrian Church, while Krishnaswami Aiyar C. J. held otherwise, and a decree was passed in terms of the majority view. The basis of the decision of the majority of Judges is that the defendants and their adherents voluntarily separated themselves from the Malankara Jacobite Syrian Church and constituted a new church for themselves by adopting the constitution, Ext. AM. According to the learned Judges, Ext. AM amounted to virtual a repudiation of the religious supremacy of the Patriarch as laid down by the canons and precedents of the church and by the decisions of Courts binding on the parties. They were of opinion that the spiritual supremacy of the Patriarch of Antioch was a fundamental principle of the church in the opinion of the founders of the original trust. On the basis of the principles laid down by the House of Lords in the 'FREE CHURCH OF SCOTLAND v. OVERTOUR (Lord)', (1904) A C 515, the learned Judges held that by this deviation from the original object of the trust the defendants and their party ceased to be members of the Malankara Jacobite Syrian Church. They also held that the meeting at which the plaintiffs were elected trustees was validly convened, that the defendants and their partisans were not entitled to be invited for that meeting, and that the plaintiffs were lawfully elected trustees of the Malankara Jacobite Syrian Church.

(6) The reasons given by Nokes J. for holding that Ext. AM amounts to a repudiation of the spiritual supremacy of the Patriarch may be summarised thus:

"(1) "The provision of the Constitution which permits the installation of a Catholicos while ignoring the ruling Patriarch is a clear departure from precedent" (p. 727). (2) "The written constitution makes no provision for the approval by the Patriarch of Antioch of the election of the Malankara Metropolitan. This is a departure from the previous practice" (p. 729). (3) "The written constitution provides that the Catholicos with the co-operation of the local Synod shall ordain Metropolitans in Malankara and that the Catholicos shall issue staticons. (Ext. A M, Articles 107, 103). Unless the Catholicos were validly appointed, these articles would be a direct infringement of the Patriarchial power" (p. 730). (4) "The written constitution denied that the Patriarch was entitled to ressisa (namely, annual contribution of money by the members of the church) as of right. This is "a departure from the canon and the custom of the church". (p. 734)."

The conclusions of the learned Judge are given thus at pages 734 and 735:

"To summarise this part of the case, it seems clear that the party of the Catholicos strongly resented the supremacy of the Patriarch, and were prepared to defy him if they could do so without losing the trust properties. The question is whether they went too far. The effect of the written constitution, construed with the recognised canon of the church and the relevant judgments, may be stated thus: The defendants' party (1) did not recognise the ruling Patriarch of Antioch, and would not recognise him unless he was accepted on terms which (inter alia) restricted his supremacy in matters of faith; (2) rejected the recognised version of the canon of the church; (3) provides for a Catholicos without reference to the approval of the Patriarch thereby depriving the Patriarch of his rights to disapprove a candidate for the office of Catholicos or of Malankara Metropolitan, and curtailing the rights of the Patriarch in respect of ordination and of Morone; and (4) agreed to divert to the Catholicos the Patriarch's contributions of money from Malankara."

The learned Judge ends with the following observations at page 736:

"It appears to me clear beyond argument that persons who persistently reject the head of a church cease to be members of that church. And this situation is emphasised by their setting up a local rival, and diverting to him the contributions due to the head of the church. Indeed, the party of the Catholicos have done now almost exactly what the Marthomites did over 50 years ago, with the difference that the Marthomites acted openly in repudiating the Antiochean connection."

(7) The validity of the election of the plaintiffs as trustees is dealt with by the learned Judge at page 739. He found that the plaintiffs were validly elected trustees of the Malankara Jacobite Syrian Church. At page 740 the learned Judge has given his reasons for holding that the first defendant was not validly elected trustee and that defendants 2 and 3 were validly removed from office. The reason given is that the defendants had already seceded from the church. In accordance with these findings the learned Judge held at page 741 that

"the plaintiffs are the trustees of the properties covered by the relevant trust and that none of the defendants is such a trustee."

(8) Mr. Justice Sathyanesan begins his judgment with the following remarks:

"I entirely agree with the findings of my learned brother Nokes J. and the decree proposed by him. I want only to deal with certain aspects of the case involved in this appeal." (page 751:)

At page 754 the learned Judge says that the main question for consideration in the appeal is "whether the defendants have seceded from the original Church and formed a new Church". Then the learned Judge considers the 'FREE CHURCH CASE OF SCOTLAND v. OVERTOUR (Lord)', 1904 A C 515, and the propositions laid down in that case. (Pages 755 to 760). He then discusses the question whether the ecclesiastical supremacy of the Patriarch is a fundamental principle of the Malankara Jacobite Syrian Church as laid down by the recognised canons of the church and by the rulings of Courts, and finds the same in

the affirmative. (Pages 761 to 778). From pages 779 to 794 he deals with the question of Catholicate and finds that the installation of Catholicos without reference to the Patriarch would amount to depriving the Patriarch of his ecclesiastical supremacy in the church. Then the learned Judge deals with the question whether the defendants and their party have seceded from the church by adopting the Constitution, Ext. AM (Pages 796 to 806). At page 800 he observes thus about Ext. AM:

"Ext. AM appears to be the culmination of a long movement started by Mar Gheevarghese Dionysius to make the Malankara church autonomous and independent of the Patriarch of Antioch. If there were any obstacles, any faltering and delay on the way, it was because the trust properties which belonged to Malankara Church under the Patriarch of Antioch had to be secured and hence some tinkering of things had to be done with the mention of the word 'Patriarch' if the autonomy could not be declared by the Patriarch himself, and because there was an opposite party maintaining faithful and real allegiance to the Patriarch of Antioch as the true and lawful Head of the Jacobite Church."

Then he examines the various clauses of Ext. AM and finds that under that Constitution the Catholicos is made "the Supreme Head of the Eastern Orthodox Syrian Church" and that the Patriarch is in fact neither the ecclesiastical head nor even the supreme teacher of the Malankara Church (Pages 802 and 803). The provision which confers on the Catholicos the right to resissa is held to be opposed to the canon which says that it belongs to the Patriarch and that anyone who appropriates it will be separated from the Church (Page 803). The provision which says that the Patriarch cannot reject a candidate to be consecrated as Catholicos or Metropolitan is, according to the learned Judge, opposed to the canon which lays down that no Maphrian or Metropolitan can be consecrated against the will of the Patriarch (Page 804). For these reasons the learned Judge held that Ex. AM amounted to constituting a new and independent church (Pages 804 and 805). It was therefore held that defendants 1 to 3 having seceded from the Malankara Jacobite Syrian Church have ceased to be the lawful trustees of the properties of that Church. It was also held that the plaintiffs were validly elected trustees of the Church and that the churches under the control of the first defendant were not entitled to be invited for the meeting at which the plaintiffs were elected trustees.

(9) Krishnaswami Iyer C. J. took the view that by reason of the Patriarch issuing a Kalpana, Ext. Z to his followers on or about 27-2-1110 declaring that the first defendant and his partisans had cut themselves adrift from the Church and asking his followers not to associate themselves with them, the Patriarch and his party must be deemed to have seceded from the party of the first defendant with the result that the church community of which the Patriarch was the spiritual head was dissolved and the Patriarch constituted a new church consisting of himself and his followers excluding the Catholicos' party (p. 823). The learned Chief Justice made it clear that this finding of his was without "reference to the intrinsic soundness of the positions taken by the parties but only to the beneficial rights in the trust"(p. 823). He further held that as the Patriarch is an essential feature of the Jacobite Church the old Jacobite Church ceased to exist even for the Catholicos' party when the Patriarch went out of it and it was, therefore, extinguished (Page 841). The result is the following in the words of the learned Chief Justice:

"Two new Churches in Malankara have thus come into being in legal import, one with the Patriarch and the other without him. Hence the trust constituted for services in the old Malankara Jacobite church for its continuance and efficiency would naturally fail. But as the trusts were public religious charitable trusts this Court as a Court of equity could apply the doctrine of cy pres and allot the trust properties to kindred charities permissible under the law. The question of applying the cy pres doctrine and the earlier question as to whether the trusts have failed 'cannot and ought not to be decided in the absence of the Diwan, the protector of charities in this State."

It was also held that the plaintiffs' "suit was bound to fail on the ground that neither side had the right to represent the old Jacobite Church" (Page 843). The learned Chief Justice further observed thus at page 843:

"In my view, it must be left to the Diwan to take such steps as he may be advised for the protection of trust properties in respect of which the trust has failed."

In the view that the learned Judge took it was thought not necessary to consider the question whether by adopting the constitution Ext. AM the Catholicos party went out of the church and constituted a new church. (page 844). But it was observed that if it were necessary to decide the question he would hold in agreement with the District Judge that Ext. AM did not amount to a repudiation of the authority of the Patriarch and that the first defendant and his party have not gone out of the Church (p. 844). If that is the case, the plaintiffs according to the learned Chief Justice have not been legally elected trustees of the church. He however wanted to make it clear that his considered opinion was that it was for the Diwan to settle the destination of the trust properties by an appropriate proceeding. (page 845).

(10) Soon after the judgment was confirmed by His Highness the Maharaja of Travancore Mr. Justice Sathyanesan relinquished office as Judge of the High Court and reverted as District Judge. Subsequently this review petition was filed. There are as many as 92 grounds taken in the review petition and by a subsequent petition five more grounds were added. The petition came for hearing at the first instance before Krishnaswami Aiyar C. J. and Nokes and Krishna Pillai JJ. But no order was passed by them or in the words of Krishna Pillai J. no order was "pronounced in open Court as contemplated by law". Mr. Justice Nokes retired from the High Court not long afterwards. Krishnaswami Iyer C. J. also retired after some time. The review petition subsequently came before a Full Bench consisting of Mr. Justice Krishna Pillai, Mr. Justice Habib Muhammad and Mr. Justice Govinda Pillai. The question as to whether these Judges who had not taken part in the decision of the appeal had jurisdiction to hear the review petition was argued before them. The petition was argued on the merits also. The order passed by the learned Judges is reported in '1948 T L R 1'. The learned Judges particularly Mr. Justice Krishna Pillai discussed the question relating to jurisdiction at great length and they unanimously held in favour of the review petitioners on the question of jurisdiction. The merits of the petition were also discussed at considerable length and notice was ordered to be issued to the respondents to the

petition on all the 97 grounds taken in the review petition and in the supplemental petition.

(11) The petition came for final hearing before the same learned Judges who ordered notice. The respondents to the petition objected to the hearing of the review petition by those learned Judges since they had expressed definite opinion on the question of jurisdiction and on the merits of the petition in their prior order. This objection was overruled and the learned Judges heard both sides on the question of jurisdiction. They did not however decide the question but referred it to a Full Bench consisting of five Judges. Accordingly the question of jurisdiction was heard by a Full Bench consisting of the three learned Judges who ordered notice on the review petition and Mr. Justice Sankaran and Mr. Justice Mathew Muricken. The decision of the Full Bench is reported in '1949 T L R 303'. All the five Judges wrote separate orders. Mr. Justice Krishna Pillai who had by this time become the Chief Justice and Habib Mohammad and Govinda Pillai JJ. adhered to the view already expressed by them and decided the question in favour of the review petitioners. The decision of the other two learned Judges was in favour of the respondents in the review petition. As the majority view was in favour of the review petitioners the petition has to be heard on the merits. It is in these circumstances that the petition came for hearing before us.

(12) Before going into the merits of the petition it is necessary to consider a preliminary objection raised by the learned counsel for the respondents in the review petition. The objection is to the following effect: The judgment in this case is a judgment passed by His Highness the Maharaja of Travancore under S. 11 of the Travancore High Court Act (Act IV (4) of 1099). Under S. 12 of that Act if a review of that judgment is allowed the fresh judgment to be passed should be the judgment of His Highness as provided in S. 11. The power exercised by His Highness in this respect was his personal prerogative as the sovereign and fountain head of justice and such power is not vested in the Rajpramukh under the Covenant. Hence no effective judgment can be passed in this case even if the review is allowed. It is, therefore argued that the petition should be dismissed 'in limine'. The learned counsel for the review petitioners argued that the power that was exercised by His Highness the Maharaja of Travancore under S. 11 of the Act IV (4) of 1099 can now be exercised by the Raj Pramukh. He relies on article 3 (a) of the covenant which says that

> "all rights, authority and jurisdiction belonging to the Ruler of either of the Covenanting States which appertain or are incidental to the Government of that State shall vest in the United State."

According to him, the right that was exercised by the Maharaja under S. 11 of Act IV (4) of 1099 was a right appertaining to the Government of the State and not a personal right of the Sovereign. Reliance was also placed by the learned counsel on Ss. 3 and 7 of the Ordinance 1 of 1124 relating to Administration and Application of Laws. We do not think that it is necessary to consider in this case whether His Highness the Rajpramukh has got the right to confirm a judgment passed under S. 11 of the Travancore High Court Act IV (4) of 1099. That Act has been repealed by Ordinance 2 of 1124 namely the United State of Travancore Cochin High Court Ordinance. Section 8 of that Ordinance provides thus:

> "All proceedings commenced prior to the coming into force of this Ordinance in either of the High Courts of Travancore and Cochin hereinafter in this Ordinance referred to as the existing High Courts shall be continued and depend in the High Court as if they had commenced in the High Court after such date. Any order made by either of the existing High Courts in any such proceedings as aforesaid shall, for all purposes have effect not only as an order of that Court but also as an order made by the High Court."

Section 25 of the Ordinance relates to the hearing of appeals of the value of Rs. 5,000 and upwards by a Full Bench — There is no provision in that section for submitting the judgment passed by the Full Bench to the Rajpramukh for his confirmation. Section 26 relates to the review of judgment passed by a Full Bench. It reads thus:

> "In cases decided under S. 25 of this Ordinance a Full Bench of the High Court may admit a review of judgment subject to the provisions of the Travancore and Cochin Codes of Civil Procedure."

It is thus clear that if the review is admitted an effective judgment can be passed by a Full Bench of this Court and that S. 11 of the Travancore High Court Act IV (4) of 1099 is no bar to the review being admitted. The preliminary objection is therefore overruled.

(13) Coming to the merits of the petition, there are, as stated above, as many as 97 grounds taken by the petitioners. These were compressed into 12 main grounds and a memo was filed in Court to that effect by the petitioners' advocate. Mr. Engineer the learned counsel for the petitioners, who argued the petition before us confined his argument to the grounds mentioned below. He did not contend for the position that the first part of sub-r. (1) of R. (1) of O. 45, Travancore Code of Civil Procedure applies to this case. In other words he did not argue that there is in this case the discovery of any new and important matter or evidence which was not within the knowledge of the petitioners or which could not be produced by them when the decree was passed. He rested his case on the second part of sub-r. (1) namely "mistake or error apparent on the face of the record", or "any other sufficient reasons." The learned counsel also conceded that the phrase "any other sufficient reason" means a reason at least analogous to those specified in the rule immediately previously namely excusable failure to bring to the notice of the Court new and important matter or evidence or mistake or error apparent on the face of the record as laid down by the Privy Council in 'CHHAJJU RAM v. NEKI', 49 Ind App 144 (P C). The question therefore for consideration is whether the grounds taken by the petitioners show that there is some mistake or error apparent on the face of the record in the judgment in this case.

(14) We shall now proceed to consider seriatim the grounds relied on by the petitioners. (After considering all the grounds the judgment proceeded:) We have considered in detail all the grounds urged before us on behalf of the review petitioners, and we have come to the conclusion that no case has been made out for reviewing the judgment. We, therefore, dismiss the review petition with costs.

(15) KUNHI RAMAN, C. J.: This case which bristles with complications and which is not entirely free from ugly episodes during its long pendency in the erstwhile Travancore High Court has given us considerable anxiety and worry in spite of valuable assistance rendered by eminent counsel. We have had to discuss every relevant aspect that was brought to our notice in the course of

the able arguments of counsel and I have only to say that I agree to the conclusion reached by my learned brother that this review petition should be dismissed with costs.

(16) SUBRAMANIA AIYAR, J.: I endorse all that was said by my Lord the Chief Justice and I too agree to the conclusion reached by our learned colleague that the application for review of judgment should be rejected with costs.

(17) BY THE COURT: After this judgment is delivered Mr. Simon, on behalf of the petitioners in this case, applies for a certificate for appealing to the Supreme Court under Art. 133 of the Constitution of India. We are not satisfied that this is a fit case for granting such a certificate.

V.B.B. *Petition dismissed.*

[C. N. 53.]

A. I. R. (39) 1952 Travancore-Cochin 125

SUBRAMANIA IYER, J.

P. Chinnakannu Pillai, Petitioner v. Ammalu Ammal Gomathi Ammal and another, Respondents.

O. P. No. 69 of 1951, D/- 1-10-1951.

Constitution of India, Art. 226 — Order of Rent Controller under Travancore-Cochin Buildings (Lease and Rent Control) Order, 1950 erroneous but not without jurisdiction — High Court will not interfere — The question as to whether business which is in fact conducted by the husband of the landlord can be said to be a business that the landlord is carrying on, within the meaning of Clause (3) to Section 9 is a matter which can, and has to be, decided by the authorities under the Act and the parties are bound by the final order passed in the proceedings however erroneous it may be — Tribunal having authority has jurisdiction to decide rightly or wrongly — (Houses and Rents — Travancore-Cochin Buildings (Lease and Rent Control) Order (1950), S. 9(3)). (Para 8)

(b) *Houses and Rents — Travancore-Cochin Buildings (Lease and Rent Control) Order (1950), S. 9 — Authorities under order cannot order eviction where there is agreement between parties that on eviction landlord will pay for improvement — Controller has no jurisdiction to order eviction upon payment.*

There is no provision in the Order authorising the Controller to investigate and decide any question of value of improvement effected by the tenant or direct payment of any amount in that behalf before delivery of possession, even in a case where the liability may be admitted. The scope of his investigation is defined in various clauses of Section 9 of the Order. The jurisdiction of the Controller and the highest authorities to direct eviction of a tenant from, and to put the landlord in possession, of the holding must be confined to cases where the landlord is not liable to pay value for any improvements to the tenant as a condition of his getting possession of the property. To hold otherwise would be, "to destroy by a sidewind public or private right which were not in the contemplation of the Legislature." There does not exist in the Travancore-Cochin Buildings (Lease and Rent Control) Order, 1950 a provision in any manner affecting pre-existing rights of the tenant. The Order must be construed as complementary to and not as conflicting with the jurisdiction of the civil Courts. (Para 10)

(c) *Civil P. C. (1908), Ss. 9 and 21 — Jurisdiction, plea of.*

Jurisdiction is at the threshold of an action and therefore must when questioned, ordinarily be first decided and entry into the merits must await a decision in the affirmative. In cases of inherent absence, omission to raise or press want of jurisdiction or even express consent to its exercise cannot confer it, and any act done would be 'ultra vires' and of no effect. (Para 13)

Anno: Civil P. C., S. 9 N. 1, 5, 6; S. 21 N. 3.

N. Varadaraja Iyengar, for Petitioner; P. I. Simon, for Respondent (No. 1); Government Pleader, for the State.

Cases referred to:

('01) 25 Bom 337: (27 Ind App 216 PC) (Pr 8)
(1873) 15 E Q 51: (42 L J Ch 97) (Pr 10)

ORDER: This is an application for a writ of 'certiorari' to remove the records in the proceeding which ended with the order of the Government dated 20th June, 1951—L. Dis 772/51/P. W. C. for its being quashed. The records are here.

(2) The 1st respondent Gomathi Ammal purchased the equity of redemption over certain properties including the building and site in dispute in this case in the year 1121, when they were outstanding with a possessory mortgagee who had leased the subject-matter of this proceeding to the petitioner under a rent deed in the year 1117 while he was already in possession as a lessee. The 1st respondent redeemed the mortgage and took a deed of release from the mortgagee wherein she was directed to obtain possession from the petitioner on payment of Rs. 800/- towards value of improvements. A term of five years had been fixed as the duration of the lease evidenced by the aforesaid document of the year 1117. On the expiry of that period, the 1st respondent issued notice to the petitioner demanding possession. This was followed up by a suit, O. S. 1050/1122 in the District Munsiff's Court, Trivandrum filed by the 1st respondent against the petitioner for arrears of rent as well as eviction. This suit was filed in Medam 1122.

The petitioner filed a written statement in Kanni 1123 contending, 'inter alia', that the owner of the equity of redemption had agreed to sell it to him, that the sale relied upon by the 1st respondent-plaintiff was in contravention of that agreement and consequently invalid, and that in the event of eviction, he is entitled to get an amount of Rs. 2,000/- by way of value of improvements. It was also contended that the prayer for eviction could not be granted on account of the Travancore Rent Control Order, 1123. The 1st respondent thereafter filed an application (B. R. C. Case No. 215/1124) before the Controller under the provisions of the said Order, claiming possession on the ground that the lessee had left rent in arrears which would be a ground for eviction. The petitioner had deposited the arrears of rent claimed in the Munsiff's Court and he was also depositing rent that accrued due after the suit. There was thus no arrear of rent as alleged in the application and that being the sole ground relied upon to sustain the prayer for eviction, the application was dismissed.

(3) Soon after this, the 1st respondent started fresh proceedings before the Controller by filing Building Rent Control Case No. 248/1124 claiming eviction on two grounds, firstly arrears of rent, and secondly, requirement of the premises for her own use or purposes of "a jeweller's business run as a family concern" by her husband under the name "B. Doraiswamy & Sons" that was being conduct-

ed in a rented building, which had to be surrendered to its owner. It was stated that after such surrender the business was being carried on at her residence.

(4) The petitioner filed written objections contending inter alia that the 1st respondent was not the true owner of the property on account of the agreement for sale in his favour and that the only right of the owner was to enforce that contract. It was also contended that the petitioner had spent more than Rs. 2,000/- for improving the property which he would lose if eviction be ordered by the Controller. It was stated that these two pleas were pending adjudication in the Munsif's Court and that until those matters are decided by that Court, the Controller had no jurisdiction to pass an order for eviction.

(5) The Controller ordered eviction without taking any evidence and without considering the objections. Against this decision an appeal was preferred by the petitioner before the Division Peishkar, Trivandrum, who allowed it and remanded the case for fresh disposal after taking evidence and after disposing of the several points raised in defence. The 1st respondent sought to have this order revised by the Government. The Government dismissed the revision and confirmed the order of remand.

(6) After remand, the Controller renumbered the proceeding as B. R. C. Case No. 190/1950. The 1st respondent's husband was examined on her behalf and some documentary evidence was also adduced. At the stage of argument before the Controller, the Travancore-Cochin Buildings (Lease & Rent Control) Order, 1950 had come into force and the matter was disposed of under the provisions of that Order.

(7) At the argument, the first ground relied upon for eviction, viz., the alleged arrears of rent was not pressed and the only question that was considered by the Controller was whether the second ground viz., that the premises were required by the landlord for the purposes mentioned in the petition was true and whether that would justify an order for eviction. The Controller's opinion was in favour of the landlord and he therefore directed that the petitioner "shall be evicted from the building in question under Clause 9 (3) (a) (iii) of the said Order."

Against this, the petitioner filed an appeal No. 79/1950 before the District Collector, Trivandrum. The Collector agreed with the Controller as regards the requirement of the premises by the landlord and observing that:

> "another point raised is that the present case cannot be decided as there is a civil suit pending in respect of the same subject-matter. The civil suit referred to will not be a bar to any decision under the Rent Control Order. This point also therefore fails",

dismissed the appeal. The petitioner sought to have that order vacated by the Government in revision which attempt however failed, the Government having dismissed the revision and confirmed the order of the Collector. The aforesaid proceedings have occasioned the application before this Court.

(8) The order for eviction passed as aforesaid is challenged as "illegal, void and 'ultra vires'" for the following reasons:

> "1. That to justify eviction of a tenant from a non-residential building, under Section 9 (3) (a) (iii) it is necessary that the building is required for the purpose of a business which the landlord is personally carrying on;
>
> 2. That the 1st respondent had given a possessory mortgage of the premises on 11-11-1124 which would belie the case of her own requirement for carrying on the jeweller's business and that the non-mention of this requirement in the first application before the Controller leads to the same conclusions; and
>
> 3. That the Rent Control authorities had no jurisdiction to entertain a petition for eviction until the 1st respondent had paid the sum of Rs. 800/ which she had specifically undertaken to pay; and that they had no jurisdiction to entertain the petition and pass orders for eviction until the substantial questions in dispute between the parties in the civil suit, O. S. 1050/1122 is disposed of by the Court which is seized of the matter."

The question therefore is whether the authorities under the Building (Lease and Rent Control) Order have exceeded their jurisdiction or whether they have merely come to an erroneous decision. However erroneous the decision may have been, yet if they had jurisdiction to make the order complained of, this Court cannot interfere. Section 9(3) of the Travancore-Cochin Buildings (Lease and Rent Control) Order, 1950 provides that:

> "(a) a landlord may apply to the controller for an order directing the tenant to put the landlord in possession.....
>
> (i) * * * *
>
> (ii) * * * * *
>
> (iii) in the case of a non-residential building if he is not occupying for purposes of a business which he is carrying on, a non-residential building in the town or village concerned which is his own or to the possession of which he is entitled
>
> * * * *

The rest of the clause is immaterial for this case. The Controller has therefore jurisdiction to consider whether the requirements of this clause are satisfied and if he considers that they are satisfied, the party aggrieved is entitled to have the matter scrutinised by an appellate authority who is the Collector and any party aggrieved by the order of the Collector is entitled to have the matter considered by the Government in revision. The question as to whether the business which is in fact conducted by the husband of the landlord can be said to be a business that the landlord is carrying on, within the meaning of this clause, is a matter which can, and has to be, decided by the authorities concerned and the parties are bound by the final order passed in the proceedings however erroneous it may be. A tribunal having authority has as Land Hobhouse said in Malkarjun's case 'MALKARJUN v. NARHARI', 25 Bom 337 (PC), 'Jurisdiction to decide wrong as well as right."

(9) The first ground relied upon by the petitioner would not avail him as it would, if upheld, only amount to an erroneous exercise of jurisdiction. The second is not an independent ground & is no more than an aid to appreciate the truth and bona fides of the claim which forms the first ground.

(10) The third and last ground however stands on a different footing and on that, in my judgment, the petitioner should succeed. The question that is raised by this ground is whether when admittedly the landlord is liable to pay compensation for improvements effected by the tenant, an order could be passed by the Controller for eviction without or before such payment. The right of a tenant to retain possession of the holding until payment of value of improvement has been recognised in this country by usage of High antiquity and this usage has been recognised by sta-

tute in State where statutes have supervened. The Travancore-Cochin Buildings (Lease and Rent Control) Order, 1950 does not authorise the Controller to consider any question of value of improvements or to direct payment thereof. The scope of his investigation is defined in the various clauses of Section 9. The second proviso to the first clause of that section provides that — in a case,

"Where the tenant denies the title of the landlord or claims right of permanent tenancy, the Controller shall decide whether the denial or claim, is bona fide and if he records a finding to that effect, the landlord shall be entitled to sue for eviction of the tenant in a civil Court and the Court may pass a decree for eviction on any of the grounds mentioned in this clause notwithstanding that the Court finds that such denial does not involve forfeiture of the lease or that the claim is unfounded."

Clause (I) to Section 9 states that:

"A tenant shall not be evicted whether in execution of a decree or otherwise except in accordance with the provisions of this clause. The Travancore Building Rent Control Order, 1122 under which the proceeding started was promulgated under Section 5 of the Travancore Emergency Powers Act, 1 of 1122. The preamble to Act 1 of 1122, says

Whereas notwithstanding the termination of the war an emergent situation exists which renders it necessary to make provision for regulating certain matters, for securing public peace, for the maintenance of public order, and for maintaining supplies and services essential to the life of the community";

and Section 5 provides:

"5. (1) Our Government, so far as it appears to them to be necessary or expedient for maintaining supplies and services essential to the life of the community, may by notified order provide for regulating the letting and sub-letting of any accommodation or class of accommodation, whether residential or non-residential, whether furnished or unfurnished and whether with or without board, and in particular.....

(i) for controlling the rents for such accommodation (either generally or when let to specified persons or class of persons or in specified circumstances);

(ii) for preventing the eviction of tenants & sub-tenants from such accommodation in specified circumstances.

(2) An order under sub-section (1) may be made so as to have effect either generally or in any particular area."

The Travancore-Cochin Buildings (Lease and Rent Control) Order, 1950 repealed the said Order & re-enacted its provisions with certain changes. It is thus a measure designed to tide over an emergency, to avoid exploitation of the situation, by landlords, to satisfy their legitimate claims and requirements and subject to these to secure to tenants immunity from eviction without affecting their existing rights. It contemplates the immediate implementation of the order for eviction passed under its provisions by execution and does not envisage any investigation, decisions or direction leadng to any interception, delay or hindrance. As already stated, there is no provision authorising the Controller to investigate and decide any question of value of improvements or direct payment of any amount in that behalf before delivery of possession, even in a case where the liability may be admitted as in this case. The husband of the 1st respondent in his deposition admits liability to pay Rs. 800/- as directed in the release of the mortgage taken by his wife, the 1st respondent. The tenant, that is the petitioner, claims a larger sum by way of value of improvements & the question of the quantum of the compensation payable is pending adjudication by the Court in O. S. 1050/1122 filed by the 1st respondent, the landlord. In that suit it is competent for the Court to decree that the tenant shall be evicted only on payment of the last pie due to him by way of value of improvements, that is to say, it is competent for the Court to decide that the tenant is entitled to retain possession of the property until payment of the value of his improvements as fixed by it. The jurisdiction of the Controller and the higher authorities to direct eviction of a tenant from, and to put the landlord in possession of, the holding must therefore be confined to cases where the landlord is not liable to pay value for any improvements to the tenant as a condition of his getting possession of the property. To hold otherwise would be, as observed by Sir John Wickens, V. C. in 'FORBES v. ECCLESIASTICAL COMMISSIONERS FOR ENGLAND', (1873) 15 E Q 51, "to destroy by a sidewind public rights which were not in the contemplation of the Legislature." (at page 55).

This dictum would apply to private rights as well .No statute should be construed as destructive of pre-existing substantive rights of parties in the absence of provisions which expressly or by necessary implication so provide. There does not exist in the Travancore-Cochin Buildings (Lease and Rent Control) Order, 1950 a provision in any manner affecting pre-existing rights of the tenant. In fact the Legislation is one that benefits the tenant in that it secures him possession notwithstanding even the decree of a civil Court for eviction except pursuant to an order in that behalf to be passed by the Controller. The Buildings (Lease and Rent Control) Order must be construed as complementary to and not as conflicting with the jurisdiction of the civil Courts. The second proviso to the first clause of Section 9, already read, directs resort to the civil Court for final adjudication of the merits of a claim for title or of a permanent tenancy raised by a tenant. I have no hesitation in asserting that the Buildings (Lease and Rent Control) Order gives no jurisdiction to the Controller to direct that the tenant be evicted from and the landlord be put in possession of the property under the circumstances of this case. How can the civil Court before which the suit is pending decide in favour of the tenant, declaring him entitled to retain possession until the value of improvements be paid to him, if another jurisdiction can meanwhile unconditionally deprive him of possession? I cannot think that the Legislature ever intended a conflict of jurisdiction between the civil Court and the Controller, as such a conflict would lead to anomalous, if not absurd, consequences.

(11) The learned Advocate-General who appeared on behalf of the Travancore-Cochin State impleaded as 2nd respondent, contended that the tenant would be entitled to sue for compensation for improvements due to him, even after he is deprived of possession in enforcement of an order for eviction passed by the Controller. This is a point on which there is conflict of opinion which conflict does not fell to be resolved in this case, even assuming that the tenant has the right to sue as urged by the learned Advocate-General, that will not solve the question because the right of the tenant is not merely to get compensation for his improvements but to retain possession of the holding until such compensation is paid. That

right of retention is destroyed and will be lost to the tenant if he is deprived of possession before payment.

(12) I know not why, the petitioner in this Court omitted to challenge the jurisdiction of the Controller to pass the impugned order, as the landlord's title had been denied in the Munsiff's Court and the denial was repeated in his objections before the Controller which plea limited the Controller's jurisdiction in the first instance to considering the bona fide character of the denial. The Controller does not appear to have bestowed attention upon this plea nor have the appellate and revisional authorities done any better in this regard. None of the orders even refer to this plea and its consequences upon the proceedings.

(13) Jurisdiction is at the threshold of an action and therefore must when questioned, ordinarily be first decided and entry into the merits must await a decision in the affirmative. In cases of inherent absence, omission to raise or press want of jurisdiction or even express consent to its exercise, cannot confer it, and any act done would be 'ultra vires' and of no effect. In view of the conclusion reached by me in favour of the petitioner, I have not considered, being unnecessary, the question whether the Court can or need have regard to the point as to jurisdiction if it emerges from the records though not raised by the parties.

(14) In the result I allow this application and quash the order of the Government dated 20th June 1951, L. Dis. No. 772/51/PWC and the order passed by the Collector and the Controller directing eviction of the petitioner from the property in question. The respondents will pay the petitioner's costs; advocate's fee Rs. 100/-.

R.G.D. *Application allowed.*

[C. N. 54.]

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KUNHI RAMAN, C. J. AND SANKARAN, J.

State v. Cheloor Manakkal Narayanan Ittiravi Namboodiri and others, Accused.

Criminal Appeal No. 194 of 1950, D/- 16-7-1951.

(a) Penal Code (1860), S. 405 — "Dishonestly uses or disposes of that property" — Accused Receiver of mill — Payment over and above market price received — Failure to amount — Offence, if committed.

The accused, a receiver of a cotton mill appointed by the High Court, in the exercise of discretion conferred on him by the High Court, demanded and received payment over and above the market price in respect of bales allotted to a shopkeeper. The accused was given absolute powers by orders of the High Court and therefore he was well within his rights in demanding the extra payments. The accused failed to account for this extra payment. It was contended that the extra payment was made with the object of propitiating the accused, that it was paid as a bribe, that when it was paid the offence became complete and that therefore, there could not be any subsequent misappropriation of the money nor could there be criminal breach of trust in respect of that money which was intended by both parties to go into the pocket of the accused.

'Held' that the accused was clearly liable for criminal breach of trust as defined in Sec. 405 as it could be said within the meaning of that section that the accused who was entrusted with the property of the mill and its products dishonestly used or disposed of that property in violation of the direction of law which prescribed the mode in which such trust was to be discharged by him. (Para 12)

Anno: I. P. C., S. 405 N. 7.

(b) Penal Code (1860), S. 405 — Accused Receiver of mill — Accused directing officers of mill to affix seals to bales manufactured in May to indicate that they were manufactured in April — Prices in April lower than in May — Accused held committed breach of trust. (Para 12)

Anno: I. P. C., S. 405 N. 12.

(c) Evidence Act (1872), Ss. 114, Illustration (b) and 133 — Evidence of accomplice — Need for corroboration — Criminal P. C. (1898), S. 337.

The testimony of an accomplice should not be acted upon unless there is corroboration and a conviction should not be based without such corroboration on the evidence of an accomplice. (Para 17)

Anno: Evidence Act, S. 114 N. 2 Pts. 1 and 10; S. 133 N. 6 Pt. 1; Cr. P. C., S. 337 N. 17 Pt. 6.

Advocate-General, T. N. Subramania Iyer, for the State; M. K. Nambiar and M. B. Kurup; Komattil Achutha Menon and P. Divakara Menon, and T. K. Narayana Pillai and D. Narayanan Poti, for Accused Nos. 1, 2 and 3 respectively.

Case referred to:

('49) 1949-2 Mad L J 194: (AIR (36) 1949 PC 257) (Pr 17)

KUNHI RAMAN, C. J.: This appeal is brought on behalf of the State from the order of acquittal made by the Special First Class Magistrate of Trichur in C. C. No. 1/1125. There were three accused persons who were tried by the Magistrate. They were Ittiravi Namboodiri, T. A. Ramachandra Iyer and Kesavan Nambudiri. The first two were joint receivers of the Sitaram Spinning and Weaving Mills Ltd., Trichur appointed by the High Court of Cochin in O. S. 2/1123 with effect from 2-7-1123 M. E. The third accused is a nephew of the first accused. In the charge framed by the Magistrate accused 1 and 2 were alleged to have committed the offence of criminal breach of trust by public servants under S. 389 of the Cochin Penal Code corresponding to S. 409 of the Indian Penal Code. The third accused was alleged to have abetted the commission of this offence by accused 1 and 2 and to have been present when the offence was committed by them. He was, therefore, charged under Sections 389 and 109 of the Cochin Penal Code corresponding to Ss. 409 & 114 of the Indian Penal Code. After hearing the evidence placed before him the Magistrate found that the accused were not guilty and he accordingly acquitted them under Section 234(c) of the Cochin Criminal Procedure Code. The learned Advocate-General argues that this acquittal is illegal and incorrect and calls for interference by the High Court.

(2) The case against the accused was originally taken cognisance of by the District Magistrate of Trichur who examined P. W. 1 in part and then transferred the case to the Special First Class Magistrate. From a perusal of the judgment of the Special First Class Magistrate, it would be evident that he had no experience in trying criminal cases. We are told that he was a Sub-Registrar before becoming a Magistrate. In any event he does not deserve to be congratulated for writing the judgment from which this appeal is brought. We should in this connection wish to record our appreciation of the able manner in which the appeal was argued before us both by the learned Advocate-General on behalf of the State and

the learned counsel who appeared for the three accused who placed before us a clear analysis of the evidence in support of the respective contentions urged by them.

(3) The case for the prosecution in the trial Court was that while accused 1 and 2 were functioning as joint receivers appointed by the Cochin High Court of the Sitaram Spinning and Weaving Mills Ltd., Trichur (which will hereinafter be referred to as the Mills) the first accused received from P. W. 1, M. S. Vaidyanatha Iyer, Rs. 23,100 in excess of the price of one hundred bales of cloth which he had allotted to him from the Mills and that he dishonestly misappropriated the same without entering it in the receivers' accounts and thereby committed the offence of criminal breach of trust by a public servant. The second accused who was joint receiver is said to have participated in the same & the third accused is alleged to have abetted the first accused in the commission of this offence.

(4) The evidence for the prosecution disclosed that at the time of the trial P. W. 1 happened to be the owner of the Swadesi Piecegoods Shop in Trichur. He was also a share-holder in the Mills. There is no doubt he had abundant funds at his disposal. Until February 1948 sale of cotton textiles was controlled by an order of the Government and during that period he was getting an allotment of 40 bales of cloth per month. He got this quota from the joint receivers in February and March. After the control of cotton textiles was removed in February 1948 the price of the commodity rose abruptly and there was a regular scramble for cloth manufactured by the Mills since there was no other cloth available in the local market. P. W. 1 was therefore very anxious that he should get a big share of the cloth manufactured by the Mills for the month of April. With that intention he approached the first accused and as a result of negotiation, he got an assurance that he would be given one hundred bales in case he paid Rs. 10,000/ over and above the normal sale price. This was referred to as premium in the course of the conversation between the parties. In accordance with this agreement P. W. 1 went to the residence of the first accused at Vallikat Madhom on 12-9-1123 & paid him Rs. 9000/-. At that time, the third accused who is a nephew of the first accused was present and it was he who counted the money on behalf of the first accused. Thereupon the first accused gave P. W. 1 a delivery note which has been marked as Ext. A. This was for 50 bales which were to be released in his favour on his paying Rs. 33,000/- odd. Under Ex. B, which is the invoice for this lot P. W. 1 took delivery of the 50 bales. An attempt was made at the trial to create a little confusion by drawing attention to the date 3-9-1123 appearing in Ex. A, whereas the transaction took place on 12-9-1123. This apparent discrepancy will be commented on presently at the appropriate place. Subsequently, when P. W. 1 learned that the remaining 50 bales which were promised to be given to him were ready for delivery, he went to the house of the first accused in the night and there made a calculation of the amount to be paid by him on the basis of the cost of the first lot of 50 bales being 26 per cent. above the fixed rates and the cost of the subsequent lot of 50 bales being 50 per cent. over and above the rates fixed. It may here be explained that although the control was raised by the Government among the textile dealers there was what some of the witnesses described as a gentleman's agreement according to which it was decided that they should not charge above certain rates which were fixed by the Southern India Mill-owners' Association. The rates were fixed by Mr. Batchelor, a Director of Messrs. Binny & Co. (Madras) Ltd. who seems to have taken the initiative in doing this. The rates appear in Ex. DP. It must also be mentioned here that there was another point made on behalf of the defence with regard to the second lot of 50 bales for which according to the evidence of P. W. 1 he was to pay 50 per cent. more than the fixed rates. As a matter of fact, it was only 40 per cent. more and according to the prosecution it was a mistake made by P. W. 1 as a result of a slip of the tongue when he was giving evidence in the Magistrate's Court.

(5) At the interview which P. W. 1 had with the first accused, the third accused was also present. He made a calculation according to which over and above Rs. 9000/- already paid by P. W. 1 he was to pay Rs. 14,100/-. He asked for a week's time to make this payment. The first accused was not satisfied with an oral promise and insisted upon P. W. 1 executing a promissory note. This agreement according to P. W. 1 was ultimately concluded and P. W. 1 executed Ex. C a promissory note not in favour of the first accused but at the request of the first accused in favour of a relation of his by name Chengashneiloor Parameswaran Nambudiri. This was done by P. W. 1 on 29-9-1123 and he delivered the promissory note to the first accused. Subsequently, the first accused and P. W. 1 went to the Mills and P. W. 1 was given 49 bales. That was the only quantity that was then available for delivery under the invoice signed by the second accused bearing date 29-9-1123. It its also disclosed in the evidence that when the promissory note was executed by P. W. 1 he was given Rs. 900 in cash by the first accused on 29-9-1123 in adjustment of the account, the promissory note being for Rs. 15,000/. This device of paying and receiving was evidently resorted to with the object of warding off suspicion by avoiding figures which may tally with the version of P. W. 1.

(6) Altogether there were 37 witnesses examined on behalf of the prosecution in the trial Court. It also appears from the evidence that due to scarcity of water the Mills were not able to cope with the demand in April 1948 of bleached goods. Thereupon at the direction of the 1st accused bales of unbleached cloth coming under the quota for the month of May were stamped with the seal for April. This according to the prosecution resulted in loss to the Mills because the goods manufactured in April were cheaper than the goods that were available in May. This incident is also set forth in the charge as constituting criminal breach of trust. The explanation given by the first accused at the trial was that he was not paid Rs. 9000/- by P. W. 1 as alleged by him and that the promissory note Ext. C was executed for cash consideration because P. W. 1 was not in a position to find funds to enable him to make the purchase of the allotments made in his favour by the accused.

(7) The endeavour made at the trial was to assert that even assuming the case for the prosecution is true, the extra payments made by P. W. 1 to the first accused were in the nature of illegal gratification meant solely for the benefit of the first accused and therefore there cannot be any criminal breach of trust committed by the first accused. This contention seems to have found favour with the Magistrate who reached the conclusion that at the worst, the extra payments if they were made by P. W. 1 were in the nature of illegal gratification and that 1st accused was not bound to bring these amounts into the receiver's account in respect of the goods sold from the Mills

The trial Court also was not prepared to believe the evidence of P. W. 1 with regard to the payment of Rs. 9000/-. The conclusion reached by the Magistrate was that the offence of criminal breach of trust by a public servant was not committed by accused 1 and 2 and that therefore there was no case made out against the third accused. He accordingigy acquitted all the three accused.

(8) It would be convenient at this stage to refer to the powers vested in the receivers who are accused 1 and 2. They were duly appointed as receivers by an order of the Cochin High Court. Ext. BF is a copy of the directions given to the receivers as to the manner in which they should discharge their duties. This conferred upon the joint receivers all powers of management according to the articles of association of the Mills. They were to submit to the High Court on the 10th of every Malayalam Month a statement of accounts of receipts and disbursements. Clause (3) which we consider as important is to the effect that "all moneys received in the course of the management shall be deposited in the Bank and drawn upon according to needs." The next clause restricts the power of operating upon the Bank account to the first accused on behalf of himself and the joint receiver the second accused. They were ordered to maintain correct and regular accounts with regard to the management of the Mills. The first accused was given a car allowance of Rs. 300 per mensem and the second accused was paid Rs. 600 per month as remuneration plus Rs. 200/- per month as car allowance. They were to move the Court and solicit orders and directions whenever any questions arose in the course of the receivership. They were called upon to put into Court an acceptance of these conditions and an undertaking to be responsible for any loss or damage caused to the Mills due to their negligence or default. The subsequent orders passed by the Cochin High Court indicate that the receivers were permitted to enjoy every concession that they asked for, with the result that it became quite easy for them to commit defalcations. For example, on the 4th of Kumbhom 1123 they put in a petition pointing out that as there was stock worth Rs. 1,75,000/- in the Mills they may be permitted to sell such stock to the merchants in Cochin State "giving as much preference as possible to such of those former agents of the Mills who are also Cochinites." They also pointed out that it was expedient to exhaust the stock of the Mills as quickly as possible because there was danger of large quantities of textitle goods being imported to the Cochin State from Bombay. They requested that they may be permitted to add to the price a commission at the rate of 1½ per cent. of the sales during pre-war days, in order that they may reserve this commission in the accounts of Mills and it may be disbursed to the agents who insisted upon commission being paid to them. This petition was ordered by the Chief Justice of the Cochin High Court on the same date (4-7-1123). On 15-7-1123 another order was passed by the learned Chief Justice which gives some concessions and privileges which are not usually granted unconditionally to receivers appointed by the Court. At the beginning of this order there was reference made to the removal of the control orders pertaining to textile goods passed by the Government of India and the Cochin Government and stated that therefore it had become incumbent to give directions to the receivers with regard to the distribution of cloth. In the last paragraph is contained the following direction:

> "As long as the Mills are under Court management the receivers should consider themselves free to enter into any arrangement with anybody which they deem best in the interests of the institution. That is the only criterion which I consider necessary to be adpoted now. However, I would request the learned advocate appearing for the receivers to inform them about the two or three very attractive offers put forward by some of the advocates appearing in the case. Evidently there appears to be a great demand for the agency and according to law and in commonsense the receivers are bound to act as prudent managers, using that expression as Hindu Law and Marumakkathayam Law conceive it. The duty of a prudent manager is to see that the maximum advantage is obtained and in fact it goes without my saying. The receivers will, therefore, look into this matter and see whether some attractive terms will be obtained."

These directions vest, if we may use that expression, an arbitrary discretion in the receivers in spite of the qualifying clause of managers in Hindu families and Marumakkathayam tarwad to do what they liked in distributing the cloth. They were not asked to be governed by any regulations or rules regarding the ceiling price fixed for the goods. They could accept the best offers made to them irrespective of the manner in which the offers came. Their solitary concern, according to this order should be to get as much value as possible for the goods. It is strange that there is no reference made in this order to any Code of rules which may be adopted by the Piecegoods Merchants' Association. On the other hand, even if there are such codes which the advocates described in picturesque language as "gentleman's agreement" they need not be worried about them. On the other hand, their job is to make as much profit as possible. The sum and substance of these directions is that the widest arbitrary discretion was vested in the receivers to choose their vendees and to fix any price that they considered proper. There cannot be greater danger courted than by granting such wide powers to receivers. On 4-9-1123 another order was passed by the Chief Justice of the Cochin High Court. In this it is laid down:

> "This Court's order directing that cloth produced before 1st April 1948 should not be distributed without further orders from this Court stands cancelled. The receivers will effect the distribution in the usual course subject to the general directions given by the Hon'ble Chief Justice. It is expected that it would be possible to introduce a new scheme for distribution beginning with the production of and after the 1st May 1948."

This is Ext. BZ(1). We should like to refer to Ext. A at this stage. This was incidentally referred to earlier in the course of this judgment in connection with the conflicting versions regarding the date of Ext. A. According to P. W. 1, Ext. A the letter by which 50 bales of cloth were allotted to him from the April production was given to him when the transaction took place on 12-9-1123. On the other hand the date which this document bears is 3-9-1123. We scrutinised the appearance of this document carefully and we are satisfied that it was not an order that was typewritten specially for the benefit of P. W. 1. We have no doubt that it is a stock form prepared in bulk for distribution to persons in whose favour allotments of cloth are made by the receivers. It bears the same date 15th April 1948, corresponding to 3rd Medom 1123. It was on the 4th of Medom that the receivers succeeded in

getting the order from the Chief Justice of the Cochin High Court vesting a wide discretion in them. They in all probability anticipated such a concession and in anticipation had prepared several of these forms in bulk. Only the name of the allottee remains to be filled and the name of P. W. 1 is written in manuscript at the top of this document. There is also space in the document for entering the number of bales allotted to the party concerned. The opening words of the letter are "Dear Sirs" which will not be appropriate in the case of a single individual like P. W. 1. Moreover, it is not the original type-written document. It is a carbon copy as is evident from its appearance. These features can be understood only by a close scrutiny of the document and it is not a matter for surprise that P. W. 1 who had obviously not scrutinised this document nor the date appearing on the document became confused when he was giving evidence with regard to the date on which the bales were allotted in his favour.

(9) We have already referred to the decision made by the South Indian Mill Owners' Association regarding the price to be fixed for textile goods. Ext. BP is a list of such prices. It was appropriately referred to by the learned counsel appearing in this case as a gentleman's agreement from which we infer that it is an agreement that is binding only on gentlemen. Indulging in sales in the black market by persons who do not fall under this category cannot be prevented. There is no legal sanction for enforcing that agreement and the mere fact that there was an agreement like that cannot be taken advantage of by the accused persons who from the very manner in which they have been behaving as receivers were not apparently guided by decent rules of conduct. Ext. BS is another report submitted by the receivers on which their prayer was granted by the Chief Justice of the Cochin High Court whose order is Ext. BT. In Ext. CB(1) the High Court of Cochin passed the following orders and sent it to the joint receivers accused 1 and 2:

"On your report referred to above, I am to inform you that (1) regarding the fresh list showing the revised rates mentioned in para (1) of your report you are free to fix prices observing generally two directions, namely (1) prices should compare with all India figures (b) there is provision for the welfare fund in the new scheme of distribution now pending consideration and that (2) sanction has been accorded for the purchase of cotton as mentioned in para 2 of your report."

Only one other document deserves mention at this stage and that is Ext. IV the order made by the High Court in discharging the receivers without prejudice to the rights of the Mills if so advised, to establish their claim in a regular suit. When that application was made there was violent opposition on behalf of the Mills on behalf of which it was stated that the receivers had made considerable secret profits and that all these amounts have not been accounted for by them. The High Court which granted the order of discharge refers to the starting of criminal proceedings against the receivers in respect of their alleged criminal acts and left it to the Mills to seek their remedy by appropriate proceedings against the receivers. There seems to have been considerable feeling against the receivers that they were not discharging their duties honestly but were guilty of gross fraud. This culminated in the starting of the prosecution of the receivers and the order of acquittal made by the Magistrate after the trial.

(10-11) Coming now to the evidence called at the trial it may be stated at the outset that there is nothing in the evidence to incriminate the second and third accused. The main witness who has spoken about the incidents that led to the starting of the prosecution is P. W. 1. According to his evidence the second accused was not present at any of the discussions which he had with the first accused in his house and there is no evidence to show that the second accused knew about any criminal act alleged to have been done by the first accused. It was the first accused who was playing the dominant role he being the receiver invested with the power of allotting quota and fixing the price. The second accused was assigned comparatively lighter responsibility being mainly in charge of routine work. With regard to the third accused who is a nephew of the first accused the only evidence is that he happened to be present when P. W. 1 took Rs. 9,000/- to the house of the first accused for paying him the same. It was the third accused who according to the witness received it and counted the amount to verify whether the correct amount was brought. There is also the evidence of a merchant in Cochin who approached the third accused with regard to his own business when the third accused assured him that it will be possible for him to intervene and make the first accused show concessions to him. Evidence of this kind which has been called at the trial does not bring the guilt home to the third accused although there is considerable suspicion that he was taking an unhealthy interest in the nefarious activities of his uncle. But that by itself will not be sufficient to find him guilty of the charge of abetment of the offence by his uncle the first accused. We therefore hold that in view of the evidence, there is no reason to interfere with the finding of acquittal of the Court below so far as the second and third accused are concerned. The appeal as against them must therefore be dismissed.

(12) The main contention of the learned counsel for the first accused-respondent is that according to the version originally given by P. W. 1 the extra payment which he is alleged to have made over and above the sale price of the 100 bales of cloth allotted to him was in the nature of illegal gratification to induce the first accused to make an allotment of 100 bales in his favour. The version given by P. W. 1 is that he paid Rs. 9000/- in cash when this agreement was concluded and that subsequently he executed Ext. C the promissory note for Rs. 15,000/- and got back Rs. 900/- in cash from the first accused. Altogether he was to pay over and above the actual sale price of the bales allotted to him Rs. 23,100/- made up of the cash payment of Rs. 9,000/- and the execution of the promissory note Ext. C. It is argued that if this represents correctly the nature of the payment then the moment the amount was paid & the promissory note passed the offence of receiving illegal gratification was completed. The learned counsel for the first accused argues that to constitute criminal breach of trust there must first of all be payment of money in an innocent manner followed by subsequent misappropriation. Here the payment was made with the object of propitiating the first accused. It was paid as a bribe. When it was paid, the offence became complete. There cannot be any subsequent misappropriation of the money nor can there be criminal breach of trust in respect of that money which was intended by both the parties to go into the pocket of the first accused. This contention seems to us to be insufficient to meet the case for the prosecution that a breach of trust was committed by the first accused in failing to account for the total amount which he received from P. W. 1 or made him agree to give for the hundred bales of cloth allotted to him. As receivers appointed by the High Court and who were invested with absolute powers with regard

to the quantity of cloth which they were going to allot and the price which they were going to charge for the textile goods manufactured by the Mills accused 1 and 2 had unlimited or arbitrary discretion conferred upon them by the Cochin High Court. In the exercise of that discretion, the first accused demanded 26 per cent. over and above the market price in respect of the first lot of 50 bales allotted to P. W. 1 and 40 per cent. for the second lot of 50 bales allotted to him by the first accused. The receivers, as we have already indicated, were not bound by any gentleman's agreement entered into by the Mill Owners' Association. They were given absolute powers by orders passed by the Chief Justice of the erstwhile Cochin High Court and therefore the first accused would have been well within his rights in demanding this extra payment. No doubt when P. W. 1 made his statement to the Police Officer who was conducting the investigation, he referred to the extra payment and the execution of the promissory note as coming under the category of bribes. In his evidence he says that the first accused represented to him that these extra amounts were treated as "premium". Whatever might have been the impression created in the mind of P. W. 1 when the extra payment was demanded it is not likely that the first accused would have had the courage to openly demand a bribe. It is more probable that he would have tried to cover the fraud contemplated by him by telling P. W. 1 that he wanted the extra value as 'premium.' If that is the manner in which the extra amount was collected by the first accused and there was nothing in the order of appointment or in the orders clarifying the powers of the receivers passed subsequently by the erstwhile Cochin High Court to prevent them from demanding such an extra amount, then it was incumbent upon the receivers who were standing in a fiduciary relationship to the Court which appointed them and to the Mills of which they were made joint-receivers to enter these extra amounts in their accounts. If they have failed to do so, then they are clearly liable for criminal breach of trust as defined under Section 385 of the Cochin Penal Code corresponding to S. 405 of the Indian Penal Code. The section may be read to clarify the position:

> "Whoever being in any manner entrusted with property or with any dominion over property, dishonestly misappropriates or converts to his own use that property or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits criminal breach of trust."

If the version of P. W. 1 is believed that the first accused received Rs. 9000/- which is admittedly not accounted for in the receivers' accounts and if P. W. 1's evidence is believed that he was made to execute Ext. C for the balance of the extra value which the first accused charged for the hundred bales of cloth, then it can be said within the meaning of the section that the first accused who was entrusted with the property of the Mills and its products dishonestly used or disposed of that property in violation of the direction of law which prescribed the mode in which such trust was to be discharged by him. He was bound according to the orders made by the High Court of Cochin, to account for the actual price charged by him for the goods manufactured by the Mills although there was no limit fixed to the power of fixing any price he liked for such goods. Similarly, if as alleged on behalf of the prosecution he directed the officers of the Mill to affix seals to bales manufactured in the month of May to indicate that they were manufactured in the previous month of April when the prices were 20 to 25 per cent. lower than the prices prevailing in the market for goods manufactured in the month of May, then he has committed criminal breach of trust because he has acted in violation of the direction prescribing the method in which the trust is to be discharged by him. Any subsequent act done with the intention of recouping the loss cannot save him. There was a legal obligation imposed upon him both by the order of appointment as receiver and by the subsequent directions given by the Cochin High Court to him to conform to certain rules and regulations. He has violated those rules and regulations, because admittedly he has not brought into account the amount of Rs. 9,000/ received from P. W. 1 nor has he admitted that the promissory note Ext. C was executed towards the goods allotted to P. W. 1.

(His Lordship discussed the evidence and proceeded.)

(13-16) Comment is made in the judgment of the Magistrate that the entries found in the account books of P. W. 1 did not appear to be genuine. There is no doubt that P. W. 1 was not very anxious to make regular entries in his account books of transactions which he knew to be shady. If as he believed, the amount was paid by him as illegal gratification to the first accused, then there is criminal liability attaching to him also. This would naturally make him nervous and that is accountable for the absence of any prompt entry in his account book of the extra amount which he had agreed to pay to the 1st accused.

(17) This incidentally raises the question of his being an accomplice of the first accused. If the extra amount paid or promised to be paid to the 1st accused was in the nature of illegal gratification, then P. W. 1 would certainly be an accomplice and the evidence of an accomplice has to be accepted with considerable caution. The Supreme Court had occasion to stress the importance of the rule that the testimony of an accomplice should not be acted upon unless there is corroboration and that a conviction should not be based without such corroboration on the evidence of an accomplice. The Judicial Committee of the Privy Council had dealt with this question in the case reported in 'BHUBONI SAHA v. THE KING', (1949) 2 Mad L J 194. There the question related to the confession of a co-accused and the view expressed was that it can be used only in support of other evidence and cannot be made the foundation of a conviction. It was also pointed out that although the conviction founded upon the testimony of an accomplice supported only by the confession of a co-accused may be justified in law in view of the provisions of Section 157 of the Indian Evidence Act yet the Court should not easily depart from the rule of prudence based on long experience which requires that there must be independent evidence to corroborate the evidence of an accomplice when it will implicate an accused person. We are not losing sight of this important principle when dealing with the evidence of P. W. 1. We are also not forgetting that P. W. 1 stood to gain by avoiding his pronote. In a case like the present, it is not possible to get a number of witnesses to speak to the incident which would amount either to the offence of receiving illegal gratification or the offence of criminal breach of trust under the Penal Code. Therefore the absence of the evidence of other witnesses directly in support

of the oral testimony of P. W. 1 cannot be regarded as a circumstance adverse to the prosecution. The only manner in which the evidence of P. W. 1 can be tested is by seeing whether it is consistent with the circumstances and the circumstantial evidence in the case. There is the evidence of the Anchal Master P. W. 10 which if believed would support the fact that as early as possible P. W. 1 put in writing his complaint against the 1st accused with the intention of transmitting that writing to the first accused. We have already commented upon the importance of the promissory note Ext. C which on the face of it seems to betray the guilt of the first accused. We have already stated that it is impossible to believe the version of the first accused that he not only allotted 100 bales of cloth in favour of P. W. 1, but actually went out of his way and put money in his pocket to enable him to pay the price of these bales. If he had faith in the solvency of P. W. 1 there was nothing wrong in giving him the bales and taking a voucher that he would pay the price of the bales as and when they were sold. Instead of doing so, his version is that he actually paid cash to P. W. 1 and thus enabled him to pay cash for the goods that were allotted to him. The payment was made not out of his funds but out of moneys said to have been placed with him by P. W. 8 without any voucher. This is too much to be believed in view of the relationship that subsisted between the first accused and P. W. 1 which was not that of intimate friends.

(18) With regard to the case for the prosecution that the goods manufactured in May which had a higher market value were stamped with the seal for April to indicate falsely that they were goods manufactured in the month of April, there is the evidence of P. W. 12 Dikshit, who was a Superintendent in the Mills. He has deposed that when the fact was noticed by him he thought it was highly irregular and warned the Weaving Master not to do such a thing. It was represented to him that the seals were affixed to the bundles under the written orders of the receivers. The written order Ex. AM has been produced. It is signed by the first accused. He had not taken the permission of the Court for giving any such orders. The stamping in this manner directly results in a loss to the Mills. This could not be covered by making a subsequent profit for the Mills by affixing the May seal on goods made in April. The case for the prosecution is that it was with the idea of giving P. W. 1 the full quantity of 100 bales allotted to him that this was done and that it would result in a profit to P. W. 1 and a loss to the Mills. There is no doubt that the rates were higher in May than in April. Therefore the April produce would have fetched a lower value than the May produce. The receivers would not have been justified in charging a lower rate for goods that were manufactured in May. There was an argument addressed on behalf of the first accused at the hearing. His learned counsel said that if unbleached goods made in May were affixed with the seal for April it would not have resulted in loss to the Mills. This appears to us to be mere quibbling. There cannot be any doubt that the first accused acted in contravention of the direction given to him and of the duty imposed upon him not to do acts which are detrimental to the interests of the Mills.

(19) We have carefully gone through the evidence of P. W. 1 and the other witnesses already mentioned. It took a little time to do this because the evidence was all recorded in not clearly legible Malayalam and the whole of the evidence had to be carefully scrutinised. On going through the evidence we feel that the evidence of P. W. 1 and the other witnesses mentioned by us deserves to be believed in view of the strong circumstantial evidence against the first accused. If this evidence is believed, then there is no doubt that the first accused has committed the offence of criminal breach of trust under Section 389 of the Cochin Penal Code. The appeal from the order of the first accused must, therefore, be allowed and the acquittal of the first accused converted into conviction under Section 389 of the Cochin Penal Code. The sentence of the Court is that the first accused shall undergo rigorous imprisonment for one year and pay a fine of Rs. 1,000/- in default of payment of fine, he shall undergo a further term of rigorous imprisonment for four months. Cancel bail bond.

V.R.B. *Appeal partly allowed.*

A. I. R. 1952 Travancore-Cochin 133

KUNHI RAMAN C. J. AND SUBRAMANIA IYER J.

State v. Govinda Pillai Kumara Pillai, Accused.

Criminal Ref. No. 9 of 1951, D/- 19-10-1951.

Criminal P. C. (1898), Ss. 215 and 532 — Committing Magistrate having no jurisdiction — S. 215 does not apply — S. 532 applies.

Where the order of commitment is made by a Magistrate about whose jurisdiction there is no doubt whatsoever and there is ground for interfering with that order of commitment, the High Court has the power under S. 215 to quash the commitment in a proper case. But where the Magistrate passing the order of commitment is not competent, but professes to act or purports to act in the exercise of a power which he thinks he has got, then the appropriate section under which relief can be given to the party who objects to the commitment is S. 532. *(Para 3)*

Anno: Cr. P. C., S. 215 N. 2; S. 532 N. 1, 2.

Government Pleader, for the State; T. R. Atchutha Warrier, for Accused.

KUNHI RAMAN, C.J.: The additional sessions Judge of Alleppey is responsible for this reference.

(2) The stationary Second Class Magistrate of Sherthallai passed an order of commitment for trial to the Alleppey Sessions Court in respect of offences committed by the accused under Ss. 302 and 318 of the Indian Penal Code. The case was transferred to the file of the Addl. Sessions Court. When the trial was about to commence, the advocate for the accused raised the question as to the legality of the order of commitment. According to the reference made by the learned Judge the argument seems to have been that the order of commitment was void because it was passed by a Magistrate who was not competent to make that order. This contention seems to have found favour with the Court. The result is the present reference. In the course of the order, the learned additional Judge reads S. 215 of the Indian Code of Criminal Procedure as also S. 532 of the same code. He records his conclusion in the following words:

> "In the circumstances.....the provisions of S. 215 of the Indian Criminal P. C. have to be invoked for the purpose of deciding on the correctness, legality or propriety of the order of commitment in question. The Honourable High Court alone is competent to exercise the powers under the above mentioned section."

That is the obvious reason why the reference was made by the Court below.

(3) We are afraid the learned Judge did not apply his mind to the wording of Section 215 when he made these observations. The section refers only to cases where a commitment is made by a magistrate. In the present case the Judge expresses the opinion that the magistrate is not competent. In such circumstances, the provisions of S. 215 cannot be attracted. Where the order of commitment is made by a Magistrate about whose jurisdiction there is no doubt whatsoever and there is ground for interfering with that order of commitment, the High Court has the power under S. 215 to quash the commitment in proper cases. But where the Magistrate passing the order of commitment is not competent, but professes to act or purports to act in the exercise of a power which he thinks he has got, then the appropriate section under which relief can be given to the party who objects to the commitment is S. 532 of the Indian Code of Criminal Procedure. The opening words of the section are clear. Reference is made to a magistrate purporting to exercise powers duly conferred but which were not so conferred. From the facts narrated by the learned Judge in the order of reference, this seems to us to be a case which would come within the purview of S. 532. At the same time we want to make it clear that we are not expressing any opinion as to whether the magistrate that passed the order was competent or not. That question does not arise in the reference. We are depending for the facts upon the reference made by the Court below. Therefore, since this is not a case in which the provisions of S. 215 of the Criminal P. C. are attracted, the Court below can act in the exercise of the power conferred upon it by S. 532. The reference is answered in these terms. Communicate at once.

R.G.D. *Reference answered.*

A. I. R. 1952 Travancore-Cochin 134

KUNHI RAMAN, C. J. AND SUBRAMANIA IYER, J.

Ananda Theertha, Appellant v. Kumaraswami and others, Respondents.

A. S., No. 441 of 1121, D/- 31-8-1951.

(a) Civil P. C. (1908), S. 92 — Interest in trust — Interest in every part of trust property need not be proved.

In order to sustain a suit under S. 72, Tr. C. P.C. (corresponding to S. 92, C.P.C.) it is not necessary that the plaintiffs should prove that they have interest in every part of the property comprised in the Trust. If there is any item of property not subject to the Trust, that item would be excluded from the operation of the decree. The inclusion of such an item should not entail dismissal of the suit. AIR (35) 1948 P.C. 214, Rel. on. *(Para 4)*

Anno: C. P. C., S. 92 N. 8.

(b) Civil P. C. (1908), S. 92 — Public religious and charitable trust.

The fact that anybody was at liberty to go at any time to the Math (which was charitable or religious institution) to worship the Swami and take food there, plainly establishes that the trust was one for public purposes: AIR (35) 1948 P C 214, Rel. on. *(Para 6)*

Anno: C P. C., S. 92 N. 5.

(c) Civil P. C. (1908), S. 92 — Appeal — Decision under S. 92 — Binding nature — Right of person interested in trust but not party to suit, to file appeal.

A suit under S. 92 is a representative suit and if properly conducted, the decision would bind all those persons who have some interest in the matter in common with the plaintiffs on record even though they are not 'eo nomine' there. If a person interested, though not on record, would be bound by the decree passed in a representative suit, it is only reasonable to allow him the right of preferring an appeal against an adverse decree which is not sought to be set right by the parties on record. *(Para 11)*

Anno: C. P. C., S. 92 N. 36.

T. N. Subramania Iyer, Advocate-General, for Appellant; N. Varadaraja Iyengar and Bhoothalinga Iyer, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('08) 31 Mad 236: (35 Ind App 176 PC) (Pr 12)

('21) 48 Cal 493: 48 Ind App 12: (AIR (8) 1921 P C 123) (Pr 13)

('38) 65 Ind App 198: (AIR (25) 1938 P C 184) (Pr 13)

('48) AIR (35) 1948 P C 214: (1948 All L J 435) (Pr 4)

('28) AIR (15) 1928 Mad 456: (108 Ind Cas 298) (Pr 13)

JUDGMENT: This appeal arises out of a suit brought by a sanyasin and a layman as two persons interested in the Trust after obtaining the sanction of the Diwan of the erstwhile Travancore State under S. 72 of the Travancore Code of Civil Procedure which corresponds to S. 92 of the Indian Code. The suit was filed in the District Court of Trivandrum and was numbered there as O. S. 83 of 1113. It was afterwards withdrawn by the erstwhile Travancore High Court for trial and disposal therein in the exercise of its extraordinary Civil jurisdiction and was given a new number as O. S. No. 2/1119. A learned Judge of the High Court tried the case and after an elaborate enquiry wherein a large volume of oral and documentary evidence was adduced, disposed of the matter by dismissing the suit on 14th Kanni 1120. The 1st defendant died pending the suit and two persons were sought to be impleaded in his stead to represent the Sree Narayan Dharma Sangham as whose President the 1st defendant had been made a party. There was a competition between defendants 8 and 9 for the Presidentship. That dispute was tried by the learned Judge who tried the suit but he was not able to come to a conclusion in favour of either of them and therefore he directed the continuance of both in the array of parties. In the judgment, it is found that the 9th defendant is the representative of that institution and not the 8th. It appears that the 8th defendant has filed another suit in the District Court to establish his claim to Presidentship and that that suit is pending.

(2) In the course of the suit the other members of the Dharma Sanghom got themselves impleaded as defendants. The 8th defendant is the appellant and the plaintiffs and the other surviving defendants are the respondents.

(3) The learned Judge has written an elaborate judgment in the case which runs to 39 pages in print. The ground for the dismissal of the suit is stated by the learned Judge in paragraphs 26 and 28 of his judgment. He finds in para 26 that 'the properties and institutions acquired by Narayana Guru now in the possession of the Sanghom and those acquired by the Sanghom do not constitute a public trust of a religious and charitable nature.

On the other hand, he held that the evidence shows that they belong absolutely to the Sri Narayana Dharma Sangham'. He starts paragraph 28 thus:

"Even on the assumption that there is a trust as alleged in the plaint, it appears to me that the two plaintiffs cannot be characterised as persons interested in the trust, enabling them to institute the suit under S. 72, C. P. C."

He concludes the paragraph thus:

"If the scope of the suit had been restricted to temples included in the alleged trust, it might be possible for the plaintiffs to contend that a scheme suit like the present one is maintainable with respect to the temples on the ground that they worship therein. The suit however is not instituted in that way. In the way in which it has been conceived and filed, the plaintiffs cannot be held competent to maintain it, unless they prove that they have interest in the entire foundation, of which the Sanghom is alleged to be the trustee."

(4) The entire foundation referred to in that paragraph and in the plaint consists of institutions such as, temples, mutts, Ashramams, hospitals and schools. Had the suit been confined to temples it would have succeeded even according to the learned judge. It is on account of the fact that the plaintiffs have not proved an interest within the meaning of S. 72 of the Tr. C.P.C. in respect of every one of the institutions comprised in the Trust that the suit was dismissed. This view of the learned Judge cannot be supported. In order to sustain a suit under S. 72, it is not necessary that the plaintiffs should prove that they have interest in every part of the property comprised in the Trust. If there is any item of property not subject to the Trust, that item would be excluded from the operation of the decree. The inclusion of such an item should not entail dismissal of the suit. We need only refer to the decision of the Privy Council in 'GURUNATHARUDHASWAMI v. BHIMAPPA GANGADHARAPPA', AIR (35) 1948 P C 214 where it was found that a portion of the property over which the plaintiffs claimed interest did not form part of the Trust and it was excluded from the operation of the decree which was confined to the properties comprised in the Trust. The Privy Council did not consider the inclusion of an item free from the Trust to be a fatal defect which would entail dismissal of the suit.

(5) Sree Narayan Guru who is the Founder of the Trust was admittedly a religious Leader and Reformer. The principle that he wanted to propagate was an absolute equality of human beings, of a casteless society and a life of sacrifice for Sanyasins. He organised various institutions for the benefit of the public. He established several institutions by donations received from his devotees and followers by way of immovable properties and money. Several institutions of a public, charitable or religious character were made over to him for management. He ordained many persons as Sayansins. Besides these Sanyasin disciples he had lay disciples as well. An association mainly of laymen was formed called the "Sree Narayana Dharma Paripalana Yogam" popularly called the S. N. D. P. Yogam. The association of the sanyasin disciples was called the "Sri Narayana Dharma Sangam". To ensure peace and prosperity and the perpetuation of his doctrines, he insisted upon the sanyasin disciples observing celebacy and not being entitled to earn property for themselves. Otherwise, they were free to engage themselves in ordinary..... activities and avocations. Sree Narayana Guru, as the evidence shows, himself never touched money nor did he ever desire to own any property himself. All that was under his control was of and for, the public. He was not an individual but an institution with the headquarters, if it may be so called, at Sivagiri. Ex. 11 is a Will executed by him in the year 1101. He thereby nominates his 'prime sishya' Boothananda who had been associated with him for over 28 years to continue to be the manager and representative of the various charitable institutions and properties appurtenant thereto that are under his control and provides that after the death of the nominee, the management must be in his 'sishya parampara' & that the charitable institutions should be maintained for ever. Earlier in the year 1090, Swamiji had given a power of attorney in favour of another 'sishya', Swami Chythanya. In that document he details the various activities and institutons started and conducted by him with the co-operation and contribution of the public and his sishyas. He makes an unequivocal declaration therein that all those properties and institutions that were organised or managed by him and the properties appurtenant thereto were all erected, earned and held for the benefit of the public. Detailed directions are given for the management of the properties and of the institutions. Provision is also made for consulting the public in the matter of management and in the matter of rectifying irregularities if any such happen to occur. Those two documents make the matter perfectly clear that the holding of either the institutions or the properties as the private properties either of his or of his 'sishyas' is opposed, if not obnoxious, to the fundamental principles of selflessness and public service advocated and demonstrated by him and whose perpetual continuation through his sishyas he desired. It is thus obvious that the institutions under his control or directions and the properties appurtenant thereto were all public charitable institutions. The plaintiffs are truly persons interested in these institutions within the meaning of S. 72 of the Tr. C.P.C. It is not disputed that any member of the public would be entitled to resort to and offer worship in the Mutt and Varkala which, as already stated, was the head-quarters of Swamiji wherein are established one or two temples and the 'Samadhi' of the Swamiji after his demise. The public freely resort to that place for worship. This they used to do at all times.

(6) The following passage from the judgment of the Privy Council in 1948 P C 214 will elucidate the position. Their Lordships say:

"The evidence establishes beyond doubt, in their Lordships' view, that the properties in suit were either originally given, or were dedicated by the Swami, to the purposes of the Math which was a charitable or religious institution. It has been argued by counsel for the appellant that even if this be so the trust was not for public, but for private, purposes. But this is clearly not so. It is common ground that anybody was at liberty to go at any time to the Math to worship the Swami and take food there. The trust was plainly one for public purposes."

That is the nature of the evidence in this case and that being so, the conclusion that we have to come to is the one that the Privy Council came to in that case. We have no hesitation to find that the Trust in question is a Trust for public purposes of a charitable or religious nature as contemplated in S. 72 of the Tr. C.P.C.

(7) Indeed it is not contended on behalf of the respondents that the Dharma Sangham is not an institution for public charitable purpose. What is contended is merely that the plaintiffs are not interested in that institution and that only members

of that sangham are interested and can start action under S. 72. This contention can hardly be accepted. The Sangham itself exists for the welfare of the public. The public therefore are the beneficiaries of the trust. When it was admitted that the members of the Sangham are the trustees, the question arose as to who the beneficiaries are and the answer given to our query was that the members of the Sangham constitute at once the trustees and beneficiaries which would be an unacceptable if not impossible position.

(8) If, however, there is any institution or property that is not subject to the Trust, it would certainly be beyond the scope of the suit. The learned Judge who tried the case has not considered the question as to whether there is any item which is not subject to the Trust, he having disposed of the suit on the basis that the properties except the temples are the sole property of the Sangham in which the plaintiffs were not interested. In the view that we take of the matter, there is necessity to consider the matter afresh to determine the scope of the Trust and the properties appurtenant thereto.

(9) The judgment of the learned Judge cannot therefore be supported and has to be set aside and the case remanded for fresh disposal.

(10) It was contended that even if the Trust set up is established, no case is made out to frame a scheme for the management of the Trust. Reliance is placed on the fact that the Dharma Sangham has got itself registered as an Association under the Trusts Registration Act, 11 of 1088 (Cochin). The judgment of the learned Judge itself contains sufficient grounds to justify, if not necessitate, the framing of the scheme. It is not necessary to detail the portions thereof. We are satisfied that on the evidence in the case a ground has been made out for the framing of a scheme. In framing the scheme the claims of the members of the Dharma Sangham to be managers of any of the institutions will be considered and given effect to.

(11) In this state of the case Mr. Varadaraja Iyengar learned counsel for the respondents (contesting defendants) raised a preliminary objection that the appeal is incompetent having been one filed by the 8th defendant who was impleaded as the representative of the Dharma Sangham as its President and that it was not competent for him to file an appeal against the interest of the Dharma Sangham. The appellant's claim to presidentship has been found against by the learned Judge. It is represented, as already observed, that the 8th defendant has filed a separate suit to establish that claim. The question of his Presidentship is therefore left open and the 8th defendant has to be regarded as a person interested in the Trust otherwise than as the President of the Dharma Sangham and so regarded, he as one of the persons interested in the Trust in respect of which the suit was filed by the plaintiff, is entitled to file on appeal against the decree dismissing the suit especially because the conduct of the plaintiffs in not having filed the appeal against the decree which, as mentioned already, is 'prima facie' not supportable, leads to an inference of mala fides on their part and their omission is against the interests of the persons interested in the Trust as whose representatives the suit was filed by them. A suit under S. 92, C. P. C., is a representative suit and if properly conducted, the decision would bind all those persons who have some interest in the matter in common with the plaintiffs on record even though they are not 'eo nomine' there. If a person interested, though not on record, would be bound by the decree passed in a representative suit, it is only reasonable to allow him the right of preferring an appeal against an adverse decree which is not sought to be set right by the parties on record. In this case however we need not go to that extent because the appellant was a party on record and as such in any view he is entitled to prefer the appeal.

(12) In 'SANKARALINGA NADAN v. RAJESWARA DORAI', 31 Mad 236 P. C., it was held that the plaintiff in a suit under S. 92 having obtained a decree in his favour, compromised the matter during the pendency of an appeal which compromise was sought to be recorded, other persons not on record but interested in the Trust were allowed to be impleaded and on their objection, the compromise entered into was thrown out.

(13) In 'Kumaraswami Asari v. Poojari Lakshmana Goundan', AIR (15) 1928 Mad 456 an appeal filed by the defendant-plaintiffs in a suit under S. 92 of the Indian Civil P. C. which was returned for representation was not represented by the appellants-plaintiffs, other parties interested filed a fresh appeal and the question was whether they were competent to file the appeal and if so, whether the delay in the filing of the appeal could be condoned at their request. It was held that the plaintiffs-appellants having brought the suit under S. 92, they did so in a representative capacity and that their omission to represent the appeal cannot be justified and was entitled to be made good by other parties similarly interested. The fresh appeal filed by the non-plaintiffs was therefore accepted and the delay condoned. Reference may also be made to 'RAJA ANAND RAO v. RAMDAS DADURAM'. 48 Cal 493: 48 Ind App 12 P C and 'MT. ALI BEGUM v. BADRA-UL-ISLAM ALI', 65 Ind App 198.

(14) It is not necessary to multiply authorities. It is sufficient to say that the 8th defendant as a person interested in the Trust in respect of which the plaintiffs, as persons interested filed the suit, is entitled to prefer this appeal against the decree dismissing the suit against which decree the plaintiffs on record omitted to take further action. In the facts of this case, their omission must be attributed to a collusion with the contending parties and we therefore overrule the preliminary objection.

(15) The result is that the appeal should be allowed, the decree of the learned Judge reversed and the case remanded to the original side of this Court for fresh disposal by framing a scheme in respect of the institution which form the subject matter of the public Trust, excluding the institutions and properties, if any which are not impressed with the Trust set up. The costs of this appeal will be provided for in the revised decree which will ultimately be passed in the suit.

V.B.B. *Case remanded.*

A. I. R. 1952 Travancore-Cochin 136

GANGADHARA MENON AND JOSEPH VITHAYATHIL, JJ.

Chendadesi Ventaperumal Nadar, Appellant v. Perumal Pillai Nadachy Parvathy and others, Respondents.

A. S. No. 528 of 1950, D/- 5-10-1951.

Civil P. C. (1908), O. 32, R. 5 — Travancore Civil P. C., O. 32 R. 3(5) — Law before introduction of sub-r. (5) — Guardian representing minor in suit continues to represent him in execution — Another person representing him in execution and notices sent to him — Minor held not represented

in execution — Execution proceedings held not binding on minor — Suit for declaration that minor is not bound by sale can be treated as application under S. 47 — Limitation is under Art. 181 Lim. Act (Civil P. C. (1908), S. 47). (Limitation Act (1908), Arts. 166 and 181.)

It has been the law in Travancore even before the introduction of sub-r. 5 to O. 32 R. 3, C.P.C. (Tr.) in 1120 that the guardian appointed for a minor in a suit continues to be the guardian of the minor for purposes of execution also. Where therefore in the execution application filed by the decree-holder the minor was represented not by the person who was appointed as his guardian for the suit but by his mother who was not competent to represent him and all notices relating to the excution were served on her, it must be taken that the minor was not represented in the execution proceedings. These proceedings cannot therefore bind the minor. The fact that the guardian for suit applies to the Execution Court to correct the record and put his name as guardian and clothe him with authority to act on behalf of the minor, does not mean that he acted on behalf of the minor. (Paras 5, 6)

In view of the fact that the minor was not properly represented in the execution proceedings in such a case, the sale cannot affect the interests of the minor and is void so far as the minor is concerned.

The suit, so far as it impeaches the validity of the Court sale, can be treated as a proceeding under S. 47, Criminal P. C., if the plaintiff's (minor's) claim for this relief is not barred by limitation. AIR (1941) Lah 327, Relied on. (Para 12)

Except in the case of an application under O. 21, R. 90 of the Indian Civil Procedure Code for setting aside a Court sale on the ground of material irregularity or fraud in publishing or conducting it in which case Art. 166 (corresponding to Art. 151 of the Travancore Limitation Act), would apply, it is Art. 181 (corresponding to Art. 165 of the Travancore Limitation Act) that applies to applications for relief on the ground that the Court sale is void, and the limitation is three years from the time when the right to apply accrues. Case law Ref. (Paras 13, 19)

Anno: C. P. C., S. 47, N. 82, 88; O. 32, R. 5, N. 2 & 3; Limitation Act, Art. 181, N. 9; Art. 166, N. 2, 7 and 14.

T. S. Krishnamoorthi Iyer, for Appellant; M. Madhavan Nair, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('01) 25 Bom 337: (27 Ind App 216 PC) (Pr 10)
('05) 32 Cal 296: (32 Ind App 23 PC) (Pr 14)
('34) AIR (21) 1934 All 314: (1934 All L J 859) (Prs 13, 16)
('32) AIR (19) 1932 Cal 381: (137 Ind Cas 378) (Prs 13, 15)
('41) AIR (28) 1941 Lah 327: (196 Ind Cas 611) (Prs 12, 13)
('20) 43 Mad 313: (AIR (7) 1920 Mad 402) (Pr 14)
('24) AIR (11) 1924 Mad 431: (47 Mad 288 FB) (Prs 13, 14)
('50) AIR (37) 1950 Mad 367: (1950-1 Mad L J 22) (Prs 13, 18)
(1863) 1 Marsh 647 (Pr 14)
('36) AIR (23) 1936 Pat 496: (163 Ind Cas 34) (Prs 13, 17)
('38) AIR (25) 1938 Pat 372: (19 Pat L T 193) (Prs 10, 11)
('40) AIR (27) 1940 Pat 62: (21 Pat L T 864) (Prs 8, 9)
('48) AIR (35) 1948 Pat 91: (26 Pat 15) (Prs 8, 9)
10 T L J 299 (Pr 19)
24 T L J 734 (Pr 19)
('49) 1949 T L R 14 (FB) (Pr 19)
('49) 1949 T C L R 141 (Pr 19)

JOSEPH VITHAYATHIL, J.: The plaintiff in O.S. No. 552 of 1118 of the District Munsiff's Court of Nagercoil is the appellant in this case. The suit is for a declaration that the decree and execution proceedings in O. S. No. 2038 of 1104 of the District Munsiff's Court of Nagercoil are void and for setting aside the same and for a permanent injunction restraining the 1st defendant from recoverig possession of the plaint property on the basis of the Court sale in that case. The plaintiff's adoptive father had executed two hypothecation bonds in favour of the father of defendants 2 and 3. After the death of the hypothecator the father of defendants 2 and 3 filed O. S. No. 2038 of 1104 on the basis of the hypothecation bonds against the present plaintiff and the widow of the hypothecator. The present plaintiff who was a minor was at first represented by his mother as guardian for the suit. Although a written statement was filed by her on behalf of the minor nothing further was done in the case and the suit was decreed ex parte.

(2) As per Ex. A adoption deed, dated 3-1-1102 the natural father of the minor was to be his legal guardian after death of the adoptive father. The natural father who is the 5th defendant in this case filed a petition to set aside the ex parte decree and to have him appointed as guardian for the suit of the minor. The ex parte decree was set aside and the natural father was appointed guardian for the suit of the minor in 15-10-1105. He filed a fresh written statement but the suit was again decreed on 17-11-1105. When the decree was prepared, by mistake the mother of the minor was stated to be his guardian. In the execution application that was filed by the decree-holder the minor was represented by his mother and therefore the notices relating to the execution were issued to the mother. When the property was brought to sale the present 5th defendant put in a petition on 16-4-1107, contending that he was the legal guardian of the minor defendant and praying that the decree-holder should be directed to correct the decree and that he might be given six months' time in order to raise the decree amount by mortgaging the decree schedule property with the leave of the Court after getting the decree corrected. The decree-holder agreed to the sale being adjourned for three months and it was accordingly adjourned to 15-7-1107. On that day the 5th defendant filed another petition for further adjournment of the sale for three months, alleging that he had put in a petition to correct the decree, that the petition was posted for hearing on 20-7-1107 and that he could act on behalf of the minor only after the decree was corrected. This petition was rejected by the Court and the sale was held on the same day. The decree-holder purchased the property for the decree amount. From the order passed on 16-7-1107 an appeal was filed in the District Court by the 5th defendant and that also was dismissed. When the decree-holder applied for delivery of possession of the property the 5th defendant raised objections on behalf of the minor and they also were rejected.

The appeal filed from the order rejecting those objections was also dismissed. Then the present suit was filed by the plaintiff for the reliefs mentioned above.

(3) The main allegations in the plaint are that the amounts under the two hypothecation bonds executed by the plaintiff's adoptive father had really been discharged, that there was negligence on the part of the defendant 5 in the conduct of the case, that the decree is invalid & that in any case the execution proceedings are void since the plaintiff was not represented in those proceedings. The 1st defendant in his written statement denied all these allegations and contended that the decree and execution proceedings in O. S. No. 2038 of 1104 are valid and binding on the present plaintiff. The 5th defendant filed a written statement supporting the plaintiff. The trial Court held that there was no negligence on the part of the 5th defendant in the conduct of the case on behalf of the present plaintiff in O. S. No. 2038 of 1104, that the plaintiff was properly represented in the execution proceedings in that case and that the decree and auction sale are valid. The suit was therefore dismissed with costs.

(4) In this appeal the only point that was argued by the learned Advocate for the appellant was that the auction sale in O. S. No. 2038 of 1104 is void since the present plaintiff was not properly represented in the execution proceedings. Although in the appeal memorandum the finding of the lower Court relating to the validity of the decree in O. S. No. 2038 of 1104 is also objected to, the learned Advocate did not press that point. There is nothing to show that there was any negligence on the part of the present 5th defendant in the conduct of the case on behalf of the minor. The plaintiff has not been able to prove in this case that the amounts under the two hypothecation bonds have been discharged. In the circumstances there is no reason to hold that there was any negligence on the part of the 5th defendant in defending the suit on behalf of the present plaintiff. The only question to be decided in this appeal is whether the Court sale in O. S. No. 2038 of 1104 is void and not binding on the plaintiff. It is not disputed that the mother of the plaintiff who was appointed guardian at first was removed from guardianship and that the 5th defendant was appointed guardian in her place. Therefore the only person who could represent the minor in the suit and in the execution proceedings was the 5th defendant.

(5) Order 32, Rule 3, Sub-Rule 5, Criminal P.C., provides that a person appointed as guardian for the suit of a minor shall, unless his appointment has terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any appellate or revisional Court and in proceedings in the execution of the decree. Although this provision was introduced in the Travancore Criminal P.C., only by the amendment of 1120 it has been the law in Travancore that the guardian appointed for a minor in a suit continues to be the guardian of the minor for purposes of execution also. Sub-rule 5, before it was amended in 1120 read thus:

> "When the enforcement of a decree is applied for against the heir or representative, being a minor, of a deceased party a guardian for the suit of such minor shall be appointed by the Court and the decree-holder shall serve on such guardian notice of such application."

This provision implies that in the case of a minor who is a party to the suit and for whom a guardian for the suit has been appointed it is not necessary to appoint a fresh guardian in execution. It is true that there was difference of opinion among the Indian High Courts on the question as to whether under the Civil Procedure Code before it was amended in 1937 a guardian for the suit appointed on the trial side would continue as the guardian of the minor for purposes of execution also. But in view of the above provision in the Travancore Civil P.C., there can be no doubt that even before the amendment of 1120 a guardian for the suit of a minor defendant would continue to be the guardian of the minor for purposes of execution also. Such being the case it cannot be denied that the 5th defendant alone could represent the present plaintiff in the execution proceedings in O. S. No. 2038 of 1104. In the execution application filed by the decree-holder the minor was represented by his mother who was not competent to represent him and all notices relating to the execution were served on her. It has therefore to be taken that the minor was not represented in the execution proceedings. These proceedings cannot therefore bind the plaintiff.

(6) It was argued for the respondent that the plaintiff was substantially represented in the execution proceedings since the 5th defendant, his legal guardian, appeared in the execution proceedings and filed petitions on his behalf. But what the 5th defendant actually did before the sale was held was to bring to the notice of the execution Court and to the decree-holder that he was the legal guardian of the minor, that the minor was wrongly represented in the execution proceedings by his mother, that the mistake in the decree with regard to the name of the guardian should be corrected and that unless the decree was corrected he could not act on behalf of the minor and raise money for discharging the decree-debt by mortgaging the decree schedule property with the permission of the Court. He, therefore, at first prayed for six months' time for getting the decree corrected. It was for the decree-holder to take steps to correct the decree and to have the minor properly represented in the execution proceedings. The decree-holder did not choose to do so. In the second petition that was filed by the 5th defendant he stated that he had already filed a petition to get the decree corrected and that that petition was posted to a particular date. He therefore, prayed for the adjournment of the sale for a further period of three months. That petition was opposed by the decree-holder and was rejected. In the circumstances it cannot be said that the 5th defendant raised any contention on behalf of the minor in the execution proceedings. What he really wanted was to get himself clothed with authority to act on behalf of the minor in the execution proceedings. It cannot therefore be said that the minor was substantially represented in the execution proceedings.

(7) The next question for consideration is what the effect of the Court sale is so far as the minor is concerned. According to the learned Advocate for the appellant the sale is null and void and would not affect the rights of the minor in the property. The widow of the deceased hypothecator had no right in the property sold and she could not represent the estate of the deceased. According to the learned Advocate for the respondent the sale is not void but is only voidable and since the suit was not instituted within one year from the date of confirmation of the sale it is barred by limitation. The sale took place on 15-7-1107 and was confirmed on 27-9-1107. According to the allegation in the plaint the plaintiff came of age on 7-9-1116. This suit was instituted on 26-6-1118. It is, therefore, argued that the suit is barred under Article 9 of the Travancore Limitation Act. The

learned Advocate for the appellant argues that it is not necessary to set aside the sale as it is null and void that the prayer in the plaint for setting aside the sale is superfluous, that the real relief claimed in the suit is one for a declaration that the sale is null and void and for an injunction restraining the 1st defendant from recovering possession of the property from the plaintiff, and that the period of limitation for such a suit is three years prescribed by Article 165 of the Travancore Limitation Act (corresponding to Article 181 of the Indian Limitation Act) and not Article 9 (Article 12 of the Indian Limitation Act.)

(8) The learned Advocate for the appellant relied on the rulings reported in 'SHIVA SAHAI RAM v. SUNDAR MANDAL', AIR (35) 1948 Pat 91 and 'BACHOO PRASAD SINGH v. GOBARDHANDAS', AIR (27) 1940 Pat 62, for the position that the sale in this case is void and not merely voidable.

(9) In 'SHIVA SAHAI v. SUNDAR MANDAL', AIR (35) 1948 Pat 91, it was held that a sale held without notice of the execution proceedings to the legal guardian of the minor is void so far as the minor is concerned. In that case a money decree was obtained against three brothers two of them were minors. The minors were represented by a Pleader guardian 'ad litem' appointed in the suit. When the decree was sought to be executed the minors were described as represented by their elder brother as guardian without any steps being taken to discharge the Pleader guardian 'ad litem' appointed in the suit. The judgment-debtors' property was sold in execution and was purchased by the decree-holder. It was held that the elder brother had no authority to represent minor brothers in execution as there was no order of the Court removing the Pleader guardian and appointing him as guardian in his place. Hence it was held that the provision as to notice under Order 21, Rule 22 was not complied with so far as the minors were concerned and that therefore the Court had no jurisdiction to sell the minors' share of the property. In a suit instituted for declaration that the interest of the minors was not affected by the sale it was held that the sale was void so far as the minors' share was concerned. Their Lordships followed a similar decision of the Patna High Court reported in 'BACHOO PRASAD SINGH v. GOBARDHANA DAS' AIR (37) 1940 Pat 62, in which case execution was sought against the minors describing them as under the guardianship of a person other than the guardian 'ad litem' appointed by the Court and notice under Order 21, Rule 22 was served on that person. It was held that the sale was void so far as the minors' share of the property was concerned.

(10) The learned Advocate for the respondent on the other hand relied on the rulings in 'MALKARJUN v. NARHARI', 25 Bom 337 and 'SARJU SINGH v. BHAGWAT PRASAD SINGH', AIR (25) 1938 Pat 372, in support of his position that the sale held in such circumstances would not be void. In 'MALKARJUN v. NARHARI', 25 Bom 337, after the death of the judgment-debtor the decree was executed against his estate. Notice under Order 21, Rule 22 was served upon a person who was not the legal representative of the deceased. But the execution Court decided erroneously that he was the legal representative. Their Lordships of the Privy Council held that notices having been served under Order 21, Rule 22 though upon a wrong person the Court had jurisdiction to sell the property and that the sale was not void but only voidable. It was observed by their Lordships that the execution Court had applied its mind to the question as to who was the legal representative of the deceased judgment-debtor and had come to a decision on the matter and had afterwards proceeded with the execution. In the circumstances it was held that although the decision was wrong the Court had jurisdiction to decide wrong as well as right and that therefore it could not be said that the Court acted without jurisdiction in conducting the sale with the wrong person as the legal representative and that the remedy of the aggrieved party was to seek to set aside the sale in appropriate proceedings. But in the present case the Court had not applied its mind to the question as to who was the legal guardian of the minor defendant and had not come to a decision on the matter. We do not therefore think that the decision is 25 Bombay 337 applies to the facts of his case.

(11) This decision was followed in 'SARJU SINGH v. BHAGWAT PRASAD SINGH', AIR (25) 1938 Pat 372. In that case after the death of one of the judgment-debtors the mother of his minor son who was impleaded in execution was appointed guardian of the minor. But notice under Order 21, Rule 22 was issued not to the mother but to one of the other judgment-debtors who was described as the guardian of the minor. Subsequently, a property that belonged to the judgment-debtors was attached in execution. It was held that though notice under Order 21, Rule 22 was not issued to the proper guardian the order of attachment could not be said to be without jurisdiction. In that case the only question that arose for consideration was whether the order of attachment amounted to a reival of the execution application and whether the subsequent execution application was therefore not time-barred. It was held that the order of attachment amounted to a revival. The question whether the auction sale held under such circumstances would be void or not was not considered in that case.

(12) In view of the fact that the minor was not properly represented in the execution proceedings in this case we are inclined to hold that the sale cannot affect the interests of the minor and that is void so far as the minor is concerned. It was argued for the respondent that so long as the decree in O. S. No. 2038 of 1104 is found to be valid and binding on the present plaintiff who was a party to it, he can object to the validity of the sale only in execution and not by a separate suit as provided in Section 47 of the Indian Civil P.C., corresponding to Section 40 of the Travancore Civil Procedure Code and that therefore this suit is not maintainable. Reference was made to the ruling in 'FIRM ANNU MAL HAR NARAIN v. BRIJ LAL', AIR (28) 1941 Lah 327. It was a case in which a suit was instituted on behalf of a minor for setting aside a Court sale on the ground that the minor was not properly represented in the execution proceedings. It was held that it was a matter relating to the execution of the decree, that it would come under Section 47 and that therefore a separate suit was not maintainable. But under Sub-section 2 of Section 47 the Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under that section as a suit or a suit as a proceeding under that section. The present suit, so far as it impeaches the validity of the Court sale, can therefore be treated as a proceeding under Section 47, Civil P.C. If the plaintiffs' claim for this relief is not barred by limitation we do not find any reason why this suit should not be treated as a proceeding under Section 47.

(13) The next question for consideration is what Article of the Limitation Act will apply to this case if it is treated as a proceeding under Section

47, Civil P. .C., for relief on the ground that the Court sale is void. It has been held in various cases that except in the case of an application under Order 21, Rule 90 of the Indian Civil Procedure Code for setting aside a Court sale on the ground of material irregularity or fraud in publishing or conducting it in which case Article 166 (corresponding to Article 151 of the Travancore Limitation Act) would apply, it is Article 181 (corresponding to Article 165 of the Travancore Limitation Act) that applies to applications for relief on the ground that the Court sale is void. Reference may be made to the rulings reported in 'RAJAGOPALA IYER v. RAMNUJACHARIER', AIR (11) 1924 Mad 431 FB; 'FIRM ANNU MAL HAR NARAIN v. BRIJ LAL', AIR (38) 1941 Lah 327; 'SURJA KANTA v. JOGENDRA NATH', AIR (19) 1932 Cal 381; 'NAROTAM DA v. BHAGWAN DASS', AIR (21) 1934 All 314; 'RAMANAND GANPAT RAI v. RAKHAL MANDAL', AIR (23) 1936 Pat 496; 'VENKATESWARA ETTU NAICKAR v. AYYAMMAL', AIR (37) 1950 Mad 367.

(14) 'RAJAGOPALA IYER v. RAMANUJACHARIER', AIR (11) 1924 Mad 431, is a case in which notice under Order 21, Rule 22, Civil P.C., was not issued. It was held in that case that an application by the judgment-debtor for relief on the ground that the sale was void would come under Section 47, Civil P.C., and that the period of limitation for such an application is three years under Article 181 of the Limitation Act. Following the decision of the Privy Council in 'KHIARAJMAL v. DAIM', 32 Cal 296, their Lordships held that it was not necessary to apply to the Court to set aside the sale in such a case. In 32 Cal 296, the Privy Council laid down the law thus:

"The Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. If authority be desired for elementary propositions it may be found in the judgment of Sir Barnes Peacock in 'KISHEN CHUNDER GHOSE v. ASHOORUM', (1863) 1 Marsh 647."

Following this ruling Schawbe, C. J., observed thus:

"If it is possible for the petitioner in this case to proceed without applying to set aside the sale, he could avoid the harsh limitation imposed by Article 166. In my judgment he could do so. He could, but for the provisions of Section 47 of the Civil P.C., of 1908, bring a suit for possession of the property sold and the purchaser would not be able to rely upon the Court sale as a defence, because that sale is a nullity, and the Privy Council has held that it is not necessary to take any steps to set it aside. By reason of Section 47, all questions arising between parties to the suit relating to execution ought to be determined by the Court executing the decree and not by a separate suit, and it has been held that the fact that a Court purchaser is a necessary party would not prevent the application of this rule. But this is only a question of procedure and the Court may treat the proceeding under this section as a suit subject to any objection as to limitation. It is unnecessary to consider whether the effect of this is that the period of limitation to be applied is the period provided by the Limitation Act in respect of applications or that provided in respect of suits. If the former, the period of limitation will be three years under Article 181, and if the latter the 12 years provided in the case of suits to recover possession of immoveable property. I cannot agree with the view that all applications under Section 47 are governed by Article 166, nor do I think that the statements in cases to that fact are more than 'obiter dicta', the intention being to express the view, with which I agree, that if an application is an application to set aside a sale in execution of a decree it matters not whether the application is made under Section 47 or under Order 21, Rule 90. 'SESHAGIRI RAO v. SRINIVASA RAO', 43 Mad 313, is a direct authority for the proposition that when a sale is absolutely void for want of jurisdiction the article applicable is Article 181."

(15) 'SURAJKANTA v. JOGENDRANATH', AIR (19) 1932 Cal 381, was a case in which notice under Order 21, Rule 22, Civil P.C., was not served on the judgment-debtor. It was held that an application for relief on the ground that the sale was void should be treated as one under Section 47, Civil P.C., and that the period of limitation would be three years from the date of the sale.

(16) 'NAROTAM DASS v. BHAGWAN DASS', AIR (21) 1934 All 314, was a case in which the judgment-debtor sought to set aside a sale on the ground that it was void. Their Lordships observed thus in that case: "If a party wants a sale to be set aside for any of the reasons under Rule 90, Order 21 then the application must be made within 30 days as enacted by Article 166 of the Limitation Act; but where a void sale is sought to be set aside then the application would not be under Rule 90, Order 21, Civil P.C., but will be deemed to be an application made in execution governed by Section 47, Civil P.C., and to which Article 181, Limitation Act, would be applicable."

(17) In 'RAMANAND GANAPAT RAI v. RAKHAL MANDAL', AIR (23) 1936 Pat 496, it was held that a sale which is void does not require to be set aside and that the period of limitation applicable to an objection to the sale is that given in Article 181.

(18) In 'VENKATA SWARA ETTU NAICKER v. AYYAMMAL', A I R (37) 1950 Mad 367, the sale was conducted without proclamation under Order 21, Rule 66. It was held that the sale was invalid, that an application to set it aside would come under Section 47, Civil P.C., and that the period of limitation is that prescribed by Article 181, namely three years from the time when the right to apply accrues.

(19) The learned Advocate for the respondent relied on the rulings reported in 'CHOMMARU v. MANI', 10 T L J 299; 'PARVATHI v. PARAMESWARAN', 24 T L J 734, 'BHAGAVATHI PILLAI v. SRIKANTAN NAIR', 1949 T L R 14 FB and 'NILAKANTAN TAMPI v. KUNJUKRISHNA PILLAI', 1949 T C L R 141, in support of the position that a suit for setting aside a Court sale even in cases in which the sale is void should be brought within one year under Article 9 of the Travancore Limitation Act. According to that Article a suit to set aside a sale in execution of a decree of a Civil Court by whomsoever brought on any ground other than that the judgment-debtor or his family or tarwad had no right, title and interest in the property sold should be instituted within one year from the date of confirmation of the sale. On the basis of the comprehensive language employed in the Article it was held in the above cases that a suit to set aside a Court sale on any ground other than that mentioned in the Article should be brought within one year from the date of the confirmation of the sale. But it was not held in those cases that the Court sales which were impeached were void. In '10 T L J 299', it was held that the sale was not void but only voidable. It is true that it was

observed in those cases that when a Court sale has once taken place a party cannot ignore it and claim relief without seeking to set it aside within the period of one year prescribed by Article 9 of the Travancore Limitation Act. But in none of these cases was the question raised whether a suit instituted by a party to a decree for relief on the ground that the Court sale is void should be treated as an application under Section 40 of the Travancore Civil Procedure Code corresponding to Section 47 of the Indian Civil Procedure Code. If the suit is treated as an application under Section 40 (Tr C. P. C.), it is clear that Article 9 of the Travancore Limitation Act will not apply to such an application and that the Article that will apply is Article 165, corresponding to Article 181 of the Indian Limitation Act and that the plaintiff will have three years from the time when the right to apply accrues.

(20) It is admitted that the plaintiff became a major only on 7-9-1116. The suit was instituted within three years from that date. It is therefore within time.

(21) The plaintiff is, therefore, entitled to a declaration that the Court sale in O. S. No. 2038 of 1104 of the Nagercoil Munsiff's Court is void and to restrain the 1st defendant from recovering possession of the plaint property from him. It is represented that the 1st defendant has already obtained delivery of a portion of the property. The appellant's learned Advocate submitted that although the auction-sale is void and not binding on the appellant he is prepared to deposit the auction amount in Court before he is allowed to obtain re-delivery of the property taken delivery of by the 1st defendant. We, therefore, set aside the decree of the lower Court and declare that the Court sale in O. S. No. 2038 of 1104 of the Nagercoil District Munsiff's Court is void and not binding on the plaintiff. We also give him a decree for recovering possession of that portion of the plaint property which was taken delivery of by the 1st defendant as per the Court sale in O. S. No. 2038 of 1104. The plaintiff will however deposit in the lower Court the auction amount in O.S. No. 2038 of 1104, before obtaining re-delivery of the property. In the circumstances of this case we direct both parties to suffer their respective costs both here and in the lower Court.

(22) The appeal is allowed in the manner mentioned above.

R.G.D.

Appeal allowed.

A. I. R. 1952 Travancore-Cochin 141

KOSHI AND GOVINDA PILLAI, JJ.

Narayana Pillai Bhagavathi Pillai and others, Appellants v. Govinda Pillai Narayana Pillai and others, Respondents.

A. S. No. 400/1123 (T) D/- 10-8-1951.

(a) Travancore Nayar Act (II (2) of 1100), S. 41 — Acquisitions made by female during coverture — Presumption.

The presumption, in the case of Marumakkathayees, was that acquisitions made by a female during coverture were with funds advanced by the husband for the benefit of herself and her children. (Para 5)

(b) Travancore Nayar Act (II (2) of 1100), S. 22 — Gift in wife's name — Children's right to get share therein.

Under Section 22 it is unnecessary that the gift of a property by the husband to the wife is to be in the name of the children also; even if it stands in the sole name of the wife, the children would get a share in the same, unless a contrary intention was expressed in the instrument of gift. 1947 T L J 426, Foll. 32 T L J 665, Dissent from. (Para 7)

M. Madhavan Nair, for Appellants; K. Velayudhan Nair, for Respondents Nos. 1, 3 and 4. Hrishikesan Nair, for Respondent No. 8.

Cases referred to:

32 T L J 665 (Pr 7)
('47) 1947 T L J 426 (Pr 7)

JUDGMENT.: Plaintiffs 1 to 4 are the appellants. The first plaintiff and defendants 1 to 6 are the children of defendants 9 and 10. The 9th defendant is the mother and the 10th defendant is the father. Plaintiffs 2 to 6 and the 8th defendant are the children of the 1st plaintiff and the 7th defendant is the daughter of 6th defendant. The plaintiffs' case was that themselves and defendants 1 to 9 were members of an undivided tarwad, to which the plaint schedule properties belonged. The plaint 'A' schedule properties belonged jointly to these parties, as they were acquired in the name of the 9th defendant, who was the 'karnavathi' of the 'tarwad', with funds belonging to the 'tarwad' and 'sub-tarwad' of the parties. The plaint 'B' and 'C' schedule properties were those acquired by the 9th defendant in the name of her husband, the 10th defendant. Thus, according to the plaintiffs, these properties belonged to them and defendants 1 to 9 jointly. While so, defendants 1 to 5, by fraud and undue influence practised on defendants 9 and 10, got a settlement deed, Ex. 'E', executed by them on 24-11-1110. It was in favour of defendants 1 to 5 and 8. Defendants 9 and 10 were incompetent to execute such a document which was, therefore, not binding on the plaintiffs or their 'tarwad'. Hence the suit was filed for a declaration that the plaint schedule properties belonged to the plaintiffs' 'tarwad', for setting aside Ex. 'E' — settlement deed — executed by defendants 9 and 10 in favour of defendants 1 to 5 and 8, for recovery of possession of the plaint 'A' schedule properties from defendants 1 to 5 and 8, and for realisation of the amounts mentioned in the 'C' schedule from defendants 11 and 12.

Defendants 1 to 5, 9, 10 and 13 contested the suit. Defendants 1 to 5 contended that their 'tarwad' had become divided in 1108, that the 1st defendant or the 8th defendant had never been in management of that 'tarwad', that the 'sub-tarwad' of plaintiffs and defendants 1 to 9 had no property of its own, except those obtained on partition from the main 'tarwad' in the year 1108, that the plaint 'A' schedule properties were self-acquisitions of the 9th defendant, that plaint 'B' and 'C' schedule properties were the self-acquisitions of the 10th defendant, that defendants 9 and 10 were, therefore, competent to make arrangements regarding the plaint properties, that defendants 9 and 10 executed Ex. 'E', settlement deed, of their own free will and that the plaintiffs were not entitled to get any relief. Defendants 9 and 10 supported them. The contentions of the other defendants also supported defendants 1 to 5.

In the replication, the plaintiffs admitted that the first defendant was never the 'karnavan' of the 'sub-tarwad', that the 9th defendant was managing the affairs of the 'sub-tarwad' as 'karnavathi' till her death, that the properties obtained on partition from the main 'tarwad' in 1108 were managed by her, that the other members of the 'tarwad' had no control over these properties, that, even before the partition of 1108, the 9th defen-

dant was in possession of several properties belonging to the common 'tarwad' for maintenance, that the plaint properties were acquired with funds derived from the income of these properties and that the plaintiffs were entitled to the decree prayed for.

(2) The lower Court held that the properties included in Ex. F, settlement deed, belonged absolutely to defendants 9 and 10, that defendants 9 and 10 were, therefore, competent to execute Ex. E, that Ex. E was not vitiated by any of the invalidating circumstances relied on by the plaintiffs, that the income from the plaint A schedule properties came to only 400 Fs. a year and that the plaintiffs were not entitled to any relief. The suit was accordingly dismissed. The lower Court did not allow the defendants their costs of the suit, because, according to it, the same was not to be allowed in view of the close relationship between the plaintiffs and the defendants and of the peculiar circumstances of the case. All the parties were, therefore, directed to suffer their costs.

(3) The plaintiffs question the correctness of the decree passed by the Court below. Respondents 1, 3 and 4, who were defendants 1, 3 and 4, have filed a memorandum of cross-objections claiming their costs in the Court below. This was filed out of time and, so, a petition, C. M. P. No. 844 of 1950, had been filed to excuse the delay. An affidavit in support of the same had been filed by the 4th respondent. It was stated that he was laid up with dysentry from 20-4-1124 to 29-4-1124 and that, therefore, he was unable to instruct his advocate. There were other respondents also, who had entered appearance jointly with the 4th respondent, and there was no reason why they did not take the necessary steps. The reasons given are unsatisfactory and, so, we do not excuse the delay. Besides, the lower Court had, in its judgment, said that, according to it, it was only just and equitable to direct all parties to suffer their costs. We do not wish to interfere with the discretion thus exercised by the Court below. For these reasons, the delay is not excused and the cross-appeal is dismissed without costs.

(4) Coming to the merits of the appeal filed by the plaintiff, it was conceded by the learned advocate for the appellants that his clients had no case as regards plaint B and C schedule properties. These properties stand in the name of the 10th defendant, the father. He was the 'karnavan' of a tolerably rich 'tarwad'. The plaintiffs' case was that, with the help of their 'tarwad' and 'subtarwad' income, the acquisitions mentioned in the plaint B and C schedules were made by the 9th defendant in the name of the 10th defendant. There is absolutely no evidence for this. That was why the concession was made by the appellants' learned advocate. It is, therefore, held that the plaintiffs can have no case as regards plaint B and C schedule properties.

(5) The plaint A schedule consists of 8 items of properties. All these properties are mortgage acquisitions, standing in the name of the 9th defendant. Item 1 in the plaint A schedule was acquired in the name of the 9th defendant, on an assignment of mortgage. Ex. 1, dated 14-7-1094, is the document for the same. Items 5 to 8 were also acquired in her name, on 17-10-1094, by taking a mortgage, Ex. A, for 8700 'fanams'. Items 2 to 4 were acquired on mortgage in the name of the 9th defendant and her brother (P. W. 3) on 18-10-1087. Subsequently, P. W. 3 took a superior mortgage; and the 9th defendant executed a release of her one half right over those properties in favour of P. W. 3. P. W. 3 gifted his right over these properties to his wife and children and, for the money due to the 9th defendant under the release, a sub-mortgage (Ex. D) was executed by P. W. 3 and his wife and children on 12-4-1109, in the name of the 9th defendant. Thus, the right of the 9th defendant over items 2 to 4, when Ex. E was executed in 1110, was obtained by her in 1087. It had not been shown in this case that the 9th defendant had any independent source of income for these acquisitions.

The presumption, in the case of Marumakkathayees, was that acquisitions mad by a female during coverture were with funds advanced by the husband for the benefit of herself and her children. This was recognised in S. 41 of the Nair Act, II (2) of 1100. It laid down that property, acquired by gift or bequest from the father or husband before Act I (1) of 1088 came into force, shall, in the absence of evidence to the contrary, be treated as the 'tarwad' property of the donees or devisees and of their 'thayvashi'. There could, therefore, be no doubt that the mortgage right held by the 9th defendant over items 2 to 4 under Ex. B belonged to herself and her 'thayazhi'. This right has now been merged in the sub-mortgage, Ex. D, over the whole of items 2 to 4. The plaintiffs are members of her 'thayvazhi' and, so, without their consent she was incompetent to make any arrangement regarding those properties. Ex. E is, therefore declared to belong to the 'sub-tarwad' of plaintiffs and defendants 1 to 9.

(6) Plaint A schedule item No. 1 was outstanding on mortgage from the 'jenmi's tarwad'. That mortgage right was obtained on assignment in the 9th defendant's name, on 14-7-1094, under Ex. I. The consideration paid for this document was 1750 'fanams'. It was mentioned in that document that the acquisition was made with funds given by her husband for her maintenance and use. The intention of the husband, though the husband is not a party to Ex. I, was expressed in the document itself and it was significant to see that the first plaintiff's husband (P. W. 4) was an attestor to the same. It has to be taken that this acquisition was intended for the exclusive use of the 9th defendant and that she was competent to deal with the same in any manner which pleased her. The plaintiffs have, therefore, not made out a case to establish their claim over plaint A schedule item No. 1 and the decree of the Court below is correct on this point.

(7) Ex. A, dated 17-10-1094, is the mortgage taken in the name of the 9th defendant for plaint A schedule items 5 to 8 for 8700 'fanams'. The Court below held that, since this was an acquisition after Act I (1) of 1088, the acquisition was to enure to the benefit of the 9th defendant and her children, unless the contrary intention was expressed by the 10th defendant who was held to have advanced the necessary funds for acquiring these properties. Since the 10th defendant was also a party to Ex. E and as he had filed a written statement raising a contention, that the acquisition was for the benefit of himself and the 9th defendant, the lower Court assumed that the intention of the acquirer was clear and that the 9th defendant alone was entitled to the properties.

Ex. E is a document that has come into existence sixteen years after the acquisition and that is sought to be set aside in this suit. The written statement of the 10th defendant could only be in accordance with what was mentioned in Ex. E, so that these two circumstances would not be evidence for the intention of the person who advanced the money at the time of the acquisition made in 1094. We saw, in Ex. I, that, when the

money was to go for the exclusive benefit of the 9th defendant, words indicating the expression of that intention were incorporated in that document itself. No such intention is seen expressed in Ex. A. Out of this consideration of 8700 'fanams', it was stated that, 'fanams' 2000 had been paid out of amounts given by the 10th defendant to the 9th defendant as gift. The lower Court drew the presumption that the balance consideration must also have proceeded from the 10th defendant, who was the 'karnavan' of a tolerably rich 'tarwad'. Accepting the findings, which are not objected to by the respondents, it has to be held that the gift of the funds for Ex. A by the 10th defendant to his wife, the 9th defendant for taking Ex. A will enure to the benefit of the 9th defendant and her children.

Section 22 of Act XI (11) of 1100 provides for the evolution of such properties. It is mentioned there that the property acquired by gift by wife from the husband shall, unless a contrary intention is expressed in the instrument of gift, belong to the wife and each of the children in equal shares. It is unnecessary that the gift is to be in the name of the children also. Even if it stood in the sole name of the wife, the children would get a share in the same, unless a contrary intention was expressed in the instrument of gift. In this case there was no such document. The consideration alone proceeded from the father

A wrong interpretation was put on this section in the case 'SREEDHARAN MOOTHATH v. VELAYUDHAN PILLAI', 32 TLJ 665. It was held there that, where an acquisition stood in the name of the wife or widow, or where she alone was named in the instrument of gift, it must be taken, unless a contrary intention was shown, that she alone was intended to take the property. If this is accepted, it will be contrary to the provision in S. 22 which has laid down that the properties, acquired under the circumstances mentioned in that section, will, in the absence of a contrary intention expressed in the instrument of gift or bequest, belong to the wife and each of the children in equal shares. The ruling in 32 TLJ, however, came up for consideration before a Full Bench of the High Court in 'RAMAKRISHNA PILLAI v. GOURI PILLA AMMA', 1947 TLJ 426. It was held there that both the Nair Acts of 1088 and 1100 expressly declared that, in the case of a gift by a husband or father to a wife or child, or to a wife and child, the effect of the gift would be a gift in favour of the wife and the subsisting children as tenants in common, unless a contrary intention was indicated. It was also pointed out that 'SREEDHARAN MOOTHATH v. VELAYUDHAN PILLAI', was wrongly decided and must be overruled.

It would, therefore, be unnecessary to pursue this matter any further except to hold that Ex. A mortgage right, though stood in the sole name of the mother — 9th defendant — would enure to her benefit and to the benefit of her children then subsisting. The first plaintiff and defendants 1 to 6 were her children and so the right over these properties would go to them and to the 9th defendant. They would hold the properties as tenants in common, so that the first plaintiff would be entitled to a 1/8th share in the mortgage right under Ex. A. That was a vested right in the first plaintiff along with the acquisition and, without her consent, defendants 9 and 10 would not be competent to do anything against the first plaintiff's interest. Ex. E is, therefore, invalid to the extent of the first plaintiff's 1/8th share in the plaint A Sch. items 5 to 8.

(8) The result would be to dismiss the appeal as regards all the plaint schedule properties except A schedule items 2 to 8. Ex. E is, therefore, set aside to the extent of the first plaintiff's 1/8th share in the plaint A schedule items 2 to 8. Since A schedule items 2 to 4 are held to belong to the 'sub-tarwad' of the plaintiffs and defendants 1 to 9 and as there has been no partition of these properties with the consent of all the members of this 'tarwad', Ex. E has to be set aside as regards items 2 to 4. The plaintiffs claimed all the properties as belonging to the 'sub-tarwad' and this contention was not made out by them except as regards items 2 to 4 in the plaint A schedule. The decree of the lower Court will, therefore, stand modified as follows:

(9) The first plaintiff is allowed to get plaint A schedule items 5 to 8 divided into eight shares and to get one share out of the same. Ex. E is set aside as regards plaint A schedule items 2 to 4 and the plaintiffs are allowed to recover possession of these properties on behalf of their 'sub-tarwads' till those properties are divided in accordance with law. The first plaintiff will get mesne profits for her 1/8th share in the plaint A schedule items 5 to 8, from the date of suit, from defendants 1 to 5 and 8. Similarly, the plaintiffs as a whole will get mesne profits from plaint A schedule items 2 to 4, from the date of suit, from the above named parties. Since there is no evidence to record a finding as to the 'quantum' of mesne profits of these properties, the same is allowed to be settled in execution. Since both sides were raising untenable contentions relating to at least a portion of the plaint claim, they are directed to suffer their costs in this Court. The order relating to costs in the lower Court will stand.

V.R.B. *Decree modified.*

A. I. R. 1952 Travancore-Cochin 143

KOSHI AND GOVINDA PILLAI, JJ.

Punchiri Boat Service Ltd., Appellant v. Abraham, Respondent.

A. S. No. 527 of 1123(T), D/- 30-7-1951.

(a) Tort — Negligence — Collisions in Canals.

The principles regarding collision at sea can be applied to collisions in backwaters and canals. Every vessel is to observe the regulations and rules prescribed therefor. It is always a positive duty on the part of the boat-men to observe the regulations, and a departure from the same can only be justified by necessity. Non-observance of the regulations is 'prima facie' negligence, unless it can be shown that the departure from the regulation either did not in fact, wholly or in part, cause the collision.

Where the boat had no bright light, as provided for in Rule 41, framed by the Government under the Public Canals and Public Ferries Act, the boat was being driven by mechanical contrivance; it was also going up-stream; there was a heavy "vallom" going down-stream and its progress was being controlled by the manual labour of two pole-men in it:

'Held' that of the two sets of vessels, it was possible only for the boat to check effectively its further progress, to regulate the speed of the boat progress, and direction, and to stop the boat or manoeuvre the same to avoid the collision. The accident was thus due to the culp-

able negligence of those in charge of the motor boat. (Paras 12, 13, 13a)

(b) Civil P. C. (1908), O. 20, R. 4 — Nautical points — Advice of assessors.

Although, in nautical points the Court is assisted by advice of nautical assessors, the Court is not bound to take such advice tendered by the Assessors. The Court has to make up its own mind on questions of nautical skill and seamanship with reference to the evidence adduced in each case. (The views expressed by the Canal Officers without taking into account the several aspects of the case, or without taking statements of independent witnesses, held could not be accepted). (Para 13a)

Anno: C. P. C., O. 20, R. 4 N. 5.

T. K. Joseph, for Appellant; K. T. Thomas and K. M. Joseph, for Respondent.

GOVINDA PILLAI J.: The defendant is the appellant. The plaintiff is the Manager of the General Shipping and Forwarding Service, Mattancherry, Cochin. He had been entrusted by the Punalur Paper Mills with the work of transporting 64 barrels of caustic-soda from Cochin to Pullikkadavu landings at Quilon. On 23-12-1944, he had engaged a 'kettuvallom', belonging to P. W. 2 in this case, for this purpose and had loaded all the barrels in it. Each barrel contained 661 pounds of caustic-soda. A few days afterwards, that is on 13-5-1120, this 'vallom' was in the Chavara canal going southwards. Between 9 and 10 P. M. on that day a motor boat, Madhy by name, belonging to the defendant-company, was proceeding northwards to Kottayam from Quilon along the same canal. It hit the 'Vallom' and, as a result of the same, the vallom was split and it sank with its cargo.

(1a) According to the plaintiff, the said collision was due to the culpable negligence of the serang of the boat, Madhy, and because of the non-observance of the rules of navigation. The 64 barrels of caustic-soda, which sank in the canal, were salvaged by the plaintiff and given delivery at the Pullikkadavu landings, to which they were due, at a cost of I. Rs. 1197-14-0. The total weight of the 64 barrels was 43,072 pounds which, on account of the sinking of the 'vallom', was found reduced to 37,439 pounds when weighed at the railway station in Quilon. Thus, the shortage caused in the caustic-soda on account of the collision was 5,633 pounds, the price of which came to I. Rs. 1278-4-0. According to the plaintiff's estimate, therefore, the net loss came to I. Rs. 2476-2-0 and the suit was filed claiming the same as damages, on account of the said collision. The plaintiff, further, stated that the defendant-company was informed of all these facts by him then and there.

(1b) The defendant was only giving hopes to the plaintiff that the loss would be made good. But, as there was no compliance with the demand, the suit was filed. The plaintiff, therefore, prayed for a decree for the amounts mentioned above, with interest thereon at 12 per cent per annum from 13-5-1120. Though I. Rs. 1278-4-0 had been claimed in the plaint on account of loss in weight of the caustic-soda, the plaintiff had admitted, while he was examined as P. W. 1, that the Punalur Paper Mills had, by Ex. C debit-note, claimed only Rs. 1064-7-2 on this account and that he was limiting his claim to that amount. The defendant, in the written statement, stated that it was not aware of the terms and conditions under which the plaintiff was engaged by the Punalur Paper Mills or of the contents and the weight of the barrels at the time of loading or after they were salvaged. It, however, admitted that there was a collision of the motor boat and with the 'Kettuvallom' in the Chavara canal at the time and place mentioned in the plaint. But it maintained that the collision was entirely due to the culpable negligence, rashness and recklessness of the persons who were poling the 'kettuvallom'. Besides, the 'vallom' was not keeping to its side of the canal, whereas, the Madhy boat was going in the usual course and keeping its side through the canal with due care.

(1c) The serang was observing all the rules of navigation with diligence. The cost of salvaging claimed by the plaintiff, was fabulously excessive and the utmost that was required for that purpose was only Rs. 100/-. It was contended that the plaintiff was, in any way, not entitled to cost of further transport of cargo from Chavara to Quilon. It was mentioned by the defendant that the loss in weight of the caustic-soda could have been controlled, if prompt action had been taken by the plaintiff or the pole-men to salvage the cargo. At any rate, the damages claimed were remote and, in any event, excessive. The defendant was not liable, in fact or in law, for any of the damages claimed by the plaintiff. The defendant had never given any hope to the plaintiff to pay any loss or damages to the plaintiff. From the very first, the defendant was denying any liability on account of the alleged damage caused, and had asserted that the 'vallom' ran into the boat owing to the active fault and culpable negligence of the men in charge of the 'vallom'. The plaintiff's notice through the advocate was replied showing the actual state of affairs. The plaintiff had no cause of action against the defendant, whereas, there had been considerable damage and inconvenience to the defendant on account of the 'vollom' running into the motor boat and breaking its planks and thereby delaying the boat service. The plaintiff was, therefore, not entitled to claim any damages.

(2) The Court below found that the accident was caused by the negligence of the serang and master of the defendant's boat, Madhy, and by their violation of the Navigation rules, that the barrels were salvaged without unnecessary delay, that the costs of salvage and further transportation charges claimed in the plaint were unduly excessive, that the plaintiff was entitled to the actual costs which could be estimated at Rs. 604/-, that there was reduction in weight of the caustic-soda on account of the accident to the extent of 2 and odd tons, that the amount which the plaintiff was obliged to make good to the Punalur Paper Mills came to Rs. 1064-7-2, that the plaintiff was entitled to get the same from the defendant, and that the plaintiff was entitled to a decree for Rs. 1668-7-8 together with proportionate costs and interest at 6 per cent per annum from the date of suit to the date of decree and at 4 per cent per annum on the principal amount and costs from the date of decree.

(3) In appeal, the defendant questioned all the findings of the lower Court and submitted that the defendant was in no way liable for the damages awarded by the Court below. The plaintiff has filed a cross-appeal claiming Rs. 593-0-0 more on account of the costs of salvage disallowed by the lower Court.

(4) The most important question for consideration is whether the collision of the boat, Madhy, and the 'kettuvallom' poled by P. W. 2 was due to the negligence of the employees of the motor boat or to that of the pole-men in the 'vallom', or whether the collision was accidental for which no

party could be blamed. The plaintiff had examined P. Ws. 2 to 6 and 9 to prove the negligence of the employees of the motor boat. The defendant had examined D.Ws. 4 to 6 to show that the negligence was more on the part of the pole-man of the 'vallom' than that of the employees of the motor boat. It would appear that after the accident there had been an enquiry conducted by the Canal Officers, under the Public Canals and Public Ferries Act, VI of 1096, and the Rules framed thereunder, and they had come to certain conclusions of which we are not very much concerned. In this case, we are to depend on the evidence adduced here, though the statements recorded by the Canal Officer could have been used either to contradict or to corroborate those deponents who were examined in this case. Apart from this, we are not concerned with the report submitted by the Canal Officers to their superiors or of the orders passed by the Executive Engineer or the Chief Engineer.

(5) The appellant's learned Advocate had stated that the details of the alleged negligence of the employees of the motor boat had not been given in the plaint and that, when the plaintiff was examined as P. W. 1, his only case was that the accident was due to the over-speed of the motor boat. In the plaint, paragraph 3, the plaintiff had stated that the collision was due to the culpable negligence of the serang of the boat, Madhy, and that the rules of navigation were also violated by the said Serang. The defendant denied this and made a counter allegation that the collision was due to the culpable negligence of the pole-men of the 'vallom'. The defendant could have, if it was thought necessary, asked for details of these allegations. That was not done and, on these general allegations the parties went to trial and each side attempted to prove its case by examining independent witnesses.

(5a) The acts of negligence relied on by the plaintiff were that the motor boat was going at a very high speed along the canal, that is, at a speed higher than that allowed by the rules framed under Act VI of 1096, mentioned above, and that the boat had not the necessary head-light or the other lights as required by the said rules. The serang was stated not to have exercised due care and caution as was expected of him. The defendant denied all these acts of negligence and went a step further in stating that the 'vallom' was being taken along the wrong side of the canal and that the accident was due to such negligent act of the pole-men. We have to examine the evidence, with reference to these statements and counter statements made by the parties and the evidence adduced in the case.

(6) The canal, at the place of accident, was straight. Its width was more than fifty feet at that place. The 'vallom' came in contact with the motor boat on its right side, three feet away from the front portion. The planks of the motor boat, 1 foot 8 inches had been damaged by this collision. The front right side of the 'vallom' was split, thereby loosening the planks, and this resulted in the sinking of the 'vallom' with the cargo. The 'vallom' contained 64 barrels of caustic-soda weighing more than 18 tons. The motor boat was one licensed to carry 64 passengers. These are facts admitted and not disputed in the case. It was also proved beyond doubt that there was a 'vallom' going in front of the damaged vallom, one after the other and practically in line. P.W. 3 was the pole-man of that 'vallom'. These two 'valloms' were going towards the south along the canal, the direction of which was north to south at that spot. On account of the tide, the current of the canal was towards the south.

(6a) In front of these two 'valloms' and about 50 feet away, there were two other 'valloms' lying stationary. These were on the eastern side of the canal, that is, on the side of the canal which the moving 'valloms' were to take. The two stationary 'valloms' contained controlled food stuffs and they were under the care of a police constable in it. Practically opposite to these stationary 'valloms' was a landing place of Messrs. Hopkin & Willams, Limited, which had its factory to the west of that landing place. A 'vallom' containing sand was being unloaded at that landing place and P.W. 4 was supervising the same. P.W. 5 was a lady living on the eastern side of the canal, just near the place of the accident. With these facts, the evidence adduced in the case and the law governing such collisions would be examined to see whether anyone was responsible for the accident or whether it was only an accident for which no party could be blamed.

(7) In the 9th edition, by Gibb, of "Marsden's Collisions at Sea," negligence is defined thus at page 3:

"Negligence, in a legal sense, is a negative rather than a positive term, and is not susceptible of precise definition of universal application. The ideas of negligence and duty are strictly correlative. There is no such thing as negligence in the abstract, for negligence is simply the neglect of some care, which we are bound by law to exercise. What it is may perhaps best be expressed as 'doing something which ought either to be done in a different way or not at all, or omitting to do something which ought to be done'. In collision cases the negligence relied on is generally a failure to exercise the skill, care and nerve which are ordinarily to be found in a competent seaman, or a breach of regulation either international or local, governing navigation or equipment, or more rarely the inefficient or defective condition of the vessel or her equipment. 'We are not to expect extraordinary skill or extraordinary diligence, but that degree of skill, and that degree of diligence, which is generally to be found in persons who discharge their duty' ....."

(7a) The principles mentioned therein could be applied to collisions in backwaters and canals. Every vessel is to observe the regulations and rules prescribed therefor. To what extent the breach of the regulations will constitute negligence is described at page 5 of the said book as follows:

"As will be seen hereafter it is a positive duty to observe the regulations, and a departure from them is only justified by necessity. Non-observance is 'prima facie' negligence, therefore it would seem that unless it can be clearly shown that the departure from the regulation either did not in fact wholly or in part cause the collision, or was in fact right under the circumstances, non-observance will involve blame. In order to avoid blame under the old law it had to be proved that a breach could not possibly have contributed to the collision; now, it is submitted, it must be proved affirmatively that it did not cause or contribute to the collision."

(7b) At page 9 of the same book, the principles to guide a vessel to avoid a collision are stated thus:

"A vessel is not justified in delaying to take precautions until the last moment; or in trusting to being able to "shave" clear of the other. If by doing so she frightens the other into taking a wrong step, and a collision occurs, she will

be responsible for the entire loss. By a prompt compliance with the regulations, where a vessel is required to alter her course to avoid another, she apprises the latter of her ability and intention to comply with the regulations; whereas by delaying to take the required step, she may lead the other vessel to suppose that she is unable to comply with them, and cause her to take a step which may make a collision inevitable. Where a ship, in order to show that she is free from blame, is required to prove that she altered her course at the proper time, it is not enough for her to show that her helm was altered at that time; she must prove that she answered her helm in time."

(8) Coupled with these principles, the burden of proof in collision cases has also to be taken into account. Paragraphs 1065 and 1066 of Halsbury's Laws of England, Volume 30, Second edition, deals with the rules relating to proof of negligence in collision cases. Those paragraphs could be quoted with advantage.

"1065. The burden of proof, in the case of collision between two vessels, usually at first rests on the plaintiff, even if the defendant has broken a collision regulation, or even if the defendant alleges inevitable accident or admits that he is partly in fault. Where the evidence on both sides is nicely balanced and conflicting, the Court will be guided by the probabilities of the cases set up, and the reasonable way is to analyse the facts so as to ascertain what is the principal subject of inquiry on which the case hinges, and endeavour to arrive at a satisfactory conclusion as to the testimony upon that. But the plaintiff cannot succeed if the case is left in doubt, and it is for him to give preponderating evidence. By proving certain circumstances the plaintiff may shift the burden of proof on to the defendant. Thus, where a vessel under way in daylight and clear weather runs down a vessel at anchor, the burden, when those facts are admitted or proved, is on the owners of the vessel under way to prove they were not in fault. In a similar case at night, the owner of the vessel at anchor establishes a 'prima facie' case when he has shown that his vessel had a proper light. It is 'prima facie' evidence of negligence for a vessel to drag her anchor and for a barge to a sink and get into such a position that a steamer alongside of her sits on her. The defendant in a collision case is usually bound to prove those facts which are peculiarly or exclusively within his knowledge.

"1066 The Court generally follows ascertained lines in drawing conclusions as to testimony in collision cases. When the certain facts of a case, such as weather, description of vessels, courses, time, and place, which are admitted or indisputably proved, are ascertained, the doubtful facts are to be fitted in with them as far as possible. It is a rule in collision cases not to attribute perjury, if it is possible to avoid doing so. Although in nautical points the Court is assisted by the opinion and advice of nautical assessors, whose duty it is to be guided in matters of nautical experience by their own knowledge, the Court is not bound to take the advice of its nautical assessors but must make up its own mind on questions of nautical skill and seamanship."

(9) Bearing in mind these principles, the evidence in this case has to be considered.

(10) (After discussing evidence His Lordship proceeded.) Thus the evidence, let in by both sides, would show that the boat-men had seen the 'valloms' at least some time before the collision. The evidence of these witnesses would also show that the boat had no bright light, as provided for in R. 41, framed by the Government, under the Public Canals and Public Ferries Act. There should be a white light, so constructed as to show an unbroken light over an arc of 20 points of the compass or 225 degrees from 2 points abaft the beam on the one side ahead to two points abaft the beam on the other. This light is to be carried forward of, and at a higher level than the coloured lights, provided under (a) and (b) of R. 41. Though P. W. 9 would say that there was this bright light in the boat, the other evidence was to the effect that there were only red and green lights and a hurricane light in the engine-room. It was clear beyond any doubt that there was not this bright light in the boat. P. W. 9, the Boat-master, had stated that he was sitting near the Serang at the time of the accident. He was watching the front side and he stated that he saw the 'vallom', which was hit and sunk, only when it was ten or fifteen feet away from the boat.

(10-a) He had admitted that the bright light, when on, would bring to the vision all objects fifty feet away from the boat. If that was so, there was no reason for his not seeing the vallom', at such a distance. But he saw it only when it was fifteen feet away from the boat. Thus, there was a breach of one of the rules governing navigation in canals. If the boat-men had seen the 'valloms' at about 50 feet away from it, there would have been every opportunity for the boat-men to take necessary precautions to avoid the accident. P.W. 9 had stated that at the time of the collision the brake had been applied to the motor boat; but that it had stopped only after going fifteen feet forward. From his evidence it was, therefore, possible to infer that if brakes were applied the boat would stop fifteen feet away.

(10-b) In this case what we have to consider is the relative possibility of the two vessels to control their speed to avoid the collision. The boat was being driven by mechanical contrivance. It was also going up-stream, for the current in the canal at that time was towards the south. There was a heavy 'vallom' going down-stream and its progress was being controlled by the manual labour of two pole-men in it. Of the two sets of vessels, it was possible only for the boat to check effectively its further progress. If the light were on and the serang had observed the presence of the 'valloms' in front, fifty feet away, he would not have been justified in delaying to take precautions until the last moment, or in trusting to being able to 'shave' clear off the 'valloms.'

(11) Under Rule 73, governing the vessels in all public canals other than open back-waters, the speed of a steam vessel was not to exceed four miles an hour between sun-rise and sun-set and three miles an hour between sun-set and sun-rise. The evidence on the plaintiff's side in the case showed that the boat was coming at a very high speed. P.W. 2 would say that it was coming northwards like a mad elephant. The other witnesses, P.Ws. 3 to 6, would also support P.W. 2. P.W. 6 stated that the boat was being taken along the canal at the speed it had in the open back-waters. The evidence would indicate that the boat was being driven at a speed higher than that sanctioned by law. D.W. 6, on whom the defendant was placing much reliance, had stated that after the impact, the boat and the 'vallom' proceeded about ten to fifteen yards towards the north. P.W. 9, would say that the boat stopped, on the application of the brakes, after proceeding fifteen feet. Probably, that would be the case

if it came at the slow speed of three miles an hour. But it would not be so if it came at a high speed.

(11-a) It could not be forgotten that the 'vallom' in question had in it 64 barrels of caustic-soda, weighing over 18 tons. The boat was pushing forward this heavy 'vallom' after the impact and that would show that the boat must have been proceeding, before the accident, at a rather high speed. D.Ws. 4 and 5 had also stated that, after the impact, the ont portion of the 'vallom' got entangled with the boat and this resulted in the 'vallom' being pushed forwar in the direction of the boat. Thus, the evidence of the defence witnesses would show that the speed, at which the boat was travelling efore the accident, was much more than the sanctioned rate. This is certainly a case of extreme negligence on the part of those responsible in driving the boat.

(12) All the witnesses for the plaintiff and the defendant agreed that there was a close "shaving" of the boat with P.W. 3's 'vallom.' Though the 'vallom', which sank, was coming immediately behind that 'vallom', it must have been coming at some distance. Some of the witnesses said that it was not less than fifteen feet behind the first 'vallom.' The plaintiff's witnesses would say that the pole-men in the 'valloms' as well as the pedestrians on either bank of the canal had called out to the boat-men to stop and proceed more by the western side. D.Ws. 4 to 6 also admitted that at least the pole-men cried out to the boatmen to proceed slowly. Thus, there was the indication that those who controlled the boat had notice of approach of the two 'valloms' sufficiently before the impact. As mentioned already, it was earlier for the boat-men coming up-stream, with mechanical controls, to regulate the speed of the boat progress, and direction, and to stop the boat or manoeuvre the same to avoid the collision. The evidence, already indicated, would show that any serious attempt was not made by the boatmen to avoid the collision.

(13) It was, therefore, clear that the boat-men had not done everything, which they ought to have done, to avoid the collision. They had also failed to exercise the skill, care and nerve, which were ordinarily expected of a competent driver of a motor boat. They had also committed a breach of the regulations in not having the bright top light and in taking the boat at a speed higher than that sanctioned by law. It is always a positive duty on the part of the boatmen to observe the regulations, and a departure from the same can only be justified by necessity. As mentioned at page 5 in Marsden's book, referred to already, non-observance of the regulations is 'prima facie' negligence, unless it can be shown that the departure from the regulation either did not in fact, wholly or in part, cause the collision. It was shown already that the non-observance of the regulation, that is, by not keeping the top light and by taking the vessel at a high speed, was a direct cause of the collision in this case. The evidence adduced by the plaintiff is corroborated by certain circumstances mentioned by the defence witnesses and that has already been referred to.

(13-a) The evidence in this case as well as the said circumstances would show that the accident was because of the culpable negligence of those controlling the boat. The defendant had produced certain records, prepared by the Canal Officers, where there was a finding that the boatmen were not negligent. Those reports by themselves could not render substantive evidence. The Canal Officers had not witnessed the occurrence. They mentioned in their reports only certain inferences which they made after seeing the vessels some time afterwards. It was amply clear that these reports had not taken into account the facts and circumstances mentioned above. Although, in nautical points the Court is assisted by advice of nautical assessors, the Court is not bound to take such advice tendered by the assessors. The Court has to make up its own mind on questions of nautical skill and seamanship with reference to the evidence adduced in each case. The view expressed by the Canal Officers, without taking into account the several aspects of the case, or without taking statements of independent witnesses, would not therefore be accepted. We, therefore, agree with the Court below in holding that the accident in question was due to the culpable negligence of those in charge of the motor boat, belonging to the defendant company.

(14) This will lead to the next question, whether the plaintiff had sustained any damage, and, if so, whether the same was recoverable from the defendant. The plaintiff claimed the damages under two heads, namely, compensation for the loss in weight of caustic-soda, consequent on some of the barrels getting damaged by immersion in water, and the cost of salvaging the articles in the 'vallom.' These, if proved, are only approximate items of damage, so that the plaintiff will be entitled to get necessary compensation. In the plaint it had been stated that there was a shortage of weight when these barrels were weighed in Quilon, to the extent of 5633 pounds, the cost of which came to Rs. 1,278-4-0. Ex. D is the statement showing the weight of the 64 barrels after they were salvaged from water. The total weight of caustic-soda in the barrels, at the time when they were loaded in the 'vallom', was 18 tons 17 cwts. 80 pounds. This figure was taken from the advice list obtained by the Punalur Paper Mills from the Imperial Chemicals. Ex. C would show that. If these figures were correct, then certainly damage had been caused to the articles in the 'vallom.'

(14-a) Though in the plaint it had been stated that the compensation on this account came to Rs. 1,278-4-0, it was stated by the plaintiff as P.W. 1 that he would be satisfied with Rs. 1,064-7-2 as this latter amount alone was claimed by the Punalur Paper Mills. The appellant's learned Advocate had argued that the evidence relating to the shortage in caustic-soda after the accident was not acceptable. Ex. A is the boat-note given by P.W. 2 to the plaintiff at Cochin when the barrels were loaded in the 'vallom.' That does not give any weight. The suggestion was that the barrels might have been tampered with on the way and the caustic-soda pilfered, so that the immersion of the barrels in water might not be a cause for the decrease in weight. No such case had been put forward in the written statement and it would appear that the case proceeded to trial on the assumption that the quantity mentioned by the plaintiff was the actual quantity lost on account of the accident.

(14-b) It was true that the defendant had put the plaintiff to prove the same. The plaintiff had sworn to these facts and there was no reason to hold against his version. The question of pilfering on the way was never a case put forward by the defendant. No witness examined for the plaintiff had been asked any question about this. There was not even a remote suggestion about the matter. The loss could, therefore, have been occasioned only by the barrels containing caustic-soda going under water on account of the

accident. The lower Court found that the actual cost came to Rs. 1,064-7-2, and we accept the same.

(15) The next item claimed was a sum of Rs. 1,197-14-0, on account of the costs for salvaging the barrels and for transporting the same to Quilon. The learned Judge was of opinion that this claim was excessive. To take out 64 barrels, each containing approximately 661 pounds of caustic-soda, a sum of Rs. 384 had been claimed. Over and above the said sum of Rs. 384/- the plaintiff had claimed also Rs. 112/- on account of money given to P.W. 7, who supervised the salvaging. This was exorbitant. The full details of these had not been given by the plaintiff. A 'peredu' account, Ex E, had been filed in Court rather late. Exs. K and L, which were also receipts for payments made to persons on this account, were produced in Court very late. In the absence of any better evidence, the Court below allowed Rs. 300/- on his account. A sum of Rs. 120/- had also been allowed as the charges for transporting the barrels from Chavara to Quilon and Rs. 64/- for loading the valloms engaged at Chavara. Another sum of Rs. 120/- towards miscellaneous expenses had also been allowed by the learned Judge.

(15-a) It was true that there was not much material before the lower Court for arriving at the several figures mentioned in its judgment. But it was beyond doubt that the plaintiff had to incur additional expenses to salvage the barrels and to transport the same to Quilon. In the circumstances of this case we would take that the estimate given by the learned Judge was reasonable. We would, therefore, allow that amount alone to the plaintiff. The plaintiff's cross-appeal, claiming the disallowed amount, has therefore to be dismissed.

(16) In the result we confirm the decree of the Court below and dismiss the appeal and cross-appeal with costs.

Appeal dismissed.

D.H.

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KOSHI AND SANKARAN, JJ.

Narayanan Namboodiri, Appellant v. Raman Namboodiripad, Respondent.

Second Appeal No. 308 of 1124, D/- 17-2-50.

(a) Civil P. C. (1908), Ss. 100-101 — Service grant — Grant whether for future service and whether grantee's family is extinct are both questions of fact — Finding cannot be challenged in second appeal. (Para 2)

Anno : Civil P. C., Ss. 100-101 N. 52.

(b) Grant — Service grant — Grant for future service — Special nature of Service — Resumability.

A grant which is for the future and not for past services is resumable on extinction of the grantee's family as the performance of services by the grantee becomes impossible. (Para 2)

Further where the service required is guarding the grantor's illom at night, it is a special duty which can be entrusted only to the members of the grantee's family and cannot be performed by anybody else and hence the grant can be resumed on the extinction of the grantee's family. 3 T L J 322, Disting. (Para 3)

(c) Civil P. C. (1908), O. 2, R. 2 — Service grant — Suit for recovery of possession on default of services by grantee — Second suit for resumption of grant not barred.

A suit for recovery of possession of certain property on the ground that the grantees thereof had defaulted in performing the services for which the grant was made, in which the prayer for recovery of possession is not pressed does not bar a subsequent suit for resumption of the grant on extinction of the grantee's family on the ground that services had become impossible of performance, as they are two different causes of action. (Para 2)

Anno : C. P. C., O. 2, R. 2 N. 23.

(d) Grant — Service grant — Mortgage by grantee — Effect on grantor's right to resume.

The grantees of a service grant are entitled only to enjoy the property so long as the services imposed on them are duly performed by them. It is not open to the grantees to alienate or encumber the property. It follows therefore that a mortgage deed executed by the members of the grantee family, is invalid and inoperative as against the grantor's right to resume the property. The grantor is entitled to ignore the charge created under the mortgage deed and resume the property free of such charge. 28 T L J 1112, Ref. (Para 4)

(e) Grant — Service grant — Improvement on property by grantee made in good faith — Right of grantee to its value on resumption.

In the case of service grant, the members of the grantee family have every right to be in possession and enjoyment of the property so long as they are prepared to perform the service imposed on them by the grant. They have the unquestionable right to effect improvements on the property, and it cannot be said that such improvements are effected by them without any good faith. Since such improvements clearly go to the benefit of the grantor it is only just and proper that he pays the value of such improvements before getting possession of the property. (Para 5)

P. Narayana Pillai, for Appellant; G. Rama Iyer, for Respondent.

Cases referred to :

3 T L J 322 (Pr 3)
28 T L J 1112 (Pr 4)

SANKARAN, J.: Plaintiff 2 is the appellant. The plaint property belonged to the plaintiff's illom known as Puthenveli Mana. This property had been demised under an Adima grant in favour of a Nayar Tarwad known as Meveli tarwad, subject to the condition that the members of this tarwad were to guard the plaintiff's illom during night time. They were also to supply four bundles of betel leaves and fifty plantain leaves on the occasion of certain ceremonies in the plaintiff's illom. The Maveli tarwad had adopted the members of Thatchuparambil house as members of the Maveli tarwad. The original Maveli tarwad became extinct and the last of the adopted members of the Thatchuparambil house also died in the year 1110. The plaintiffs have therefore sought for recovery of the property on the ground that the services contemplated by the demise have become impossible of performance. Defendant 1 has been impleaded as a person in possession of the property under Ex. IV mortgage-deed, dated 29th Thulam 1097 executed by the members of the grantee family. The plaintiffs have impeached the validity of this mortgage and have contended that the members of the Maveli tarwad have no right to alienate or encumber the plaint property.

Defendant 1 resisted the suit and contended that the plaintiffs are not entitled to sue for recovery of the plaint property. According to him, the demise in favour of the Meveli tarwad was in consideration of past services rendered by the members of that tarwad and not for the performance of any future service. It was also contended that Kumaran Sankaran Nayar the last member of the Thatchuparambil house, is still alive and that himself and his wife and children are entitled to the plaint property. Defendant 1 further contended that even if the property is resumable by the plaintiffs, he is entitled to get the mortgage amount due under Ex. IV together with the value of the improvements on the property before the property is recovered from him.

(1-a) The trial Court found that the demise in favour of the Maveli tarwad was for the performance of future services, that the members of that family had no right to execute Ex. IV mortgage-deed, that the grantee family has become extinct and that the plaintiffs' illom is entitled to recover the property with mesne profits at the rate of Rs. 100/- per year. Defendant 1's claim for the value of the improvements on the property was upheld and the plaintiffs were directed to deposit in Court Rs. 922-4-7, towards the value of such improvements. Both sides preferred appeals against that decree, A. S. No. 191 of 1119 being by the plaintiffs, and A. S. No. 278 of 1119 being by defendant 1. The lower appellate Court dismissed A. S. No. 191 and partly allowed A. S. No. 278 by directing the plaintiffs to deposit in Court the mortgage amount under Ex. IV also, over and above the value of the improvements awarded in favour of defendant No. 1 by the trial Court. Plaintiff 2 has therefore come up in second appeal. Defendant-respondent 1 has filed an objection memorandum in respect of certain points decided against him by the lower appellate Court.

(2) Both the lower Courts have concurrently found that the grantee family has become extinct, that the grant was for the performance of future services by the members of the grantee family themselves and that since the performance of the services by the members of the grantee family has become impossible the property is resumable by the plaintiffs. In this second appeal defendant 1 respondent is not entitled to challenge the correctness of these findings, particularly the first two findings which are on pure questions of fact. The finding regarding the resumability of the property is attacked by the learned Advocate for the respondent by arguing that the prior decision in Ex. C, suit stands as a bar against the plaintiffs' illom in respect of their right to ask for recovery of possession of the property. Ex. C is copy of the decree in O. S. No. 1047 of 1094, instituted by the plaintiffs' illom for recovery of possession of the property. on the ground that the members of the grantee family had committed default in the performance of the services. That case was finally disposed of by the High Court as per Ex. L judgment, dated 16th Karkadakom 1098. The paryer for recovery of the property was not pressed in that case and accordingly the plaintiffs were given a declaration that they were entitled to demand the performances of the services by the members of the grantee family and also to insist on the payment of the articles which they were bound to pay. The mere fact that the prayer for recovery of possession of the property was not pressed in that case cannot bar the plaintiffs' right to resume the property at any subsequent stage. As already stated, Ex. C suit was instituted on the ground that the members of the grantee family had committed default in the performance of the services. The present suit is based on an entirely different cause of action, namely, that the grantee family has become extinct and that as such the performance of the services contemplated by the grant has become impossible. It is thus clear that Ex. L decision cannot stand against the plaintiffs' claim in the present suit for resumption of the property.

(3) Another aspect urged on behalf of the respondent is that the plaintiffs are entitled only to see to the performance of the services by the grantees or by any other persons deputed by them. The ruling in 'NARAYANAN NARAYANARU v. MATHU PHILIPOSE', 3 T L J 322, is relied on in support of this position. In that case the Admimagrant was for the performance of Velan services in the plaint temple, and it was held that so long as the holder of the property got such services performed by a competent person, the property was not liable to be surrendered. So far as that case was concerned, importance was laid on the performance of the particular service stipulated, and not on the particular individual who was to perform that service. The position in the present case is entirely different. The plaintiffs' illom appears to have entertained complete faith and confidence in the members of the Maveli tarwad and accordingly they were entrusted with the duty of guarding the plaintiffs' illom during night time and it was for the performance of such a special service that the property was demised in favour of that tarwad as Admima grant. That service cannot be got performed by anybody else in whom the plaintiffs may have no confidence or faith. It is also seen that the grantee family has become extinct. Thus the decision in 'NARAYANAN NARAYANARU v. MATHU PHILIPOSE', 3 T L J 322, has no application to the facts of the present case. It may also be pointed out in this connection that the respondent has not paid court-fee in support of his objection memorandum. Hence he is not entitled to argue against the decree allowing resumption of the property.

(4) In Ex. C case as well as in the subsequent suit evidenced by Ex. G, it was found that the Adima grant was for the performance of future services by the members of the grantee family. Exhibit G is copy of the judgment in O. S. No. 780 of 1101. It was a suit for recovery of the value of the articles which the grantees had defaulted to pay to the plaintiffs' illom. The plaintiffs had claimed such amount as a charge on the property. As per the final decision in that case, the claim to have such amount charged on the property, was disallowed even though a personal decree was passed against the grantees. Ex. A is copy of the High Court judgment in that case. That decision is 'RAMAN NAMBOORI v. THRIVIKRAMAN NAMBOORIPAD', 28 T L J 1112. The purport of that decision is that since the grantor had the right to resume the property for non-performance of the services any declaration of the debts of the grantees as a charge on that property, will be inconsistent with the grantor's right over the property. The grantees were entitled only to enjoy the property so long as the services imposed on them were duly performed by them. In the nature of the grant in this case, it was not open to the grantees to alienate or encumber the property. It follows therefore that Ex. IV mortgage deed executed by the members of the grantee family is invalid and inoperative as against the grantor's right over the property. The plaintiffs are entitled to ignore the charge created under Ex. IV mortgage-deed, and resume the property free of such charge. To this extent the appellant is entitled to succeed.

(5) Next there is the question whether the respondent is entitled to get the value of improvements effected by himself and his predecessors-in-interest on the plaint property. The members of the grantee family had every right to be in possession and enjoyment of the property so long as they were prepared to perform the services imposed on them by the grant. They had the unquestionable right to effect improvements on the property, and it cannot be said that such improvements were effected by them without any good faith. The grantee's possession of the property together with all the improvements thereon, passed to the respondent under Ex. IV mortgage. The plaintiffs were aware of the execution of that mortgage deed even when they instituted Ex. G suit in the year 1101. The mortgagee had been impleaded as defendant 4 in that case. The mortgage-deed was also produced in that case and it was marked as Ex. II. All the same the plaintiffs permitted the respondent to continue to be in possession of the property, and they instituted the present suit for resumption of the property only in the year 1113. In view of such conduct on the part of the plaintiffs, it is not now open to them to contend that the possession of defendant-respondent 1, is only that of a trespasser so far as the plaint property is concerned and that he is not entitled to get the value of improvements effected on the property. Since such improvements clearly go to the benefit of the plaintiffs, it is only just and proper that they pay the value of such improvements before getting recovery of possession of the property. Accordingly we uphold the finding of the lower Court that the appellant plaintiff is entitled to recover possession of the property from defendant-respondent 1 only on payment of Rs. 922-4-7 to defendant 1 towards the value of improvements on the property. On giving notice to defendant 1 about such deposit, the plaintiffs will be entitled to recover possession of the property with mesne profits at the rate of Rs. 100 per year as directed in the lower Court's decree.

(6) In the result this appeal is allowed only to the extent indicated above. The lower Court's decree is modified by directing that the plaintiffs are not liable to pay to defendant 1 the mortgage amount covered by Ex. IV but only the value of improvements to the extent of Rs. 922-4-7. Subject to such modifications the lower Court's decree is confirmed. It is seen that the appellant has not paid the additional court-fee as per the direction in the lower Court's judgment. He will pay such deficit Court-fee on the basis of the calculation indicated in the lower Court's judgment within three months from this date. He has to pay the deficit Court-fee payable in this Court as well as in the lower Courts and only after payment of such deficit Court-fee he will be entitled to execute the decree in this case. If, within the time mentioned above, the Court-fee is not paid by him, the Sirkar will be entitled to realise such Court-fee as a first charge on the interest decreed in favour of the plaintiffs. The objection memorandum filed by the respondent is also dismissed. The parties will suffer their respective costs in this Court. A copy of the decree will be sent to the District Collector.

Order accordingly.

D.R.R.

A. I. R. 1952 Travancore-Cochin 150

KUNHI RAMAN, C. J. AND SANKARAN, J.

Narayana Menon, Appellant v. Raman Namboodiripad and others, Respondents.

A. S. No. 68 of 1123 (c), D/- 31-8-1951.

(a) T. P. Act (1882), S. 61 — Several mortgages in favour of same mortgagee — In respect of transactions before Cochin T. P.Act, mortgagee could insist on redemption of all mortgages simultaneously — (Cochin T. P. Act (XVII (17) of 1111), Ss. 65 and 2) .

Codified law in Cochin regulating the transfer of properties, was introduced for the first time by the passing of the Cochin Transfer of Property Act (Act XVII (17) of 1111) which was brought into force with effect from 1-1-1112. By Section 65 of that Act it was laid down that the mortgagor who has executed two or more mortgages on the same property in favour of the same mortgagee shall in the absence of a contract to the contrary be entitled to redeem any one such mortgage separately or any two or more such mortgages together. Such a right conferred on the mortgagor could be availed of only in respect of mortgages which came into existence subsequent to the passing of the Act unless a similar right was available to the mortgagor as per the common law of the State, which was in force till the commencement of the Act.

Under the common law as recognised and enforced in the Cochin State prior to the passing of the Transfer of Property Act the mortgagor seeking redemption of the mortgaged property was bound simultaneously to redeem all the subsisting mortgages in favour of the same mortgagee in respect of the property sought to be redeemed and to pay off all the charges created under those documents. 3 Select Decisions (Cochin) 34, Followed. Case law Ref. (Para 2)

(It was held on the construction of the deeds (executed prior to Act) that there was also an implied agreement that the charges should be simultaneously redeemed). (Para 3)

Even though the mortgagee's right to recover by independent action the mortgage amounts due to him may have become time-barred, he can use his possessory lien over the property as a shield against the claim for redemption of the properties and insist on payment of all the amounts for which he has a charge on the properties before he is asked to surrender possession of the properties and there is no bar of limitation to such a claim being set up by way of defence to a suit for redemption. The essential test in such cases will be to see whether the mortgagee-defendant has obtained a lien on the properties sought to be redeemed, in respect of the amounts claimed by him, so as to entitle him to retain possession of the properties by virtue of such lien until the repayment of such amounts. (It was held that such a lien was created). (Para 4)

Anno : T. P. Act, S. 61 N. 1, 6.

(b) Debt laws — Cochin Agriculturists' Relief Act (XVIII (18) of 1114) — Possessory mortgage — Pattom not sufficient to cover interest — Mortgagor liable to pay interest from pocket — Such debt will be scaled down.

Where in a mortgage deed it was stipulated that since the pattom obtainable from the properties put in the possession of the mortgagee was not sufficient to cover the interest payable on the additional considerations advanced under the documents, the mortgagor would pay such

interest out of his own pocket, and that such interest would also be a charge on the properties, these debts come within the scope of the Cochin Agriculturists' Relief Act (Act XVIII (18) of 1114) and assignee of the rights of the mortgagor who is an agriculturist is entitled to the benefit of the scaling down of these debts as per the provisions of the Act. (Para 6)

(c) Debt Laws — Cochin Agriculturists' Relief Act (XVIII (18) of 1114), S. 3 — Paddy debt is within scope of Act — Paddy debt is to be converted into money-debt at price prevailing when such debt became payable. (Para 6)

K. Achutha Menon and T. M. Mahalingom Iyer, for Appellant; T. S. Venkiteswara Iyer and C. S. Ananthakrishna Iyer, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

29 Cochin L J 213 (Pr 2)
29 Cochin L R 241 (Pr 2)
37 Cochin L R 60 (Pr 6)
(50) 5 DLR (Trav-C) 473: (AIR (38) 1951 Trav-C 17) (Prs 2, 4)
3 Select Dec (Cochin) 34 (Prs 2, 4)

SANKARAN, J.: The 2nd defendant has preferred this appeal against the decree passed by the Anjikaimal District Court in O. S. No. 23 of 1120 allowing the plaintiff to redeem the suit properties from defendants 1 and 2 on payment of the mortgage amount of Rs. 3,442/- covered by the mortgage deed Ex. III, dated 32-1-1062. This mortgage was in favour of one Kochukrishna Menon. & ancestor of defendants 1 and 2, who was also put in possession of the properties under that document. The pattom of the properties was estimated at 896 paras of paddy, out of which 233 paras 4¼ edangalies of paddy had to be utilised for the payment of michavaram and tax to be paid in respect of these properties and the balance to be appropriated towards the interest on the mortgage amount. On the security of the same properties the mortgagors had taken two other loans also from the mortgagee. The first of these loans consisted of Rs. 170/- and 1120 paras of paddy and the document under which this loan was obtained is the puramkadam deed Ex. XXIII, dated 29-3-1067. The next loans consisted of Rs. 300/- and 1773 paras of paddy and the document executed in respect of the same is the puramkadam deed Ex. X, dated 21-1-1069. The plaintiff who has taken an assignment of the rights of the mortgagors instituted the present suit for recovery of possession of the properties from defendants 1 and 2 who are enjoying the properties as the heirs of the original mortgagee, on redemption of the mortgage Ex. III alone.

These defendants resisted the suit and contended that the plaintiff is boun to redeem the mortgage Ex. III and also the puramkadams Exs. XXIII and X at the same time and that the mortgagee-defendant can be compelled to surrender possession of the properties only on payment of the full amount due under these three documents together with the value of improvements claimed to have been effected by them on the mortgaged properties. The plaintiff maintained that the mortgagees have no right to insist a simultaneous redemption of all the three mortgages and that their right to recover the debt due under Exs. XXIII and X which are only simple mortgages has been lost by efflux of time. He has also contended that in case the defendants' claim for simultaneous redemption is upheld, the amount payable under Exs. XXIII and X should be scaled down and fixed in accordance with the provisions contained in the Cochin Agriculturists' Relief Act (Act XVIII of 1114.) The mortgagees' claim for value of improvements was also denied by the plaintiff as totally unsustainable. The lower Court negatived all the claims put forward by defendants 1 and 2 and decreed redemption as prayed for by the plaintiff. The 2nd defendant has therefore come up in appeal. Towards the redemption price an additional amount of Rs. 25,000/- has been claimed in this appeal.

(2) The first ground urged on behalf of the appellant is that the lower Court has erred in its view that the plaintiff is not bound to redeem the puramkadams Exs. XXIII and X along with the mortgage Ex. III. These three documents relate to properties situated within the former Cochin State and hence the rights and liabilities of the parties in respect of the transactions covered by these three documents have to be determined in accordance with the principles of the law of property that was in force in Cochin at the relevant period. Exs. III, XXIII and X came into existence in the years 1062, 1067 and 1069 respectively. During this period there was no codified law in Cochin regulating the transfer of properties. Such codified law was introduced for the first time by the passing of the Cochin Transfer of Property Act (Act XVII of 1111), which was brought into force with effect from 1-1-1112. By Section 65 of that Act it was laid down that the mortgagor who has executed two or more mortgages in favour of the same mortgagee shall in the absence of a contract to the contrary be entitled to redeem any one such mortgage separately or any two or more such mortgages together. Such a right conferred on the mortgagor could be availed of only in respect of mortgages which came into existence subsequent to the passing of the Act unless a similar right was available to the mortgagor as per the common law of the State, which was in force till the commencement of the Act. In Section 2 of the Act it is expressly provided that nothing in the Act shall be deemed to affect:

> "any right or liability arising out of a legal relation constituted before this Act came into force, or any relief in respect of any such right or liability."

It is argued on behalf of the appellant that under the common law as recognised and enforced in the Cochin State prior to the passing of the Transfer of Property Act the mortgagor seeking redemption of the mortgaged property was bound simultaneously to redeem all the subsisting mortgages in favour of the same mortgagee in respect of the property sought to be redeemed and to pay off all the charges created under those documents.

That this contention is well-founded is clear from the ruling in UZHUTHRA WARRIER v. SUBRAMANIA PATTAR', 3 Select Dec. (Cochin) 34. That was a suit for redemption of certain properties demised on kanom on payment of the kanom amount or the mortgage amount alone. There was a subsequent puramkadam also in favour of the kanomdar. He resisted the claim for redemption and contended that the puramkadom amount should also be paid alone with the mortgage amount before he could be compelled to surrender possession of the properties. His right to recover the amount by instituting a suit against the mortgagor has already become time-barred. Accepting his contention it was ruled by the Court that the plaintiff-mortgagor was not entitled to recover possession of the properties until

the puramkadom amount together with interest was also paid along with the mortgage amount. It was also held that even though the mortgagee's remedy to enforce the claim for recovery of the puramkadom debt had become barred by limitation the debt constituted a charge on the mortgaged properties, that he had an undoubted lien over such properties and that such lien could not be extinguished so long as the debt remained unpaid. Thus, in this particular case, there has been a judicial pronouncement in favour of the mortgagee recognising his right under the common law of Cochin to insist on simultaneous redemption of all the mortgages in his favour in respect of the same properties. Even though the same question had come up for consideration of the erstwhile High Court of Cochin in a few later cases there has been no decision disagreeing with the ruling in UZHUTHRA WARRIER v. SUBRAMANIA PATTAR.' One of the learned Judges who took part in the decision in 'NEELACANTA IYER v. KRISHNA IYER', 29 Cochin L R 241, expressed a doubt as to the propriety of recognising in the State the doctrine of consolidation of mortgages. His view was not fully shared by the other learned Judge who took part in that decision, who recorded the view that he was not prepared to commit himself to an outright rejection of the doctrine.

The question of the mortgagee's right to insist on a simultaneous redemption of all the charges in his favour in respect of the same property again came up for consideration in 'KORU v. KRISHNA MENON', 29 Cochin L R 213. In that case also there was some discussion on the common law of Cochin governing the matter. All the same there was no definite pronouncement in that case as to whether or not the mortgagee had a right to insist on a simultaneous redemption of all the mortgages in respect of the same properties. In both these cases, such a right was found in favour of the mortgagee mainly on the basis that in the documents in his favour the mortgagor had agreed either expressly or impliedly to a simultaneous redemption of all the mortgages. The earlier decision in UZHUTHRA WARRIER v. SUBRAMANIA PATTAR', was not based on any such agreement between the parties. Necessarily it has to be taken that the decision in that case was based on the common law of the land as it was understood and recognised at that time. The correctness of that decision has been left unchallenged for the last 50 years. The common law as judicially understood and construed by the highest Court in the State must govern the rights and liabilities of the parties in respect of the transactions entered into by them prior to the introduction of the Transfer of Property Act in the year 1112. This was the view taken by this Court in 'VARAHA DEVASWOM v. ABDULLA SAIT', 5 D L R (Trav-C) 473, where also the question of the right of the mortgagee to insist on simultaneous redemption of two mortgages brought into existence prior to the year 1112 had come up for consideration.

The learned Advocate for the respondent-plaintiff has contended that the decision in 'UZHUTHRA WARRIER v. SUBRAMANIA PATTAR', 3 Select Dec. (Cochin) 34, is incorrect and that it requires reconsideration. As already stated, that decision can be taken to be only a Judicial exposition of the common law of Cochin as it was understood and recognised in the State prior to the passing of the Transfer of Property Act. Innumerable transactions must have come into existence on the basis of such a law. To rule at this distance of time that the common law in force in Cochin was something different from that laid down in UZHUTHRA WARRIER v. SUBRAMANIA PATTAR', would result in an unnecessary and unjustifiable interference with the rights and liabilities which have already come into existence on the basis of the law as was understood by the parties. It may also be stated that there is nothing to show that the common law of Cochin prior to the passing of the Transfer of Property Act was different from that expounded in 'UZHUTHRA WARRIER v. SUBRAMANIA PATTAR.' The rights and liabilities arising out of the dealings with immovable properties subsequent to 1112 are governed by the provisions of the Transfer of Property Act. Under these circumstances, we are unable to accept the contention urged by the respondent's learned Advocate that the decision in 'UZHUTHRA WARRIER v. SUBRAMANIA PATTAR', 3 Select Dec. (Cochin) 34, requires reconsideration. Numerous decisions of the several High Courts were cited at the bar on the question of the right of the mortgagee to insist on a simultaneous redemption of all the mortgages in his favour. In the view that we have taken that the question of such a right raised in this particular case has to be decided on the basis of the common law of Cochin which was in force at the relevant time, it is clear that the decisions of the other High Courts cannot be of any help in deciding this case and hence it has become unnecessary to refer to these cases.

The common law of Cochin as recognised in 'UZHUTHRA WARRIER v. SUBRAMANIA PATTAR', is decidedly in favour of the appellant's contention that he is liable to surrender possession of the properties only on receipt of the amounts due under the puramkadams Exs. XXIII and X also along with the mortgage amount due under Ex. III.

(3) The intention of the parties as can be gathered from the puramkadoms Exs. XXIII and X is also definitely in favour of the appellant's contention that the further advances received under the purankadoms were also meant to be mere additions to the consideration that had already been received under the mortgage-deed Ex. III and that the whole amount had to be paid at the time of redemption. Out of the pattom of the mortgaged properties as fixed in Ex. III, a certain portion had to be utilised for payment of michavaram and tax and the balance had to be appropriated towards the interest on the mortgage amount. In Ex. XXIII there is a specific undertaking that since it is not possible to appropriate the interest on the additional amount under the document, out of the pattom of the mortgaged properties the mortgagor would pay such interest out of his own pocket. This undertaking clearly indicates that the intention of the parties was that the mortgagee may retain possession of the properties as security for the puramkadom amount also. Had it been otherwise there was no necessity or occasion to refer to the mortgage which had already been in existence and also to the insufficiency of the pattom to cover the interest on the additional advance received under the puramkadams. If there was any surplus available out of such pattom certainly the same would have been allowed to be appropriated towards the interest due on the puramkadom amount. There is a similar undertaking in the next puramkadam Ex. X also that the mortgagor would pay the interest on the amount covered by these documents out of his own pocket. There is a further stipulation that the amount with interest would be a charge on the properties covered by the mortgage and puramkadam deeds Exs. III

and XXIII respectively. Even though these stipulations do not amount to an express agreement that all the three charges would be simultaneously redeemed, an implied agreement to that effect is clearly deducible from a reading of the documents as a whole with particular reference to the stipulations already mentioned. Since the common law in force in Cochin at the time was in favour of such simultaneous redemption of the several charges in favour of the same mortgagee it is only natural that the mortgagor received further advances on the security of the properties mortgaged and executed the puramkadams containing the stipulations indicative of the idea of such a simultaneous redemption. Thus, on the strength of the implied agreement embodied in Exs. XXIII and X also, defendants 1 and 2 are entitled to insist on getting the amounts due under the puramkadoms Exs. XXIII and X along with the mortgage amount under Ex. III before they are compelled to surrender possession of the properties.

(4) Another contention urged on behalf of the plaintiff-respondent is that the mortgagee's right to enforce the puramkadoms Exs. XXIII and X against the mortgagor by suing on the same having become barred by limitations, he cannot be allowed to recover the amounts due under these documents in the present suit for redemption of the earlier mortgage Ex. III. The identical question had come up for consideration in 'UZHUTHRA WARRIER v. SUBRAMANIA PATTAR', 3 Select Dec. (Cochin) 34, and in 'VARAHA DEVASWOM v. ABDULLA SAIT', 5 D L R (Trav-C) 473.

In both these cases it was ruled that even though the mortgagee's right to recover by independent action the mortgage amounts due to him may have become time-barred. he can use his possessory lien over the property as a shield against the claim for redemption of the properties and insist on payment of all the amounts for which he has a charge on the properties before he is asked to surrender possession of the properties and that there is no bar of limitation to such a claim being set up by way of defence to a suit for redemption. The essential test in such cases will be to see whether the mortgagee-defendant has obtained a lien on the properties sought to be redeemed, in respect of the amounts claimed by him, so as to entitle him to retain possession of the properties by virtue of such lien until the repayment of such amounts.

There can be no doubt that such a lien was created in favour of the mortgagee under Ex. III in respect of the amounts advanced under the puramkadoms Exs. XXIII and X. The additional advances under these documents were made at a time when he was in possession of the properties on the strength of Ex. III. It was on the strength of such possession and as an additional charge on the properties that these further advances were made by him. The fact that these advances are described as puramkadoms also indicates that they are considered as additional considerations under the same mortgage transaction. This means that the mortgagee is entitled to retain possession of the properties as security for all such amounts and that a possessory lien is available to him in respect of the amounts advanced under each of these documents. On the strengh of such lien defendants 1 and 2 are entitled to claim reimbursement of the amounts due under Exs. XXIII and X also before surrendering possession of the properties and such a claim by way of defence to the redemption suit is not affected by the bar of limitation which has precluded them from seeking a separate remedy by independent action for recovery of the amounts due under these two documents.

(5) The next aspect to be considered is what is the extent of the amount that has to be paid by the plaintiff under Exs. XXIII and X for extinguishment of the possessory lien which defendants 1 and 2 have over the properties on the strength of these documents. On this question there is considerable dispute between the parties. The lower Court in view of its finding that the plaintiff is entitled to redeem the properties on payment of the mortgage amount due under Ex. III alone has not considered these points of dispute and has not fixed the exact amount payable under each of these documents. Since the appellant has succeeded in his contention that the amounts legitimately due under Exs. XXIII and X should also be directed to be paid by the plaintiff before recovery of possession of the properties it has become necessary to fix the amounts thus payable under each of these documents. The principal amount of the debt due under Ex. XXIII consists of Rs. 170/- and 1120 paras of paddy and the principal amount covered by Ex. X consists of Rs. 300/- and 1773 paras of paddy. 573 paras of paddy out of the 1773 paras of paddy covered by Ex. X had been reserved with the mortgagee for redeeming an additional item of property which had been included in this document and which was already outstanding under a prior mortgage. It is admitted by defendants 1 and 2 in paragraph 6 of their written statement that this item of property has not been redeemed by them or by their predecessor-in-interest. It follows, therefore, that to the extent of 573 paras of paddy Ex. X is lacking in consideration and that the principal amount which these defendants are entitled to get under these documents consists of Rs. 300/- and 1,800 paras of paddy only. Out of this consideration a portion was made up of the arrears of interest that had accumulated under Ex. XXIII. It is argued on behalf of the plaintiff that this amount must be deemed to retain its character as interest due under Ex. XXIII even after it had been treated as part of the consideration for Ex. X. We are unable to accept this argument as sound. When credit was given under Ex. X for an amount which was payable by the mortgagor by way of arrears of interest due under Ex. XXIII that amount lost its character as interest and it assumed the character of a principal amount advanced by the mortgagee. The mortgagee is therefore liable to pay this amount also as part of the principal amount covered by Ex. X. So far as the principal amount under the mortgage-deed Ex. III is concerned it is common ground that an amount of Rs. 100/- out of such consideration had been satisfied under the release deed Ex. VI, dated 5-12-1088, executed by the mortgagees in respect of a few items covered by the mortgage. Deducting this amount of Rs. 100/- out of the consideration of Rs. 3,442/- received under Ex. III, there is only a balance of Rs. 3,342/- remaining to be paid under this document. The principal amounts payable under the three documents are fixed accordingly.

(6) Then there is the question of interest payable on the principal amounts covered by Exs. XXIII and X. Since the pattom obtainable from the properties put in the possession of the mortgagee was not sufficient to cover the interest payable on the additional considerations advanced under these documents, it was expressly stipulated that the mortgagor would pay such interest out of his own pocket. It was further stipulated that such interest will also be a charge on the properties. It is contended on behalf of the plaintiff

that these debts come within the scope of the Cochin Agriculturitsts' Relief Act (Act XVIII of 1114) and that the plaintiff is entitled to the benefit of the scaling down of these debts as per the provisions of the Act. It is not disputed that the plaintiff is an agriculturist as defined in the Act. Since he has become an assignee of the rights of the mortgagor of the plaint properties he has also become liable to pay the amounts due under Exs. III. XXIII and X and, as such, he is entitled to the benefits conferred by the Agriculturists' Relief Act.

On behalf of the appellant, it is argued that the paddy portion of the debt covered by Exs. XXIII and X is outside the purview of the Agriculturists' Relief Act. This contention is unsustainable in view of the definition of the word 'debt' as given in Section 3 of the Act, which is as follows: "Debt means any liability in cash or kind, whether secured or unsecured, due from an agriculturist, whether payable under a decree or order of a civil or revenue Court or otherwise ....." The expression "liability in kind" as used in this definition will certainly be taken in the paddy debt payable under Exs. XXIII and X and hence it cannot be said that such debt is outside the scope of the Agriculturists' Relief Act. Section 7 of the Act lays down that all debts payable by an agriculturist at the commencement of the Act shall be scaled down in accordance with the provisions of the Act, notwithstanding any law, custom, contract or decree of Court to the contrary. Section 8 is to the effect that all interest outstanding on 1-1-1107 shall be deemed to be discharged and only the principal outstanding shall be deemed to be the amount repayable on that date. In view of this provision the interest due under Exs. XXIII and X need be calculated only for the period from 1-1-1107, onwards. Simple interest at 6 per cent per annum will alone be calculated for this period in arriving at the amount payable by way of interest as per the provision in Clause (b) of Section 9 of the Act.

Then there is the question of the rate at which paddy has to be commutted into money for the purpose of ascertaining the amount payable to defendants 1 and 2 under Exs. XXIII and X. This matter is governed by the Full Bench decision of the Cochin High Court in 'KUNHAN NAIR v. RAMAN', 37 Cochin L R 60. It has been ruled in that case that where claims on account of paddy are sought to be enforced the conversion of such paddy into money has to be made at the price prevailing on the date when such paddy become payable. As per the stipulations contained in Exs. XXIII and X the interest had to be paid at the end of every year. It follows therefore that the paddy to be given on account of such interest became due at the end of every year and that, as such, the paddy on account of such interest has to be valued at the rate prevailing on the respective dates when such interest became payable. So far as the principal amount of paddy covered by these documents is concerned the stipulation was that the same should be paid whenever demanded. The plaintiff has no case that the mortgagees-defendants had made any demand for the repayment of these amounts at any time prior to the notice issued by the plaintiff claiming surrender of possession of the properties on receipt of the amount due under the mortgage-deed Ex. III. It was in the reply notice sent by defendants 1 and 2 that they made a demand for the first time that the amounts due under Exs. XXIII and X should also be paid to them. Ex. B is this reply notice and it is dated 12-11-1119. Thus the paddy fixed as principal amount of paddy due under Exs. XXIII and X became payable only on 12-11-1119 and hence such paddy has to be valued at the price prevailing on that date. The amount payable under each of these documents by way of principal amount and interests will be calculated and fixed in the manner indicated above.

(7) The mortgagee's claim for value of improvements alleged to have been effected in the plaint properties may now be considered. In paragraph 9 of the written statement of defendants 1 and 2 value of improvements is claimed under two items, viz., (1) the cost of converting the garden land into wet land for paddy cultivation and (2) the cost of making either items of wet lands fit for raising two crops every year. Beyond stating that these defendants are entitled to get their cost of improvements under both these items, no specific amount was claimed by them under these items. At the instance of these defendants D.W. 5 was deputed as commissioner to assess the value of these items of improvements. Ex. I is the report submitted by him. It is stated in the report as well as in the evidence of the commissioner that no indication is found on the properties to show that these items of improvements were really effected by these defendants or by their lessees. The commissioner has in his report simply made a calculation as to the cost that might have been incurred by the mortgagees in case the several items of works as stated by them were really done in the properties. Thus the amount of Rs. 20,657-0-0 arrived at by the commissioner in his report Ex. I is based on the calculations made by him purely on the basis of certain hypothetical data. In the absence of any direct and reliable evidence to show that the data adopted by the commissioner as the basis of his calculations are real, the report Ex. I by itself is of no use in fixing the value of improvements due to the mortgagees. Some evidence was attempted to be adduced by defendants 1 and 2 to prove that the different items of works on the basis of which the commissioner proceeded to make his calculation were really done in the mortgaged properties. (His Lordship reviewed the evidence and continued): It has already been found that the defendant's contention that some portion of the mortgaged properties was garden land and that they converted the same into wet land is baseless and untrue. On a consideration of all these aspects, the inference is irresistible that the claim for improvements has been advanced by these defendants purely on a speculative basis No amount by way of value of improvemetns can be awarded on the basis of such speculations. The mortgagees in possession have to establish by reliable and convincing evidence that real and substantial improvements resulting in an increase in the value of the properties have been effected by them on the properties before they can claim any amount by way of value of such improvements. There is no such evidence in this case in support of the claim for value of improvements put forward by defendants 1 and 2. The lower Court was therefore right in completely negativing the defendants' claim on this account.

(8) The last point urged on behalf of the appellant is about the mesne profits awarded by the lower Court. From the finding already recorded that the plaintiff is bound to pay the amount due under Exs. XXIII and X also before he can get recovery of possession of the properties from defendants 1 and 2 it follows that the liability of these defendants for mesne profits will arise only from the date of the deposit of such additional amounts also in Court by the plaintiff with notice to these defendants. The lower Court has fixed

the mesne profits at the rate of the pattom fixed in Ex. III. The plaintiff has not filed any objection to such basis adopted by the lower Court in fixing the rate of mesne profits. But the 2nd defendant contends that even if such a basis is adopted the amount of mesne profits has to be reduced in proportion to the reduction in the extent of the properties. It is common ground that a portion of the mortgaged properties has been released under Ex. VI and that another portion of the properties has been sold away for arrears of michavaram and tax due in respect of these properties. The remaining properties covered by the mortgage are alone now sought to be recovered by the plaintiff from the defendants and hence they can be made liable only for the proportionate mesne profits due in respect of that portion of the properties, sought to be recovered. On the basis of the pattom fixed in Ex. III the proportionate amount of pattom due in respect of the properties which the defendants are now liable to surrender to the plaintiff will be ascertained and the same will be fixed as the amount of mesne profits to be provided for in the decree in this case.

In the result, this appeal is allowed to the extent already indicated and the lower Court's decree modified as follows: Over and above the mortgage amount of Rs. 3,342/- remaining due under the mortgage deed Ex. III, the plaintiff shall deposit in Court the amounts due under Exs. XXIII and X, which will be fixed in accordance with the directions contained in paragraphs 5 and 6 of this judgment. On depositing the whole of this amount with notice to the defendants, the plaintiff will be entitled to get redemption of Exs. III, XXIII and X and to recover possession of the suit properties from the defendants. Defendants 1 and 2 will draw this amount from Court on production of the title deeds. From the date of notice of the deposit of the amounts found to be due to those defendants they will also be liable for mesne profits that will be fixed as per the direction contained in paragraph 8 of this judgment. In respect of the claim for value of improvements put forward by the 2nd defendant this appeal fails and to that extent the appeal is dismissed. The parties will pay and receive proportionate costs. The lower Court is directed to pass a final decree in the case after fixing the amount payable under Exs. XXIII and X as indicated in paragraphs 5 and 6 and also after fixing the mesne profits as indicated in paragraph 8 of his judgment. The final decree will be passed without delay.

R.G.D. *Appeal partly allowed.*

A. I. R. 1952 Travancore-Cochin 155
KUNHI RAMAN C. J.
AND SUBRAMANIA IYER J.

Chacko Thomas and others, Appellants v. The State.

Criminal Appeals Nos. 71, 87 and 88 of 1951, D/- 21-8-1951.

Evidence Act (1872), Ss. 133 and 114, illus. (b)—Evidence of accomplice—Corroboration—Extent and nature of.

It is a well established rule both in England and in India that the evidence of an accomplice who from the very nature of things has participated in the crime, should not ordinarily be made the basis for convicting the accused person. This is often described as a rule of prudence. But it has in practice acquired the value of a rule of law. It is not necessary that the accomplice should be confirmed in every detail of the crime. If such a condition is insisted upon, then the evidence of the accomplice would not be essential to the case, but it would be only confirmatory of other and independent testimony. The corroboration must be by some evidence other than that of an accomplice, and therefore one accomplice's evidence is not corroboration of the testimony of another accomplice. The evidence of an accomplice must be confirmed not only as to the circumstances of the crime, but also as to the identity of the prisoner.

It would be sufficient if there is confirmation as to the material circumstances of the crime and to the identity of the accused in relation to the crime so that the Court may be satisfied that it is not unsafe to act upon the testimony of the accomplice. The nature of the evidence required for corroboration need not necessarily be direct evidence. It may be circumstantial evidence connecting the accused with the crime. The degree or extent of the corroboration cannot be defined, but is a matter for the decision of the Court in each particular case. Case law Ref. **(Paras 5, 6, 7)**

Anno: Evidence Act, S. 114 N. 2; S. 133 N. 6, 7.

K. T. Thomas & Mrs. K. V. Mariakutty, for Appellants; Public Prosecutor, T. R. Balakrishna Iyer, for The State.

Cases referred to:

(Arranged in order of Courts and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

(1856) Dears C C 555: (25 L J M C 16) (Pr 5)
(1916) 2 K B 658: (86 L J K B 28) (Pr 5)
(1908) 1 K B 680: (77 L J K B 1043) (Pr 5)
(1894) 2 Q B 415: (63 L J M C 198) (Pr 5)

KUNHI RAMAN, C. J.: These appeals are presented on behalf of the 1st, 3rd and 4th accused in Sessions Case No. 25 of 1950 on the file of the Sessions Court of Quilon. They were tried for offences under Ss. 492(a) and (b) read with Ss. 28 or 99 and 514 of the Travancore Penal Code. The learned Judge convicted the first accused under S. 492 (a) read with S. 99 and sentenced him to rigorous imprisonment for five years and to pay a fine of Rs. 1000/-. In default of payment of fine he is to undergo rigorous imprisonment for a further period of six months. Accused 3 and 4 were convicted under S. 492 (a) of the Travancore Penal Code and sentenced to undergo rigorous imprisonment for five years. The second accused who was granted a conditional pardon was examined as an approver. The 5th accused was acquitted.

(2) The case for the prosecution is briefly summarised in the judgment of the learned trial Judge who has also reviewed the evidence in a fair and impartial manner. He states in the beginning of his judgment that the counterfeiting of the currency notes is alleged to have taken place in a new house which was built by the first accused at Alencheri in Anchal Pakuthy, Pathanapuram Taluk. The 1st accused was also charged with having uttered some of these notes by circulating them at Permade, Ambalapuzha and Alleppey and trying to pass one of these notes also at Pathanapuram market in Chingom 1123 about the time of the Onam Festival. The offence of counterfeiting currency notes of the denomination of Rs. 10/- took place in 1122. The delay in starting the prosecution was because for a long

time the crime remained undetected. It was only when the third accused happened to be arrested in connection with another offence that the police succeeded in discovering the nefarious activities of these accused persons who were tried in the Court below. The third and 4th accused had made certain confessions. The 4th accused confessed soon after his arrest. The 3rd accused made a confession when he was arrested in connection with another crime. This confession has been marked as Ex. AB. In the course of the enquiry Bava Joseph, the 2nd accused was granted a conditional pardon by the District Magistrate on 24-4-1950 the condition being that he should make a true and full disclosure of all circumstances connected with the crime of which he was aware. He was examined as P. W. 17.

(3) In paragraph 2 of his judgment the learned trial judge gives a summary of the prosecution case. Towards the end of Mithunam 1122 the 1st accused accompanied by the 4th accused went to the house of the approver who has been examined as P.W. 17 at the trial and started negotiations for the purchase from P.W. 17 of a hand-press which has been marked as M. O. 1 and certain blocks which have been marked as M. O. 11 for the purpose of counterfeiting Rs. 10/- Currency Notes. The first accused paid part of the consideration to P.W. 17 and arranged with him that he should get ready all the necessary accessories for carrying out their scheme. After a week, the 1st accused came back accompanied by the 5th accused and took delivery of the hand press blocks and accessories. P.W. 17 went with these two people to Changanessery which they reached at about midnight. From there the 1st accused made P.W. 17 fetch the 4th accused and all of them then proceeded to the 1st accused's house at Anchal. In one of the rooms in that house described as the southern room 500/- Currency Notes of Rs. 10/- each were then manufactured by the 4th accused., P.W. 17 the approver assisting him in the process. These persons were, however not satisfied with the appearance of these 500 Currency Notes. They thought that the resemblance of these notes to the genuine notes was not sufficiently good and, therefore they destroyed all these notes except M. O. IX which P.W. 17 had retained and sent away the 4th accused who was found to be not quite a success in executing the work that they had in mind. The following day P.W. 17 went to Kottayam and saw the 3rd accused who was considered to be a better workman. The 3rd accused was persuaded to agree to do the job for the 1st accused and he was taken by P W. 17 to the house of the 1st accused at Anchal. On their way they halted for the night at the house of the 5th accused at Kottakakara. The next morning P.W. 17 accompanied by the 3rd and 5th accused proceeded to the residence of the 1st accused at Anchal. They were met by the 1st accused at a junction near his residence. He treated them to tea in the teashop of P.W. 4 and took them to his house. There the 3rd accused was made to manufacture 1000 counterfeit currency notes of the value of Rs. 10/- each. This was done at the instance of the 1st accused. This time the efforts of the gang were considered satisfactory, with the result that they put the counterfeit notes into circulation at Peermede, Ambalapuzha and certain other places. One was discovered at the Ambalapuzha Sub-Treasury. The Treasury Officer forwarded it to the Police Station for investigation. Another was uttered at Alleppey and this led to the starting of another criminal prosecution. 166 notes were delivered at Peermade Station by the Manager and also a clerk employed in one of the estate in that locality and also by the Agent of a Bank in Vandiperiyar. These formed the subject-matter of another prosecution. At about Onam day in 1123 the 1st accused is alleged to have tried to palm off one of these notes to P.W. 11 at Pathanamthitta Market but he did not succeed. At the trial all the accused pleaded that they were not guilty.

(4) The learned Judge found at the trial that M. Os. 3 to 10 were all counterfeit notes which it was possible to manufacture by using M. Os. 1 and 2. The important points for determination framed in the judgment of the learned trial Judge were points 2, 3 and 4. Stated briefly these are whether the 4th accused counterfeited 500 ten rupee notes or knowingly performed any part of the process of counterfeiting them in the house of the first accused at Anchal in Mithunam-Karkatakam 1123; whether the 3rd accused counterfeited 100 ten rupee currency notes or knowingly performed any part of the process of counterfeiting them in the house of the 1st and 5th accused abetted the 4th and 5th accused in doing these illegal acts. There is an additional point raised as to whether the 1st accused attempted to pass as genuine any of these counterfeit currency notes, knowing or having reason to believe the same to be counterfeit. On this point, the learned trial Judge has not accepted the evidence adduced on behalf of the prosecution and has held that this charge has not been made out against the 1st accused. There is therefore no necessity to deal with this aspect of the case in the course of this judgment. Similarly with regard to the 5th accused the learned trial Judge was not prepared to believe that the case against him has been made out, because the only evidence against him was that he was found in a room in the house of the 1st accused in which counterfeiting was going on. There was no other evidence which would implicate him or which would show that he participated in the unlawful act in any manner. In these circumstances, the learned trial Judge has held that it would not be safe from the evidence against the 5th accused to hold that he abetted the 3rd accused in committing the offence which is the subject-matter of the charge against the accused persons. He has accordingly acquitted him.

There is no appeal brought on behalf of the State in this Court from this order of acquittal, and therefore, the case of the 5th accused also need not be considered in this judgment. On the other hand, accused 1, 3 and 4 have been held to be guilty of the main charges brought against them. Against the 1st accused the finding is that he abetted under S. 99 of the Travancore Penal Code the commission of the offence under S. 492 (a). The finding against the 3rd and 4th accused is that they are guilty of the offence under S. 492 (a) of the Travancore Penal Code of counterfeiting false currency notes. These findings have been attacked by the learned counsel appearing for these three accused persons. The main argument addressed by Mr. K. T. Thomas, the learned counsel for the 1st accused appellant, which has also been adopted by the learned counsel appearing for the 2nd and 3rd accused, relates to the credibility of the evidence on which the conviction is based. The reason for the stress laid upon this aspect of the case is because an important piece of evidence which supports the conviction is the evidence of the approver P. W. 17 who was jointly accused with the appellants. On a perusal of the judgment of the learned trial Judge it is clear that he has not misdirected himself as to the extent to which the evidence of an accomplice can be taken into consideration and as to the neces-

sity for corroboration in material particulars in order that a conviction may be based on the evidence of an accomplice. He has started the discussion by referring to the provisions of S. 133 of the Indian Evidence Act according to which a conviction can be based upon the uncorroborated testimony of an accomplice. Coupled with this is illustration (B) to S. 144 according which the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars.' The extent and nature of corroboration have also been borne in mind as is evident from the discussion in the judgment of the learned trial Judge.

(5) It is a well established rule both in England and in India that the evidence of an accomplice who from the very nature of things has participated in the crime, should not ordinarily be made the basis for convicting an accused person. This is often described as a rule of prudence. But it has in practice acquired the value of a rule of law. The scope of this rule has been clearly laid down in the judgment of the Court of Criminal Appeal in England in the case of 'Rex v. Baskerville', reported in (1916) 2 K B 658. Certain portions of the judgment of Lord Reading, Chief Justice, may be quoted with advantage. In the early part of the judgment his Lordship says:

"There is no doubt that the uncorroborated evidence of an accomplice is admissible in law; see 'REX v. ATWOOD'. (1787) 1 Leach, 464. But it has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the Judge, to advice them not to convict upon such evidence; but the Judge should point cut to the jury that it is within their legal province to convict upon such unconfirmed evidence; 'REG. v. STUBBS', (Dears 555). In re 'MEUNIER', (1894) 2 Q B 415.

This rule of practice has become virtually equivalent to a rule of law, and since the Court of Criminal Appeal Act came into operation this Court has held that, in the absence of such a warning by the Judge, the conviction must be quashed: ('REX v. TATE', (1908) 2 K B 680)."

The judgment goes on to state that even when the jury has been properly diretced in this manner by the presiding Judge, it would be open to the Court of Criminal Appeal to interfere with a verdict of guilty if upon reviewing all the facts and evidence in the case, the Court of appeal thinks that the verdict is unreasonable or that it cannot be supported having regard to the evidence. Such a power is expressly conferred upon the Court of Criminal Appeal by the Court of Criminal Appeal Act, 1907, S. 4, sub-s. 1. The extent of the corroboration necessary is then dealt with in the judgment and it is pointed out that "confirmation does not mean that there should be independent evidence of that which the accomplice relates, or his testimony would be unnecessary". Per Moule J. in 'REG. v. MALLINS', (3 Cox C C 326). The learned Chief Justice then goes on to observe that it is not necessary that the accomplice should be confirmed in every detail of the crime. If such a condition is insisted upon, then the evidence of the accomplice would not be essential to the case, but it would be only confirmatory of other and independent testimony. It is also pointed out that the corroboration must be by some evidence other than that of an accomplice, and therefore one accomplice's evidence is not corroboration of the testimony of another accomplice: 'REX v. NOAKES', (1082) 9 C and P 326). It is pointed out in the judgment that the rule of practice requiring corroboration has arisen

"in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal. What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it."

After discussing the case law on the point in England His Lordship records his conclusion in the following words:

"After examining these and other authorities to the present date, we have come to the conclusion that the better opinion of the law upon this point is that stated in 'REG. v. STUBBS', by Parke B, namely, that the evidence of an accomplice must be confirmed not only as to the circumstances of the crime, but also as to the identity of the prisoner."

It is made clear in this part of the judgment that it would not be reasonable to expect confirmation of all the circumstances of the crime, but that it would be sufficient if there is confirmation as to the material circumstances of the crime and to the identity of the accused in relation to the crime so that the Court may be satisfied that it is not unsafe to act upon the testimony of the accomplice. The view expressed by Baron Parke in 'REG v. STUBBS', was adopted that view having prevailed till the passing of the Court of Criminal Appeal Act and also to the date on which the judgment in the case was delivered by the Court of Criminal Appeal. Without formulating the kind of evidence which should be regarded as corroboration, His Lordship stresses the fact that corroborative evidence

"is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime was committed but that it was committed by the accused."

(6) Passing to the nature of the evidence required for corroboration, it is pointed out that it need not necessarily be direct evidence. It may be circumstantial evidence connecting the accused with the crime and reliance is placed upon the decision in 'REG. v. BARKETT', (8 C & P 732) and His Lordship points out:

Were the law otherwise many crimes which are usually committed between accomplices in secret, such as incest, offences with females, or the present case, could never be brought to justice."

(7) In the Judicial pronouncements of the Privy Council a similar rule has been recognised. We have had occasion to refer to one of these cases in our judgment in 'Criminal Appeals Nos. 41 and 135 to 137 of 1124'. The view that we took in that case was that the evidence of the accomplice must be corroborated in material particulars by untainted evidence. Reference was made to the decision of the Privy Council reported in 1944-2 M L J 194 ('BHUBENT SAHU v. THE KING'). The practice in India has followed the rule observed in England that the evidence of an accomplice must be corroborated in material particulars. The degree or extent of the corroboration cannot be defined, but is a matter for the decision of the Court in each particular case. In the present case, the evidence of P. W. 5 corroborates the testimony of the accomplice. The learned trial Judge has carefully considered the reliability and dependability of his evidence and he has recorded his conclusion that he believes P. W. 5. If P. W. 5 is believed, then his evidence supplies the necessary corroboration to prove the crime against all three appellants. (His Lordship considered the evidence and proceeded.)

(8) In the judgment of the learned trial Judge he has given in a tabular statement the manner in which the approver's evidence has been corroborated by untainted evidence in the case. It is thus clear that the trial Court has not lost sight of the fundamental principle to be observed in appreciating the evidence of an approver or accomplice. The relevant evidence on which the learned counsel on both sides rely has been read out to us and on considering the entire evidence we are satisfied that the conclusion reached by the learned trial Judge is fully warranted. The conviction of the three appellants must therefore be upheld. The sentences cannot be said to be too severe. In the circumstances, the conviction and sentences are confirmed and the appeals dismissed.

(9) After this judgment was pronounced Mr. Thomas on behalf of the first accused and Mrs. M. John on behalf of accused 3 and 4 make an oral application for a certificate for leave to appeal to the Supreme Court. We are not satisfied that this is a fit case for granting such a certificate and, therefore, the request cannot be granted.

R.G.D. *Appeals dismissed.*

A. I. R. 1952 Travancore-Cochin 158
JOSEPH VITHAYATHIL J.

K. K. Anthrew, Petitioner v. The State.

Criminal Revn. Petn. Nos. 145 and 117 of 1125, D/- 22-10-1951.

(a) Penal Code (1860), Ss. 409 and 405 — Criminal breach of trust by servant — Master, when vicariously liable.

'Mens rea' is the essence of the offence of criminal breach of trust. The mere fact that the 2nd accused was employed by the 1st accused, a Government licensee for purchase of paddy, for purchasing paddy and issuing receipts cannot make the first accused vicariously liable for the offence of criminal breach of trust and forgery committed by the 2nd accused in the course of his employment. The 1st accused may be answerable to the Government for the misappropriation of paddy committed by the 2nd accused, but that does not mean that he will be criminally liable for the offences committed by his employee. According to the definition of the offence of criminal breach of trust the 1st accused will be criminally liable for the offence of the 2nd accused only if it is proved that he wilfully suffered the 2nd accused to commit the offence. So long as there is nothing to show that the accused wilfully allowed the 2nd accused to commit the offence of dishonestly misappropriating paddy it cannot be said that the 1st accused has committed the offence of criminal breach of trust. (Paras 3, 4)

Anno: Penal Code, S. 409 N. 1; S. 405 N. 7.

(b) Criminal P. C. (1898), S. 215 — No evidence against accused — It is point of law and commitment can be quashed.

When there is no evidence in the case on the basis of which the accused can be convicted on trial it is a point of law and the High Court can set aside the order of commitment. (Para 5)

Anno: Cr. P. C., S. 215 N. 8.

K. K. Mathew (in No. 145) and K. Korathu (in No. 170), for Petitioner; M. N. Parameswaran Pillai, Public Prosecutor, for The State.

Case referred to:

('51) AIR (38) 1951 S C 204: (52 Cri L J 768) (Pr 4)

ORDER: The 1st accused in P.E. No. 13 of 1122 of the Moovattupuzha Stationary First Class Magistrate's Court is the revision petitioner in Criminal Revision Petition No. 145 of 1125 and the 2nd accused in that case is the revision petitioner in Criminal Revision Petition No. 170-1125. The accused are charged with offences punishable under Ss. 410 and 469 of the Travancore Penal Code corresponding to Ss. 409 and 467 of the Indian Penal Code. The prosecution case is as follows:

(2) The 1st accused was a license-holder for the purchase of paddy on behalf of Government from the landholders of Moovattupuzha and Kothamangalam Pakuthies in the year 1121. He was supplied with printed triplicate receipts by the Taluq Office, one of which was to be given to the seller of paddy, one to be sent to the Taluq Office and the other to be kept with the licensee. The 1st accused entrusted the 2nd accused with the work of purchasing paddy and issuing receipts therefor. It is alleged that the 2nd accused got 25 paras of paddy from P. W. 1 on 20-8-1121 and gave Ex. A receipt for the same. But the quantity of paddy shown in the counterfoil sent to the Taluk Office and in the duplicate kept by the licensee was only 4 paras. That was the quantity that was entered in the Nalvazhi Register of the 1st accused also. When this fraud was detected by the Special Proverthicar one Lobba an associate of the accused got Ex. A receipt from P. W. 1 and the 2nd accused corrected the entry therein so that it might tally with the counterfoil. A similar fraud was practised in the purchase of paddy from P. W. 10 also. Exs. D and E are receipts issued to P. W. 10 by the 2nd accused. They do not tally with Exs. J and K counterfoils and Ex. T (3) entry in the Nalvazhi and Ex. U (1) entry in the Ara Register. 11 witnesses were examined for the prosecution and Exs. A1 to U2 were filed. Finding that a prima facie case was made out against the accused the learned First Class Magistrate framed a charge against them under Ss. 410 and 469, T.P.C. for criminal breach of trust and forgery and committed them to the Sessions Court of Parur to stand their trial for the said offences. The Revision Petitions are filed from this order of commitment.

(3) The contention raised by the 1st accused in Criminal Revision Petition No. 145 of 1125 is that no case has been made out against him and that the learned magistrate has gone wrong in committing him to the Sessions Court. I think that this contention is well-founded. There is absolutely no evidence in the case to show that the 1st accused was a party to the offences of criminal breach of trust and forgery alleged to have been committed by the 2nd accused or that he abetted the commission of these offences. None of the witnesses examined by the prosecution swears to the fact that the 1st accused was present when paddy was purchased by the 2nd accused from P. W. 1 and P. W. 10 and when receipts were given to them by the 2nd accused. It is also not sworn to by any witness that the 1st accused had anything to do with the correction of Ex. A receipt by the 2nd accused. There is also no evidence in the case to the effect that the 1st accused was aware of the commission of these offences by the 2nd accused or that he had reason to suspect that the 2nd accused committed these offences. The mere fact that the 2nd was employed by the 1st accused for purchasing paddy and issuing receipts cannot make the 1st accused vicariously liable for the

offences committed by the 2nd accused in the course of his employment. The 1st accused may be answerable to Government for the misappropriation of paddy committed by the 2nd accused, but that does not mean that he will be criminally liable for the offences committed by his employee. According to the definition of the offence of criminal breach of trust the 1st accused will be criminally liable for the offence of the 2nd accused only if it is proved that he 'wilfully' suffered the 2nd accused to commit the offence. So long as there is nothing to show in this case that the accused wilfully allowed the 2nd accused to commit the offence of dishonestly misappropriating paddy it cannot be said that the 1st accused has committed the offence of criminal breach of trust.

As stated above, there is no evidence in the case to show that the 1st accused either knew or had reason to suspect that the 2nd accused was dishonestly misappropriating paddy purchased from the land-holders. It has also to be noted that although large quantities of paddy have been purchased from the land-holders by the 1st accused through the 2nd accused the offence is alleged to have been committed only in respect of a few paras of paddy purchased from P.Ws. 1 and 10. In the circumstances, it is only reasonable to hold that the 1st accused had no occasion to suspect that these two acts of misappropriation would be committed by the 2nd accused. It cannot therefore be said that the 1st accused had wilfully suffered the 2nd accused to dishonestly misappropriate paddy in violation of the terms of the license granted by Government.

(4) 'Mens rea' is the essence of the offence of criminal breach of trust. It has been recently held by the Supreme Court in 'HARIPRASADA RAO v. THE STATE', AIR (38) 1951 S C 204 that when a servant sells petrol to a bogus customer in the absence of coupons in contravention of the Motor Spirit Rationing Order and the master is not present at the time nor has he any knowledge of the supply of petrol by the servant to the bogus customer the master cannot be held to be vicariously liable for the act of the servant, unless the statute either clearly or by necessary implication rules out 'mens rea' as a constituent part of the crime.

(5) It was argued by the learned Public Prosecutor that this Court can set aside an order of commitment only on a point of law as provided in S. 215 of the Criminal Procedure Code. But it is well established that when there is no evidence in the case on the basis of which the accused can be convicted on trial it is a point of law and the High Court can set aside the order of commitment. In this case there is absolutely no evidence either oral or documentary to connect the 1st accused with the offences alleged to have been committed by the 2nd accused.

(6) I therefore quash the commitment of the 1st accused by the learned First Class Magistrate. Criminal Revision Petition No. 145 of 1125 is thus allowed. The bail bond executed by the 1st accused will be cancelled.

(7) With regard to the 2nd accused I find no reason to interfere with the order of commitment by the learned First Class Magistrate. There is prima facie evidence against him with regard to the commission of the offences with which he is charged. Criminal Revision Petition No. 170 of 1125 is therefore dismissed.

R.G.D. *Orders accordingly.*

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* A. I. R. 1952 Travancore-Cochin 159

FULL BENCH

KOSHI, GOVINDA PILLAI AND JOSEPH VITHAYATHIL JJ.

Mariamma Mathew, Petitioner v. Ittoop Poulo, Counter -Petitioner.

C. R. P. Nos. 536 and 1097 of 1123, D/- 2-11-1951.

(a) Civil P. C. (1908), S. 136 — Attachment before judgment—Property beyond Court's jurisdiction — (Travancore Civil P. C. (VIII (8) of 1100), S. 101).

A Court can pass an order for attachment before judgment of properties situated beyond its jurisdiction; 10 Ind Cas 794 (Rang); AIR (13) 1926 Lah 330; AIR (18) 1931 Rang 279 and AIR (24) 1937 Rang 367, Ref. (Para 5)

Anno: C. P. C., S. 136 N. 7 Pt. 3.

† * (b) Civil P. C. (1908), S. 136 — Non-compliance with — Effect — (Travancore Civil P. C. (VIII (8) of 1100), S. 101).

S. 136 prescribes the procedure, it does not touch the jurisdiction. (Para 5)

When an order of attachment before judgment of properties situated within the jurisdiction of one Court is made by another Court, the provision in S. 136 to send the order of attachment to the District Court within the local limits of whose jurisdiction the properties sought to be attached are situated, is only a procedural one and so long as the Court effecting the attachment has jurisdiction over the subject-matter of attachment non-compliance with the provision in S. 136 can only amount to an irregularity. Case law discussed. 16 Trav L T 368, Approved. (Para 5)

Anno: C. P. C., S. 136 N. 6.

(c) Civil P. C. (1908)), S. 136 and O. 21 R. 58, Proviso — Non-compliance with S. 136 — Claim to property attached long delayed — Waiver regarding irregular assumption of jurisdiction — (Travancore Civil P. C. (VIII (8) of 1100), O. 21 R. 56).

Where an order of attachment before judgment relating to property situated within the jurisdiction of another Court is not transmitted through the District Court but is sent directly to that Court and the claim to such property is long delayed, the long delay can, regard being had to O. 21, R. 58, be taken to be evidence of waiver on the part of the claimant regarding the irregular assumption of jurisdiction by the Court passing the order of attachment. (Para 7)

Anno: C. P. C., S. 136 N. 6; O. 21 R. 58 N. 21.

* (d) Civil P. C. (1908), O. 21, R. 54 (2) — Several properties sought to be attached — Affixture of copy of order on each property — (Travancore Civil P. C. (VIII (8) of 1100), O. 21 R. 52 (2)).

It is settled law that unless the formalities prescribed to effect an attachment are duly complied with it cannot be said that there has been a valid attachment. A strict compliance with the provisions prescribed has therefore to be insisted upon to hold that an attachment has been duly accomplished. AIR (15) 1928 P C 139; AIR (7) 1920 Mad 804 F B and AIR (33) 1946 All 438, Rel. on. (Para 17)

When several properties are sought to be attached under one order, affixture of the copy of the order of attachment on one or some alone of the properties would not be sufficient to effect a valid attachment of all the properties. But a copy of the order should be affixed on each separate property. AIR (30) 1943 Mad 712 and AIR (35) 1948 Mad 191, Rel. on; AIR (36) 1949 Cal 320, Dissent. (Para 18)

Anno:C. P. C., O. 21 R. 54 N. 8 Pts. 3 and 4.

N. Varadaraja Iyengar, Advocate, for Petitioner; K. P. Abraham and K. T. Ninan, Advocate, for Counter-Petitioner.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('87) 9 All 191: (13 Ind App 134 P C) (Prs 7, 13)
('88) 11 Mad 26: (14 Ind App 160 (P C)) (Prs 7, 13)
('28) AIR (15) 1928 P C 139: (51 Mad 349) (Prs 17, 18)
('28) AIR (15) 1928 P C 162: (3 Luck 314) (Pr 7)
('41) AIR (28) 1941 All 212: (195 Ind Cas 891) (Pr 8)
('46) AIR (33) 1946 All 438: (ILR (1946) All 788) (Prs 17, 18)
('88) 12 Bom 368 (Pr 19)
('85) 11 Cal 74 (Pr 19)
('95) 22 Cal 764 (Pr 11)
('09) 36 Cal 193: (1 Ind Cas 913) (Prs 7, 13)
('49) AIR (36) 1949 Cal 320: (83 Cal L J 104) (Pr 19)
('49) AIR (36) 1949 Cal 690 (Pr 11)
('19) AIR (6) 1919 Lah 27: (1 Lah 158) (Pr 12)
('26) AIR (13) 1926 Lah 330: (93 Ind Cas 361) (Pr 5)
('43) AIR (30) 1943 Lah 129: (207 Ind Cas 561) (Pr 10)
('51) AIR (38) 1951 Madh B 82 (2) (Pr 9)
('19) 42 Mad 844: (AIR (7) 1920 Mad 804 FB) (Prs 17, 18)
('40) AIR (27) 1940 Mad 214: (187 Ind Cas 758) (Pr 10)
('43) AIR (30) 1943 Mad 449: (ILR (1943) Mad 804) (Pr 13)
('43) AIR (30) 1943 Mad 712: (210 Ind Cas 197) (Prs 18, 19)
('48) AIR (35) 1948 Mad 191: (1947-2 Mad L J 310) (Prs 18, 19)
('46) AIR (33) 1946 Pat 301: (25 Pat 50) (Pr 10)
('11) 10 Ind Cas 794: (4 Bur L T 89) (Pr 5)
('31) AIR (18) 1931 Rang 279: (9 Rang 561) (Prs 5, 8)
('37) AIR (24) 1937 Rang 367: (1937 Rang L R 249) (Pr 5)
16 Trav L T 368 (Prs 1, 4, 14)
(1890) 19 Atlantic Rep 898 (Pr 7)
(1856) 5 Duer N Y 672 (Pr 7)
(1874) L R 5 P C 516: (30 L T 729) (Prs 7, 12)
(1838) 12 Peters U S 300 (Pr 7)
(1838) 21 Peters U S 657 (Pr 7)
(1879) 98 U S 476: (25 Law Ed 237) (Pr 7)

ORDER: These two revision petitions arise from an order of the District Munsiff, Parur, disposing of three separate claims preferred regarding certain properties attached before judgment, pursuant to an order of the District Munsiff, Perumpavoor. In O. S. No. 744 of 1112 on the file of the Perumpavoor District Munsiff's Court the plaintiff sought for and obtained an order for attachment before judgment of 12 items of immovable properties. One alone among the 12 items was situated within the jurisdiction of that Court. The remaining items lay within the jurisdiction of Parur Munsiff's Court. The attachment of the property within the jurisdiction of the Perumpavoor Munsiff's Court was effected on 24-12-1112 and with respect to the properties within the jurisdiction of the Parur Court the Perumpavoor Munsiff sent his order of attachment and the connected papers direct to the Parur Court instead of sending the same through the District Court at Parur as required by S. 101 of the Travancore Civil P. C. (a provision corresponding to S. 136 of the Civil P. C. Act V (5) 1908).

The District Munsiff, Parur, got the 11 items situated within his jurisdiction attached by an Amin from his Court and his report shows that the attachment was effected on 7-1-1113. In due course the plaintiff's suit resulted in a decree in his favour and as he proceeded to execute it by bringing the properties attached before judgment to sale the three claims giving rise to the order under revision were preferred by three several alienees from the judgment-debtor. These claims raised two preliminary questions of which one was whether the attachment effected by the Parur Munsiff's Court was valid inasmuch as the order for attachment was sent direct to that Court instead of through the District Court at Parur as enjoined by S. 101 of the Travancore Civil P. C. This preliminary point was found against by the learned Munsiff. On the authority of a Division Bench ruling of the Travancore High Court reported as 'JACOB v. CHACHI', 16 Trav L T 368 the Munsiff held that the failure to transmit the attachment order through the District Court at Parur was only an irregularity and not a matter affecting the jurisdiction of the Parur Munsiff's Court to effect the attachment.

(2) The second preliminary point arose from the fact that on four alone out of the eleven items of properties situated within the jurisdiction of the Parur Court there was affixture of the copy of the order of attachment. The eleven items lay scattered in four 'muries' and one item in each 'muri' was selected for publication of the order by affixture. It was contended that, assuming the Parur Munsiff's Court could have validly attached before judgment these properties pursuant to an order of the Perumpavoor Munsiff's Court sent direct to that Court, no effective or valid attachment there would be unless there was affixture of the copy of the order on every one of the properties and that as there was admittedly no affixture on items 2, 4, 5, 7, 8, 9 and 12 these items were not in any event subjects of the attachment said to have been effected. This point found favour with the learned Munsiff and the decree-holder has preferred C. R. P. No. 1097 challenging the correctness of that view.

(3) As a result of the decision on the second preliminary point all the items involved in claim petition No. 14123 of 1121 were found not to have been validly attached. The next claim C.M.P. No. 11189 of 1122, related to item 6 of the attachment schedule, and to a building on item (1) which was within the jurisdiction of the Perumpavoor Court. The Munsiff not only found that these items were validly attached but also that the claimant obtained title to the properties under a document which came into existence when more than a year and a half had elapsed from the date of the attachment. That claim was hence dismissed and the petitioner therein has preferred C. R. P. No. 536 of 1123. The third claim, C. M. P. 19274 of 1122 related to items 7, 10, and 12 of the attachment schedule and from the Court's decision on the second preliminary point it followed

that there was really no attachment of items 7 and 12. The claim with respect to item 10 was dismissed but the claimant has not preferred any revision petition. The decree-holder has filed an objection memorandum in C.R.P. No. 536 while the counter-petitioners in C.R.P. 1097 (claimants in the three petitions before the lower Court) have filed a memorandum of objection in the decree-holder's revision petition C.R.P. No. 1097.

(4) We are now called upon primarily to examine the correctness of the decisions the lower Court gave upon the two preliminary points raised before it and we shall first deal with C.R.P. No. 536 in which the claimant in C.M.P. No. 11189 challenges the validity of the decision that the attachment effected by the Parur Munsiff's Court is not rendered invalid by reason of the fact that the order of attachment was transmitted to the Parur Munsiff's Court direct and not through the District Court. When the petition came up for hearing before one of us sitting as a Single Judge doubts were raised regarding the correctness of the decision in '16 Trav L T 368', and it was thought desirable that the point should be considered by a Full Bench. Accordingly C.R.P. No. 536 and the connected revision C.R.P. 1097 were referred to a Full Bench.

(5) On behalf of the petitioner in C.R.P. No. 536 it was strenuously contended before us that in the absence of an order from the District Court authorising the District Munsiff of Parur to carry out the attachment directed by the Perumpavoor Court, the Parur Munsiff's Court had no jurisdiction to effect the attachment and that the attachment effected in this case over the properties situated within the jurisdiction of the Parur Court was hence invalid and of no legal effect. The point is not free from difficulty, for it involves the determination of the question whether the transmission of the order of attachment in disregard of the provision in S. 101, Travancore Civil P. C. was only an irregularity, or a matter affecting the jurisdiction of the Munsiff's Court at Parur. Where there is no lack of inherent jurisdiction over the subject-matter but there was only irregular assumption of jurisdiction there is a plethora of decisions including those of the Privy Council that the proceeding will not be invalid but only irregular and that the defect is one which might be waived. Before we proceed to examine the proposition it is convenient to quote here the provisions of S. 101 of the Travancore Civil P. C.

"101. Where an application is made that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate, a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

2. The District Court, shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court, which issued or made such warrant or order, of the arrest or attachment.

3. The Court making an arrest under this Section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying any decree that may be passed against him by that Court, in either of which cases the Court making the arrest shall release him."

The above corresponds to sub-ss. 1 to 3 of S. 136 of Act V (5) of 1908 and sub-s. 4 of section 136 is omitted from the Travancore Code. It is now well settled that under Act V(5) of 1908 a Court can pass an order for attachment before judgment of properties situated beyond its jurisdiction. 'SOMASUNDARAM CHETTY v. MUTHU VEERAPPA CHETTY', 10 Ind Cas 794 (Rang); 'CHAUDRI KANHYA FIRM v. FIRM DINA NATH HARDIALMALL', AIR (13) 1926 Lah 330; 'M.S.M. CHETTIAR FIRM v. MAUNG SEIN', AIR (18) 1931 Rang 279 and 'DESRAJ CHANANLAL v. RAMJASRAR MADANCHAND', AIR (24) 1937 Rang 367. That however was not the position under the previous Codes, and the Civil P. C., Act VIII (8) of 1100, Travancore, is modelled on Civil P. C. Act V (5) of 1908. It was not disputed that the Perumpavoor Munsiff's Court had jurisdiction to order attachment before judgment of properties situated within the jurisdiction of the Parur Munsiff's Court. Nor was it disputed that the Parur Munsiff's Court had jurisdiction over the properties attached in this case.

The question is, when an order of attachment before judgment of properties situated within the jurisdiction of one Court is made by another Court, the provision in S. 101 to send the order of attachment to the District Court within the local limits of whose jurisdiction the properties sought to be attached are situated is only a mode of procedure prescribed or whether the jurisdiction of the Court effecting the attachment will depend upon the District Court's order in that behalf. Our considered view is that the provision is only a procedural one and that so long as the Court effecting the attachment has jurisdiction over the subject-matter or attachment non-compliance with the provision in S. 101 can only amount to an irregularity.

Sub-section 2 of S. 101 shows that when an order for attachment before judgment passed by a Court is sent to the District Court, the latter Court is bound to carry out the order itself or through a Court subordinate to it. The only function of the District Court to which the order of attachment is sent or of a Court subordinate to it to which the District Court might send it is only to carry out the order and complete the formalities of attachment. In other words S. 101 prescribes the procedure, it does not touch the jurisdiction.

(6) Though it cannot be said that the function of a Court to which a decree is transferred for execution is similar, balance of judicial opinion is in favour of the view that when in disregard of the provisions of O. XXI R. 5 of the Civil P. C. Act V(5), 1908, a Court sends its decree for execution to a Court situated in a different District the proceedings taken by the latter Court can only be said to be irregular and that that irregularity is one that can be waived. Unlike R. 4 of O. XXI of the Travancore Civil P. C., R. 5 of O. XXI of the Indian Civil P. C. dealing with the mode of transfer of a decree for execution provides that where the Court to which the decree is to be sent for execution is situated in a different District, the Court which passes it shall send it to the District Court of the District in which the decree is to be executed.

Under R. 4 of O. XXI of the Travancore Civil P. C. any Court sending a decree for execution to

another Court may send it direct to that Court. This and the provision in S. 39 of that Code (corresponding to S. 46 of the Indian Code) are in our view pointers in the direction that the jurisdiction of the Court to which an order of attachment is sent for attachment to be carried out, or a decree is sent for execution, or a precept is sent under Section 39 does not depend on the intervention of any District Court. The question would always be whether the Court to which the transmission is made has jurisdiction over the subject-matter, and if that question be found in the affirmative, any irregularity in procedure regarding assumption of jurisdiction cannot render a proceeding taken by that Court null and void. The irregularity would only be one which might be waived.

Decisions which lay down that an execution proceeding conducted by a Court to which a decree is transferred for execution in disregard of the provision in Order XXI, Rule 5 of Act V (5), 1908, will not be null and void will be presently referred to, but before we do that some early Privy Council decisions which state that the answer to a question similar to the one before us in this revision must depend upon whether the case is one where there was inherent lack of jurisdiction or it was only a case of irregular assumption of jurisdiction may usefully be cited.

(7) In 'PISANI v. ATTORNEY-GENERAL OF GIBRALTER', (1874) L R 5 P C 516, their Lordships of the Judicial Committee held:

"That, where there is jurisdiction over the subject-matter, but non-compliance with the procedure prescribed as essential for the exercise of the jurisdiction, the defect might be waived."

That case further held that defects of jurisdiction arising from irregularities, in the commencement of the proceedings may be waived by the failure to take objection at the proper stage of the proceeding. The leading case on the subject is 'LEDGARD v. BULL', 9 All 191 (PC). In that case the Judicial Committee observed as follows:

"When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendants cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit."

These observations have been repeated by their Lordships in later decisions. 'MEENAKSHI v. SUBBRAMANIA', 11 Mad 26 and 'JANG BAHADUR v. BANK OF UPPER INDIA, LTD', AIR (15) 1928 PC 162. The rule of these decisions has been applied by Courts in India in great many cases of which a decision of Mookerjee, J., (Sir Asutosh) reported as 'GURDEO SINGH v. CHANDRIKA SINGH', 36 Cal 193, alone need be referred to here. After an examination of the Indian, English and American authorities on the point the learned Judge elucidated the distinction in matters of jurisdiction as between a mere irregularity in the assumption or exercise of jurisdiction and inherent lack of jurisdiction in the following way:

"A Court cannot adjudicate upon a subject-matter, which does not fall within its province as defined or limited by law; this jurisdiction may be regarded to be essential, for jurisdiction over the subject-matter is a condition precedent to the acquisition of authority over the parties, and, if a Court has no jurisdiction over the subject-matter of the controversy, consent of the parties cannot confer such jurisdiction, and a judgment made without jurisdiction, in such a case is absolutely null and void; it may be set aside by review or appeal, or its nullity may be established, when it is sought to be relied upon in some other proceedings. See Hawes on Jurisdiction, pp. 12—16; Hermann on Estoppel, S. 110 and (1890), 19 Atlantic Rep. 898.

"An entirely different class of questions, however, arises when it is suggested that a Court in the exercise of the jurisdiction which it possesses, has not acted according to the mode prescribed by the Statute. If such a question is raised, it relates obviously, not to the existence of jurisdiction, but to the exercise of it in an irregular or illegal manner. This distinction between elements, which are essential for the foundation of jurisdiction and the mode in which such jurisdiction has to be assumed and exercised, is of fundamental importance, but has not always been sufficiently recognised. That the distinction is well-founded is manifest from cases of high authority. Thus, in 'PISANI v. ATTORNEY-GENERAL OF GIBRALTER', their Lordships of the Judicial Committee held that, where there is jurisdiction over the subject-matter, but non-compliance with the procedure prescribed as essential for the exercise of jurisdiction, the defect might be waived."

After making these preliminary observations the learned Judge proceeds to observe:

"Although the objection that a Court is not given jurisdiction over the subject-matter by law cannot be waived, yet defects of jurisdiction arising from irregularities in the commencement of the proceedings may be waived by the failure to take objection at the proper stage of the proceedings. 'HARKNESS v. HYDE', (1879) 98 U S 476; 'JOLLAND v. SPRAGUE', (1838) 12 Peters U S 300; 'RHODE ISLAND v. MASSACHUSSETTS (1838) 21 Peters U S 657 at p. 718. To put the matter from another point of view, it is only when a Judge or Court has no jurisdiction over the subject-matter of the proceeding or action in which an order is made or a judgment rendered, that such an order or judgment is wholly void, and that the maxim applies that consent cannot give jurisdiction; in all other cases, this objection to the exercise of the jurisdiction may be waived and is waived when not taken at the time the exercise of the jurisdiction is first claimed. 'HOBART v. FROST', (1856) 5 Duer N Y 672; Black on Judgments, S. 217."

We have now to apply these principles to the case on hand. We have noticed that the attachment over the properties within the jurisdiction of the Parur Munsiff's Court was effected in 'Chingom' 1113. The earliest of the three claim petitions was filed in Court more than 8 years afterwards in 1121 and the other claims in 1122. Order XXI, Rule 56 (Rule 58 of the Indian Code) expressly provides that the Court shall not hold an investigation regarding a claim where it considers that the claim was designedly or unnecessarily delayed. It cannot for a moment be believed that the claimants were not aware of the attachment and the long delay can, regard being had to the statutory provision referred to, be taken to be evidence of waiver on the part of the claimants regarding the irregular assumption of jurisdiction by the Parur Munsiff's Court.

(8) Decisions bearing on the question whether a direct transmission, without the medium of the District Court, of an order for attachment before

judgment passed by one Court to another Court within whose local jurisdiction the properties sought to be attached lie, will render the attachment invalid or whether non-compliance with the rule will only amount to an irregularity are few and far between. In 'M. S. M. CHETTYAR FIRM v. MAUNG SEIN', AIR (18) 1931 Rang 279, it was held that such assumption of jurisdiction will only amount to an irregularity and that the attachment effected will not be 'ipso facto' invalid. This decision is by a single Judge. In 'FIRM SURAJBALI RAM HARAKH v. MOHAR ALI', AIR (28) 1941 All 212 — a Single Bench of the Allahabad High Court took the opposite view that the attachment effected under such auspices will be unauthorised and invalid. Either of these decisions does not discuss the question at any great length or refer to the Privy Council cases we have mentioned. This observation applies equally to other decisions bearing on Section 136, Civil Procedure Code, referred to in 'AIR (28) 1941 All 212.'

(9) In the decision of the Madhya Bharat High Court, 'RAMESHWARDAYAL v. BHEEMSEN', AIR (38) 1951 Mad B 82 (2) — brought to our notice by the learned Counsel for the petitioner, the Court which passed the order for attachment before judgment sent the order direct in the name of the Nazir of the Court within the local limits of whose jurisdiction the property was situate. There were also other contraventions of the Statute and the Court held that the attachment effected in the case was invalid.

(10) Earlier we had mentioned that, with reference to execution proceedings taken out pursuant to transfers made in disregard of provisions in Order XXI, Rule 5 of the Code of 1908, the balance of judicial opinion was in favour of the view that such transfers would only be irregular and not illegal. The cases that hold that way say that where there is no inherent lack of jurisdiction but only non-compliance with the mode of transfer prescribed there is only an irregularity in the assumption of jurisdiction and that that irregularity will stand cured by want of objection in proper time. Among cases that take that view mention may be made of 'VENKATARATNAM v. CHENNAYYA', AIR (27) 1940 Mad 214; 'BHAGWAN SINGH v. BARAKAT RAM', AIR (30) 1943 Lah 129 and 'INDERDEO PRASAD RAI v. DEONARAYAN', AIR (33) 1946 Pat 301.

In the second of these cases (AIR (30) 1943 Lah 129) Tek Chand, J., (Beckett, J., concurring) has discussed the question very elaborately. After referring to the Privy Council decisions cited by us and distinguishing the Indian decisions which take a contrary view the learned Judge unhesitatingly held that the case was not one of inherent lack of jurisdiction, territorial or pecuniary, over the subject-matter but that it was merely one of irregular assumption of it, the irregularity consisting in non-compliance of the procedure prescribed for the transmission of the certificate. It was also held that the judgment-debtor having allowed the proceeding in the transferee Court to go on without objection for a long time may be taken to have waived it and that the proceedings before the transferee Court were not null and void. The Patna Case (AIR (33) 1946 Pat 301) follows the Lahore decision and expresses full concurrence with the reasoning and conclusion of Tek Chand, J.

(11) Most of the cases taking the opposite view are referred to and distinguished by Tek Chand, J., in his judgment. It is in the Calcutta High Court that opposite view has found favour more than in any other High Court..The earliest decision of that Court which has come to our notice is the decision in 'DEBI DIAL SAHU v. MOHARAJ SINGH', 22 Cal 764. There the objection was raised immediately the irregular transfer was made. The reason given for the Court's view was that the intention of the Legislature appeared to be to give the Court of the District in which it was desired to execute the decree which was passed by the Court of another District supreme authority in regard to the execution of that decree and that it was for the District Judge to assign cases to any subordinate Court in that District.

This reason cannot hold good in cases arising under the Travancore Code of Civil Procedure as Order XXI, Rule 4, thereof provides that any Court sending a decree for execution to another Court may send it direct to that Court. Further the decision in '22 Cal 764', was given under the Code of 1882 and that Code contained no provision similar to Section 46 of the Code of 1908. This decision has recently been followed in 'SACHINDRA KUMAR v. USHA PROVA DE', AIR (36) 1949 Cal 690. The Lahore decision cited is referred to and dissented from. As the question before us does not relate to execution proceedings and the material provision in the Travancore Code which governs this case is different from the provision in the Code of 1908, we do not think it necessary to state anything more than that our inclination is to fall into line with the view expressed by the Lahore, Madras and Patna High Courts.

(12) Before leaving this question two cases which are somewhat analogous may also be referred to. In 'KISHAN LAL v. JAI LAL', AIR (6) 1919 Lah 27, the Senior Subordinate Judge had transferred a suit to the Junior Subordinate Judge of the same District Court purporting to act under Section 24, Civil Procedure Code. It was held that the Court of the Junior Subordinate Judge being not subordinate to that of the Senior Subordinate Judge within the meaning of the said section the latter could not have transferred the case to the former under ub-section 1 (a) of that Section, notwithstanding that the District Judge had delegated his power to transfer to the Senior Subordinate Judge. It was held however that although the transfer was irregular, as the parties had acquiesced in the jurisdiction of the Junior Subordinate Judge they could not subsequenty object to it.

Scott-Smith, J., who gave the judgment in that case said that in the case before him there was no doubt that the Court of the Junior Subordinate Judge had jurisdiction over the subject-matter of the case and the only objection urged was that there was non-compliance of the procedure prescribed as essential for the exercise of the jurisdiction, namely, that the case had not been transferred to that Court by the Distirct Judge who was the only officer authorised to make such transfers. The decision in 'PISANI v. ATTORNEY-GENERAL OF GIBRALTER', (1874) L R 5 PC 516, was referred to in support of the position that any defect of jurisdiction arising from such irregularity can be waived.

(13) The next case is a decision by Krishnaswami Iyengar and Kunhi Raman, JJ., reported as 'BALAKRISHNAYYA v. LINGA RAO', AIR (30) 1943 Mad 449. There, after the passing of a final mortgage decree the Court which passed the decree ceased to have territorial jurisdiction over any of the mortgaged properties and in pursuance of a notification which had not the effect of transfer of business another Court acquired territorial jurisdiction over the said properties. According to a Full Bench decision of the Madras High Court the latter Court could not execute the decree un-

less the Court which passed the decree had transferred it for execution. In that case however the decree-holder applied directly to the second Court for execution and it was held that the absence of an order of transfer was merely an irregularity in the assumption of jurisdiction by that Court when execution proceedings were commenced there and that therefore when objection to the defect of jurisdiction was not taken in the first instance the judgment-debtor must be deemed to have waived it. Krishnaswami Iyengar, J., who delivered the judgment in that case has discussed the question at considerable length and also referred to the decisions in 'LEDGERD v. BULL', 9 all 191 (PC); 'MEENAKSHI v. SUBRAMANIA', 11 Mad 26 (PC) and 'GURDEO SINGH v. CHANDRIKA SINGH', 36 Cal 193.

(14) From the foregoing discussion it is clear that our view is that the decision in '16 Trav L T 368, was rightly given and that the decision of the lower Court to the effect that the attachment effected by the Parur Court is not invalid as regards properties in respect of which the formalities prescribed by the Code have been duly complied with is also right.

(15) It was faintly suggested that there was no proper attachment of the building on Item (I) in that no order of attachment was affixed thereon. Item 1 is situated within the jurisdiction of the Perumpavoor Munsiff's Court and it was that Court which effected its attachment. We are at a loss to know how the Parur Munsiff's Court could entertain a claim in respect thereto. Though this aspect was not mentioned during the argument, the learned Counsel for the petitioner did not himself seriously press the point that there was no valid attachment of the building. Admittedly the land comprised in Item I was properly attached.

(16) The grounds mentioned in the memorandum of objection filed by the decree-holder are virtually the same as those taken C. R. P. No. 1097 and the question raised by them can be more appropriately discussed in that revision. C. R. P. 536 fails and we dismiss it with costs.

(17) We have noticed that the learned Munsiff upheld the objection raised by the claim petitioners that there was no valid or effective attachment of Items 2, 4, 5, 7, 8, 9 and 12 of the attachment Schedule. In C. R. P. No. 1097, the decree-holder questions the correctness of that decision. The point of the objection that prevailed with the lower Court was that no copy of the attachment order was affixed on any of these items and what we have to consider is whether a property can be said to have been attached unless a copy of the order of attachment is affixed on it. The decision involves the interpretation of Sub-rule (2), Rule 52, Order XXI, of the Travancore Civil Procedure Code corresponding to Sub-Rule 2, Rule 54, Order XXI of the Indian Code. Sub-rules (1) and (2) read as follows:

"52 (1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house."

It is settled law that unless the formalities prescribed to effect an attachment are duly complied with it cannot be said that there has been a valid attachment. In 'MUTHIAH CHETTI v. PALANIAPPA CHETTY', AIR (15) 1928 P C 139, in pronouncing the judgment of the Judicial Committee Lord Shaw said that no property can be declared to be attached unless first the order for attachment has been issued; and secondly in execution of that order the other things prescribed by the rules in the Code have been done. It was also stated that the attachment is something separate from the mere order, and is something which has to be done and effected before attachment can be declared to have been accomplished.

In 'SINNAPPAN v. ARUNACHALAM PILLAI', 42 Mad 844, a Full Bench of the Madras High Court said that an attachment operates as a valid prohibition against an alienation of the attached property only from the date on which the necessary proclamation is made and copy of the order affixed as contemplated in Order XXI, Rule 54, C.P.C. It was also pointed out there that when the rights of transferees for consideration are affected by the attachment, to protect the interest of such transferees it is necessary that the fact of attachment should be made known by following the procedure laid down by the Code. The same view was taken in 'POKHPAL SINGH v. KANHAIYA LAL', AIR (33) 1946 All 438. A strict compliance with the provisions prescribed has therefore to be insisted upon to hold that an attachment has been duly accomplished.

(18) Here the question is whether when several properties are sought to be attached under one order, affixture of the copy of the order of attachment on one or some alone of the properties would be sufficient to effect a valid attachment of all the properties or whether the properties on which the order of attachment was affixed could alone be said to have been validly attached. The learned Munsiff held that to constitute a valid attachment there should be affixture of the order individually on all the properties and for that view he quoted the authority of a Division Bench ruling of the Madras High Court by Sir Lionel Leach, C. J., and Sahabuddin, J., in 'RUKMINAMMA v. RAMAYYA', AIR (30) 1943 Mad 712. The following quotation from the decision of the learned Chief Justice may usefully be made here:

"Order XXI. Rule 54 (2) speaks of 'the property.' This description is manifestly inappropriate where the decree-holder has attached numerous properties situate in different places ..... How can it be said that when an order of attachment is affixed only to one property there has been effective attachment of properties situate elsewhere? As we have indicated, in our opinion, the use of the words 'the property' implies separate attachments where the application for attachment embraces several properties situate in different places."

This case was followed by Rajamannar, J., as he then was, in 'MURUGAPPA CHETTIAR v. THIRUMALAI', AIR (35) 1948 Mad 191. The question is discussed at greater length in this case than in 'AIR (30) 1943 Mad 712' and when referring to that case the learned Judge stated thus:

"When several properties are sought to be attached in pursuance of an order for attachment, there must be proof of affixture on every one of the properties. This was laid down in 'AIR (30) 1943 Mad 712', that where there are several lots of property, an order of attachment affixed only to one such lot cannot be deemed to be effective "attachment of other lots of properties."

The decision in 'SIMAPPAN v. ARUNACHALAM PILLAI', 42 Mad 844; 'MUTHIAH CHETTI v. PALANIAPPA CHETTI', AIR (15) 1928 PC 139 and

'POKHPAL SINGH v. KANHAIYA LAL', AIR (33) 1946 All 438, are all referred to and discussed by the learned Judge. Regard being had to the purpose with which the provision that in causing an attachment of immoveable property a copy of the order of attachment should be affixed on the property sought to be attached is embodied into the Code we are not inclined to differ from the view taken in these cases that when several properties are attached a copy of the order should be affixed on each separate property. In the case before us the properties situate in one 'muri' were treated as one lot and a copy of the order was affixed on one item comprised in each lot. We cannot agree that that would satisfy the requirements of the provision referred to.

(19) Mr. K. T. Ninan, who appeared for the decree-holder, invited our attention to a recent decision of the Calcutta High Court which takes the contrary view. 'AYEZALI MIR v. MAHANANDA-BARUI', AIR (36) 1949 Cal 320. The decision in 'MURUGAPPA CHETTIAR v. THIMMALAI NADAR', AIR (35) 1948 Mad 191 is expressly dissented from in that case. Das Gupta. J., who gave that decision sat there as a Single Judge. The relevant portion of the head-note is as follows:

"The Legislature was clearly conscious of the fact that a property to be attached may be in different lots and in R. 67, O. 21, provided for separate proclamation for each lot in certain cases, but omitted to make any such provision for different lots in O. 21, R. 54. The intention of the Legislature is therefore clear that the immoveable property to be attached is considered to be one and it is sufficient if the order is affixed on a conspicuous part of the property. The law does not require that where this property is in several plots contiguous or otherwise the order should be affixed on each separate plot."

With respect we venture to observe that the learned Judge has sought to give to Sub-rule 3 of Rule 67 (Rule 65 of Travancore Civil Procedure Code) of Order XXI a meaning different from that it really bears. Rule 67 deals with the mode of making proclamation for the sale of immovable property and Sub-rule (1) enacts that every proclamation shall be made and published as nearly as may be in the manner prescribed by Rule 54, Sub-rule (2). Sub-rule (2) of Rule 67 relates to the publication of the proclamation in the official Gazette or in a local newspaper and Sub-rule (3) states that where the property is divided into lots for the purpose of being sold separately, it shall not be necessary to make separate proclamation for each lot unless proper notice of the sale cannot in the opinion of the Court otherwise be given.

In the first place as pointed out in 'RUKMINAMMA v. RAMAYYA'. AIR (30) 1943 Mad 712, a distinction must be drawn between attachment and the proclamation of sale of the property attached: Rule 67 and in particuar Sub-rule (3) relates to the procedure after attachment. Sub-rule (3) applies to a case where the property intended to be sold in execution of a decree is divided into a number of small lots as a means of obtaining a better aggregate price. What it states is that in such cases the law does not require that separate proclamation of sale should be made on each lot into which the property is so divided. In other words a mere breaking of a property into lots does not necessarily convert it into several properties for the purpose of a proclamation for sale. This is the view West and Birdwood, JJ., took in 'PEDRO ANTONIO DE PENHA v. JAIBHOY ARDESHIR SET', 12 Bom 368, concerning Sections 274 and 289 of the Code of 1881 (corresponding to Order XXI, Rules 54 and 67), when there existed no provision corresponding to Sub-rule (3) of Rule 67 in Section 289.

What the Legislature did in 1908 was to give statutory recognition to the view expressed in '12 Bom 368.' See Mulla's Civil Procedure Code. 11th Edition, 1941, page 860, Commentary to Sub-rule (3). This Sub-rule really emphasises that when different items are sought to be attached or sold there should be affixture of the notice of attachment or of proclamation on the items individually. Sub-rule (3) of Rule 67 only states that a plot divided into a number of small lots for purposes of convenience should not be treated as separate items for the observance of the formalities referred to in Sub-rule (1). In the case in (1888) ILR 12 Bom 368, the property was of 10 or 11 acres in extent and it was split up into 22 blocks. It was held that each block should not be treated as a separate item for the purpose of Section 289, (now Order 21. Rule 67).

Further Das Gupta. J., also omitted to notice an early Division Bench ruling of the Calcutta High Court 'TRIPURASUNDARI v. DURGA CHURAN PAL, 11 Cal 74, where it was held that when separate properties are attached under one proceeding or order in one execution case, the attachment is separate and distinct as regards each. The learned Judges there were no doubt interpreting Section 289 of the Code of 1882 as it stood before the words "on the spot where the property is attached" were deleted by the Civil Procedure Code Amendment Act VII (7) of 1885. Their observation that when several separate properties are attached under one order the attachment is separate and distinct as regards each is worthy of notice and helpful to understand Order 21, Rule 54 in the true light that when several properties are attached copy of the order of attachment should be affixed separately on each item.

(20) The lower Court's view that Items 2, 4, 5, 7, 8, 9 and 12 cannot be held to have been validly attached is in our opinion correct and is in accord with the true meaning of the relevant provision in Order XXI, Rule 52 (2) of the Travancore Code (Rule 54 (2) of the Indian Code).

(21) Before concluding reference has to be made to a point mentioned by Mr. Varadaraja Iyengar regarding the merits of the claims. He was referring to a question raised by the memorandum of objection. Of the three transfers relied upon by the respective claimants one alone, namely, that in C.M.P. No. 14128/21, was before the attachment was effected but that claim succeeded fully for a different reason that not even one item comprised in it was effectively attached. The other two transfers were respectively on 5-6-1113 and 8-7-1114 while the attachment by the Parur Court was effected as early as 7-1-1113. On the date of the attachment either claimant had therefore no interest or possession over the concerned properties and no interference is hence called for pursuant to the memorandum of objection filed on behalf of the claimants (counter-petitioners.)

(21) As indicated above C. R. P. No. 1097 also fails and is dismissed with costs.

V.R.B. *Petitions dismissed.*

A. I. R. 1952 Travancore-Cochin 165

FULL BENCH

KUNHI RAMAN, C. J., KOSHI AND SUBRAMANIA IYER, JJ.

In Re an Advocate of the Travancore-Cochin High Court.

Bar Council Case No. 1 of 1123, D/- 29-7-51.

Bar Councils Act (1926), S. 10 — Advocate refusing to examine certain witnesses — No misconduct.

Until the authority conferred upon an Advocate to act, plead or appear is withdrawn, he can exercise his descretion in examining or refusing to examine any particular witnesses. Although there may be circumstances in which want of 'bona fides' may be attributed to an advocate, when there are no circumstances showing want of 'bona fides' on his part, he is perfectly within the scope of his authority in refusing to examine certain witnesses and cannot be blamed for his decision. (Paras 1, 3)

Anno: Bar Councils Act, S. 10 N. 4, 7.

T. K. Joseph, for Advocate; T. N. Subramania Iyer, Advocate-General, for Advocates' Association and P. Narayana Menon, for Ernakulam Bar Association.

Cases referred to :

(1860) 157 E R 1436: (5 H & N 890) (Pr 3)
(1887) 20 Q B D 141: (57 L J Q B 49) (Pr 3)

KUNHI RAMAN, C. J.: This case arose on the complaint of a litigant who had engaged the Advocate concerned in a criminal case. The litigant had launched a criminal prosecution under Section 323 of the Travancore Penal Code in the Second Class Magistrate's Court at Kottayam. The Advocate was engaged by him to conduct the prosecution. His complaint is that two of the principal witnesses whom he had summoned to give evidence in his favour and who were present in Court were given up by the Advocate without consulting him and without his knowledge and consent. The matter was referred to the Bar Council Tribunal which has submitted its report. On the question as to whether the Advocate gave up the witnesses without the knowledge and consent of the complainant, the finding recorded by the Bar Council Tribunal is against the litigant. They have stated that in their opinion the witnesses were given up by the Advocate with the knowledge and consent of the litigant and there was no suppression of any facts from him. With regard to the power of giving up witnesses which an Advocate can exercise when he is engaged by a litigant, the Bar Council Tribunal has also recorded its opinion based upon judicial decisions, that until the authority conferred upon the Advocate to act, plead or appear is withdrawn, he can exercise his discretion in examining or refusing to examine any particular witnesses. Therefore, what the Advocate did in the present case is in the opinion of the Bar Council Tribunal within the scope of the authority conferred upon him by the litigant.

(2) The learned Advocate-General appears in his official capacity and also on behalf of the Advocate's Association and the President of the Bar Association in Ernakulam also appears. Both of them endorse the views expressed by the Bar Council Tribunal and say that there is no case made out against the Advocate.

(3) Mr. T. K. Joseph who appears for the Advocate in question invites the attention of the Court to certain judicial decisions in England. In the case reported in 'PATIENCE SWINFEN v. LORD CHELMSFORD', (1860) 157 E R 1436 at p. 1449, this question as to the power of a Counsel to decide whether a witness should be examined or not was considered and dealt with as follows:

> "The conduct and control of the cause are necessarily left to Counsel. If a party desires to retain the power of directing Counsel how the suit shall be conducted, he must agree with some Counsel willing so to bind himself. A Counsel is not subject to an action for calling or not calling a particular witness, or for putting or omitting to put a particular question, or for honestly taking a view of the case which may turn out to be quite erroneous. If he were so liable, Counsel would perform their duties under the peril of an action by every disappointed and angry client."

A similar view is expressed in the case reported in 'MATHEWS v. MUNSTER', (1887) 20 Q B D 141. In the judgment of Bowen, L. J., at page 144 the learned Judge says:

> "Counsel is clothed by his retainer with complete authority over the suit, the mode of conducting it, and all that is incident to it and this is understood by the opposite party."

In the present case, we have considered the facts as disclosed in the complaint made by the litigant and although there may be circumstances in which want of 'bona fides' may be attributed to an Advocate we are satisfied that there is no justification for levelling such a charge against the Advocate against whom proceedings were started in the present case. He has acted in the lawful exercise of the power which is vested in every Advocate and we have no hesitation whatsoever in accepting the findings of the Bar Council Tribunal. The Advocate is not to be blamed for not examining the two witnesses. He exercised his 'bona fide' discretion in arriving at this decision and we see no reason why any aspersion should be cast upon his conduct. The petition on which action was taken must, therefore, be dismissed.

D.R.R. *Petition dismissed.*

A. I. R. 1952 Travancore-Cochin 166

GOVINDA PILLAI, J.

Thankamma, Petitioner v. The Honourable Speaker, Legislative Assembly, Travancore-Cochin State and another, Counter-Petitioners.

O. P. No. 124 of 1951, D/- 21-1-1952.

† (a) Constitution of India, Art. 212(2) — Conduct of business — Taking of oath under Article 188.

The taking of oath under Art. 188 is not an item in the conduct of business mentioned in Article 212. It is only a condition precedent to entitle the members to sit in the assembly and conduct the business. (Para 5)

† (b) Constitution of India, Arts. 212 (2), 178 and 188 — Officer of legislature — Speaker administering oath.

The officers of the assembly are mentioned in Article 178. The speaker is an officer of the assembly and the ruling that he gives in the conduct of business may not be subject to the control of the Civil Courts. But the oath to the member is to be administered under Article 188 by His Highness the Rajpramukh or by some one appointed by him in that behalf. It may be, that His Highness the Rajpramukh may appoint the speaker to administer the oath. But the administration of the oath is not a function exercised by the Speaker in his official capacity and will not give him any special prerogative to seek shelter under Article 212. (1884) 12 Q B D 271, Disting. (Para 6)

(c) Constitution of India, Art. 190(3)(b) — Letter of resignation — Requirements of — Power of speaker to enquire about genuineness.

What is contemplated in the section is a resignation with the full consent of the writer of his or her own volition and not any letter of resignation. Provision in Article 190(3)(b) necessarily indicates that the letter of resignation must proceed from the member and that the resignation must relate to a membership held by the person who sends the same. A person cannot resign prospective status which he or she may not get in the ordinary course of events. The mere receipt by the Speaker of a letter of resignation purporting to be from a member will not cause that member's seat to become vacant. It is open to the speaker to enquire whether that is a genuine letter or a forged letter, or one obtained by fraud or force is only a void document.

(Held on facts that the letter of resignation was not intended to be one resigning the seat, and it was void document and by virtue of that, the petitioner had not lost seat in the assembly). (Paras 7, 9)

C. P. Madhavan Nair and T. S. Venkiteswara Iyer, for Petitioner; G. V. Ramanan, for Counter-Petitioner No. 1; T. N. Subramania Iyer, Advocate-General, for the State.

Case referred to:
(1884) 12 Q B D 271: (53 L J Q B 209) (Pr 6)

ORDER.: The petition is filed under Article 226 of the Constitution of India for directions, orders, or writ of prohibition or any other appropriate writ to the respondents in order that the petitioner may be allowed to continue her membership and retain her seat in the Legislative Assembly and also to direct the 1st respondent, the Honourable Speaker of the Legislative Assembly, Travancore-Cochin State to administer oath to her and to allow her to take her seat in the Assembly. The petitioner was returned unopposed in a By-election held in August 1951 to the Travancore-Cochin Legislative Assembly with regard to 43 Ernakulam Women Constituency which fell vacant. Her election was duly notified in a Gazette Extraordinary, dated 10-9-1951. The only other candidate who had filed the nomination paper for this seat was one Dr. Madhavi Amma. 26-8-1951 was the last date fixed for the withdrawal of the nomination paper.

That was a period of unrest among the members in the assembly. The ministry had been re-constituted and none from the Cochin members had been included in the Cabinet of ministers. Some of the members from the Cochin group had even tendered their resignation of their membership and protested against the exclusive formation of the ministry from among the members of the Travancore area. Negotiations for reapproachment were pending at that time. So some prominent persons including some leaders of the seceding party approached the petitioner with a proposal that they would persuade the rival candidate to withdraw her candidature so as to enable the petitioner to be returned unopposed, if the petitioner would, if necessary, record her protest against the exclusion of the Cochin members from the ministry. One Sri K. B. Mohamed, along with Sri Pullayil Krishnankutty Menon induced the petitioner to sign a paper to the effect that she resigned her membership, though on that day she was not even a member. They had also expressly told her that the paper would not be used by them against the petitioner's wishes. The petitioner accepted their suggestion and advice and wrote out on a piece of paper to their dictation that she had resigned her membership in the assembly. That was purported to be addressed to the Speaker, Legislative Assembly, Trivandrum. There was no date put on it, as it was not intended to be used.

This note was prepared on 26-8-1951, the date fixed for the withdrawal of nominations submitted by her candidature. Subsequently, her rival candidate withdrew her candidature, so that eventually she was declared to have been returned unopposed. This letter was written even before she became a member. It was given only as earnest of giving a real letter of resignation if subsequent events and political situation called for it. It was also clearly understood that this paper would be returned to her and that she would write a proper letter of resignation with the date thereon in case that became necessary. This paper was handed over to Sri Pullayil Krishnankutty Menon who was helping her in her candidature, and in whom she had placed full confidence.

When the political situation eased and some of the members from Cochin group were proposed to be included in the ministry, the petitioner demanded the return of that paper from Sri Pullayil Krishnankutty Menon. He first began to prevaricate, but later, said that he might despatch it. This aroused rank suspicion in her mind and she pointed out to him that it was clear breach of faith to withhold it. In order to prevent foul play and mischief the petitioner despatched an express telegram to the first respondent, the Hon'ble Speaker, on 4-9-1951. She also posted a letter the same day confirming the telegram. This telegram intimated the first counter-petitioner that an undated letter purporting to be her resignation of assembly membership was understood as being despatched that she did not confirm the same, that if any such letter should happen to reach him, her present letter might be considered as a withdrawal of the contents therein, and that no action was to be taken on any such letter. The next day she sent another letter to the same effect by registered post. On 10-9-1951, the petitioner received from the Secretary, Legislative Assembly, a requisition to the effect that she should make it convenient to be present in the Honourable Speaker's Chambers at 10.45 A.M. on 17-9-1951 for the purpose of taking the oath of office.

The petitioner was away in Rameswaram from the 13th to 15th September 1951 and so she sent a reply to the Secretary on 16th September 1951 that she would be able to go to Trivandrum for swearing only on the 24th September. The petitioner attended the session on the 24th September 1951 and the first counter-petitioner asked her to take her seat and promised to swear her in after lunch. After some time, an Honourable member Sri P. Nanu raised a point of order whether the petitioner was entitled to take her seat before taking oath and whether it was true that she had resigned her membership. The Honourable Speaker replied that as the petitioner had been elected as a member she was entitled to take her seat, that the other question did not arise then, and that the same would be considered later.

Despite the assurance given by the Hon'ble Speaker in the morning, the oath was not administered to the petitioner by the first counter-petitioner on that day. The next day an official communication was handed over to her by the Secretary, Legislative Assembly stating that a lettter dated 13-9-1951, purporting to be the petitioner's resignation of her membership was received by the Honourable Speaker on 17-9-1951, and that she might confirm or repudiate the authorship of that letter. There was no reference

in it to the petitioner's telegram and the letter of 4-9-1951 or the registered letter of the next day.

(2) On 1-10-1951, the petitioner personally handed over a reply to the Secretary, Legislative Assembly, explaining in detail the circumstances under which the un-dated letter, which was not intended to operate or to be used as a letter of resignation, happened to be handed over to the aforesaid Sri Pullayil Krishnankutty Menon, even before the petitioner was declared elected to the assembly. It was poinfed out that it was clearly a breach of faith to forge the date in that letter and despatch it to the first counter-petitioner as if it was sent by the petitioner. The circumstances were also explained by her to the Honourable Speaker. She was however surprised to receive a copy of the Notification, dated 15-10-1951, from the Secretary, Legislative Assembly, that the petitioner had resigned her seat in the Travancore-Cochin Legislative Assembly with effect from 13-9-1951. That was neither true nor correct. The procedure adopted by the first counter-petitioner — the Honourable Speaker — and the second counter-petitioner — the State of Travancore-Cochin was ultra vires and erroneous. After the explanation tendered by the petitioner, the first counter-petitioner should have held that the petitioner did not "resign her seat by writing under her hand."

The petitioner anticipated foul play and the necessary authorities had been informed of this sufficiently early. The resignation referred to in Article 190 of the Constitution should be a genuine and voluntary resignation, and a fraudulent letter despatched by post with forged date by a third party without authority would not come under this section. The petitioner's reply was a repudiation of the letter as a letter of resignation and her telegram and letters of the 4th and 5th September would shew that she had repudiated the genuine character of the alleged letter of resignation. The action of the first counter-petitioner was illegal, inequitable and opposed to natural justice. The letter itself was despatched by registered post at Ernakulam on the 14th September 1951 when the petitioner was in Rameswaram. She therefore contends that her seat in the assembly has not become vacant, that she continues to be a member and retains her seat and is entitled to exercise all the rights and privileges of a member of the Legislative Assembly, and that in view of the communication received by the petitioner from the Secretary of the Legislative Assembly, the petitioner is obliged to seek redress in this Court against the action of the counter-petitioners.

The petitioner therefore prays that this Court may be pleased to enquire into the matter and issue directions, orders writ of prohibition, or any other appropriate writ, which this Court deems fit, to the counter-petitioners, to abrogate the said notifiction and allow the petitioner to continue her membership and retain her seat in the assembly, and also to direct the first counter-petitioner to administer oath to her and allow her to take her seat in the assembly.

(3) An affidavit in support of the several facts mentioned in the petition has also been filed along with the petition. The original letters received by the petitioner from the Secretary of the Legislative Assembly and copies of letters sent by her along with postal acknowledgements are filed as Annexures A to J. An affidavit from Sri Parameswara Iyer, the agent for the Hindu, Madras in Rameswaram is also attached to the petition. This was intended to show that she was in Rameswaram on the 13th and 14th of September 1951, and she left the place only on the 15th and that he had made the necessary arrangements for the stay of the petitioner and her party in Rameswaram. Three other affidavits, one from Sri K. B. Mohammed, mentioned in the petition, another from Sri Narayanan and a third from Sri Kelambi are also attached to the petition.

Sri K. B. Mohammed is a municipal councillor of the Ernakulam Municipality for the last ten years and was its chairman for about four years. In that affidavit he has stated that there was great rancour in the hearts of Cochin members of the Legislative Assembly against the Travancoreans on account of the non-inclusion of Cochinites in the Cabinet, that Janab K. G. M. Mather and some other persons of influence took him and Sri Pullayil Krishnankutty Menon to the petitioner with a proposal that they would induce Dr. Madhav Amma to withdraw, provided, the petitioner was prepared to tender her resignation if the unpleasant political crisis continued, that the petitioner agreed to this and at the instance of some of them she wrote out on a piece of paper that she resigned, that this was done at about noon on the 26th August 1951, that subsequent to this Dr. Madhavi Amma withdrew her candidature, that the paper signed by the petitioner was handed over at their instance to Sri Pullayil Krishnankutty Menon, so that it could be shown to others as an indication of protest, that this paper was not intended to be used as a letter of resignation, that she had however promised to write out and sign a formal solemn letter of resignation in case the Travancore Cabinet remained stubborn, and that it was also promised by them that if the situation grew better, this piece of paper woud be returned to her.

Sri Narayanan was then present in the petitioner's house. He is one who pays a sale-tax of about Rs. 2,000, income-tax of about Rs. 800, and land tax of about Rs. 100 a year. He confirms the statement made by Sri K. B Mohammad in his affidavit. Sri Kelambi is a Managing Director of a bank. He pays land revenue to the extent of Rs. 40. He was also present when the negotiations were carried through at about the noon of 26-8-1951, and he supports the other two deponants.

(4) Notice of this petition was given to the counter-petitioners. The Secretary to the Legislative Assembly has filed a counter-affidavit. He does not say anything about the circumstances under which the letter which bore the date 13-9-1951 was written and signed by the petitioner. He would say that the Honourable Speaker and the assembly office were unaware of the allegations, and that they were entirely irrelevant for the determination of the issue. According to him, when the Honourable member Sri Nanu raised the point of order the reply of the Honourable Speaker was to the effect that Mrs. Menon (the petitioner) has been elected as a member and that she is to occupy a seat for the purpose of being sworn in and for that purpose alone. In paragraph 4 of the affidavit he admitted the letter sent by him to the petitioner on 25-9-1951 and the reply received. In paragraph 8 of the affidavit by the petitioner she had stated that no reference was made, in the letter of 25-9-1951, or thereafter, by either the first counter-petitioner or the Secretary to the petitioner's telegram and letter of the 4th September 1951 and her registered letter of the next day. To this the reply was that there was no need to mention the early correspondence in that letter.

In the counter-affidavit it was further stated that the letter of resignation was received by the

Honourable Speaker by registered post on the 17th September that the same was opened by him in the Secretary's presence, initialled and handed over to him, that the allegation in the petitioner's affidavit regarding the procedure adopted and the decision come to by the Honourable Speaker were without substance, that the petitioner was not entitled to a writ, that the civil Courts had no jurisdiction to entertain or consider a matter which was purely one that related to the privileges of members and the procedure to be adopted by the House of Legislature, that a member's resignation automatically put an end to his or her membership under Art. 190 (3) (b) of the constitution, that no question of acceptance of resignation arose, that resignation was unilateral act that no power was vested in any authority to accept or reject the same, and that since the authorship of the letter was admitted, it was no part of the function of the Honourable Speaker to go further into the matter. The petition was therefore pressed to be dismissed with costs.

(5) I shall first consider the preliminary objection raised by the Advocate-General on behalf of the counter-petitioners. It was stated that the civil Courts have no jurisdiction to go into the question raised in the petition and he relied on Clause 2 of Article 212 of the Constitution and also on Article 188. Article 212, Clause 2 reads as follows:

> "No officer or member of the Legislature of a State in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order in the Legislature shall be subject to the jurisdiction of any Court in respect of the exercise by him of those powers."

It was argued that the matters complained of in the petition related to the conduct of business, and as such, the Courts have no jurisdiction. Articles 188 and 189 are given under the heading 'Conduct of business.' Article 188 reads thus:

> "Every member of the Legislative Assembly or the Legislative Council of a State shall, before taking his seat make and subscribe before the Governor, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule."

Part VI of the Constitution relating to the States in Part A of the First Schedule are made to apply to the States in Part B of the same schedule with slight modifications, of which we are not concerned in this petition. except to substitute "Rajpramukh" for Governor. The business of the House is to be conducted by the members thereof in the assembly presided over by the Speaker or the Deputy Speaker or in their absence by the chairman nominated by the Speaker under Rule 7 of the Travancore-Cochin Legislative Assembly Rules. Necessarily, therefore, the members are to take their seat in the assembly for this purpose. What Article 188 provided for was that the members before taking their seat should make or subscribe an oath or affirmation before His Highness the Rajpramukh or some person appointed by him in that behalf. The taking of oath is therefore not an item in the conduct of business mentioned in Article 212, but it allows the members to sit in the assembly and take part in the conduct of the business of the assembly. So it is only a condition precedent to entitle the members to sit in the assembly and conduct business. There is also another reason why the learned Advocate-General's objections cannot be sustained.

(6) Article 212 (2) relates to the business conducted by the officers of the assembly or the members thereof in whom powers are vested by or under the Constitution. The officers of the assembly are mentioned in Article 178. They are the Speaker and the Deputy Speaker of the Legislative Assembly, (the Chairman and the Deputy Chairman of the Legislative Council or panel of chairman nominated by the Honourable Speaker.) The Honourable Speaker is therefore an officer of the assembly and the ruling that he gives in the conduct of business may not be subject to the control of the civil Courts. But it can easily be seen from Article 188 of the Constitution that the oath to the member is to be administered by His Highness the Rajpramukh or by some one appointed by him in that behalf. So the administration of the oath is not a function exercised by the Honourable Speaker in his official capacity. It may be, that His Highness the Rajpramukh may appoint him to administer the oath, just as it is competent for His Highness to appoint any one else for the same purpose. It might be that in this case His Highness the Rajpramukh had been pleased to authorise the Speaker to administer oath to the members; otherwise there was no necessity for the Secretary of the assembly to write to the petitioner on 10-9-1951 to be present in the Speaker's chambers to take the oath. But that will not give him any special prerogative to seek shelter under Article 212. His refusal to administer the oath would not therefore clearly come under Article 212.

The learned Advocate-General referred me to 'BRADLAUGH v. GOSSETT', (1884) 12 QBD 271. There. the House of Commons passed a resolution to expel one Mr. Bradlaugh, who was duly elected a burgess to serve in the House of Commons for Northampton, and for that purpose the Serjeant-at-Arms was given the authority to take the necessary steps. It was this resolution that was called in question in this case. It was held there that the House of Commons was not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which had relation to its internal procedure only, and that what was said or done within its walls could not be inquired into in a Court of law. But this ruling has no application to the matter at issue in this case. There is no other provision in the Constitution disentitling the civil Courts from going into questions of the nature now before me. Under Article 226 of the Constitution, the High Court has jurisdiction to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, for the enforcement of any of the rights conferred by Part III and for any other purpose. The preliminary objection is therefore overruled.

(7) Article 190 (3) provides, that if a member of a House of the Legislature of a State resigns his seat by writing under his hand addressed to the Speaker or the Chairman as the case may be, his seat shall thereupon become vacant. This provision necessarily indicates that the letter of resignation must proceed from the member and that the resignation must relate to a membership held by the person who sends the same. The mere receipt by the Speaker of a letter of resignation purporting to be from a member will not cause that member's seat to become vacant. It is open to the Honourable Speaker to enquire whether that is a genuine letter or a forged letter, or one obtained by fraud or force is only a void document. The position taken, that the Honourable Speaker has no right to enquire into any matter relating to resignation cannot therefore be sustained. What is contemplated in the section is a resignation with the full consent of the writer

of his or her own volition and not any letter of resignation. From the facts placed before me and the allegations not controverted by the opposite parties, I take it that the following facts are to be established.

(8) There was a vacancy of a seat to the Assembly from 43, Ernakulam Women Constituency. The petitioner and Dr. Madhavi Amma were candidates who stood for election for that seat. The latest date for withdrawal of the candidature was 26-8-1951. Before Dr. Madhavi Amma withdrew her candidature, the petitioner had given the alleged letter of resignation to Sri Pullaiyi Krishnankutty Menon for the purpose and under the conditions mentioned by the petitioner. On suspicion of foul play she had intimated the import of that letter and the circumstances under which it was written to the Honourable Speaker. It was not dated then. Before the date which is now borne by that letter that is, 13-9-1951, she had informed the Speaker that it was not a letter of resignation and that she withdrew the contents thereof. After the petitioner gave the letter in question, Dr. Madhavi Amma withdrew her candidature, and the petitioner was declared elected by the Gazette Notification, dated 10-9-1951. This Gazette Notification was after the Honourable Speaker and the Secretary of the Assembly were apprised of the real nature of the alleged resignation letter handed over by her to a third party. It was also after the receipt of her letters of the 4th and 5th September that the Secretary invited her to be present on the 17th September to take the oath of office.

Meanwhile, the letter given by the petitioner to Sri Pullayil Krishnankutty Menon was given a date 13-9-1951 without the knowledge and consent of the petitioner and it was sent by registered post to the Hon'ble Speaker who received it on 17-9-1951. At the time this date was inserted on the letter sent by registered post on 14-9-1951 from Ernakulam, the petitioner was nowhere here. The petitioner presented herself for taking oath on 24-9-1951 and she was allowed a seat in the assembly for the purpose of taking oath. On the 25th September the Secretary asked her by a letter about the genuineness of the alleged resignation letter and she gave her reply on 1-10-1951, explaining the circumstances. This was followed by a notification by the Secretary that the seat in the assembly had become vacant from 13-9-1951.

(9) The letter in question was in the hands of the learned Advocate-General and on the motion of the petitioner, it was directed to be produced. The letter was shown to me at the time of the argument by the Advocate-General and I saw that the date was put in a different ink. It was abundantly clear that the date was not there when the letter was handed over to Sri Pullayil Krishnankutty Menon by the petitioner. Her repudiation of the same on the 4th September 1951 would clearly indicate this.

These facts would show that the letter of resignation was not intended to be one resigning her seat for at that time she was not even an elected member of the Legislative Assembly. Her securing the seat was after she passed the letter, after which alone Dr. Madhavi Amma withdrew her candidature. She cannot resign prospective status which she may or may not get in the ordinary course of events. I would therefore hold that the letter is void document and by virtue of that, the petitioner had not lost her seat in the assembly. It follows from this, that the Honourable Speaker to whom the power to administer oath had been delegated acted wrongly in not administering oath and thereby refusing the petitioner a seat in the assembly. She is therefore entitled to an order or direction being issued to administer oath to the petitioner and to allow her to take a seat in the assembly, thereby enjoying all the rights and privileges of an Honourable member of the assembly. Ordered accordingly.

(10) Since the whole trouble arose out of the inadvertence of the petitioner she is not allowed the costs of this petition. The counter-petitioners also raised unnecessary questions regarding the maintainability of the petition and other matters in this enquiry. They will also suffer their costs.

D.H. *Petition allowed.*

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KUNHI RAMAN C. J. AND SUBRAMANIA IYER J.

K. V. S. Vassan Bros. and others, Appellants v. The Official Liquidator, The Associated Banking Corporation of India Ltd. (in liquidation), Bombay, and another, Respondents.

A. S. No. 400 of 1950, D/- 20-8-1951.

(a) Interpretation of Statutes —Definition.

While the construction of the definition of a term in a statute should be such as not be repugnant to the context, it must equally be such as would aid the achievement of the purpose that is sought to be served by the Act. A construction that would defeat or enable the defeating of the purpose of the Act should never be accepted. (Para 16)

Anno: C. P. C., Pre. N. 7.

(b) Banking Companies Act (1949), S. 5 (1) (c) — Banking Company — Meaning — Starting of liquidation proceedings — Company does not cease to exist — Companies Act (1913), S. 277-F.

In order that a company may be a banking company under S. 5 (1) (c), it is not necessary that at a particular point of time it should be in a position to transact its business. The definition contained in S. 5 (1) (c) can only mean that transacting the business of banking should be its business and not that that business should have been transacted at any particular point of time. (Para 7)

Notwithstanding the fact that a banking company may not be transacting the business of banking at a particular point of time on account of a supervening cause, (for instance, by the starting of liquidation proceeding), it will not cease to be a banking company within the meaning of the definition contained in Section 5 (1) (c). (Para 21)

A banking company continues to exist even after proceedings are started for its liquidation until it is dissolved by the order of Court under S. 194, Companies Act and so long as it exists, it retains its original character. The Court dealing with an application for the winding up of a company is entitled to sanction a scheme for reconstruction which, if done the company would continue to function. The mere fact that proceedings have been started for the liquidation of the company does not, therefore, mean that the company ceased to exist. AIR (26) 1939 Mad 58 and AIR (37) 1950 All 309, Rel. on. (Para 14)

Unlike the law of companies in general which aims at the protection of stock-holders the law of banking companies is meant to safeguard the

interests of depositors. All the provisions of the Banking Companies Act are aimed at achieving this object, particularly the provisions in the matter of liquidation. If a banking company can escape the operation of the provisions of the Banking Companies Act by cessation of business, the Act can easily be rendered nugatory. (Pr 16)

K. P. Abraham, for Appellants; A. Krishna Menon, for Respondent No. 1; V. O. Markose, for Respondent No. 2.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologcally. List of foreign cases referred to comes after the Indian Cases).

('32) 59 Cal 1343: (AIR (19) 1932 P C 138) (Pr 22)

('50) AIR (37) 1950 All 309: (5 Dom L R (All) 192) (Pr 21)

('51) AIR (38) 1951 Bom 274: (ILR (1951) Bom 403) (Pr 14)

('39) AIR 1939 Mad 58: (180 Ind Cas 238) (Pr 13)

('39) AIR (26) 1939 Mad 318: (183 Ind Cas 353) (Pr 23)

('44) AIR (31) 1944 Mad 58: (ILR (1944) Mad 328) (Pr 22)

40 Cochin L R 193 F B (Prs 5, 7)

SUBRAMANIA IYER, J.: This appeal is filed by five persons as creditors of the Associated Banking Corporation of India Ltd. (in liquidation) which will, hereinafter be referred to as the Bank. There is also a reference made by the District Judge of Anjikaimal for directions.

(2) The Bank is a public limited company formed, as the name indicates for the purpose of carrying on the business of banking. Its registered office was and is within the jurisdiction of the Bombay High Court. It had a Branch at Mattancherry in the erstwhile State of Cochin. The Bank commenced business in July 1942 and the Branch at Mattancherry was opened in September 1945. 10 more branches were established at other places.

(3) The Bank had a bright beginning. As ill-fate would have it, this initial prosperity was short lived. On 18th March 1947, a creditor of the Bank filed a petition in the High Court of Bombay, I. C. No. 28/1947 for the winding up of the Bank by Court and in April 1947 on the application of the petitioner, a provisional liquidator was appointed. The said application appears to have been allowed by the Bombay High Court and the Bank has been ordered to be wound up and the Official Liquidator of the Bombay High Court has been appointed as the liquidator, who is respondent 1 in this appeal.

(4) Two of the share-holders of the Bank who were also Directors thereof and who were residing at Mattancherry, filed C.M.P. 165/1122 on 6th May 1947 before the erstwhile Cochin High Court within whose jurisdiction the Branch at Mattancherry was situate for an order for winding up of the Bank as an unregistered company on the ground that there was a heavy run on the Bank since the third week of February 1947 that the Bank paid out of its liquid resources more than a crore of rupees in three weeks and that it had found it impossible to meet further demands for withdrawals. Reference was also made in the petition to the proceedings for winding up the Bank which had been started in the High Court at Bombay.

(5) The petition was presented before the Vacation Judge of the erstwhile Cochin High Court during the summer recess. An interim liquidator was forthwith appointed. On 4-3-1123, the prayer for a winding up of the Bank was allowed and the Official Liquidator was appointed liquidator of the Bank on 29-2-1124 (15th October 1948). Certain persons alleging themselves to be creditors of the Bank filed two petitions in the High Court of Cochin questioning that Court's jurisdiction to entertain the aforesaid petition for winding up of the Bank. The learned Judge before whom those applications were argued, referred the matter to a Full Bench for decision. The 'CANARA BANK LTD., COCHIN BRANCH v. OFFICIAL LIQUIDATOR, ASSOCIATED BANKING CORPORATION LTD.', 40 Cochin L R 193 is the decision of the Full Bench. The Full Bench was of the opinion that the High Court had jurisdiction to entertain the application and pass orders for winding up the Bank as an unregistered company in so far as it related to the Bank's branch at Mattancherry.

(6) By order dated 5th Makaram 1124 (18th January 1949) the High Court of Cochin transferred the matter of the liquidation to the District Court of Anjikaimal wherein it was pending when, on 16th March 1949, the Indian Banking Companies Act X of 1949 and on 18th March 1950 when the Indian Banking Companies (Amendment) Act XX of 1950 came into force.

(7) In the erstwhile State of Cochin there was Act IV of 1080 regarding companies which was repealed by Proclamation dated 19th Thulam 1097 (4th November 1921) bringing into force the provisions of the Indian Companies Act, VII of 1913, with all amendments thereof up-to-date 'mutatis mutandis.' Subsequent amendments to the Indian Companies Act were also brought into force in the Cochin State by a later Proclamation, IV of 1112 dated 13th Meenon 1112 (26th March 1937). This proclamation brought into force in the Cochin State expressly the amendment of the Indian Companies Act VII of 1913 made by Act XXII of 1936 which made special provisions for Banking Companies by introducing Part X A in the Indian Companies Act. That was the law applicable in the State when the aforesaid C. M. P. 165 of 1122 was presented before the High Court of Cochin, because though the Cochin Companies Act XI of 1120 had been passed on 28th Makaram 1120 (10th February 1945) S. 1(2) thereof provided that " it shall come into force on such date as Government may by notification in the Cochin Government appoint" which notification was published only on 2nd Makaram 1123 appointing the 1st of Chingom 1124 (17th August 1948) as the date on which the said Act shall come into force. Under that Act it was the District Court of Anjikaimal within whose jurisdiction the Bank's Branch at Mattancherry was situate that had jurisdiction. Even before Act XI of 1120 came into force, the District Courts in the State had been conferred with jurisdiction in company matters by orders in that behalf passed by the Government under S. 3 of the Indian Companies Act. The High Court of Cochin held in the aforesaid Full Bench case. 'CANADA BANK LTD., COCHIN BRANCH v. OFFICIAL LIQUIDATOR, ASSOCIATED BANKING CORPORATION, LTD.'. 40 Coch L R 193 that notwithstanding the conferment of power on District Courts the High Court still retained concurrent jurisdiction. It is not necessary for purposes of this case to canvass the correctness of that conclusion.

(8) Respondent 2 who is the Liquidator appointed by the Cochin High Court presented a report in the Court below on 7th March 1950 to the effect that respondent 1, the liquidator appointed by the High Court of Bombay, sent to him a communica-

tion dated 28th February 1950, para 2 of which is as follows:

"2. Under the new Constitution, the State of Cochin is no longer a foreign State but under S. 1 of the Constitution Act read with Part B of Sch. 1, it has become a part of the Indian Union and under Arts. 43 to 45 of List 1 to Sch. 7 the incorporation, regulation and winding up of all Trading Corporations are not State subjects but Union subjects. The result is that the Indian Companies Act now applies to the liquidation of all Cochin Branches of Companies registered in Bombay. Under S. 3 of the Indian Companies Act it is the High Court within whose jurisdiction the registered office of a company is situated that has jurisdiction to wind it up. The jurisdiction of the Court in Cochin must now cease under the conditions now prevailing as stated above."

Respondent 2 was also requested to take proper steps in order that all assets and accounts of the Bank may be handed over to Respondent 1. In the report submitted by Respondent 2, he prayed for the Court's directions upon the requisition made by Respondent 1.

(9) By the time the matter came up for consideration by the Court below, the Banking Companies (Amendment) Act XX of 1950 had been passed and arguments were addressed based upon that enactment though no reference was, as none could be, made to it in the communication which led to the report of Respondent 2 or in the report itself because, Act XX of 1950 came into force only on 18th March 1950, that is 11 days after the report was submitted before the Court below by Respondent 2. The learned District Judge notes the fact that the Banking Companies Act, X of 1949 provides in S. 1 (2) that:

"It extends to all the Provinces of India, and also to every acceding State to the extent to which the Dominion Legislature has power to make laws for that State as respects banking."

but states that:

"As at the time of passing the legislation the Dominion Legislature had no power to make laws for the State, this enactment did not then come into force here."

The learned Judge does not appear to be correct in this statement as the States of Cochin and Travancore which were acceding States (and which on integration became the Travancore-Cochin State) as also all the Acceding States except Hyderabad had presumably surrendered necessary powers to the Central Legislature and thus come within the purview of the Act. (See the report of the Select Committee which added the words "after the Provinces of India" in the clause). This, however, need not be pursued as the Amending Act, XX of 1950 substituted: "1. (2) It extends to the whole of India except the States of Jammu and Kashmir", for the original S. 1(2) which was as quoted above. We need consider in this case only the effect of sub-cl. (2) as thus substituted.

(10) Article 1 of the Constitution of India reads as follows:

"1. (1) India that is Bharat, shall be a Union of States.

(2) The States and the territories thereof shall be the States and their territories specified in Parts A, B and C of Sch. 1.

(3) The territory of India shall comprise

(a) the territories of the States;

(b) the territories specified in Part D of Sch. 1; and

(c) such other territories as may be acquired."

The State of Travancore-Cochin is one of the States specified in Part B of Sch. I of the Constitution. There cannot be, nor has there been, raised any question as to the applicability of Act XX of 1950 to the State of Travancore-Cochin. Two relevant sections of that Act must be considered. One is S. 10 which provides for the insertion of Part III A (Sections 45 A to 45 H) in the Banking Companies Act with sub-clauses to some of those sections, and the other is S. 11. Section 45A introduced by S. 10 of the Amendment Act XX of 1950, reads as follows:

"45A. In this Part and Part III, 'Court' means the High Court exercising jurisdiction in the place where the registered office of the Banking Company which is being wound up is situated or, in the case of a Banking Company incorporated outside India which is being wound up, where its principal place of business is situated and notwithstanding anything to the contrary contained in the Indian Companies Act, 1913 (VII of 1913), or in any notification, order or direction issued thereunder or in any other law for the time being in force, no other Court shall have jurisdiction to entertain any matter relating to or arising out of the winding up of a banking Company."

Section 11 provides that:

"11. Where any proceeding for the winding up of a Banking Company or any other proceeding, whether civil or criminal which has arisen out of or in the course of such winding up, is pending in any Court immediately before the commencement of this Act, it shall stand transferred on such commencement to the Court which would have had jurisdiction to entertain such proceeding if this Act had been in force on the date on which the proceeding commenced and the Court to which the proceeding stands so transferred shall dispose of the proceedings as if this Act and the amendments made thereby were applicable thereto."

Section 45A provides that in the case of a Banking Company that has its registered office in India, the exclusive jurisdiction to consider the matter of its winding up is with the High Court within whose jurisdiction the said registered office is situated notwithstanding anything to the contrary contained in the Indian Companies Act or in any notification, order or direction issued thereunder or in any other law for the time being in force. The expression 'entertain' in this section is wide enough to comprise retention as well as reception and the section therefore negatives the jurisdiction of any other Court not merely in respect if fresh matters but also as regards pending matters. Should this position admit of any doubt, the question is set at rest by S. 11 which makes this section retro-active so as to apply to all pending proceedings in other Courts which are statutorily transferred to the High Court by providing that "It shall stand transferred". The transfer is automatic and does not stand in need of being implemented or given effect to by any order of Court. The Courts other than the High Court before which proceedings were pending at the time when Act XX of 1950 came into force, that is on 18th March 1950, had thereafter no jurisdiction to deal with those matters or pass any orders thereon. They had merely to do the physical act of arranging for the despatch of the records, assets and whatever other things they had control and custody of in connection with those pending matters to the High Court within whose jurisdiction the registered office of the company was situate.

(11) Whether we regard the proceedings in this case as having arisen and pending before the Court

below under the Indian Companies Act under which they were started, or under the Cochin Companies Act which had come into force before 18th March 1950, that Court ceased to have jurisdiction to consider the matter, which jurisdiction by virtue of Act XX of 1950 vested exclusively in the High Court of Bombay as from 18th March 1950.

(12) Mr. Abraham learned Counsel for the appellants felt the force of the provisions contained in the aforesaid sections of Act XX of 1950 and only contended that the Bank in this case is not a Banking Company within the meaning of the Banking Companies Act. He relied upon S. 5, Cl. (1) (c) which reads as follows:

"5. (1) (c) 'Banking Company' means any company which transacts the business of Banking in any 'State' of India:"

He laid stress upon the present tense used in that definition and contended that the proceedings having been started for the liquidation of the Bank even in the year 1947, it was not competent for it to transact the business of banking at the time when the Banking Companies Act X of 1949 came into force, that is on 16th March 1949, or at the time when the Amendment Act XX of 1950, came into force, that is on 18th March 1950 and that even if the liquidator had been doing any business it could only have been towards and in aid of winding up.

(13) The Bank was formed as a banking company. It functioned as such until the proceedings for its liquidation were started in the High Courts of Bombay and Cochin. Special provisions regarding banking companies were introduced into the Indian Companies Act VII of 1913, by Act XXII of 1936 by introducing Part X A. Section 277-F which is the first section thus introduced begins as follows:

"277F. A 'banking company' means a company which carries on as its principal business the accepting of deposits of money on current account or otherwise, subject to withdrawals by cheque, draft or order, notwithstanding that it engages in addition in any one or more of the following forms of business, namely:

(1) * * * *"

The rest of the section is unnecessary for the purpose of the present case.

(14) The proceedings with which we are concerned in this case are proceedings for the winding up of a banking company or proceedings which have arisen out of or in the course of such winding up. If the Bank was a banking Company when and how did it cease to be such? A company continues to exist even after proceedings are started for its liquidation until it is dissolved by the order of Court under S. 194, Indian Companies Act and so long as it exists, it retains its original character. The Court dealing with an application for the winding up of a company is entitled to sanction a scheme for reconstruction which, if done, the company would continue to function. In re 'CALICUT BANK LTD.', AIR (26) 1939 Mad 58 Leach C. J. said:

"There is no reason why the application for winding up should not be considered by the Court. In fact it should be considered at the earliest possible moment. Even if an order for winding up is passed, it will not interfere with any proper scheme being considered."

The mere fact that proceedings have been started for the liquidation of the company does not, therefore, mean that the company ceased to exist. Section 2 of the Banking Companies Act is to the effect that:

"2. The provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of the Indian Companies Act 1913 (VII of 1913) and any other law for the time being in force."

Section 162, Cl. (iii), Indian Companies Act, provides that:

"162. A company may be wound up by the Court:
(iii) If the company does not commence its business within a year from its incorporation, or suspends its business for a whole year."

Suspension of business for a year would thus be itself a ground for the winding up of the company. Section 38 of the Banking Companies Act, which provides for the winding up of a Banking company by Court "if it is unable to pay its debts" or if the Reserve Bank applies in this behalf to the Court" is enacted "without prejudice to the provisions contained in S. 162 or S. 271 of the Indian Companies Act VII of 1913". A banking company could, therefore, be wound up by an order of Court under S. 38, Banking Companies Act, or under S. 162 Indian Companies Act. 'FORTUNE COMMERCIAL BANK, LTD v. VIDYAGAURI J. MEHTA', AIR (38) 1951 Bom 274. If by suspending business, a banking company would cease to be a banking company, S. 162(iii) of the Indian Companies Act would cease to be applicable and such a company could not be wound up under that section, whose operation however is expressly saved by S. 38, Banking Companies Act. Mr. Abraham's contention is thus opposed to the aforesaid express statutory provisions.

(15) A reference to S. 1 (3), Indian Companies Act, which reads that "it extends to the whole of India except Part B States" as also to S. 277 F, and to S. 5(1)(c), Banking Companies Act, which have already been read, will indicate that the point stressed in the definition of a banking company contained in S. 5 (1) (c) is the place of business, that is, any State in India and not the time at which the business should be transacted, the adjectival clause being meant to connote its function generally and not the exercise thereof.

(16) Unlike the law of companies in general which aims at the protection of stock-holders the law of banking companies is meant to safeguard the interests of depositors. All the provisions of the Banking Companies Act are aimed at achieving this object, particularly the provisions in the matter of liquidation. If a banking company can escape the operation of the provisions of the Banking Companies Act by cessation of business, the Act can easily be rendered nugatory. . While the construction of the definition of a term in a statute should be such as not to be repugnant to the context, it must equally be such as would aid the achievement of the purpose that is sought to be served by the Act. A construction that would defeat or enable the defeating of the purpose of the Act should never be accepted.

(17) In order that a company may be a banking company under S. 5 (1) (c), it is not necessary that at a particular point of time it should be in a position to transact its business. The definition contained in S. 5 (1) (c) can only mean that transacting the business of banking should be its business and not that that business should have been transacted at any particular point of time.

(18) A company comes into existence on its formation, i.e., on its registration under the Indian Companies Act. It then gets its character, whether as an investment company, insurance company or other, which depends upon and has to be determined by reference to the memorandum of association. It retains that character until it

is changed by alteration of the memorandum, by amalgamation or otherwise as provided by the Act, and it exists until it is dissolved under S. 194 or struck off the register under S. 247, Indian Companies Act, which is subject to restoration by order of Court. Neglect to start business after obtaining a certificate for commencement of business, or default in continuing business started and conducted, if continued for one year, would furnish a ground for an application for winding up under S. 162 (iii). Cessation of business irrespective of its period would justify the Registrar of Joint Stock Companies in taking steps to strike the name of the company off the register under S. 247. The Company would not cease to be, or cease to be of the denomination that it was on its formation, by neglect to start, or default in continuing to carrying on, the business for which it was formed.

(19) Take the case of a company formed solely for the purpose of carrying on the business of banking. On satisfaction of the conditions in that behalf, the certificate for commencement of business is issued. No business, however, is started for one year. How is the company to be wound up? surely as a banking company. The same would be the position, if such a company, after starting business and carrying it on for sometime, ceases so to carry on for one year. Its winding up under S. 162(iii) must be as a banking company.

(20) It is not necessary to multiply instances. It is sufficient to say that a company must be regarded and dealt with as one of its type notwithstanding stoppage of its business at any given time. Otherwise, the same company, would today be a banking company, tomorrow not, again a banking company the day after and so on, according as it does or does not transact the business of banking. Obviously such a position is unthinkable and absurd.

(21) Suppose a petition for winding up is presented a day after the company stops its business, according to the contention of Mr. Abraham, it could not be wound up by the order of Court as a banking company. This would be the result if the contention is accepted which would be quite unwarranted. Notwithstanding the fact that a banking company may not be transacting the business of banking at a particular point of time on account of a supervening cause it will not cease to be a banking company within the meaning of the definition contained in S. 5 (1) (c). Mallick C. J., observed as follows in 'JWALA BANK LTD. v. SHITLA PARSHAD SINGH', AIR (37) 1950 All 309: 5 Dom L R (All) 192:

> "5. The definition of a banking company in the Banking Companies Act does not mean that the company must, at the time in question, be able to accept deposits of money from the public repayable on demand or on such terms on which the money might have been deposited. It must mean that banking should be the primary business of the company even if, by reason of certain supervening causes, it is not able for the time being to carry on the work of receiving deposits and of making payments. The learned Company Judge has pointed out that in some cases, if the contention of learned Counsel is accepted, certain absurd results would follow. It is not necessary for us to multiply instances but there can be many such other reasons given for holding that a banking company does not cease to be a banking company merely because, by reason of certain supervening causes, it is not able to receive fresh deposits for the time being."

No other view appears to be possible. The contention urged by Mr. Abraham on behalf of the appellants-creditors which is also the contention raised on behalf of Respondent 2 cannot, therefore be upheld. No case of an alteration of the memorandum or amalgamation or reconstruction is alleged.

(22) The question as to whether a company was carrying on business at a particular time might arise in a case for instance, where certain profits of the company are sought to be taxed, as happened in 'COMMISSIONER OF INCOME-TAX, BENGAL v. SHAW WALLACE & CO', 59 Cal 1343 (P. C.). The question that arose there was whether a certain profit that was made by the Liquidator by disposing of part of the assets of the company at a profit would be taxable income and it was held that it was not as the fund in question represented the result of an appreciation of the assets of the company and was not due to any business done by the Company (See also 'MUTHUKARUPPAN CHETTIAR v. COMMISSIONER OF INCOME-TAX, MADRAS', AIR (31) 1944 Mad 58.)

(23) In this view the ground on which Respondent 1 wanted Respondent 2 to deliver to him the assets and the papers in connection with the Bank as shown in Para 2 of his communication above extracted, does not fall to be decided in this case. At the time that the application C. M. P. 165 of 1122 was filed for the winding up of the Bank, the State of Cochin was an independent State and could start proceedings for the winding up of the Bank as unregistered company under Part 9 of the Indian Companies Act. The pendency of proceedings in the Bombay High Court for winding up of the Bank would not be an obstacle either to the commencement or to the continuance of the proceedings for winding up in the Cochin Court. The proceedings in the Cochin Court would be ancillary to those in the Bombay Court unless it be the case that notwithstanding the existence of the registered office at Bombay it could be said that the domicle of the Bank is in the Cochin State as "the domicile of a Corporation is in fact the place where the brain which controls the operation of the company is situate". (Foote on Private International Law, Edn. 5, P. 178). Such a contention is however not raised here as was done successfully before the Madras High Court in connection with the Travancore National and Quilon Bank, Ltd. whose registered office was at Trivandrum but whose main business was at Madras: See 'IN THE MATTER OF TRAVANCORE NATIONAL & QUILON BANK LTD.', AIR (26) 1939 Mad 318 where the question is elaborately dealt with.

(24) On and from 26th January 1950 the States of Bombay and Cochin became dependent States both having become part of the territory of India to which the Constitution of India relates. The question that would have arisen had Respondent 1 sought his relief before the date of the Constitution of India, which would be a question of international law, does not arise after the Constitution. Even the question what might have arisen had the matter come up for consideration before 18th March 1950 when the Banking Companies Act came into force, does not also fall to be decided now because the rights of parties stand regulated by the Banking Companies Act X of 1949 and the Banking Companies (Amendment) Act XX of 1950.

(25) It was not contended before us that the appeal is not maintainable. The order passed by the Court below does not appear to be a final order regulating the rights of parties so as to render it appealable. To the question from the Court as to how the appellants are interested in this matter, the answer was that the appellants stand to

get a larger dividend if liquidation is confined to the assets and liabilities of the Bank within the Cochin State. It is just this inequality that is sought to be prevented by legislation. Section 45B, Banking Companies Act provides for the proof of all claims against a banking company whether arising from out of transactions at the registered office or at any of its various branches. The Act contemplates a single and all comprehensive proceeding in winding up and distribution of the assets equitably among the various claimants thereto. Even if the matter had arisen before the Constitution of India was enacted, under the comity of nations, it would have been a proper thing to direct a pooling of the resources in all the various places and an equitable distribution between all the claimants. If, however, the appellants are entitled to any special treatment, they would be free to urge their claims before the High Court at Bombay which, as already stated is the only Court having jurisdiction to deal with the matter.

(26) The appeal should, therefore, be dismissed with costs of Respondent 1.

(27) The District Judge of Anjikaimal will transmit all the records and assets in connection with Company M. P. 1 of 1124 to the High Court at Bombay, to be dealt with by that Court. Respondent 2 will take orders from the Bombay High Court as regards whatever he has done hitherto and in respect of whatever he may have to do hereafter.

V.B.B. *Appeal dismissed.*

A. I. R. 1952 Travancore-Cochin 175

KUNHI RAMAN C. J.
AND SUBRAMANIA IYER J.

Oommini Pankajakshy, Petitioner v. Kutty Dakshayani, Counter-Petitioner.

Criminal R. P. No. 418 of 1124 (T), D/- 3-1-1951.

Criminal P. C. (1898), Ss. 350 A and 537 — Non-compliance with S. 350 A — Effect — (Travancore) Regulation V (5) of 1067 — Rules under — R. 7.

Where at each hearing, three Honorary Magistrates presided, but the three Magistrates who ultimately pronounced judgment in the case did not have the advantage of hearing the evidence of all the witnesses called for the prosecution, on the basis of which they reached the conclusion that no case has been made out against the accused the decision reached by the Bench of Magistrates cannot be supported. It must be set aside. Section 537 refers only to sentence or order passed by a Court of competent jurisdiction. In the present case the judgment is not pronounced by a Court of competent jurisdiction inasmuch as the fundamental principles laid down in the rules framed by the Government for the constitution of Benches of Magistrates and for trial have been violated. This is not a mere irregularity but a vital illegality which cannot be cured under S. 537. (Para 4)

Anno: Criminal P. C., S. 350 A N. 4.

T. R. Achutha Warrier, for Petitioner; T. K. Narayana Pillai, for Counter-Petitioner.

KUNHI RAMAN, C. J.: The complainant is the petitioner before this Court. The accused were 4 in number. The charge against them was that they had voluntarily caused hurt to the complainant on 22-8-1121 at about 4 P.M. The trial took place before the Honorary Second Class Bench of Magistrates at Neyyattinkara. Three Magistrates have signed the judgment. They are: Messrs. P. Velayudhan Pillai, A. Dasiah and P. Venkitachalam Aiyer.

(2) The first ground urged on behalf of the complainant is that the constitution of the Bench changed from time to time and the three Magistrates aforesaid who have signed the judgment did not have the advantage of hearing the evidence throughout the course of the trial. Mr. Warrier, the learned Counsel for the petitioner, has prepared an abstract of the proceedings that took place before the Bench of Magistrates on the different dates on which the case was heard. According to this abstract, P.W. 1 was examined before Messrs. Velayudhan Pillai, Sankara Pillai and Fletcher. After the charge was framed against the accused, the witness was recalled for cross-examination and this took place before Messrs. Narayanan, Dassiah and Sankara Pillai. P.W. 2 was examined before Messrs. Velayudhan Pillai, Sankara Pillai and Sankaran. P.W. 3 was examined before Messrs. Sankara Pillai, Fletcher and Narayanan. The witness was recalled for cross-examination after the charge was framed against the accused and was cross-examined before Messrs. Sankara Pillai, Dassiah and Narayanan.

P.W. 4 was examined before Messrs. Sankara Pillai, Velayudhan Pillai and Narayanan. He was recalled for cross-examination and was cross-examined before Messrs Sankara Pillai, Dassiah and Velayudhan Pillai. P.W. 5 was examined before Messrs. Sankara Pillia,, Fletcher and Narayanan and cross-examined after the charge was framed, before Messrs. Sankara Pillai, Narayanan and Dassiah. P. W. 6 was exmined before Messrs. Sankara Pillai, Fletcher and Sivaramakrishna Iyer and cross-examined after the charge was framed, before Messrs. Dassiah, Venkitachalam Iyer and Velayudhan Pillai. P.W. 7 was examined before Messrs. Fletcher, Sivaramakrishna Iyer and Sankara Pillai and cross-examined after the charge was framed before Messrs. Venkitachalam Iyer, Narayanan and Dassiah.

P.W. 8 was examined before Messrs. Velayudhan Nayar, Venkitachalam Iyer and Sivaramakrishna Iyer P.W. 9 was examined before Messrs. Sankara Pillai, Sivaramakrishna Iyer and Fletcher. It will thus be seen that one of the three Magistrates who have signed the judgment had the advantage of hearing the evidence of all the witnesses called on behalf of the prosecution. The view taken by them in their judgment was that no case has been made out against the accused and therefore it was not necessary to call upon the accused to adduce evidence. They have accordingly acquitted the accused.

(3) The relevant provisions which deal with the subject of changes in the constitution of the Bench of Magistrates during the course of a trial are to be found in Section 291 of the Travancore Criminal Procedure Code which corresponds to Section 350-A of the Indian Criminal Procedure Code. According to Section 291:

> "No order or judgment of a Bench of Magistrates shall be invalid by reason only of a change having occurred in the constitution of the Bench in any case in which the Bench by which such order or judgment is passed is duly constituted under Sections 13 and 14, and the Magistrates constituting the same have been present on the Bench throughout the proceedings."

Sections 13 and 14 need not be read in detail. According to Section 13, the Government has got the power of authorising any two or more Magistrates in any district to sit together as a Bench and

may confer on that Bench powers of a Magistrate of the First, Second of Third Class. Section 14 gives power to Government to make rules consistent with the Code for the guidance of Magistrates' Benches regarding the classes of cases to be tried, the times and places of sitting, the constitution of the Bench for conducting trials, the mode of recording evidence and the mode of settling differences of opinion which may arise between the Magistrates in Session. In exercise of the powers conferred upon them, rules have been framed by Government and the rule that is material so far as the present case is concerned is Rule No. 7, promulgated under Regulation V of 1067. According to Rule 7:

"Every Bench shall consist of an uneven number of Members of not less than three. Each member of the Bench shall have a voice in deciding as to the admissibility of evidence and in the finding and sentence. In the event of disagreement among the members, the opinion of the majority shall prevail."

It is thus clear from this rule that the quorum described by the rule is three. It may be more than three, provided the number is uneven. In the present case, at each hearing, three Honorary Magistrates presided, but the three Magistrates who ultimately pronounced judgment in the case did not have the advantage of hearing the evidence, of all the witnesses called for the prosecution, on the basis of which they reached the conclusion that no case has been made out against the accused.

(4) The learned Counsel for the respondents wants to rely upon the provisions of Section 446 of the Travancore Criminal Procedure Code which corresponds to Section 537 of the Indian Criminal Procedure Code. According to Section 446:

"Subject to the provisions hereinbefore contained no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, unless such error, omission or irregularity, has in fact occasioned a failure of justice."

It is significant that the section refers only to 'sentence or order passed by a Court of competent jurisdiction.' In the present case, we are not satisfied that the judgment was pronounced by a Court of competent jurisdiction inasmuch as the fundamental principles laid down in the rules framed by the Government for the constitution of Benches of Magistrates and for trial have been violated. In our judgment, this is not a mere irregularity but a vital illegality which cannot be cured, by the provisions of Section 446. The result is the decision reached by the Bench of Magistrates cannot be supported. It must be set aside. We order a re-trial before a competent Bench of Honorary Second Class Magistrates at Neyyattinkara.

Revision allowed.

D.H.

A. I. R. 1952 Travancore-Cochin 176

SUBRAMANIA IYER AND JOSEPH VITHAYATHIL, JJ.

Abdurahiman Koyakutty Hajee and another, Appellants v. Agastheenju Joseph and others, Respondents.

Second Appeal No. 479 of 1123, D/- 27-7-51.

(a) Evidence Act (1872), S. 41 — Judgment 'in rem' — Judgment in partition suit.

The judgment in a partition suit declaring the right of a person to a share in particular properties cannot be said to be a judgment 'in rem.' It can bind only the parties thereto. (Para 6)

Anno: Evidence Act, S. 41 N. 2.

(b) Custom — Latin Christians of Seven Hundred Sect — Daughter's right to share in father's property.

Among Latin Christians of the Seven Hundred sect the daughter is not entitled to a share in her father's property at all but only to 'stridhanam.' 13 T L J 354 (F B), Foll.; 6 T L R 26, Ref. (Paras 7, 8, and 9)

(c) Travancore Christian Succession Act, S. 30 — Applicability.

Section 30 does not apply to all Latin Christians in Travancore. It applies only to 'certain classes' of Latin Christians. (Para 11)

P. Narayana Pillai, for Appellants; K. P. Ittyarah and K. P. Abraham, for Respondents.

Cases referred to:

('67) 7 W R 338: (Beng L R Sup Vol 662 F B) (Pr 6)
(1864-65) 2Mad H C R 276 (Pr 6)
13 T L J 354 (F B) (Prs 6, 7, 8, 12)
6 T L R 26 (Pr 12)

VITHAYATHIL, J.: The 1st defendant in O. S. No. 519 of 1117 on the file of the District Munsiff's Court of Parur is the appellant in this second appeal. The suit was filed by a next friend of the minor plaintiffs for declaration of the plaintiffs' title to the plaint properties and for setting aside a summary order. The 1st plaintiff attained majority after the filing of the suit.

(2) The plaint properties belonged to Padamatthummal Karles. He had a son Devassy and two daughters Mariam and Rosa. Karles died intestate about the year 1085. The plaintiff's case is that after the death of Karles the plaint properties were in the joint possession of Devassy, Mariam and Rosa. Devassy was the foreman of a 'chitty' and he executed a security bond in favour of the subscribers charging the plaint properties. The 'chitty' collapsed, and one of the 'chitty' creditors filed O. S. No. 56 of 1091 on the file of the Parur Munsiff's Court against Devassy for 'chitty' money due to him and obtained a decree. Devassy died in 1091 leaving behind his widow Rosa and three children, and sometime afterwards Mariam also died leaving behind a son. On 28-9-1951, Rosa the widow of Devassy on her own behalf and on behalf of minor children of Devassy sold the plaint properties along with the other properties to one Augusthkunju Kutty, the father of the plaintiffs under Ex. VII, sale-deed. The sale was for Rs. 19,147-8-0/- and the vendee was directed to discharge all the 'chitty' liabilities of Devassy.

Subsequently the plaint properties were sold in Court auction for the decree-debt in O. S. No. 56 of 1091 and purchased by the decree-holder. When he sought to obtain delivery of possession of the properties he was obstructed by Rosa the sister of Devassy. The execution Court disallowed the obstruction and ordered delivery to be given to the auction-purchaser. Thereupon Rosa filed Ex. A suit (O. S. No. 98 of 1095 of the Parur District Court) for partition of the plaint properties claiming 1/3 share therein. The children and widow of Devassy, the son of Mariam, Agasthkunjukutty the vendee under Ex. viii, three 'chitty' creditors of Devassy including the auction-purchaser in O. S. No. 56 of 1091 and two subsequent vendees of

portions of the properties were defendants in that suit.

(3) In the meanwhile another 'chitty' creditor of Devassy, Makkaru Aburahiman, had filed Ex. 11 suit (O. S. No. 1225 of 1091 of the Parur Munsiff's Court) for the 'chitty' amount due to him. The defendants in that case were the children and the widow of Devassy, Agasthkunjukutty and four subscribers in the chitty.' It has to be noted that Rosa, the plaintiff in Ex. A suit was not a party in this suit and that the plaintiff in Ex. 11 suit was not a party in Ex. A suit filed by Rosa. Ex. 11 suit was decreed ex parte on 28-1-1095. Ex. A suit was contested by the auction-purchaser in O.S. No. 56 of 1091 and by another 'chitty' subscriber, their main contention being that Rosa was not entitled to a share in her father's properties.

Ex. A suit was decreed on 10-12-1097 declaring Rosa's right to one-third share in the plaint properties. It does not appear that this preliminary decree was followed up by a final decree and that there was an actual partition of the properties by metes and bounds. It is alleged by the plaintiffs that after Devassy's death his sister Rosa was in sole possession of the properties. Rosa assigned her rights in the properties to one Achan Bava. This sale-deed is not produced in the case. Under Achan Bava's will the properties devolved on Margalli the deceased mother of the plaintiffs. A copy of this will was produced in the lower appellate Court and marked as Ex. J. The plaintiffs claim the properties as the legal heirs of Margalli. It has to be noted that Margalli is the wife of Augusthykunjukutty the vendee of the properties under Ex. vii.

(4) The present 1st defendant took an assignment of Ex. ii decree and in execution of the decree purchased the suit properties in Court auction on 5-8-1111. When he attempted to take delivery of the properties the next friend of the plaintiffs filed an obstruction petition. The execution Court rejected the obstruction petition by Ex. D order dated 14-8-1117. The present suit is filed to set aside this order and for declaration of the plaintiff's title to the plaint properties. The trial Court dismissed the suit. In appeal filed by the plaintiffs the decree of the trial Court was set aside and the suit was decreed. The second appeal is filed from that decision.

(5) The lower appellate Court has proceeded on the basis that the only question to be decided in the case is whether the plaintiffs were in possession of the plaint properties on the date of Ex. D order and not whether they have title to the properties. This view of the learned Judge is clearly wrong. The suit is for declaration of the plaintiffs' title to and possession of, the plaint properties and for setting aside Ex. D order. Unless the plaintiffs are able to establish that the title to the properties vests in them they cannot succeed in this suit. They must either prove that Rosa, their predecessor-in-interest had title to the properties or that they have acquired title to them by adverse possession. The two questions to be decided in the case are, therefore, whether on the death of Karles the properties devolved on Devassy alone or on Devassy, Mariam and Rosa as co-owners and whether, even if Rosa had no title to the properties, she and her successor-in-interest have acquired title by adverse possession.

(6) With regard to the question of title, the plaintiffs rely mainly on Ex. A decision of the Parur District Court which was followed in Exs. E and G decisions of the Parur Munsiff's Court, while the 1st defendant relies on the Full Bench decision of the Travancore High Court reported in 'HARIHARASUBRAMONIA IYER v. THRESSIA', 13 T L J 354. Karles died before the date of the Travancore Christian Succession Act and therefore the provisions of that Act will not govern this case. The question therefore for consideration is whether according to the customary law governing the community to which Karles belonged the daughter is entitled to a share in the father's properties and if so, what that share is.

In Ex. A case it was held that a daughter is entitled to a share equal to that of the son and that therefore Rosa was entitled to one-third share in the properties. This decision was not appealed against and is therefore binding on the parties thereto. But the predecessor-in-interest of the 1st defendant was not a party to that suit and it cannot therefore bind him. It was argued by the learned Advocate for the respondents that Ex. A decision declaring Rosa's right to one-third share in her father's properties must be taken to be a judgment 'in rem.' We do not find our way to agree with this view. Ex. A is not a judgment coming within the scope of Section 41 of the Evidence Act. The law relating to judgment 'in rem' was exhaustively discussed by Philips and Holloway, JJ. in 'YARAKALAMMA v. ANAKALA NARAMMA', 2 Mad H C R 276, and by Sir Barnes Peacock in 'KANHYA LAL v. RADHA CHURN', 7 W R 338.

In these cases the learned Judges specified what were judgments 'in rem' and what were not and it was on the basis of these decisions that Section 41 of the Indian Evidence Act was enacted. In view of this statutory provision it is not necessary to discuss the general principles relating to judgments 'in rem.' The judgment in a partition suit declaring the right of a person to a share in particular properties cannot be said to be a judgment 'in rem.' It can bind only the parties thereto. As stated above, the first defendant's predecessor-in-interest was not a party to Ex. A suit. The fact that some other creditors of Devassy were impleaded in that suit cannot make the suit representative in character so as to make the decision binding on other creditors not made parties. Therefore there is no force in the contention that Ex. A judgment binds the 1st defendant.

(7) If Ex. A has not the effect of a judgment 'in rem' it will be necessary to consider the question whether according to the customary law governing the parties before the date of the Christian Succession Act Rosa was entitled to a share in her father's properties. On this question the appellant relies on the Full Bench ruling of the Travancore High Court mentioned above, namely, 'HARIHARA SUBRAMONIA IYER v. THRESSIA', 13 T L J 354. The parties in that case were Latin Christians of the Seven Hundred sect belonging to the Padamathummol family to which Karles also belonged. The question that arose for consideration in that case was whether according to the customary law governing the Latin Christian community of the Seven Hundred sect the daughter is entitled to a share in her father's properties. In that case all the prior decisions of the Travancore High Court relating to the question were exhaustively discussed. Many respectable persons belonging to the community were examined in that case and a large number of documents executed in different families belonging to the community showing that daughters are not entitled to a share in their father's property but only to 'Sthridhanam' were also produced. The decisions of the then Cochin Chief Court relating to the question were also considered in that case.

After an exhaustive discussion of the case law relating to the matter and a detailed consideration of the oral and documentary evidence adduced in the case relating to the custom in the community, their Lordships came to the conclusion that among

Latin Christians of the Seven Hundred sect the daughter is not entitled to a share in her father's property, but only to 'stridhanam.' What that right to 'Stridhanam' is and on what basis it should be determined was not considered or decided in that case.

(8) The learned Advocate for the respondents strenuously argued that 'HARIHARASUBRAMONIA IYER v. THRESSIA', 13 T L J 354 (FB), does not lay down the correct law relating to the custom in the community with regard to the daughter's share in her father's properties and that the decision requires reconsideration. He took us through the prior decisions of the Travancore High Court and those of the Cochin Chief Court relating to the question. After going through these decisions we are not satisfied that the Full Bench ruling in '13 T L J 354 (FB)', requires reconsideration. It was an authoritative pronouncement on the question after an exhaustive review of the case law relaiing to the matter and after considering the large volume of oral and documentary evidence adduced in the case about the custom in the community. In this view of the matter we do not think it necessary to discuss the various rulings of the Travancore High Court and the Cochin Chief Court referred to and commented upon in '13 T L J 354.'

(9) It was next argued by the learned Advocate for the respondents that the actual decision in the Full Bench case is only to the effect that the daughter is not entitled to a share equal to that of her brothers in her father's property and that it was not held in that case that the daughter is not entitled to any share at all. We cannot agree with this view also. A reading of the judgment shows that what was actually decided in that case is that the daughter is not entitled to a share in her father's property when there are sons, and that her right is only to get 'Streedhanam.' It was not considered or decided in that case what that 'Stridhanam' right is and on what basis it should be determined. It was observed that the remedy of the daughter was to file a separate suit for the 'Stridhanam' amount. It is not necessary to consider that question in this suit also as this is not a suit for enforcing the 'Stridhanam' right.

(10) Another argument advanced by the learned Advocate for the respondent was that the definition of the word "Stridhanam" in the Travancore Christian Succession Act shows that it is money, ornaments or property given or promised to be given in satisfaction of a daughter's claim against the estate of her father. This definition, it is argued, implies that the daughter is entitled to a share in her father' estate. This argument also cannot be accepted. The definition only shows that the daughter is given 'Stridhanam' in satisfaction of her claim in her father's property and that therefore if she is paid her 'Stridhanam' she will have no further claims in the property. That the daughter has got a right to get her 'Stridhanam' from her father's properties ('Stridhanam Avakasom' as it is called) was not disputed in the Full Bench case. What was held in that case was that he is not entitled to get a share in the property but only to get some money. Therefore the argument based on the definition of the word "Stridhanam' in the Christian Succession Act to establish that prior to the date of the Act the daughter was entitled to a share in her father's properties can have no force.

(11) Then it was argued that Section 30 of the Christian Succession Act recognises the customary usage among Latin Christians under which sons and daughtens share equally in the property of an intestate. Section 30 relates only to 'certain classes' of Roman Catholic Christians of the Latin rite and certain Protestant Christians living in Karunagappally Quilon, Chirayinkil, Trivandrum, Neyyathinkara and other 'taluqs' according to the customary usage among whom the male and female heirs of an intestate share equally in the property of the intestate. That section does not apply to all Latin Christians in Travancore. It applies only to 'certain classes' of Latin Christians. So far as Latin Christians of the Seven Hundred sect are concerned it was held in the Full Bench case that the customary usage among them is similar to that of the Syrian Christians and that female heirs among them do not share equally with the male heirs in the property of an intestate. Therefore there is no force in the argument based on Section 30 of the Christian Succession Act. There is also no evidence in this case to prove that according to the customary usage in the community daughters share equally with the sons in their father's property.

(12) In the light of the Full Bench ruling in 'HARIHARASUBRAMONIA IYER v. THRESSIA', 13 T L J 354, we do not think that any value can be attached to a decision to the contrary by the District Judge of Parur in Ex. A case. One of the prior decisions on which the learned District Judge has relied for his finding that among Latin Christians of the Seven Hundred sect the daughter is entitled to a share equal to that of the son is the decision in O. S. 19 of 1091 of the Parur District Court. It was that decision that was set aside by the High Court in '13 TLJ 354. Another decision relied on in Ex. A case is '6 TLR 26. That case also is expressly distinguished in 13 T L J 354. In '6 T L R 26', the parties were Latin Christians of Trivandrum among whom the daughters and sons are entitled to equal shares according to customary usage. Then the learned Judge relies on Section 30 of the Christian Succession Act referred to above. We are not in any way inclined to accept the decision of the learned District Judge in preference to that of the Full Bench of the Travancore High Court on this question.

(13) Two other documents relied on by the plaintiffs are Exs. E and G. Ex. E is an order in execution of the decree in O. S. No. 481 of 1099 of the District Munsiff's Court of Parur. The plaintiff in that case had obtained a decree against Karles Devassy in O. S. No. 16 of 1093 of the Parur Munsiff's Court and had purchased the property in Court auction. He then leased it to one John Menthis. The decree in O. S. 481 of 1099 was for recovery of property on the basis of that lease deed. That decree was assigned in favour of one Moideen Bava Kunju Moideen. When the latter applied for delivery of possession Margalli, the mother of the plaintiffs, obstructed. That obstruction was upheld by Ex. K order on the basis of the decision in Ex. A case.

The assignee-decree-holder in Ex. E case then filed Ex. C suit to set aside Ex. E order and to recover possession of the properties. That suit was dismissed as against the 1/3 share claimed by Margalli. Ex. G is the judgment in that case. Ex. G decision also was based on Ex. A. In view of our finding that Ex. A decision is not correct no value can be attached to the decisions in Exs. E and G. For the above reasons we hold that Rosa the daughter of Karles was not entitled to a share in her father's properties and that therefore the plaintiffs have not acquired any title to the properties.

(His Lordship then discussed the evidence on the question of possession and proceeded.:)

(14-16) In the circumstances of the case we are inclined to believe the 1st defendant when he

swears that after the death of Karles the plaint properties were in the possession of Devassy and that Augusteenjukutty got possession of the same under Ex. VII sale-deed. There is no allegation in the plaint to the effect that plaintiffs have acquired title to the properties by adverse possession. Neither is there any evidence to prove that the title of the legal owner has been lost by adverse possession. We, therefore, do not find our way to agree with the lower appellate Court in its view that Ex. D order is liable to be set aside. We hold that the plaintiffs have not established their title to the plaint properties. We, therefore, set aside the decree of the lower appellate Court and restore that of the trial Court and dismiss the suit.

(17) The Second Appeal is allowed with costs in all the Courts.

(18) SUBRAMANIA IYER, J.: I concur.

V.R.B. *Appeal allowed.*

A. I. R. 1952 Travancore-Cohin 179

JOSEPH VITHAYATHIL, J.

Subramania Iyer Sivarama Iyer, Petitioner v. Chinnu Pillai Pichandi Pillai, Cr.-Petitioner.

C. R. P. No. 139 of 1951, D/- 11-10-1951.

Civil P. C. (1908), O. 23, R. 3 — Decree in terms of compromise — Decree should be in terms of agreement — Decree embodying terms not agreed to by parties — Effect.

If the Court proposes to dispose of the petition to set aside the execution sale, not on the merits, but on the basis of the compromise entered into by the parties, the order should be in accordance with the terms of the compromise. The Court will be acting without jurisdiction if it embodies in the order any provision not agreed to by the parties. (1895) 2 Ch 273; AIR (8) 1921 Cal 356 (2); ARI (3) 1916 Cal 816; AIR (13) 1926 Nag 20; AIR (17) 1930 Pat 234; 26 Trav L J 971, Rel. on; AIR (8) 1921 Pat 107, Ref. (Para 5)

Where in proceedings by a judgment-debtor to set aside an execution sale the judgment-debtor undertakes to pay the whole decretal amount within 8 months and that in 2 instalments, he does not agree to pay the amount in 2 equal instalments and to pay the first instalment on a certain date and to have his petition dismissed in case the first instalment was not paid on or before that date. A direction to that effect in the order of the Court is not in terms of the agreement made by the judgment-debtor and to that extent the order must be deemed to be one passed without jurisdiction. (Para 5)

If the Court acts without jurisdiction in embodying in its order provisions not agreed to by the judgment-debtor he is not bound to have the order vacated by means of appeal or review. (Para 8)

Anno: C. P. C., O. 23, R. 3 N. 18, 27, 28.

T. N. Subramania Iyer, for Petitioner; T. K. Joseph, for Cr.-Petitioner.

Cases referred to:

(Arranged in order of Courts and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('16) 43 Cal 217: (AIR (3) 1916 Cal 816) (Pr 6)

('21) AIR (8) 1921 Cal 356 (2): (60 Ind Cas 864) (Pr 6)

('26) AIR (13) 1926 Nag 20: (89 Ind Cas 926) (Pr 6)

('21) 6 Pat L J 253: (AIR (8) 1921 Pat 107) (Pr 5)

('30) AIR (17) 1930 Pat 234: (125 Ind Cas 123) (Pr 6)

26 Trav L J 971 (Pr 6)

(1895) 2 Ch 273: (64 L J Ch 523) (Pr 6)

ORDER.: The defendant in O.S. No. 986 of 1120 of the Padmanabhapuram Munsiff's Court is the Revision Petitioner in this case. The Revision is from an order in execution. The decree-schedule properties were sold in Court-auction for the decree amount on 5-4-1124. The decree-holder himself purchased the properties for Fs. 5731 7/16 (Rs. 804), which was the decree-debt. A petition was filed by the defendant under Order 21, Rule 87, C. P.C., (Tr.) to set aside the sale on the ground of material irregularity and undervaluation. According to the defendant the properties are worth Rs. 30,000. A commission was issued to ascertain the value of the properties and according to the Commissioner's report the properties are worth Rs. 15,300/-. There is a prior charge of about Rs. 7,000. The petition to set aside the sale was posted for evidence on 19-6-1950. On that day the defendant offered to deposit the auction amount and interest within 8 months in two instalments. The decree-holder accepted this offer. The Court thereupon passed an order on 19-6-1950, itself directing the defendant to pay the sale amount and interest in 2 equal instalments within 8 months and also ordered that the 1st instalment should be paid on or before 19-10-1950, and the 2nd instalment on or before 19-2-1951. It was also provided in the order that if any instalment was defaulted the petition to set aside the sale would stand dismissed and the sale confirmed and that if both the instalments were duly paid the petition would stand allowed and the sale cancelled.

(2) No amount was paid on or before 19-10-1950 as directed in the order and therefore the Court on that day itself dismissed the petition under Order 21, Rule 87 and confirmed the sale. On 10-12-1950 the defendant filed a petition to review the order dated 19-6-1950 and to set aside the order dated 19-10-1950, confirming the sale.

(3) The main grounds alleged in the affidavit filed along with the petition are that the defendant had not agreed on 19-6-1950 to deposit the 1st instalment on 19-10-1950, that the direction in the order, dated 19-6-1950 for deposit of the 1st instalment on 19-10-1950 was against the terms of the compromise agreed to by him, that he was not aware of such a direction in the order, that time was not the essence of the contract between the parties, and that he was prepared to pay the whole amount. He, therefore, prayed that he should be allowed to deposit the amount and to have the sale set aside. The decree-holder objected to this. The lower Court rejected the petition of the defendant on the ground that he had submitted to the order of the Court fixing the dates of payment, that the petition to review the order, dated 19-6-1950, was out of time and that as long as that order stood the petition to set aside the sale was not sustainable. This revision petition is from that order.

(4) The questions that arise for consideration in this Revision are: (1) whether the order of the lower Court, dated 19-6-1950 directing the defendant to pay the 1st instalment on 19-10-1950 and providing for the dismissal of the petition under Order 21, Rule 87 in case of default of payment within that time was one passed without jurisdiction, (2) whether the defendant was bound to

have that order vacated and (3) whether the petition to review that order filed after three months is maintainable.

(5) With regard to the 1st point the offer made by the defendant on 19-6-1950, was to the following effect:

"I am prepared to deposit within eight months in two instalments the sale amount and interest."*

The decree-holder wrote down that he had no objection. It will be seen that the defendant had not agreed to pay the amount in 2 equal instalments and to pay the 1st instalment on 19-10-1950. His undertaking was only to pay the whole amount within 8 months and that in 2 instalments. It was also argued for the Revision Petitioner that by this undertaking he had not agreed to his petition being dismissed in case he defaulted payment of the amount within 8 months in two instalments. But I think that such an agreement is implied in the undertaking of the defendant. Otherwise, there will be no meaning in the undertaking to pay the amount within a particular time and the decree-holder agreeing to it. But the defendant had not agreed to pay the amount in two equal instalments and to pay the 1st instalment on 19-10-1950 and to have his petition dismissed in case the 1st instalment was not paid on or before that date. Therefore the direction in the order of the Court for payment of half the amount on or before 19-10-1950 and the provision for dismissal of the petition in case of default of that payment are not in terms of the agreement made by the defendant. If the Court proposed to dispose of the petition to set aside the sale, not on the merits, but on the basis of the compromise entered into by the parties the order should have been in accordance with the terms of the compromise.

Order 23, Rule 3 relating to compromise of suits is to the following effect:

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."

It is, therefore clear that if the Court accepts the agreement the decree should be in accordance with the terms of the agreement.

Order 23, Rule 5, C.P.C. (Tr.), provides that the provisions of Order 23 shall not apply to proceedings in execution. The Patna High Court has held that an application to set aside a sale under Order 21, Rule 90 (Indian C.P.C.), is not a proceeding in execution and that a compromise arrived at between the parties that on the judgment-debtor paying a certain sum by a particular date the Court sale should be set aside may therefore be recorded under Rule 3: 'JAGDISH MISSIR v. SURESHWAR MISSIR', 6 Pat L J 253. It is, however, not necessary to decide in this case whether the Court had jurisdiction to dispose of the petition to set aside the sale on the basis of the agreement entered into by the parties. So long as the Court has accepted the agreement and has proceeded on the basis of it the Court was bound to pass an order in terms of the agreement. If the agreement is not lawful the Court is not bound to accept it. But if a lawful agreement is accepted the decree or order should be in accordance therewith. The Court will be acting without jurisdiction if it embodies in the order any provision not agreed to by the parties. To that extent the order should be deemed to be one passed without jurisdiction.

(6) In 'HUDDERSFIELD BANKING & CO. v. LISTER', (1895) 2 Ch. 273, it was observed by Kay. L. J., that a consent decree or order is only the order of the Court carrying out the agreement between the parties and that a "consent order is a mere creature of the agreement." This observation was quoted with approval by Mukkerji, C. J., in 'KANDARAPA NAG v. BANWARI LAL NAG', AIR (8) 1921 Cal 356 (2). In 'KUSADHAJ BHAKTA v. BROJA MOHAN', 43 Cal 217, Jenkins, C. J., has observed thus:

"It is well-settled that a contract of the parties is none the less a contract because there is superadded to it the command of the Judge. It still is a contract of the parties, and as the contract is capable of being rectified for an appropriate mistake, so as the necessary consequence, is the decree which is merely a mere formal expression given to that contract."

This decision was followed in 'MIRA METI JU DOO v. MT. JANKI', AIR (13) 1926 Nag 20. It was held in that case that a compromise incorporated into a decree under Order 23, Rule 3 only represents the contract between the parties with an order of the Court superadded to it and that therefore the parties cannot avoid of any provision contained in the decree passed in pursuance of the compromise, but not contained in the compromise itself. To the same effect is the decision in 'SASADHAR GANGULI v. RAGHAB SINGH', AIR (17) 1930 Pat 234. In 'THOMAS CHERIAN v. OOMMEN THOMMI', 26 Trav L J 971, the Travancore High Court held that a compromise decree may be treated as a contract between the parties with all the incidence of a contract, that it stands on no higher footing and that such decree can be corrected or rectified if it does not represent the real contract between the parties.

(7) In the light of these rulings and the provisions in Order 23, Rule 3, C.P.C. I am of opinion that so long as the defendant had not agreed to pay half the auction amount and interest on or before 19-10-1950 and to have his petition dismissed in default of payment of that amount within that date, the lower Court acted without jurisdiction in directing him to deposit that amount on or before 19-10-1950 and in ordering that the petition would stand dismissed if the amount was not paid within that date.

(8) If the Court acted without jurisdiction in embodying in its order provisions not agreed to by the defendant he was not bound to have the order vacated by means of appeal or review.

(9) In this view of the matter the 3rd question, namely, whether the petition filed by the defendant to review the order, dated 19-6-1950, more than three months from the date of the order is maintainable does not arise for consideration.

(10) In the petition filed by the defendant on 15-12-1950, he had offered to deposit the whole amount but the decree-holder was not prepared to accept the amount and to have the sale set aside. This petition was filed within 8 months from the date of the 1st order. The offer to pay the whole amount was repeated by the defendant in the revision petition also which was filed on 1-2-1951. The period of 8 months had not expired on that date also. In the circumstances it cannot be said that the defendant has wilfully defaulted to make the payment as undertaken by him. But in view of the fact that he has not as yet deposited the amount in Court I think that he is not entitled to have the sale set aside merely because he has offered to make the payment.

(11) In the circumstances the proper thing to do will be to direct the lower Court to dispose of the

* (The original extract was in Malayalam.—Ed.)

petition to set aside the sale on the merits. The order of the lower Court dated 19-6-1950 and that dated 19-10-1950 dismissing the petition under Order 21, Rule 87 and confirming the sale as also the order dated 17-1-1951, dismissing C.M.P. No. 11922 filed by the defendant are hereby set aside and the lower Court is directed to dispose of the petition under Order 21, Rule 87 on the merits.

(12) The Revision Petition is allowed in the manner stated above.

(13) There will be no order as to costs.

V.B.B. *Order accordingly.*

A. I. R. 1952 Travancore-Cochin 181

KUNHI RAMAN, C. J. AND SUBRAMANIA IYER, J.

Krishnan Neelakandhan, Appellant v. Kerala Gilt Edged Security Life Assurance Co., Ltd., and others, Respondents.

Second Appeal No. 354 of 1121, D/- 25-7-1951.

Contract Act (1872), S. 50 — Obligation to pay premium — Discharge of, according to sanctioned method of payment.

Where from the previous conduct of the parties, it is evident that sending premium by money order was one of the approved or sanctioned methods of payment the obligation of the party who is to make the payment shall be deemed to have been discharged if the money order was sent on or before the relevant date. AIR 1947 Mad 122, Rel. on.

(Para 4)

Anno: Con. Act, S. 50 N. 1.

N. Varadaraja Iyengar, for Appellant; G. Velu Pillai, for Respondents.

Case referred to:

('47) AIR (34) 1947 Mad 122: (1946-2 Mad L J 253) (Prs 3, 4)

KUNHI RAMAN, C.J.: The Plaintiff is the appellant. He was the nominee under an insurance policy issued by the Kerala Gilt Edged Security Life Assurance Company Limited, Quilon. The life mentioned in the policy was that of his sister-in-law. The facts appearing from the records show that for 67 months subsequent to the insurance, the amount of Re. 1/- per month payable by the insured was paid. The 67th month was in June 1936. After paying the amount due for this instalment, the lady on whose insurance was effected, died. When the plaintiff in his capacity as the nominee mentioned in the policy approached the company for payment of the money alleged to be due under the policy, the company pleaded that there was default committed in payment of the subscription due at the 62nd instalment.

When there is such a default, it is open to the party concerned to get over the consequence of forfeiture of all claims by applying for reinstatement. Such a step was taken in the present case although on behalf of the policy-holder or nominee it was not admitted that there was such default. As a matter of fact such an application for reinstatement was put in and it was four months after its date that the party died. According to one of the rules of the Company, if death takes place before the expiry of six months from the date of re-instatement, the party will not be entitled to the benefit of the insurance and that was the contention urged on behalf of the company when the plaintiff put forward his claim.

(2) Both the Courts below have upheld the contentions of the company and have dismissed the suit. It is contended on behalf of the plaintiff that the alleged default in question was due to the fact that the sum of Re. 1/- payable for the month of January, although it was sent by Anchal Money Order prior to the 31st January, was received by the Company only on 31-1-1936. According to the evidence in the case the place from where the money order was sent was in the vicinity of Sherthallai and the payee was in the vicinity of Quilon and it takes 2 or 3 days for Anchal money orders to reach their destination between these two points.

The contention of the Company is that the payment should have been made by the 30th of January, because there is a period of grace of 15 days within which money could be paid and if the payment is not made within 15 days, there is another period of 15 days within which the money may be paid with a penalty of six pies in the rupee. Since subscriptions are according to Rule 21 payable in advance it was taken for granted that the payment in the present case should have been made by the 30th of January. As a matter of fact the money order reached the company only on the 31st of January.

(3) Mr. Varadaraja Iyengar, the learned Counsel for the appellant in this Second Appeal places reliance upon the decision of the Madras High Court reported in 'HAIROON BIBI v. UNITED INDIA LIFE INSURANCE CO. LTD.', AIR (34) 1947 Mad 122. That was a case in which insurance premium had to be paid by a certain date. The evidence showed that the amount was transmitted by money order prior to that date, but it reached its destination only after the expiry of that date. In spite of these circumstances, it was held that the payment was in time because the money order was despatched before the due date.

(4) The question is discussed in detail in the judgment of the learned Judge and what is pointed out therein is that from the previous conduct of the parties, it is evident that sending premium by money order was one of the approved or sanctioned methods of payment and if that is the position, then the obligation of the party who is to make the payment shall be deemed to have been discharged if the money order was sent on or before the relevant date. There is no doubt it was open to the sender of the money order to recall the amount or to prevent the money being paid over to the addressee. But so long as that has not been done it must be presumed that the obligation imposed upon the person who is to make the payment was duly discharged if the amount was remitted by money order according to the previous practice observed in the case.

In the present case also it is pointed out that on previous occasions the premium was remitted by money order and the amounts were received on the 31st of certain months without any protest by the company. It must be remembered that in the present case the amount involved is only a little over a rupee and it cannot be expected that the party concerned should undertake a journey by road or by boat from Sherthallai to Quilon incurring expenses out of all proportion to the amount involved in doing so and make the payment in person. That evidently is the reason why the parties observed the method of making the payment by money order. If it is a method that can be presumed to have been sanctioned or approved by both the parties then adopting the principle laid down in the case reported in 'HAIROON BIBI v. UNITED INDIA LIFE INSURANCE CO. LTD.', AIR (34) 1947 Mad 122, it must be held that the despatch of the money order on or before the 30th of January must be deemed to be compliance with the rule that requires that payments should be made by the 30th of the month. If this prin-

ciple is adopted then there has been no default and the view taken by the Courts below that there was default and consequently the rights under the policy had become forfeited cannot be upheld. We reverse the decisions of the Courts below and pass a decree for Rs. 250/- which it is conceded was the amount payable to the plaintiff under the policy.

(5) The next question is regarding interest and costs. The question was not raised in the form in which it was presented to this Court in the Courts below. Therefore, it is not a case in which we should allow interest or costs throughout. We direct that the appellant shall have his costs in this Court and bear his own costs in the Courts below. Interest on the decree amount from this date at 6 per cent. per annum.

V.R.B. *Appeal allowed.*

A. I. R. 1952 Travancore-Cochin 182

KUNHI RAMAN, C. J.

AND SUBRAMANIA IYER, J.

Lakshmanan Velayudhan, Petitioner v. State.

Criminal R. P. No. 277 of 1124, D/- 1-3-51.

(a) Criminal P. C. (1898), Ss. 498 and 496 — Scope — Powers of High Court and Court of Session are not controlled by S. 496 — (Travancore Criminal P. C., Ss. 409, 407).

Second part of Section 498 confers an absolute power on the High Court and the Court of Session to admit persons on bail whether they have preferred appeals or not. Section 496 does not in any way control the absolute power vested in the High Court and the Court of Session under Section 498. The proviso adverted to in S. 496 deals with the power of a Court when a person appears or is brought before it and is prepared at any time to give bail. Where the offence is a non-bailable one, the proviso certainly cannot control the provision of S. 498. AIR (23) 1936 All 107, Rel. on. **(Para 2)**

Anno: Cr. P. C., S. 498 N. 1; S. 496 N. 1 & 4.

(b) Criminal P. C. (1898), S. 107 — Magistrate's order under — Interference by Sessions Judge, propriety of.

Since the Magistrate is responsible for the maintenance of public peace within his jurisdiction, when he has made an interim order against a person committed by him to custody on the ground that such an order is necessary for preserving the public peace, it should not be lightly interfered with by a higher authority like the Court of Session, unless there is anything irregular or illegal in the order. **(Para 2)**

Anno: Cr. P. C., S. 107 N. 22.

T. K. Narayana Pillai, for Petitioner; Government Pleader, for the State.

Case referred to:

('36) AIR (23) 1936 All 107: (58 All 589: 36 Cri L J 155) (Pr 2)

KUNHI RAMAN, C. J.: Criminal R. P. No. 302/1124 is brought on behalf of the State. The learned Public Prosecutor who appears for the State contends that the order made by the learned Sessions Judge of Nagercoil in Criminal M. P. No. 115/1124 on the file of his Court was passed without jurisdiction. To appreciate this contention it is necessary to set forth some of the salient facts briefly. The respondent is described as the Secretary of the South Travancore Salt Factory Workers' Union. Proceedings were initiated against him under Section 104 of the Travancore Code of Criminal Procedure He was made to execute an interim bond on 30-5-1124, pending disposal of the case against him. Before the case was disposed of, it was alleged that he had violated some of the conditions of the bond, and thereupon on 28-6-1124 the Police Inspector of the locality moved the Magistrate who had taken the bond, for cancellation of that bond. On 5-7-1124, after examining the Inspector of Police who made the application, the Magistrate directed the cancellation of the bond and remanded the counter-petitioner to custody. Then the counter-petitioner moved the Sessions Court of Nagercoil for bail and he succeeded in obtaining an order in his favour. It is alleged in this petition that the Sessions Court had no jurisdiction to pass an order under Section 427 of the Travancore Code of Criminal Procedure.

(2) The argument of the learned Public Prosecutor is that the order passed by the Magistrate must be deemed to be one made under Section 113, Clause 3 of the Travancore Code of Criminal Procedure and when such an order has been passed, it is contended that the Sessions Court has jurisdiction to entertain an application for bail and to grant it as the Court has done in the present case. This contention cannot be accepted in view of the provisions of Section 409 of the Travancore Code of Criminal Procedure. The first part of the section deals with the amount of the bond executed under the chapter in which the section is to be found. The second part of the section which is the relevant portion for the purpose of this case reads as follows:

> "And the High Court or Court of Session may, in any case whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a police officer or Magistrate be reduced."

This part of Section 409, confers an absolute power on the High Court and the Court of Session to admit persons on bail whether they have preferred appeals or not. This section corresponds to Section 498 of the Indian Code of Criminal Procedure. The scope of the Section was dealt with in the case reported in 'EMPEROR v. MASURIA', AIR (23) 1936 All 107:58 All 589. The learned Judges (Sulaiman, C.J., and Bennet, J.) had to consider whether bail which was granted by a Sessions Judge to a person who had not been convicted of an offence but who was still detained in jail was validly granted. In answering this question in the affirmative the learned Judges stated as follows:

> "The Legislature has obviously intended to confer upon the High Court and a Court of Session very wide powers to admit to bail any person who is detained in jail, no matter whether he is a convicted person or not, and no matter whether he has appealed from conviction for an offence or has preferred any other appeal allowed by the Code, and even where there is no appeal pending. There is no reason for limiting the scope of the section so as to narrow it down to cases where persons have been convicted of offences and have preferred appeals under Section 407 and the following sections. We must, therefore, hold that the learned Sessions Judge had power under S. 498 to admit M. to bail."

With great respect we are in complete agreement with the view expressed in this judgment regarding the scope of Section 498 of the Indian Code of Criminal Procedure which is similar in wording to Section 409, second part of the Travancore Code of Criminal Procedure. The learned Public Prosecutor then referred to Section 407 according to which nothing contained in Section

407 shall be deemed to affect the provisions of Section 113. Sub-section 3. This does not in any way control the absolute power vested in the High Court and the Court of Session under Section 409 of the Code. The proviso adverted to deals with the power of a Court when a person appears or is brought before it and is prepared at any time to give bail. Where the offence is a non-bailable offence the proviso can certainly not control the provisions of Section 409. In the circumstances, we cannot accept the contention of the learned Public Prosecutor that in the present case the Sessions Judge had no jurisdiction to enlarge the petitioner on bail on his application presented to the Sessions Court.

Coming now to the merits of the order, we must express our opinion that since the Magistrate is responsible for the maintenance of public peace within his jurisdiction, when he has made an interim order against a person committed by him to custody on the ground that such an order is necessary for preserving the public peace, it should not be lightly interfered with by a higher authority like the Court of Session. No doubt, if there is anything irregular or illegal in the order it is the bounden duty of the Sessions Court to give relief to a private citizen who is injuriously affected by the order. We are not prepared to say that in the present case the learned Sessions Judge has acted in the arbitrary exercise of his discretion in granting bail. It is apparent from the order made by him that he has considered the various aspects of the case and he has understood the position to be that the Magistrate has not yet passed an order under Section 113, Sub-section 3 of the Travancore Code of Criminal Procedure. Indeed towards the end of the order he directs the Magistrate to expedite the action to be taken on the report of the Police Inspector and to pass an order under Section 113, Clause 3, if the Magistrate deems it necessary to do so. It is pending the passing of such an order that he has directed that the counter-petitioner should be enlarged on bail. The records will, therefore, be sent back to the Magistrate in order that he may deal with the case expeditiously under Section 113, Clause 3. It is unfortunate that this matter has been left pending now for nearly two years and when dealing with the case the Magistrate will take into consideration whether there is really any apprehension that a breach of peace will be committed if the counter-petitioner is not remanded to custody. There will be an order in these terms.

(3) Criminal R. P. No. 277/1124 is presented on behalf of the respondent in Criminal R. P. No. 302/1124. Exception is taken to the order of the Magistrate cancelling the interim security bond executed by the petitioner in this matter which has already been adverted to in the order which we have just pronounced in Criminal R. P. No. 302/1124. We have already expressed our views in the order in Criminal R. P. No. 302/1124 and we feel no doubt that the Magistrate will bear in mind the point that we have stressed in that order, that is to say, that he will consider whether there is any longer any apprehension of a breach of the peace taking place. Moreover, it is alleged that the since a period of two years has elapsed from the date of the order the proceedings themselves might have become infructuous in view of the fact that security can be taken under Section 103 only for a year. This point also will be considered by the Magistrate in deciding whether the case should be struck off his file and liberty given to the police, if so advised, to initiate fresh proceedings if the circumstances warrant the same.

R.G.D. *Orders accordingly.*

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GANGADHARA MENON AND JOSEPH VITHAYATHIL, JJ.

Velayudhan Thankappan, Appellant v. Raman Narayanan and others, Respondents.

A. S. No. 357 of 1123, D/- 10-8-1951.

(a) Malabar Law — Tarwad — Alienation — Necessity — Starting of a new trade is not family necessity were tarwad is of non-trading community.

The starting of a new trade is not a family necessity in case of a tarwad of a non-trading community, or where the members are not shown to be doing any business. 31 T L J 358 (FB), Relied on. **(Para 9)**

Advocate-General, T. N. Subramania Iyer, for Appellant; M. Madhavan Nair, for Respondents.

Cases referred to:

('22) 49 Cal 560: (AIR (9) 1922 P C 237) (Pr 8)

('32) 54 All 564: (AIR (19) 1932 P C 182) (Pr 8)

28 T L J 27 F B (Pr 7)

31 T L J 358 F B (Pr 8)

JUDGMENT: The plaintiff in O. S. No. 1417 of 1109 of the Trivandrum Munsiff's Court is the appellant in this case. The suit is to set aside Ex. I mortgage dated 28-10-1100 executed by defendants 2 to 11 in favour of the 1st defendant. The plaintiff and defendants 2 to 11 are members of an undivided marumakkathayam tarwad. The 3rd defendant is the karnavan of the tarwad and the 4th defendant is the next senior member. The mortgage is for fanams 7000 with a term of three years. On the same date, on which the mortgage was executed defendants 2 to 11 took the properties back on lease on a monthly rent of Rs. 10/-. The plaintiff was a minor on the date of the suit. All the adult members have joined in the execution of the mortgage. On the basis of the lease deed the 1st defendant filed O. S. 1793 of 1102 of the District Munsiff's Court of Trivandrum for arrears of rent charged on the equity of redemption and for recovery of the properties and obtained a decree. Ex. A is the copy of the plaint in that case. In execution of the decree the 1st defendant got delivery of the properties on 15-6-1105 and the equity of redemption was proclaimed for sale for the decree amount. The plaintiff filed this suit for cancellation of the mortgage deed and for setting aside the decree and execution proceedings in O. S. No. 1793 of 1102 and for recovery of the properties with mesne profits and for an injunction restraining the 1st defendant from executing the decree against the properties. The plaintiff's case is that the mortgage deed is not supported by consideration and tarwad necessity.

(2) The 1st defendant alone contested the suit. His main contentions are that the plaintiff is not a member of the sub-tarwad of defendants 2 to 11, that the plaint properties belong to the sub-tarwad of defendants 2 to 11, that the mortgage is supported by consideration and tarwad necessity, that the plaintiff is not competent to impeach the same, and that the decree and execution proceedings in O. S. No. 1793 of 1102 are valid and are not liable to be set aside. The lower Court dismissed the suit. When this appeal came up for argument the respondent's learned Advocate stated that he had no instructions and therefore the respondent was not heard.

(3) On the question whether the plaintiff is a member of the tarwad of defendants 2 to 11 the finding of the lower Court is in favour of the plaintiff. The 1st defendant has not objected to that finding and therefore that finding has become final.

(4) The important question for consideration in this case is whether Ex. I mortgage is supported by consideration and tarwad necessity. Ex. I is for Fs. 7000. The properties mortgaged are those which the sub-tarwad of plaintiff and defendants 2 to 11 got under Ex. D partition dated 9-8-1097. The consideration of Fs. 7000 is made up of 3200 fanams reserved with the 1st defendant for payment to D. W. 2 for discharging the decree debt in O. S. No. 1234 of 1099 of the Trivandrum Munsiff's Court and Fs. 3800 paid in ready cash before the sub-registrar for a trade intended to be started for the benefit of the tarwad. The decree in O. S. No. 1234 of 1099 was based on a debt due to D. W. 2 and which is admitted in Ex. D partition deed. Therefore it cannot be denied that that debt is one binding on the tarwad. That debt was discharged by the 1st defendant on 29-10-1100 under Ex. II receipt which is admitted by D. W. 2. Therefore there can be no doubt that Ex. I is supported by consideration and tarwad necessity to this extent.

(5) The other item of consideration namely Fs. 3800 was, as stated above, paid in ready cash for a trade intended to be started and conducted for the benefit of the tarwad.

(6) It is clear from the evidence in the case that this amount was actually advanced by the 1st defendant on the date of the document. The question for consideration is whether there was tarwad necessity so far as this item of consideration is concerned or in other words whether the starting of a new trade or business is a tarwad necessity.

(7) Relying on the ruling reported in 'SOORIYANATHA SASTRIAL v. SANKARAN NINARU', 28 T L J 27 F B the lower Court held that the trade in question which was started for the benefit of the tarwad with the consent of all the adult members is a tarwad necessity. What was laid down in 28 T L J 27 was that

> "unless the business was one started and continued as the tarwad concern with the knowledge and consent of all the adult members of the tarwad and unless the said business, being not of a speculative or hazardous nature attended with unforeseen risks and liabilities, was considered necessary to promote the general welfare of the tarwad as a whole or for the better and more efficient management of tarwad affairs, the debts arising from such transactions could not be treated as binding on the minors in the tarwad."

It was also laid down in that case that it is

> "foreign to the recognised principles of marumakkathayam law that the corpus of the tarwad should be charged with liability for anything other than what is strictly understood in the law as tarwad necessity, that is to say, purposes within the scope of the ordinary management of the tarwad, and transactions which are attendant with grave risk or of a speculative nature cannot be classified as acts of management to the manifest advantage of the tarwad."

(8) This question came up for consideration in another Full Bench case of the Travancore High Court reported in 'NEDUNGADI BANK LTD. v. GOVINDAN POTTI'. 31 T L J 358. In that case the law was laid down in the following terms by their Lordships:

> "Although the consent of all the adult members of a tarwad may give validity to a permanent alienation of tarwad property it does not appear that such consent would in any way raise a presumption that an alienation was for a tarwad necessity when the purpose for which the alienation was made is known. It is the duty in such circumstances of the Court to see whether the particular purpose amounts to a tarwad necessity. An alienation by a karnavan to be held valid must be found supported, (a) by consideration, and (b) by tarwad necessity and if the alienation is a permanent alienation consent of all the adult members must also be found. The consent of the adult members therefore cannot be considered sufficient to be a conclusive indication of tarwad necessity. Whether an alienation is for necessity or not would depend upon the specific purpose for which the alienation was made and the Court has to find whether such purpose would come under the category of necessities recognised by law. The starting of a new trade or business has been held not to be a family necessity under the Hindu Law in non-trading communities. Even if all the adult members join in the starting of the business or trade the minors cannot be bound. See 'SANYASI CHARAN v. KRISHNANDAN', 49 Cal 560 & 'BENARES BANK LTD. v. HARI NARAIN', 54 All 504."

(9) In the light of the principles laid down in the above cases we must hold that the starting of a new trade was not a family necessity so far as the tarwad of plaintiff and defendants 2 to 11 was concerned. It is not the 1st defendant's case that the plaintiff and defendants 2 to 11 belong to a trading community or that they had any trade of their own before the date of Ex. I. It is true that P.Ws. 1, 2 and 3 swear that some of the members of the tarwad conducted a shop for some time after the date of Ex. I. But that does not show that trade was the family business of the members of the tarwad. The 1st defendant's evidence is to the effect that to his knowledge the trade lasted for two years. There is nothing to show that the tarwad made any profit out of it. In these circumstances it cannot be held that the starting of the trade was a tarwad necessity for which tarwad properties could be alienated.

(10) We therefore hold that the consideration for Ex. I to the extent of 3800 fanams is not supported by tarwad necessity and that therefore Ex. I is not binding on the tarwad to that extent. Ex. I has therefore to be set aside to that extent. In view of the fact that Ex. I is set aside the decree in O. S. No. 7793 of 1102 of the Trivandrum Munsiff's Court which is virtually for arrears of interest on the mortgage amount and for recovery of properties on the basis of Ex I mortgage and the lease deed based on it has also to be set aside. Since Ex. I is found to be supported by consideration and tarwad necessity to the extent of fanams 3200 the 1st defendant is entitled to that amount and interest on it till the date of his obtaining possession of the properties, i.e. 15-8-1106. The annual pattom fixed in the lease deed is Rs. 120/-. The proportionate pattom for Fs. 3200 will be 120 X 32/70. Calculated on that basis the 1st defendant will be entitled to Rs. 263 as interest from 28-10-1106 to 15-8-1106 on the amount of Fs. 3200. As this is more than a moiety of the principal only 600 fanams can be allowed as interest. The plaintiff can be allowed to recover possession of the properties only on payment of Fs. 4800 to the 1st defendant.

(11) We therefore set aside Ex. I mortgage and the decree and execution proceedings in O. S. No. 1793 of 1102 of the Trivandrum Munsiff's Court and allow the plaintiff to recover possession of the plaint properties on behalf of his tarwad on deposit in Court for payment to the 1st defendant fanams 4800. From the date of deposit of that amount with notice to the 1st defendant the plaintiff will be entitled to get mesne profits from the 1st defendant at the rate of Rs. 120/- per year till the date of recovery of the properties or for three years whichever is earlier..

(12) In the circumstances of this case we direct the parties to suffer their respective costs both here and in the lower Court. The decree of the lower Court is set aside and the appeal is allowed in the manner stated above.

R.G.D. *Appeal allowed.*

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KUNHI RAMAN C. J.

AND SUBRAMANIA IYER J.

Velumpi Kochupennu and another, Appellants v. Sankaran Krishnan and others, Respondents.

Second Appeal No. 134 of 1951, D/- 30-8-51.

(a) Evidence Act (1872), Ss. 101-103 — Objection to onus — Party accepting burden of proof in trial Court — He cannot complain about it in appeal — Practice.

Where the plaintiff has accepted the onus of proof cast on him and has a finding against him, he is not entitled to turn round in a Court of appeal and say that the onus is on the other side and that they have not discharged it. **(Para 4)**

When, upon the evidence adduced by the plaintiff, he has not merely not discharged the onus that was cast upon him, but has positively disproved his case, there is no need for the defendants to adduce any evidence on their side. The defendants are entitled to rely upon the evidence adduced by or on behalf of the plaintiff and pray for a dismissal of the suit if that would be justified by such evidence, even though they have not adduced any evidence on their side and in such a case it is competent for the Court to dismiss the plaintiff's suit upon such evidence. 21 Ind Cas 96 (Mad); AIR (8) 1921 Lah 284 and AIR (21) 1934 Lah 1019, Rel. on. **(Para 4)**

Anno: Evidence Act, Ss. 101-103 N. 12.

(b) Malabar Law — Tarwad — Acquisition of property by karnavan and senior ananthiravan — Nature of.

In the absence of any detriment to the estate of the tarwad the property acquired by members of a tarwad belongs to the acquirers in their own right albeit they were the karnavan and the senior ananthiravan of the tarwad, as that fact by itself will not operate to impress upon it the character of tarwad property. The junction of the senior ananthiravan with the karnavan may lead to the inference of the binding character of an alienation of tarwad property. That principle however has no application to the case of an acquisition of properties by the two together which are claimed by them as their own. **(Para 6)**

The person claiming the property for the tarwad will have to show that the nucleus was substantial if not ample, and available to the acquirer to admit of the acquisition being made from out of that nucleus or out of the income thereof. AIR (38) 1951 Trav-C 135 and A. S. No. 199/1121 (TC), Rel. on. **(Para 11)**

K. N. Narayanan Nair, for Appellants; K. Velayudhan Nair, for Respondents.

Cases referred to:

('21) AIR (8) 1921 Lah 284: (4 Lah L J 426) (Pr 4)

('34) AIR (21) 1934 Lah 1019 (2) (Pr 4)

('13) 25 Mad L J 281: (21 Ind Cas 96) (Pr 4)

29 T L T 26 (Pr 11)

('50) 1950 K L T 735: (AIR (38) 1951 Trav-C 135) (Pr 11)

SUBRAMANIA IYER, J.: The suit (O. S. 588/1122, Munsiff's Court, Pathanamthitta) out of which this Second Appeal arises was brought by a member of an Ezhava Tarwad consisting of 7 members, a mother, her three sons, one daughter and two grand-children by that daughter. The plaintiff is the youngest of the sons. The 5th defendant is the eldest son and the 4th defendant is his younger brother. The remaining members of the tarwad are not on record. The 1st defendant is the wife of the 5th and defendants 2 and 3 are their daughter and son-in-law respectively.

(2) The suit was for setting aside two documents, Ex. A dated 26-9-1114 which is a deed of sale executed by the 4th defendant in favour of his brother's wife, the 1st defendant and Ex. B dated 15th Thulam 1119 which is an Udampadi executed in favour of defendants 2 and 3 being a deed of settlement in their favour made for their marriage. These documents were sought to be set aside on the ground that the properties comprised therein belong to the tarwad of the plaintiff that the documents are unsupported by consideration in so far as the tarwad is concerned, and that they were not executed for any necessity of the tarwad. The properties are claimed on behalf of the tarwad on the ground that they were purchased in the names of defendants 4 and 5 with tarwad funds. (See paragraph 3 of the plaint) Paragraph 6 of the plaint stated that the properties continue to be in the possession of defendants 4 and 5 on behalf of the tarwad despite the aforesaid documents and on that basis the only relief that was prayed for originally was the setting aside of the documents.

(3) The 1st defendant and defendants 2 and 3 by separate written statements contended, 'inter alia', that the properties in question were the self-acquisitions of defendants 5 and 4, that the tarwad of the plaintiff had no manner of right to or possession of the properties, and that pursuant to the documents aforesaid the properties were in their possession. They also contended that the 5th defendant was living with and was in management of the properties of the 1st defendant and was in possession of the income derived from those properties until recently when he fell out with her and their children and filed O. S. Nos. 534 and 537 of 1122 in the Pathanamthitta Munsiff's Court, that the present suit is engineered by him through the plaintiff on account of that estrangement, that the tarwad of the plaintiff had no funds for the purchase of the properties and that the only property of the tarwad which was a house and a small slice of a paramba appurtenant thereto measuring 62 cents were and have been in the possession and enjoyment of the mother, her daughter, son-in-law, and grand-children. The plaintiff filed a written statement after the above defence was entered wherein he averred that the properties belonging to the 1st defendant besides those obtained by her on partition in her tarwad, were purchased for her by the 5th defendant from out of his own funds.

The issues framed in the case were as follows:

"1. Has the plaintiff any right to the schedule properties?

2. Is the plaintiff entitled to question the documents in favour of defendants 1, 2 and 3.

3. Are the schedule properties the tarwad properties of plaintiff.

4. To what relief is the plaintiff entitled.

5. What is the order as to costs.

(4) The plaintiff on whom the burden was cast on all the issues did not enter any protest to the burden having been so cast but on the other hand endeavoured to shoulder that burden by adducing oral and documentary evidence in the shape of Exs. A to G and his own sworn testimony as the only witness on his side. It seems to us that the plaintiff having accepted the onus and having a finding against him, is not entitled to turn round in a Court of appeal and say that the onus is on the other side and that they have not discharged it. We do not however desire to rest our decision in this case upon that disability of the plaintiff. When, upon the evidence adduced by the plaintiff, he has not merely not discharged the onus that was cast upon him, but has positively disproved his case, there is no need for the defendants to adduce any evidence on their side. The defendants are entitled to rely upon the evidence adduced by or on behalf of the plaintiff and pray for a dismissal of the suit if that would be justified by such evidence, even though they have not adduced any evidence on their side and in such a case it is competent for the Court to dismiss the plaintiff's suit upon such evidence. (See 'RUTHNA GRAMANY v. N. VEERABUDRA AIYAR', 25 Mad L J 281; 'JADUNATH v. RAMUN MAL', AIR (8) 1921 Lah 284 and 'BISHAMBAR DAS v. TELU RAM', AIR (21) 1934 Lah 1019 (2).

Exhibits F and G are petitions for recording compromise of the suits O. S. Nos. 534 and 537 of 1122 and have no relevancy to the question at issue in this case, except perhaps to show that though there was estrangement between the 5th defendant and his wife and children there had been a reapproachment during the course of the proceedings in the present suit. Ex. C dated 8th Thulam 1097 is the document under which the properties in question were purchased in the names of defendants 4 and 5. The consideration was Rs. 294/- made up of Rs. 275/- reserved to be paid to a creditor of the vendors on or before the 30th Makaram of that year and Rs. 19/- stated to have been received in cash from the vendees. At the time of purchase, the property was a vacant paramba. The house that there exists now was put up by the 5th defendant for the residence of his wife and children who are living there. Exhibit E is a deed of gift executed by the father of the plaintiff, defendants 4 and 5 and their sister, in favour of their mother in the year 1073.

It is admitted by the plaintiff in his deposition that that property which is the residential house was the only property possessed by the tarwad at the time of Ex. C, that it was registered in the name of the mother in the Revenue records, that the tax is being paid by her, and that she, her daughter and grand-children are living in the house and taking the usufruct therefrom, whose value is admitted by the plaintiff to be not more than Rs. 100/- per annum. It is admitted by the plaintiff that this income would be insufficient for the maintenance even of the members resident in the house and that the deficit is made up by the 5th defendant by his own earnings. It is also admitted that defendants 4 and 5 are and have been living in the houses of their respective wives.

(5) At the time of Ex. C, the plaintiff was a student aged about 12 or 13. After he attained majority and married he is also living in the house of his wife.

(6) The plaintiff relies upon Ex. D dated 9th Kumbhom 1097 which is a deed of hypothecation executed by the plaintiff's mother, defendants 4 and 5, and their sister, who were all the major members of the family at the time, to secure future subscriptions to a chitty in which defendants 5 and 4 had each taken a half ticket. Exhibit D recites that the one ticket thus owned by the two brothers was prized by them at the auction, that the net amount due to them namely Rs. 200/- was paid to them and that the amount of Rs. 140/- due by way of future subscriptions to the chitty would be paid in instalments as specified therein for which the executants undertook personal liability and the properties comprised in Ex. E were given as security for the aforesaid obligation. The plaintiff relies particularly upon the recital contained in this document that the prize money was meant for payment towards the balance of sale price under Ex. C. The amount reserved under the sale deed is stated to be payable on or before the 30th Makaram. The receipt of the chitty prize money was in the next month.

Besides producing this document and relying upon the aforesaid recital therein, the plaintiff has made no attempt to link up the prize money with the balance sale price. His version that the prize money was utilised towards payment of the sale price is hearsay as his information is admittedly derived from his mother and sister, both of whom are alive and neither had been called as a witness. Assuming that the prize money was in fact utilised for payment in part satisfaction of the balance sale price, that fact does not operate in favour of the plaintiff as the chitty ticket which was prized belonged to defendants 4 and 5.

Indeed even the plaintiff does not claim the ticket of the chitty which stood in the names of defendants 4 and 5 as belonging to the tarwad. The prize money belongs to the owner of the ticket in the chitty. If on receipt of the prize money the owners thereof, that is, defendants 4 and 5 executed a deed to secure future subscriptions in the chitty, in which deed they sought the co-operation of their mother and sister and induced them to agree to the giving of tarwad property as security, the result would only be that for their own obligation, defendants 4 and 5 offered the tarwad property as security. This conduct of theirs is not such as to convert their property, that is the prize money, into tarwad property.

It is also not contended nor is it under the circumstances possible to contend on behalf of the plaintiff that the liability under Ex. E was discharged by or by use of any money belonging to the tarwad. It is thus obvious that there was no detriment to the estate of the tarwad in the matter of the acquisition of the property. In the absence of such detriment the property belongs to the acquirers in their own right albeit they were the karnavan and the senior ananthiravan of the tarwad as that fact by itself will not operate to impress upon it the character of tarwad property. The junction of the senior ananthiravan with the karnavan may lead to the inference of the binding character of an alienation of tarwad property. as according to one view the concurrence of the senior ananthiravan is presumptive proof of the consent of the other members. That principle however has no application to the case of an acquisition of properties by the two together which are claimed by them as their own.

(7) A scrutiny of Ex. D reveals a contrast between the properties secured thereunder, that is tarwad property, and the property for payment of whose price, the prize money is stated to have been received. Whereas the tarwad property is mentioned as belonging to all the executants, the other property is mentioned as belonging to defendants 4 and 5. Far from being evidence in favour of the plaintiff to prove the tarwad character of the properties in question, Ex. D demonstrates that those properties are the self-acquisi-

tions of defendants 4 and 5 and that fact is admitted by their mother and sister.

(8) It is thus clear that the plaintiff by the averments in his pleadings as also by his evidence not merely has not proved his case of purchase of the property in question by the funds of the tarwad, but he has effectively disproved the possibility of that case being made out. It is admitted by the plaintiff that the only property that the tarwad had was such as not to yield anything from out of which any part of the purchase price was or could have been paid. It is admitted that the 5th defendant though he is the eldest male member of the tarwad, was not in possession and management of the only tarwad property which was the residential house and the appurtenant compound. It is admitted that the 5th defendant had his own sources of income and that by his earnings he maintained his mother and sister and besides, purchased properties for his wife.

(9) Under these circumstances, the learned Munsiff found against the plaintiff upon all the issues and dismissed the suit. The learned Temporary Second Judge of Mavelikara who heard the appeal against the decree of the Munsiff, in a very short judgment, set out the facts in paragraph 1 by quoting entirely from the judgment of the Munsiff. In paragraph 2 he stated that the Munsiff dismissed the suit and hence the appeal. In paragraph 3 he poses the question thus:

> "The only point arising for determination in the appeal is whether the plaint schedule properties are the tarwad properties of plaintiff and defendants 4 and 5 or are they the self-acquisitions of defendants 4 and 5."

He then proceeds to say that

> "the specific case put forward by the 1st defendant is that the plaint schedule properties were purchased by defendants 4 and 5 with their separate funds. The burden of proof is heavily on the defendant to establish her case. There is absolutely no evidence except her interested testimony. Defendants 4 and 5 are respectively to karnavan and senior ananthiravan of the plaintiff's tarwad. The plaint schedule properties were acquired in the names of defendants 4 and 5 under Ex. C.
>
> The plaintiff's case is that the tarwad funds were utilised for purchasing schedule properties and for that plaintiff relies on Ex. D hypothecation bond. Ex. D is admittedly for tarwad properties of plaintiff and defendants 4 and 5. It is clearly stated in Ex. D that the amount secured thereunder was to be utilised for paying the consideration under Ex. C. The evidence of P. W. 1 when taken along with Ex. D clearly shows that Ex. C properties were acquired with the funds belonging to the tarwad by hypothecating tarwad properties. In these circumstances and in the absence of any evidence on the defence side, I believe P. W. 1 and his evidence and hold that the plaint schedule properties are the tarwad properties of the plaintiff and defendants 4 and 5".

(10) We cannot help remarking that the treatment of the case by the learned Temporary Second Judge is perfunctory and far from satisfactory. If he had looked into the evidence in the case, the facts and circumstances mentioned in our judgment would have been obvious. They are not matters of a controversial character where different views are possible. All the considerations relevant to the issue alike converge towards the only conclusion possible viz., that the properties in question are the self-acquisitions of defendants 4 and 5. The learned Judge says that he believes P. W. 1. If he does so, he has to decide against him because the only matters on which he gives evidence are not in favour of his case and his statement about the use of the prize money in the chitty is hearsay and is therefore no evidence. Even if that statement is taken to be true, it does not lead to any result in favour of the plaintiff. Under the circumstances, it is surprising that the learned Judge rested his conclusion on a presumption of tarwad character of the properties in question stated to have arisen on account of the fact that defendants 4 and 5 in whose names the properties were purchased happened to be the karnavan and senior ananthiravan of the plaintiff's tarwad.

(11) On the facts and circumstances of this case, there is no scope for the application of any presumption or for resting the conclusion of the Court on onus of proof. We may however refer to our decision in 'NARAYANAN KRISHNAN v. KALI LEKSHMI', 1950 K L T 735: AIR (38) 1951 Trav-C 135 where we have considered the question and said that:

> "the person claiming the property for the tarwad will have to show that the nucleus was substantial if not ample, and available to the acquirer to admit of the acquisition being made from out of that nucleus or out of the income thereof."

The latest decision of the erstwhile Travancore High Court which we could then lay our fingers on and which we followed, was 'PADMANABHAN RAMAN v. KRISHNAN RAGHAVAN', 29 T L T 26 which was of the year 1119. A still later decision of the same High Court which conforms to our view is the decision of Sankaran Subbaier J., sitting with another learned Judge in 'A. S. No. 199/1121' which, having been unreported, escaped our notice then. It is said that "the law is the last interpretation of the law given by the last Judge". If so Mr. Justice Sankara Subbaier's is the law on the point so far as the erstwhile Travancore High Court is concerned. The learned Judge starts the discussion and poses the question thus:

> "Point No. 3. This is the most important question for decision in the appeal. It was not urged before us that Narayanan Nair was not the eldest male member of his sub-tarwad. The lower Court held that the income from plaint A schedule items 1 and 9 constituted the nucleus for acquisition of the other plaint schedule items. We have therefore to see first whether A schedule items 1 and 9 were sub-tarwad acquisitions and whether the income from them afforded sufficient nucleus for the acquisition of other properties."

and concludes thus:

> "Item 9 of A schedule was first acquired under a mortgage of 1080. The mortgage stands in the name of Narayanan Nair alone. Exhibit F is a purakadom in respect of the same item and that also stands in the name of Narayanan Nair alone." "As we have already stated, there is no proof that the sub-tarwad had sufficient nucleus for acquiring properties. It is also in evidence that each of the defendants 1 to 6 has separate puduval registries of his own."

In the circumstances the learned Judge held that the properties were not tarwad properties, quite correctly, if we may say so, with respect.

(12) The result is that the Second Appeal should be allowed. We set aside the decree of the Temporary Second Judge of Mavelikara in A. S. No. 71 of 1125 and rstore that of the Munsiff. The plaintiff will pay the costs of the appellant here and in both the Courts below.

V.B.B.

Appeal allowed.

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FULL BENCH

KOSHI, C. J., GOVINDA PILLAI AND JOSEPH VITHAYATHIL, JJ.

State v. E. C. Govindan Asan and Sons and others, Cr-Petitioners.

Criminal R. P. Nos. 365 to 369 of 1124 (T), D/- 29-2-1952.

General Clauses Act (1897), S. 10 (1) — Six months' period in S. 75, Factories Act is governed by S. 10 — (Factories Act (1935), S. 75) — (Travancore Factories Act (VIII (8) of 1114) S. 75) — (Travancore General Clauses Act (II (2) of 1072), S. 10 (1).

The six months' period prescribed in S. 75 of the Factories Act is governed by S. 10 of the General Clauses Act; so that if the six months expired on a gazetted holiday, the complaint could be filed on the next day when the Court sat. AIR 1942 All 429, Rel. on; AIR 1935 Mad 857, Dissent from. Case law discussed.

(Para 6)

Anno: Factories Act, S. 75 N. 1; Gen. Clauses Act, S. 10 N. 3.

N. Kumaran Achan, Public Prosecutor, for the State; N. K. Narayana Pillai, for Cr-Petitioners.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('39) AIR 1939 All 403: (ILR (1939) All 647 F B) (Pr 2)

('42) AIR 1942 All 429: (ILR (1943) All 84 (FB)) (Prs 2, 3, 6)

('34) AIR 1934 Mad 294: (150 Ind Cas 339) (Pr 4)

('35) AIR 1935 Mad 857: (58 Mad 794 F B) (Prs 3, 4)

('37) AIR 1937 Mad 433: (170 Ind Cas 65) (Pr 4)

('38) AIR 1938 Mad 898: (ILR (1939) Mad 24) (Pr 4)

('38) AIR 1938 Nag 454: (178 Ind Cas 479) (Pr 4)

16 Trav L R 163 (Pr 4)

('03) 19 Trav L J 113 (Pr 4)

(1913) 82 L J K B 949: ((1913) 2 K B 549) (Pr 5)

ORDER.: All these petitions are filed by the State to revise and set aside the orders passed by the learned First Class Magistrate, Chengannoor, in C. C. Nos. 15 to 19 of 1124. The complaints were filed by the Inspector of Factories, Kottayam, with the sanction of the District Magistrate, against the occupier and manager of certain cashew factories, for offences said to have been committed by them in not providing with the necessary amenities in the factories as directed in the Factories Act VIII (8) of 1114. The Inspector of Factories found on 6-8-1123 that the accused had contravened the provisions of Sections 20, 32 (b) and 51 of the Factories Act, and Rule 67 framed under Section 22 and had committed an offence punishable under Section 74 (2) of the said Act. Section 75 of the Act provided that no Court was to take cognisance of any offence under the Act or any rule or order thereunder, other than an offence under Section 62 or Section 64, unless a complaint thereof was made within six months of the date on which the offence was alleged to have been committed. The offences in these cases were said to have been committed on 6-8-1123. But the complaints were filed only on 6-2-1124. That was beyond six months and not within the period as provided for in Section 75 of the Factories Act. The learned Magistrate therefore dismissed all the complaints as being late and hence not cognizable.

(2) When these Revision Petitions came up for argument before a Single Judge of this Court it was thought proper to refer the whole case for decision by a Full Bench on the important question regarding the applicability of Section 10 of the General Clauses Act to the actions taken pursuant to special statutes which provide for definite period of limitation, apart from those given in the Limitation Act. The views of the several High Courts were conflicting.

(3) The offences committed were detected on 6-8-1123. The complaints should therefore have been filed on or before 5-2-1124. The fifth 'Kanni' 1124 being the 'Samadhi' day of Sri Narayana Guru, was a holiday. The learned Government Pleader, therefore, stated that under Section 10 of the General Clauses Act a complaint filed on the next working day would be sufficient. Section 10 reads as follows:

> "Where, by a Regulation to which this Chapter applies, any act or proceeding is directed or allowed to be done or taken in a Court or office, on a certain day or within a prescribed period, then, if the Court or Office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or Office is open."

The Factories Act VIII (8) of 1114 was an Act passed long after the General Clauses Act II (2) of 1072. So, by force of the provision in Section 3 of Act II (2) of 1072, Chapter 2 will apply to all Acts passed after the commencement of the General Clauses Act, unless a contrary intention appears in the Act thus passed after the passing of Act II (2) of 1072. There is nothing in the Factories Act to indicate that the provisions in the General Clauses Act are not to apply to the same. There are certain findings in 'CHENCHURAMANA v. ARUNACHALAM', AIR (22) 1935 Mad 857, a Full Bench decision of the Madras High Court that if the period of limitation for doing any act under the provisions of a statute is mentioned in the statute itself, then, neither the provisions of the Limitation Act nor those of the General Clauses Act will be allowed to be applied to extend the said period.

That case arose on an application under the Insolvency Act. Section 9 (1) (c), of the Provincial Insolvency Act provided that a creditor shall not be entitled to present an insolvency petition against a debtor unless the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition. It was mentioned in that case that this period is a condition precedent to the filing of the petition, that is to say, the petitioning creditor must, on the day when he presents his petition, have in view some act of insolvency which the debtor has committed within the preceding three months.

It was further stressed that the petitioning creditor has to see on the date of the presentation of his application, and on that date only, what acts of insolvency are available to him, and that he cannot make use of any act of insolvency which has been committed outside the period of three months as that has ceased to be an act of insolvency. Thus, if the three months expired on a gazetted holiday, an application filed on the succeeding working day was held as not to give the petitioning creditor the right to present the

petition in insolvency. Practically, the same is the provision in the Factories Act, which provides that no Court is to take cognizance of any offence unless the complaint is filed within six months of the commission of the offence.

The view taken by the Madras High Court has not been adopted by the other Indian High Courts. In 'RAJA PANDE v. SHEOPUJAN PANDE', AIR 1942 All 429, a Full Bench of Allahabad High Court held that Section 10 of the General Clauses Act, applied to a creditor's petition of insolvency filed under Section 9 of the Provincial Insolvency Act, and that consequently, if the period of three months prescribed by Section 9 (1) (c) expired on a day when the Court was not sitting the petition could be validly presented on the next day when the Court was sitting. In that case the Court relied on the definition of period of limitation given by the late Sir John Thom, C. J., in 'DURAGPAL SINGH v. PANCHAM SINGH', AIR 1939 All 403, thus:

"It appears to me that if the result of a statutory provision is in substance to fix a period within which a person must take appropriate and necessary action if he desires to assert his rights in a Court of law, that provision prescribes a period of limitation."

(3) Iqbal Ahmed, C. J., had given his reasons for applying Section 10 of the General Clauses Act to proceedings in insolvency at pages 433 and 434 of AIR 1942 All 429, thus:

"I, however, consider that S. 10, General Clauses Act, applies to the proceedings under the Provincial Insolvency Act. That section has been quoted above, and it has been pointed out that its practical effect is the same as that of S. 4, Limitation Act. It is well-known that the Provincial Insolvency Act of 1920 was modelled on the lines of the English Bankruptcy Act of 1914, and, indeed, some sections of the Indian Act have been copied verbatim from the English Act. In the English Act there exists a provision similar to S. 10, General Clauses Act: 'Vide' S. 145, Bankruptcy Act. The Legislature did not reproduce S. 145 of the English Act in the Provincial Insolvency Act for the simple reason that the General Clauses Act governs the Provincial Insolvency Act, and, as such the provisions of S. 10, General Clauses Act, apply to proceedings under the Provincial Insolvency Act.

It would be noted that S. 10 does not speak of the period of limitation' and applies to 'any act or proceeding' which is directed or allowed to be done by any Central Act or Regulation. That the presentation of an insolvency petition under S. 9 (1) (c), Provincial Insolvency Act, is an 'act or proceeding' within the meaning of S. 10 admits of no doubt. I am, therefore, clear that, in view of the provision of S. 10, the petition presented by Sheopujan on the date that the Court re-opened was within time.

Before concluding this judgment, I must deal with the question whether or not the period of three months referred to in S. 9 (1) (c), Provincial Insolvency Act, is a period of limitation. To my mind it is. A 'period of limitation' is, I consider, synonymous with a 'time limit' for proceedings in a Court of law. The period of three months in Sub-clause (c) of S. 9 (1) does impose a limit of time about the presentation of an insolvency petition and is therefore a 'period of limitation' A period of limitation is in one sense a condition precedent to the enforcing of rights and remedies in a Court of law. It is in this sense that one may call the period of three months prescribed for the presentation of insolvency petitions as a condition governing such petitions. Nevertheless, it does not cease to be a period of limitation. But, as already indicated, whether it is or it is not a period of limitation, S. 10, General Clauses Act, must apply to petitions for insolvency. For the reasons given above, I hold that the order of remand passed by the learned District Judge is perfectly correct and accordingly, I would dismiss this appeal with costs."

(4) It would appear that the interpretation put on by the Madras High Court was too technical, though the said ruling had been followed in 'KUMARAPPA CHETTIAR v. CHIDAMBARAN CHETTIAR', AIR 1938 Mad 898 and 'VENKATA RAMA LAKSHAMAYYA v. SUBBA RAO', AIR 1937 Mad 433. There was another ruling of the Madras High Court in 'NARAYANA AYYAR v. OFFICIAL RECEIVER, SOUTH MALABAR', AIR 1934 Mad 294, wherein a contrary view had been taken. It was a decision by a Single Judge, Krishnan Pandalai, J. This was commented upon and overruled in 'CHENCHURAMANA v. ARUNACHALAM', AIR 1935 Mad 857. The Nagpur High Court, in 'BALKISAN v. BHANUPRASAD', AIR 1938 Nag 454, had followed 'NARAYANA v. OFFICIAL RECEIVER, SOUTH MALABAR', AIR 1934 Mad 294, and held that the periods mentioned in the Insolvency Act were governed by the General Clauses Act.

When Section 3 of the General Clauses Act laid down that the provisions in Chapter II of the Act would apply to all Acts passed subsequently unless a contrary intention appeared therefrom, it would not be proper to contend that Section 10 of the General Clauses Act was to apply to statutes which provided for periods of limitation in the provision contained therein. There was a ruling of the Travancore High Court in 'DEVASIVA CHANDY v. OUSEPH', 19 Trav L J 113, which held that Section 10 of the General Clauses Act would apply to the periods of limitation prescribed by the Insolvency Act, and that if on the last day of the prescribed period of three months mentioned in Section 6 (4) of the Travancore Insolvency Act in force then, corresponding to Section 9 (1) (c), of the Provincial Insolvency Act, the Court in which the creditor should file his application was closed, the creditor would be regarded as in time if he filed his application on the next day afterwards on which the Court re-opened.

Mention has to be made here of a Full Bench decision of the Travancore High Court in 'KOCHOONNI v. DEVASIA', 16 Trav L R 163. The case referred to the right of a non-Malayali Brahmin 'Jenmi' to eject his 'Kanapattom' tenant. S. 1 of the Jenmi & Kudiyan Act, while enacting that the said Act was to come into force throughout Travancore on the first day of 'Makaram' 1072, provided 'inter alia' that Paragraph 2 of Section 5 shall come into force on first 'Chingom' 1074. On this later date, the tenants of non-Malayali Brahmin 'Jenmis' would acquire a permanent right of occupancy in their holding. The non-Malayali 'Jenmis' were allowed time till the first 'Chingom' 1074 to file suits for eviction. Such a 'Jenmi' filed the suit on the second 'Chingom' 1074 because the last day of 'Karkatakom' 1073 and the first day of 'Chingom' 1074 were gazetted holidays. The question therefore for consideration in that case was whether such a suit would be within time as provided in the Jenmi and Kudiyan Act.

Since by a declaration in the Act a permanent occupancy was granted to the Kudiyan of a non-Malayali Brahmin 'Jenmi' from the first 'Chingom' 1074, it was held that such substantive right of

permanent right of occupancy conferred by an express statute from and after a particular date could not be defeated by any proceeding taken after the accrual of the said right. The said provision in the Jenmi and Kudiyan Act was not one prescribing any limitation for the purpose of suits. On the other hand, the statute had declared a substantive right from a particular date so that any person who wanted to get over the same should file the suits before the right accrued to the tenant. It was, therefore, held that the suit filed on the second day of 'Chingom' 1074 could not be maintained as the Jenmi and Kudiyan Act could not be held in abeyance by the Courts on any ground not provided for by that statute. Since the Jenmi and Kudiyan Act had been promulgated before the General Clauses Act, the application of the General Clauses Act to the Jenmi and Kudiyan Act would not arise for consideration in the present instance.

(5) The counter-petitioners' learned Advocate had referred to paragraphs 212 and 213 of page 144 of Halsbury's Laws of England, Volume 32. For purpose of easy reference these two paragraphs are given below:

"212. The fact that the last day of a prescribed period is a Sunday or other holiday does not generally give the person who is called upon to act an extra day; it is no excuse for his omission to do the act on some prior day."

"213. The general rule does not hold good where the effect of it would be to render performance of the act impossible. This would be the case if it happened that the whole period during which the act could be done consisted of holidays, in which case the act may lawfully be done on the next possible day.

"Again, the general rule does not hold good where the last day is a Sunday and the act to be done is one the performance of which on a Sunday is prohibited by the Sunday Observance Act, 1677 or where the act to be done has to be done, not by the party only; but by the Court or by the party in conjunction with the Court. In such cases the act may, when the last day limited for the performance of it happens to be a day when the Court or its office is closed, be done on the next practicable day."

The exception to the general rule laid down above would apply to the present case when the last day limited for the doing of an act happened to be a day when the Court was closed. The principle laid down in Section 10 of the General Clauses Act had therefore been accepted in paragraph 213 referred to above and so it is not a passage that would help the counter-petitioners. Reference had also been made to 'GELMINI v. MORIGGIA', (1913) 82 L J K B 949: (1913) 2 K B 549, for the position that when a particular period is mentioned in any act for commencing any action, the action should be commenced within the period thus prescribed. This principle could not be applied because the law there is different. Apparently there was no provision corresponding to Section 10 of the General Clauses Act. It is therefore no authority for the position in hand.

(6) We are, therefore, of the view that the position taken by the Allahabad High Court in 'RAJA PANDE v. SHEOPUJAN PANDE', AIR 1942 All 429 (FB), is more in accordance with the principles of equity and justice. We prefer to follow the same and hold that the six months' period prescribed in Section 75 of the Factories Act is governed by Section 10 of the General Clauses Act; so that if the six months expired on a gazetted holiday, the complaint could be filed on the next day when the Court sat. The view of the learned Magistrate that the action started by the Inspector of Factories is barred by limitation is not correct.

In the present case we wish only to point out this mistake to the Subordinate Magistrates. The offence alleged was of a technical nature and it was alleged to have been committed nearly four years ago. We do not think that the continuance of the proceedings in the case would serve any useful purpose and so we do not order the re-entertainment of the complaints for trial and disposal. After laying down the general principle that is to govern matters of the kind before us, we dismiss all the revision petitions.

V.R.B. *Petitions dismissed.*

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SANKARAN AND GANGADHARA MENON JJ.

Chacko Ninan, Appellant v. Lekshmikutty Pillai Amma, Respondent.

Second Appeal No. 704 of 1951, D/- 22-10-1951.

Debt Laws — (Travancore-Cochin) Holdings (Stay of Execution Proceedings) Act (VIII (8) of 1950), S. 4 — Availability of amount of value of improvements payable to landlord decree-holder does not amount to payment or deposit of pattom by tenant judgment-debtor.

The provisions of the Act have to be strictly construed and applied. (Para 1)

The availability of an amount by way of value of improvements payable to the judgment-debtor (tenant) in the hands of the decree-holder (landlord) will not amount to payment or deposit of the pattom by the judgment-debtor within the meaning of S. 4. That amount may be available to the decree-holder for the purpose of set off against arrears of pattom whenever recovery of possession of the property is sought for after such set off. Until such set off is made the defendant judgment-debtor will be defaulter. When he became a defaulter he forfeited the benefit of the stay allowed by S. 4 of the Act, and became liable to be evicted as per the terms of the decree. (Para 1)

P. I. Simon, for Appellant; V. G. Sankaranarayana Pillai, for Respondent.

JUDGMENT: Defendant is the appellant. He is a lessee of the suit property and there is a decree in favour of the plaintiff lessor for recovery of possession of the property on payment of the amount fixed as the value of the improvements effected by the defendant. The decree has also allowed recovery of future pattom at the rate of Rs. 15/- chs. 11 per year. Such pattom was payable on 18th of Vrischigom every year. The final decree was passed on 15th December 1950. During the suit and even after decree the defendant has not paid or deposited any pattom. On 15-2-1951 the decree-holder applied for recovery of possession of the property on deposit of the balance amount due to the defendant after setting off the arrears out of the value of improvements. The defendant objected and contended that in view of Act VIII of 1950 he is not liable to be evicted from the holding. This is a special statute conferring a temporary relief on lessees in possession of the property. The provisions of this statute have necessarily to be strictly construed and applied. Under S. 4 of the Act execution of decree for eviction has been stayed subject to certain conditions. The proviso to the section says that the benefit of such stay will not be available to a tenant who has failed to pay the rent of the holding which has accrued due after the commencement of the Act. The

Act came into force on 5th April 1950. Subsequent to that Act and before the date of the execution, one instalment of pattom had fallen due and the defendant defaulted to pay or deposit the same. Thus he has become a defaulter as contemplated by the proviso to S. 4.

It is contended on behalf of the defendant that there was still a balance amount by way of value of improvements payable to him by the defendant. But the availability of such an amount in the hands of the plaintiff will not amount to payment or deposit of pattom by the defendant. That amount may be available to the decree-holder for the purpose of set off against arrears of pattom whenever recovery of possession of the property is sought for after such set off. Until such set off is made the defendant will be defaulter. When he became a defaulter he forfeited the benefit of the stay allowed by S. 4 of the Act, and became liable to be evicted as per the terms of the decree. The lower Court's order to that effect has therefore to be upheld. In the result this appeal is dismissed with costs.

V.B.B. *Appeal dismissed.*

A. I. R. 1952 Travancore-Cochin 191

KUNHI RAMAN C. J.

AND JOSEPH VITHAYATHIL J.

Devassy, Appellant v. Sankaranarayanan Namboodiri, Respondent.

Second Appeal No. 39 of 1125, D/- 21-11-1951.

Transfer of Property Act (1882), S. 63 A — Redemption suit — Mortgagee claiming value of improvements — Mortgagee denying liability for improvements in suit against tenants — Estoppel — 'Res judicata' — (Evidence Act (1872), S. 115) — (Civil P. C. (1908), S. 11).

Where in a suit for redemption the mortgagee claimed the value of improvements and in a previous suit by him against the tenants for their eviction, he had denied any liability to pay for improvements, and to that suit the mortgagor was impleaded as a pro forma party.

Held that no case of estoppel was made out as no one was affected to his prejudice by the denial of the mortgagee, that there was no case of 'res judicata' because the mortgagor was impleaded in the former suit purely as 'pro forma' party and that therefore there was no legal impediment to the mortgagee claiming the value of improvements. **(Para 3)**

Anno: Evidence Act, S. 115 N. 36; C. P. C., S. 11 N. 12 Pt. 4, N. 46 Pt. 18.

V. Narayanan Menon, for Appellant; P. Raman Menon, for Respondent.

KUNHI RAMAN, C.J.: The first defendant is the appellant. The suit was for redemption of a mortgage. The only point that arises for consideration in this second appeal is as to whether the mortgagor is liable to pay the value of improvements claimed by the 1st defendant. The trial Court held that there were improvements to the extent of Rs. 632-13-3, which the mortgagor plaintiff was liable to pay at the time of redemption. There was an appeal to the District Court of Anjikaimal. The then Temporary Additional District Judge disallowed the value of improvements which was the main point pressed in appeal. The view taken by him is that in a prior suit which was filed by the present first defendant as plaintiff for eviction of defendants 4 & 6 who were his tenants in respect of the suit property, when a contention was raised by defendants 4 and 6 that they were entitled to the value of improvements, the present first defendant as plaintiff denied that there was any liability to pay for improvements. At the trial of that suit the issue that was framed regarding the value of improvements in that case was not pressed and, therefore, the Court passed a decree in eviction without making any provision for payment of the value of improvements. This appears from the records.

(2) The lower appellate Court in the present case referred to this incident and relying upon the authority of the case reported in '1122 Cochin 606' holds that the present first defendant must not be permitted "to blow hot and cold by the same breath." It is difficult to understand why any authority is needed for establishing such a proposition. However, the learned Additional Judge has quoted the authority. The question is whether the decision is attracted in the present case. It will be seen that in the earlier litigation the present first defendant did not deny that there were any improvements made on the property. He denied liability to pay for improvements and when the case came up for trial, the tenants who wanted to claim the value of improvements did not press their claim. A contention that a person is not liable to pay for improvements does not necessarily imply a denial that improvements were made. It may be due to other reasons which it is not necessary to specify at this stage. Moreover, the present plaintiff was impleaded in that suit as a 'pro forma' party against whom no relief was claimed.

(3) In these circumstances, the question is whether there is any legal impediment to the first defendant claiming the value of improvements when the mortgage in his favour is sought to be redeemed. There is certainly no case of estoppel made out, because it cannot be said that any one was affected to his prejudice as a result of the denial made by the first defendant in the prior suit that he was not liable for the value of improvements. It is not a case of 'res judicata' because the present plaintiff was impleaded in the earlier suit purely as 'pro forma' party. The law on the point is considered in Mulla's Commentaries on the Code of Civil Procedure (11th Edition), at page 34 where the relevant authorities are all collected in the foot-note at page 65. The learned author lays down the proposition of law in these two sentences:

> "A party may be joined as a defendant in a suit merely because his presence is necessary in order to enable the Court effectually and completely to adjudicate upon the question involved; See Order 1, Rule 10 (2) and Section 32 of the Code of 1882. In such a case no relief is sought against him and the matter in issue in the suit is not in issue between him and any other party, and cannot, therefore, be 'res judicata' against him."

It will thus be seen that there was no legal impediment to the contention urged on behalf of the first defendant in the Courts below that he was entitled to be paid the value of improvements. There is a finding by the trial Court as to what the improvements are which were not there when the mortgage was executed. The learned District Munsiff has also assessed the value of those improvements. There is no objection raised to this valuation. Nor is there any contention raised that the first defendant is not entitled to the value of improvements in his capacity as mortgagee. The only contention is the one that found favour with the lower appellate Court namely that he has been trying to blow hot and cold by the same breath. This is based upon the pleadings in the earlier litigation O. S. No. 889/119 which we have carefully considered and which we have pointed out

will not stand in the way of the claim made in the present suit for the value of improvements by the first defendant. In these circumstances, the decision of the lower appellate Court must be set aside and that of the District Munsiff restored. The appellant will have his costs here and in the Courts below.

V.R.B. *Appeal allowed.*

A. I. R. 1952 Travancore-Cochin 192

KUNHI RAMAN, C. J. AND SUBRAMANIA IYER, J.

M. D. Abraham, Appellant v. A. Philipose and others, Respondents.

A. S. Nos. 237 and 238 of 1123 and C. M. P. No. 789 of 1124 (T). D/- 20-3-1951.

Companies Act (1913), S. 211 — Voluntary winding up — Entire assets sold — Articles of association conferring special benefit on promoters in respect of profits — Promoters if entitled to special benefits in distribution of sale proceeds.

A limited liability company went into voluntary liquidation after succeeding in selling its estate for an unexpected price of over three lakhs of rupees. A liquidator was appointed for distributing the assets which were far in excess of the liabilities which were practically nil. The only persons who were entitled to payment were the share-holders and the promoters of the company, there being no depositors. The Memorandum and the Articles of Association of the company provided for conferring special benefits on the promoters after the share-holder's claims were satisfied to a certain extent. The articles dealt only with the legal rights of directors and promoters so long as the company continued to function as such and no provision was made in it for distribution of assets after the company had gone into liquidation. After the sale of the assets there was no declaration of any dividend. The promoters claimed the special benefit from the liquidator.

Held in the circumstances that the sale proceeds in the hands of the liquidator could not be called profits within the meaning of the arfiicles of association and, therefore, the promoters of the company were not entitled to any special privileges. The amount should be distributed among the share-holders 'Pro rata.' Case law Ref. (Para 10)

Anno: Companies Act, S. 211 N. 1.

K. T. Ninan, for Appellant in No. 237 of 1123; P. A. Oommen and K. Koruthu, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

(1937) 1937-2 All E R 322 (Pr 10)
(1889) 14 A C 525: (59 L J Ch 122) (Pr 10)
(1901) A C 477: (70 L J Ch 753) (Pr 5)
(1891) 1 Ch 140: (60 L J Ch 99) (Pr 10)
(1895) 2 Ch 576 (Pr 10)
(1899) 2 Ch 629 (Pr 5)
(1911) 1 Ch 92: (80 L J Ch 210) (Pr 10)
(1916) 2 Ch 115: (85 L J Ch 429) (Pr 10)
(1920) 1 Ch 193 (Pr 10)
(1927) 1 Ch 657: (96 L J Ch 328) (Pr 10)
(1933) 1 Ch 142: (102 L J Ch 121) (Pr 10)
(1889) 41 Ch D 1 (Pr 10)
(1924) 2 K B 52: (93 L J K B 709) (Pr 10)

KUNHI RAMAN C. J.: These appeals arise out of the liquidation of a limited liability company which was carrying on business under the name and style of Malankara Industrial and Mercantile Company, Limited., Triuvella. The object with which the company was started was to manage a tea estate belonging to the company and to trade in tea. The company went into voluntary liquidation after succeeding in selling its estate for an unexpected price of over three lakhs of rupees. A liquidator was appointed for distributing tne assets which were far in excess of the liabilities which were practically nil. The only persons who were entitled to payment were the shareholders and the promoters of the company, there being no depositors. If the persons entitled to share in the assets which the liquidator was called upon to distribute were the share-holders alone, there would have been no complication. But there is provision in the Memorandum and Articles of Association of the Company for conferring special benefits on the promoters after the shareholders' claims are satisfied to a certain extent. The promoters who are 14 in number claimed that special benefit from the liquidator who thereupon applied to the Court below for directions. The points on which the liquidator asked for directions were these:

"(1) Whether under Article 100 of the Articles of Association of the Company, the promoters could claim the special favours reserved under that article in the absence of declaration of a dividend by the company. The extent of the benefit is mentioned therein. It must be mentioned in this connection that the 'profits' available for division are not the profits made in carrying on the business of the company, but by an outright sale for a very high price of the whole estate to manage which the company was formed. On this question the Court below held that the promoters are entitled to the benefit contemplated by this claim although the condition that was alleged to have been fulfilled in favour of the shareholders had reference not to the distribution of dividend to the shareholders but of the price realised by sale of the assets of the company in their entirety.

(2) The promoters of the company were originally under an obligation to purchase a certain number of shares. The company had been in existence for 32 years. In the course of that period, some of the promoters had parted with their shares in favour of third parties. Therefore the question arose as to whether the special benefit reserved in favour of the promoters could be claimed by a promoter who had parted with all his shares in favour of third parties and did not hold any share on the date he claims such benefit. This question was answered by the lower Court in the affirmative.

(3) Another question on which directions were sought referred to the case of promoters who are dead. The question was whether their legal representatives or assignees of shares owned by them are entitled to the same benefit. This question was also answered in the affirmative by the Court below.

(4) The remaining questions dealt with shareholders whose whereabouts are not known or who were last known to have resided in enemy occupied country and shareholders who are dead, but whose legal representatives have not come forward to prove their claims. The question which was asked for clarification referred to the

procedure to be adopted by the liquidator in dealing with such cases. The answer given by the Court below was that the amounts coming under these categories must all be deposited in the Anchal Savings Bank in the names of the original shareholders with details as to why the deposit is made, so that they or their assignees or legal representatives may claim the amount in due course."

(2) In respect of these directions given by the Court below the liquidator has brought A. S. No. 237/1123, objecting to the correctness of the decision of the Court below. A. S. No. 238/1123 is brought by an ordinary shareholder who was not expressly impleaded as a party in the Court below, but who on the ground of his being an aggrieved party whose interests are prejudiced by the decision of the Court below has applied for leave to appeal (C. M. P. 789/1124), and has brought an appeal from the decision of the Court below. In fact he supports the contentions of the liquidator and therefore there is no conflict between his case and the case that is put forward on behalf of the liquidator. The liquidator is supporting the contentions of the ordinary shareholders as against the promoters of the company who are contending that they are entitled not only to distribution of the assets according to shares owned by them but also to the special benefits reserved in their favour by Article 100 of the Articles of Association.

(3) In view of the fact that there is no conflict between the case put forward by the ordinary shareholders who has brought A. S. 238/23 and the case of the liquidator in A. S. 237 of 1123 we grant his prayer contained in C. M. P. 789/1124 and permit him to prosecute his appeal which is fully supported by the liquidator and which is consistent with the contentions of the liquidator in his own appeal No. 237/1123.

(4) Interesting arguments have been addressed on the questions involved by Mr. Kuruvilla on behalf of the ordinary share-holders, which are the same as the arguments addressed on behalf of the liquidator, and by Mr. K. P. Abraham in support of the contention for special benefits on behalf of the promoters. These contentions centre round two questions of law. They are (1) when the entire property of the company is sold, can the price realised be called profits within the meaning of the Articles and Memorandum of Associations of the Company? (2) Will the Articles of Association apply in respect of the assets of a company after it is wound up.

(5) A number of English decisions have been cited and relied upon by learned counsel appearing on both sides. The matter is not free from difficulty and has to be considered in the light of the facts of this particular case. In this connection it would be convenient to refer to the view expressed in Buckley's Commentary on Companies Acts, 12th Edition (1949) page 900. The learned author states that primarily the rule to be borne in mind in the case of companies is that dividend should not be paid out of capital. Under the guise of paying dividends, the company must not return to the share-holders any part of the money subscribed by them on their shares. Subject to this condition, the question as to how the profit and loss account shall be made out whether profits have been earned which are capable of being divided among the share-holders, are primarily business questions for the directors or share-holders to determine in accordance with the company's regulations. If they act honestly and in accordance with such regulations in arriving at a decision on those points they discharge all the obligations imposed upon them by the Companies Acts in England. The learned author also stresses the fact that the application of such an abstract proposition which appears on its face to be simple to the effect that dividend must not be paid out of capital, does in practice raise questions of the utmost difficulty in their solution. "The question what are profits and what is capital may be difficult and sometimes an almost impossible problem to solve." Reference is made to the decision of the House of Lords in 'DOVEY v. JOHN CORY', (1901) A C 477 where Their Lordships:

> "Whilst expressing the view that no difficulty would arise in dealing with any particular case on its own facts and circumstances, declined to attempt to treat those questions in the abstract or to do that which the Parliament has refrained from doing, namely, to formulate precise rules for the guidance or embarrassment of businessmen in the conduct of business affairs and expressly dissociated itself from the reasons given by the Lord Justices for their decision in the Court below 'RE. NATIONAL BANK OF WALES, LTD.', (1899) 2 Ch 629 at p. 651."

which the House affirmed on the facts.

(6) The learned author points out that the warning given by the House of Lords has to be borne in mind when dealing with particular cases on the special facts thereon. In the present case, however, this difficulty does not arise because the directors have not declared any dividend after the sale of the assets of the company. It has, therefore, become incumbent upon this Court to decide whether the price realised by sale of the estate belonging to the company can be regarded as profits within the meaning of the articles of association or whether they come under the category of capital.

(7) In considering this question, one has naturally to advert to the memorandum of articles of association of the company. One significant feature that is noticeable is that there is no provision made in the latter for distribution of the assets after the company has gone into liquidation. The rules that are to be found incorporated in the articles deal only with the legal rights of the directors and promoters so long as the company continues to function and not when the business of the company is completely closed as has happened in the present case after the sale of the entire estate belonging to the company. In the circumstances one has of necessity to refer to judicial decisions in which in similar circumstances the questions that arise in these appeals were answered by Courts of law. The learned counsel appearing on both sides have relied mainly upon the English decisions on the point.

(8) Before referring to these decisions which are relevant to the dispute, it would be desirable to read articles 95 and 100 of the Articles of Association.

(After quoting the text of these articles in the Malayalam script the judgment proceeds:) It is clear from these articles that they refer only to the period when the company continues to function as such. Reference is made to the profits realised each year and directions are given as to how these profits are to be utilised. This cannot include the capital assets of the company realised by sale of the property belonging to the company. No doubt, there is R. (3) (g) of the Memorandum of Association which says that in the performance of its objects, the company can sell or mortgage any part of the landed property belonging to it. This does not refer to an out and out sale of the assets of the company including the only estate which the company was managing. The obvious reference is to sale and mortgage of landed properties belonging to the company while it is actually functioning.

(9) One more point has to be clarified before the points of law arising in this case can be considered. This has been explained in an affidavit which has now been filed by the liquidator of the company. He states in this affidavit that a dividend of 20 per cent from the profits accrued during the year which ended on the 31st December 1942 was paid to the share-holders in accordance with the recommendation of the Board of Directors at their meeting held on the 16th of June 1943 which was approved at the general meeting of the share-holders held on 6th July 1943. He also states that the estate forming the entire undertaking of the company was sold on the 9-7-1943 by the Managing Director of the company to one Shahool Hameed for a consideration of Rs. 3,90,500. Including cash standing to the credit of the company on that date, a total sum of Rs. 401773 was handed over to the liquidator by the Managing Director of the company in pursuance of the resolution passed at the extraordinary general meeting held on 15th November 1943 that the company be wound up voluntarily and that the deponent of the affidavit be appointed liquidator. After the sale of the Estate, there was no declaration of any dividend. He also swears in the last paragraph of his affidavit that the amount of the sale consideration was treated by the income-tax authorities as capital assets and was not assessed to income-tax. The income-tax assessed for the year 1943 was only on Rs. 2688-2-6 being the income earned till the date of sale. There was no income-tax levied on the price realised by sale of the estate belonging to the company. This clearly shows that even the income-tax authorities did not regard that amount as profits, but as part of the capital of the company.

(10) The appellant's learned counsel relies upon the following decisions. The first case cited on behalf of the appellant is the one reported in 'FRAMES v. BULFONTEIN MINING, CO.', (1891) 1 Ch 140. In the headnote, the facts of the case are briefly referred to. What happened was, there was provision in the Articles of Association of the company that the Directors should be paid each year as remuneration for their services, a sum equal to three per cent on the net profits of the company of such year. It was decided to wind up the company voluntarily. Its undertaking and assets were sold to a new company. The sale was for a very large amount and one of the directors claimed three per cent on the profit made by the sale. It was held "net profits" mentioned in the article was intended to apply to profits made by the company as a going concern and not to profits made by a sale of the company's assets, that the directors' remuneration was intended to be a return for their services, to which the present sale was not attributable, and that the plaintiff's claim failed. In the course of the judgment, Chitty, J., states that if while the Company was functioning as a going concern, a part of the assets happened to be sold and a profit was made thereby, such profit might have legitimately been brought into the profit and loss account of the year. But there is no provision in the Articles of Association to make a sale like the present which was made of the entire assets of the company for the purpose of winding it up. In the 'INLAND REVENUE COMMRS. v. GEORGE BURREL', (1924) 2 K B 52, on a winding up of a limited company the undivided profits of past years and the year in which the winding up occurred were distributed among the share-holders of whom the respondent was one. It was held that super-tax was not payable on the undivided profits as income, because in the winding up they have ceased to be profits and they are assets only. This case would seem to apply to the sum of Rs. 11273-0-0 which with the price realised by sale of the estate of the company was handed over in the present case to the liquidator for distribution. This was referred to in the case reported in 'IN RE WILLIAM METCALFE AND SONS. LTD.', (1933) 1 Ch. 142 at p. 154. Dealing with the surplus that remained in the hands of the liquidator at the time of the winding up, Lord Hanworth M. R. stated as follows:

> "There is a sum left over-surplus. The nature of that surplus was discussed in 'INLAND REVENUE COMMRS. v. BURREL'. It was there said, after a careful examination of the relevant cases, that this surplus retains no definitive characteristics — it is wrong to call it capital, but, on the other hand, it is not a source of dividends, because no dividend can be paid; it represents undistributed profits accumulated it may be during a number of years, but it cannot be dealt with as a fund for payment of dividends by the directors, for the winding up has displaced their powers."

Lord Macnaghten in 'BIRCH v. CROPPER', (1889) 14 A C 525 referred to such a surplus as forming part and parcel of the property of the company which at the date of the winding up represented the capital of the company. 'IN RE BRIDGEWATER NAVIGATION, CO.', which went on appeal to the House of Lords under the name of 'BIRCH v. CROPPER', Cotton L. J. said:

> "When a winding up has taken place "all question of preference is now at an end, and the share-holders are to be dealt with as having equal rights, because the provision in the articles creating the preference shares as regards dividend to arise on the working of the capital is at an end."

Lord Herschell in the course of his speech said about preference share-holders:

> "They are members of the company, and as such share-holders in it as the ordinary share-holders are; and it is in respect of their thus holding shares that they receive a part of the profits* * When the whole of the capital has been returned, both classes of share-holders are on the same footing, equally members and holding equal shares in the company, and it appears to me that they ought to be treated as equally entitled to its property."

'IN RE MADAME TUSSAUD AND SONS, LTD.', (1927) 1 Ch D 657 it was held that as long as a company was a going concern, preference share-holders were entitled only to the preferential dividend, but on the voluntary winding up, this preference was determined, and thenceforward the preference shares retained no preference or priority over the ordinary shares. The assets according to the view expressed in that case should be distributed among all the share-holders 'pro rata' in proportion to the amounts paid up on their shares. A similar view was expressed in the case reported in 'IN RE, SYSTON & THURMASTON GAS, LIGHT AND COKE CO., LTD.', (1937) 2 All E R 322. The learned counsel for the respondents has also cited certain decisions which are 'IN RE., SPANISH PROSPECTING CO., LTD.', (1911) 1 Ch 92, (1895) 2 Ch 576; 'LEE v. NUECHATEL ASPHALTE CO., (1889)', (1916) 2 Ch 115; (1920) 1 Ch 193; In re: 'CHINESE ANTIMONY CO. LTD', (1899) 41 Ch D 1. There is nothing in these decisions which goes against the view expressed in the cases relied upon by the appellant's learned counsel. In the circumstances, we hold that so far as the amounts in the hands of the liquidator are concerned the promoters of the company are not entitled to any special privileges. The amount has to be distributed among the share-

holders 'pro rata'. The appeal presented on behalf of the official Liquidator and the share-holder who has been given leave to appeal must, therefore, be allowed. In the view that we have taken, no question of depositing any amount in the Anchal Savings Bank will arise. All parties shall have their costs from out of the assets in the hands of the liquidator.

(11) It is now represented on behalf of the official liquidator that there are share-holders who have not been traced and who may come forward later and claim payment of the moneys due to them. We take the view that the surplus amounts in the hands of the liquidator need not be deposited in the Anchal Savings Bank as directed by the Court below. We consider that the proper direction to give is that the liquidator shall deposit amounts in his hands which he has not succeeded in disbursing in the Court below to the credit of Company Petition No. 6 of 1120 on the file of the Mavelikara District Court. The Court below shall remit it to the treasury as Civil Court Deposit. As and when the share-holders or their legal representatives who claim payment of these moneys come forward it will be open to them to apply to the Court below for payment out of their amounts.

K.S. Appeal allowed.

A. I. R. 1952 Travancore-Cochin 195

KUNHI RAMAN C. J.
AND SUBRAMANIA IYER J.

Kanakku Raman Pillai, Narayana Pillai and others, Appellants v. Kanakku Ramakrishna Pillai and others, Respondents.

A. S. No. 653 of 1122 (T), D/- 1-12-1950.

(a) Succession Act (1925), S. 63 — Attestation of will—Proof—Evidence Act (1872), S. 68 — Travancore Wills Act, S. 15.

It is not necessary to prove attestation of will that both the attesting witnesses should be called as witnesses. It is sufficient if one of the attesting witnesses proves that himself and the other attesting witness saw the executant signing the document and that both of them attested at the same time. (Para 6)

Anno: Succession Act, S. 63 N. 11; Evi. Act, S. 68 N. 13.

(b) Limitation Act (1908), Art. 47 — Travancore Limitation Act, Art. 35 — Final order — Order respecting possession of immoveable property under S 145, Criminal P. C. —Applicability.

Where the preliminary order passed by a Magistrate in proceeding under S. 145, Cr. P.C. (S. 128, Travancore Criminal P. C.) is quashed by the High Court in revision on the ground that proceedings under S. 145 were misconceived, the mere observation by the High Court in the concluding portion of the order that the peaceful possession of a particular party to the proceeding should be maintained until that party is evicted in due course of law will not make it a final order within the meaning of Section 128, Travancore Criminal P. C. or of Article 35, Travancore Limitation Act, and as such, a suit for possession of that property by the other party will not be governed by Art. 35, Travancore Limitation Act. AIR (29) 1942 P C 47; AIR (16) 1929 Mad 38 (2), Rel. on. (Paras 8, 9)

Anno: Limitation Act, Art. 47 N. 5, 9.

(c) Co-sharers — Possession — Nature of — Suit by one co-owner on his own behalf for possession against trespasser — Maintainability.

On account of the unity of possession which is an essential feature of joint tenancy as also of tenancy in common, one joint tenant or co-owner who is in possession, is in possession not merely for himself but also for all the others. Those others would be deemed to be in possession. Until partition where that is permissible, no one of them can say that he is entitled to any part of the property. A co-owner can therefore maintain a suit for possession of the entire property against a trespasser on his own behalf. (Para 12)

(d) T. P. Act (1882), S. 51 — Improvements by trespasser — Value of — Trespasser in possession if entitled to value of improvements — (Improvements by trespasser) — (Trespasser — Improvements by)

Though even a person who may be in law a trespasser, may be entitled to value of improvements if he comes into possession and makes improvements bona fide, a person deliberately entering into and doing works in the property for his own purposes with a view to start and establish a false claim for title thereto, is not entitled to value of improvements. (Para 14)

Anno: T. P. Act, S. 51 N. 10.

P. Narayana Pilla, Appellants; M. P. Varghese, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('42) AIR 1942 P C 47: (ILR (1942) Kar (PC) 122) (Pr 8)
('16) 39 Mad 501: (AIR (2) 1915 Mad 1214 (1)) (Pr 12)
('25) AIR (12) 1925 Mad 63: (75 Ind Cas 112) (Pr 12)
('29) AIR (16) 1929 Mad 38 (2): (111 Ind Cas 152) (Pr 9)
('40) 1940-1 Mad L J 290 (Pr 12)
('47) ILR (1947) Mad 179: (AIR (33) 1946 Mad 444) (Pr 9)
23 Cochin 136 (Pr 9)
31 Trav L R 193 (Pr 12)
('50) 5 Dom L R (USTC) 64: (1949 T C L R 1) (Pr 12)
2 Bl Com 182 (Pr 12)

JUDGMENT: This is an appeal filed by the defeated plaintiff in conjunction with defendants 5 and 7, in a suit for recovery of possession with mesne profits, of six items of immovable property on title, from certain persons who are alleged to be in wrongful possession. The lower Court dismissed the entire claim as regards items 1 to 3 and gave a decree to the extent of a fourth share in items 4 to 6. There is also a memorandum of objections filed by the 1st defendant respondent.

(2) The facts briefly are these: One Kochunni Pillai who was a pensioner in the Travancore State, executed a will on 5th Kumbhom 1103 and got it registered in the office of the sub-Registrar of Parur on the same date. Ex. A G is the will in original and Ex. A is a certified copy thereof. By this will the testator revoked an earlier will which he had made in the year 1099, Ex. I, and bequeathed his properties to the plaintiff, who is the younger of his two sons and to defendants 5 to 7 who are three of his five daughters. The 1st defendant is his eldest son. The will makes no provision either for the 1st defendant or for the other two

daughters. The testator died on the 25th Medom 1104. Soon after his death, the plaintiff filed O. S. 338 of 1105 in the Parur Munsiff's Court for a permanent injunction restraining the 1st defendant from interfering with his possession and enjoyment of the properties included in the schedule to that plaint which are items 1 to 3 in the schedule attached to the present plaint. He applied by an interlocutory application for a temporary injunction against the 1st defendant pending the suit. The Munsiff allowed the application and granted a temporary injunction. The 1st defendant appealed against that order and the District Judge reversed the order and dismissed the application on the ground that the 1st defendant was in possession of the properties. The plaintiff did not pursue the matter further by taking the matter to the High Court. The suit itself was found by the Munsiff to be beyond his jurisdiction and the plaint was ordered to be returned for presentation to the proper Court. (See Ex. XVII). Against that order, a Civil Revision Petition was filed in the High Court which was also dismissed. (See Ex. XIV). The plaint does not appear to have been either taken back or represented before the proper Court. Meanwhile the plaintiff started proceedings before the Division First Class Magistrate, Alwaye, against the 1st defendant praying for action under S. 128, of the Travancore Criminal P. C. (corresponding to S. 145, of the Indian and S. 126 of the Cochin Codes) in respect of the 6 items of property comprised in the present suit. The Magistrate passed a preliminary order in respect of all the items against which the 1st defendant filed a Criminal Revision Petition in the Travancore High Court. The High Court maintained the order in so far as items 4 to 6 in the present case were concerned and quashed the same as regards items 1 to 3 on the ground that there was no dispute of possession in respect of these latter items, possession thereof having been found to be with the 1st defendant by the District Court in connection with the application for injunction in O. S. 338 of 1105 already mentioned. The High Court observed that in a case where a party is in peaceful possession of the properties and another party attempts to interfere with the possession the proper remedy is not to take action under S. 128, of the Criminal P.C., but to start proceedings against the intruder under S. 90, of the Travancore Criminal P. C. (corresponding to S. 107, of the Indian and S. 92 of the Cochin Code.). The order of the High Court, Ex. XVI was passed on 2nd Vrischigom 1107. There is no information as to what happened to the proceedings before the Magistrate regarding items 4 to 6 after the order of the High Court.

(3) This suit was filed on 17th Kanni 1113 based on the rights, title and interest of the plaintiff under the will, Ex. AG, claiming recovery of possession of all the six items of property with mesne profits. Regarding items 4 to 6 the plaintiff alleged that they were in his actual possession after his father's death and that the 1st defendant trespassed thereon in Medam 1112 and obstructed his tenant, the 4th defendant's entry. Defendants 2 and 3 were stated to be in possession of some of the items wrongfully and under the 1st defendant. Defendants 5, 6 and 7 were impleaded as co-owners with the plaintiff under the will. No relief was claimed by the plaintiff against them or their interests as he has made clear in para 12 of the plaint. The 1st defendant was the main contesting defendant. He contended that the will relied upon by the plaintiff is void in law as it was brought into existence by the plaintiff by making false representations to the testator and that the testator had no testamentary capacity at the time the will was made. He also contended that all the items of property were in his possession even during the lifetime of his father and that that possession continued in him thereafter in his capacity as the karnavan of the branch tarwad consisting of the children of the deceased on whom the properties devolved on the death of the father intestate. It was also contended that the suit is barred by 'res judicata' on account of O. S. 338 of 1105 and by limitation on account of the criminal proceedings which terminated in the order of the High Court already mentioned. Various other contentions were raised by him; it is not, however necessary to refer to all those in detail. Defendants 2 and 3 filed written statements admitting that they were holding the properties under the 1st defendant and contending that they are lawfully in possession. The 6th defendant who was, as already mentioned, one of the persons to whom the properties were bequeathed under the will relied upon by the plaintiff, filed a written statement attacking the will as void as contended by the 1st defendant and contending that the properties came to and continued to be in the possession of the 1st defendant as karnavan of the group of heirs of the father on his intestacy. She also contended that should the will relied upon by the plaintiff be found by the Court to be valid, then she is not agreeable to the properties which would fall to her share being delivered to the plaintiff.

(4) The Court below found in favour of the plaintiff that the will was valid and operative, but also found that the suit is barred by res judicata and limitation as regards items 1 to 3 and in so far as these items were concerned, the suit was dismissed. In respect of items 4 to 6 the lower Court found in favour of the plaintiff on the question of title and trespass, but did not give a decree for surrender of these items. Instead, it gave a preliminary decree for partition and delivery to the plaintiff of a fourth share in those properties.

(5) The plaintiff urges in this appeal all the claims that he made in the suit and the first defendant repeats most of his contentions in the Court below. As the validity of the will is questioned that matter has first to be considered though it is raised in the memorandum of objections by the 1st defendant respondent. The lower Court discussed the oral and documentary evidence in detail and came to the conclusion that the will is valid and operative. One main circumstance on which reliance was placed by the Court below is that on 7-8-1104, that is more than a year after the date of the will, the testator was examined in open Court as a witness in a complicated case. His deposition marked Ex. E in this case would clinch the question against the 1st defendant whose contention is that the testator had no sound mind after two months from the date of execution of the previous will in 1099 when he had an attack of typhoid which ended in a defect of mind from which he never thereafter recovered. It appears to us that in the face of this, the contention ought not to have been raised. We have no hesitation to agree with the Court below in its conclusion that at the time of execution of the will Ex. AG the testator had good disposing mind and complete testamentary capacity.

(6) The learned Advocate on behalf of the 1st defendant respondent contended that the will is void in law on the ground that the requisites of S. 15 of Act VI (6) of 1074 (Travancore Wills' Act) have not been satisfied. That section provides for attestation of a will by two witnesses. The point raised by the learned counsel is not that the will has not been attested by two witnesses as required by that section, but that the attestation has been

proved only by one of the attestors, i.e., P. W. 2 and that the other attestor though alive and available, has not been called. It is not necessary to prove attestation that both the attesting witnesses should be called as witnesses. P. W. 2, one of the attestors, proves that himself and the other attesting witness saw the executant signing the document and that both of them attested at the same time. We hold that the will has been properly attested.

(7) The learned counsel for the 1st defendant-respondent did not support the judgment in so far as it relates to the finding that the suit as regards items 1 to 3, is barred by 'res judicata' on account of the proceedings in O. S. 338 of 1105. That finding is obviously unsustainable. As already mentioned, the plaint in that suit was only ordered to be returned for presentation to the proper Court.

(8) The question of limitation as regards items 1 to 3 is this. The criminal proceedings which were started by the plaintiff terminated by the order of the High Court quashing the preliminary order passed by the Magistrate in so far as items 1 to 3 were concerned. The High Court observed in the order that the District Court having found those items to be in peaceful possession of the 1st defendant that possession is liable to be maintained until eviction in due course of law. This order was passed more than three years before this suit was filed and it is therefore claimed on behalf of the 1st defendant (as it was successfully contended before the Court below) that Art. 35 of the Travancore Limitation Act applies and as the period of limitation prescribed thereunder is only three years the suit is barred by limitation. Art. 35, Travancore Limitation Act reads thus:

Description of suit.	Period of limitation.	Time from which period begins to run.
35. By any person bound by an order respecting the possession of immovable property made under the Code of Criminal Procedure, or by any one claiming under such person, to recover the property comprised in such order.	Three years.	The date of the final order in the case.

The contention is that though the High Court stated in Ex. XVI

> "in the face of the District Judge's finding that possession was with the petitioner (before the High Court who is the 1st defendant here) I think that the starting of proceedings under S. 128, Criminal P. C., was not the proper proceeding."

The learned Judge proceeded and concluded the order thus:

> "With regard to these survey numbers, the possession of the present petitioner must be maintained until he is evicted by an order of a competent civil Court.

To this extent the order of the lower Court is modified. The concluding portion of this order is relied upon as an order "respecting the possession of immovable property made under Criminal P. C." within the meaning of Art. 35, of the Limitation Act. The contention is obviously unsustainable. What the High Court did was to declare that on the facts disclosed, no case was made out for taking action under S. 128 under which section the Magistrate passed the preliminary order which was quashed by the High Court. The subsequent observation made by the High Court towards the end of the order is not and cannot be regarded as an order passed "under the Code of Criminal Procedure" though that observation may be said to be respecting the possession of immovable property, nor can that observation be said to be an order made by the High Court. It was only a statement of the law in general.

(9) In 'JAGAJIT SINGH v. PARTAB BAHADUR SINGH', AIR (29) 1942 P C 47 Lord Thankerton, delivering the judgment of the Privy Council, stated:

> "With regard to the statutory period of limitation, Art. 47 of the Act does not apply as there has been no order for possession by the Magistrate under S. 145 Criminal P. C."

The case arose out of certain proceedings before the Deputy Magistrate between the Raja of Kapurthala and the Raja of Isanagar. The parties made a statement during the course of the proceedings to the effect that one of them had entered into possession pursuant to an order of the said Magistrate in another proceedings before him fixing the boundary line between their estates, accepting which the Deputy Magistrate ordered that "now there is no need of proceedings under S. 145" and consigned the file to the records and directed intimation thereof to the Police. Though the order of the Magistrate related to the possession and operated to confirm the possession of one of the parties to the proceedings, that order was not one passed under the Criminal P. C., or one for the possession of the property. It was an order recognising an antecedent possession which one of the parties obtained independently of the order of the Magistrate which order only recognised and gave effect to that antecedent possession. In 'NAGABHUSHANAYYA v. KOTAYYA', I L R (1947) Mad 179 Lionel Leach, C. J. (as he then was) sitting with Lakshmana Rao J., stated:

> "Section 145, of the Code of Criminal P. C. contemplates two orders, a preliminary order under Sub-s. 1 and a final order under Sub-s. 6. Art. 47, of the Limitation Act, applies to the second order."

When, therefore, in proceedings where two orders are contemplated, which is the case of a proceeding under S. 128, Criminal P. C., a preliminary order passed by the Magistrate was itself quashed by the High Court it can hardly be contended that any observation made by the High Court in quashing the preliminary order should be regarded as final order under this Section. Whether the final order be the final order passed by the Magistrate himself or the final order passed by the High Court in revision, it is clear that in a case where a final order can be passed only subsequent to a preliminary order and if that preliminary order itself is not passed, there cannot be a final order within the meaning of Art. 35. It may be observed that the distinction between a preliminary and a final order would be inapplicable to cases where a preliminary order is not contemplated, for instance, an order under S. 522, Indian Criminal P. C., to which also Art. 47, of the Limitation Act will apply. The jurisdiction of Magistrates to take action under S. 128, of the Travancore Criminal P. C. arises only on a finding as to the existence of dispute likely to cause a breach of the peace. In a case where no such dispute is alleged or found to exist, the Magistrate's jurisdiction will not be attracted. The Cochin High Court in 'CHERU v. VAREED', 23 Cochin 136 quashed the proceedings taken by a Magistrate under S. 126, Cochin Criminal P. C. on the ground that there was no allegation of a dispute regarding the immovable properties as contemplated under the Section. It was there pointed out that a party in peaceful posses-

sion apprehending trespass by an intruder has to resort to S 92 Cochin Criminal P C In 'ALGARASWAMI THEVAN v. RAMABADRA NAIDU', AIR (16) 1929 Mad 38(2), it was held that when the criminal Court which is approached to take action under the Criminal P C does not itself investigate the matter but records an antecedent peaceful possession in one of the parties based on the decision of a Civil Court, the order passed will not be one passed under the Criminal P C. It is thus clear that the contention of the learned counsel for the respondent 1st defendant that Art. 35, Travancore Limitation Act applies to the case and that the suit in so far as it relates to items 1 to 3, is barred by limitation, cannot be accepted and that the conclusion come to by the learned Judge upon the question of limitation cannot be supported. We hold that there is no bar by limitation for any of the reliefs claimed in the plaint

(10) This leads to the consideration of what, if any, are the reliefs that the plaintiff is entitled to. The lower Court granted the plaintiff a preliminary decree for partition and delivery of a fourth share in items 4 to 6 This cannot be supported. When asked about the justification for such a decree, the appellant's learned counsel stated that when a plaintiff claims more, the Court can always grant less to the extent to which the plaintiff is found entitled, and instanced a case of a claim for Rs. 1,000 of which the Court finds in favour of the plaintiff to the extent of, say Rs 750/- and grants a decree for the smaller sum This kind of approach to the question is fallacious It is true that quantitatively one-fourth of the property is less than the whole property but looking to the quality of the claim, a claim and decree for partition is entirely different from a claim and decree for delivery of the entire property in ejectment Whether a suit for ejection can be amended into one for partition is itself a matter which is highly controversial Surely no relief for partition can be granted in a suit for ejectment at any rate without amendment The decree given by the lower Court for partition of items 4 to 6 is, therefore, unsustainable and is set aside The finding of the lower Court in favour of the plaintiff on the question of trespass upon these items by the 1st defendant is supported by the evidence in the case and we confirm the finding

(11) There are two provisions in the will relating to plaintiff's rights. The first provision may be translated thus:

"On my death my son Narayanan is entitled to secure and be in possession of all the properties, to be in such possession for four years thereafter, take the income, therefrom and from out of such income, conduct the matters contained in the list signed by me and given to him along with this and appropriate any balance there might be for himself After the four years he should deliver possession of each of the properties to the respective persons entitled thereto without causing any loss who, after obtaining such possession, should pay tax and enjoy it with all liberties and full powers of alienation."

This provision would appear to apply to the properties in the possession of the testator at the time of his death There is another and a later provision which may be translated thus:

"My son Narayanan is by himself entitled to recover properties which, on my death, are outstanding with others on pattom or otherwise with arrears and future rent etc., by direct negotiation or in ejectment He is also entitled to recover amounts that might be found due to me by way of pension or otherwise from the Government. He is also directed to deal with my movables etc., as prescribed in the list afore-mentioned."

This provision applies to all properties not in the possession of the testator, but in the possession of others, whatever be the reason for those others coming into the possession, whether by mere permission, or on a contract of rent or otherwise. These provisions of the Will would constitute "my son Narayanan" mentioned therein who is the plaintiff, a sort of executor or administrator charged with the possession, getting in realisation, and distribution of the entire estate of the testator according to the provisions contained in the will and the list referred to therein. The plaintiff is thus entitled to seek for recovery of possession of all the properties of the deceased from whomsoever may be found to be in possession thereof. In this case, defendants 1 to 3 are in possession under the claims set up by the 1st defendant, namely that he was in possession with the permission of his father during the father's life-time and from the date of death of the father, the possession continues to be in him in his character as the karnavan of the group of his father's heirs. The will having been found to be true and valid, the first defendant's contention is without foundation and his possession and the possession of defendants 2 and 3 who claim under him would be that of trespassers having no claim to withhold possession from the plaintiff who is entitled to such possession. The plaintiff is therefore entitled to and is given a decree for possession of all the items of property with mesne profits as claimed in the plaint, against the assets of the deceased 1st defendant. Defendants 2 and 3 are also liable but only for the amounts that they are liable to pay to the 1st defendant under their contracts, and their liability is limited to the period after suit.

(12) At the conclusion of the argument, we put it to the learned counsel for the respondent whether the plaintiff could not be given a decree even if he be regarded only as a co-owner as, on a finding in favour of the validity of the will, defts. 1 to 3 would be trespassers against whom even a co-owner can sustain a suit in ejectment of the entire property on his own behalf. He took time to consider the question & after considering it, submitted that he did not canvass the correctness of the legal position pointed out by us. Indeed it is hardly contestable. "Joint tenants are said to be "seized" 'per my et per tout'; by the half, or Moiety, & by all" ("2 Bl. Com. 182"). The position of tenants in common is also the same. On account of the unity of possession which is an essential feature of joint tenancy, as also of tenancy in common, one joint tenant or co-owner who is in possession is in possession not merely for himself but also for all the others. Those others would be deemed to be in possession. Until partition where that is permissible, no one of them can say that he is entitled to any part of the property (Vide 'AHMED SAHIB v. MAGNESTIE SYNDICATE LTD.', 39 Mad 501; 'THIMMAYYA v. SIDDAPPA', AIR (12) 1925 Mad 63; 'PALANI AMMAL v. L. SATHURAMA AIYANGAR', 1940-1 Mad L J 290; 'KORAH PHILIPOSE v. THOMA THOMA', 31 Trav L R 193; 'VARGHESE CHACKO v. SIVASANKARA PILLAI', 5 Dom L R (USTC) 64. The learned Counsel for the respondent however contended that this question does not arise in the present case because deft. 6 who is admittedly one of the co-owners has stated in para. 15 of her written statement that should the Court find that the will is genuine, she is not agreeable to the portion of the properties which would fall to her share being delivered to the plff. & that such portion should not be so delivered. This plea of deft. 6 does not, in law offer any obstacle to a decree

being given to the plff. for recovery of the entire property. Deft. 6 has no case that the party in possession holds such possession under her or with her consent. Her only contention is that the slice of property which would fall to her share should not be delivered to the plff. Admittedly there has been no partition & until a partition, no co-owner can lay claim to any slice of property. Such a claim would offend the very conception of the unity of possession which a co-owner has in law. Para. 15 of the written statement would appear to have been meant to hit the plff's. claim, but the aim is missed, the weapon not having been properly forged. If deft. 6 had stated that the plff. cannot be given a decree for possession by himself but that the decree shoud be one for joint possession of the plff. & deft. 6, that plea would have had to be upheld. The plea raised however is for refusal of a relief in respect of a slice of a property which is non-existent & cannot exist until a partition between the co-owners is effected which, in the circumstances of the case & under the provisions of the will, can take place only after the plff. recovers possession. The right to recover possession of the entire property & the liability to deliver the quantum to the various parties entitled, is upon the plff.

(13) Deft. 1 made a claim for value of improvements in the Court below. The Court deputed a Commissioner to report upon the improvements claimed & their value. Ex. XXI is the Commissioner's report. The learned Counsel for the respondent submitted that in the event of a decree being given to the plff. for possession, his claim for value of improvements must be considered. The Court below did not consider it because the decree that it granted was a preliminary decree for partition & related only to three of the items in the plaint. Now that we are granting a decree to the plff. for recovery of the entire property, the respondent's claim for value of improvements has to be considered.

(14) Ex. XXI shows that the claim for reclamation is without foundation & that except in respect of two trees of negligible value, i.e., items 15 & 18 (in Ex. XXI) all the trees for which value is claimed came into existence during the lifetime of the deceased Kochunni Pillai. Assuming that it was deft. 1 that was responsible for the coming into existence of those improvements, he not having set up any jural relation between himself & his father, or that he had independent possession of the properties which would entitle him to claim value, it is not possible to decree to him value of improvements. The probabilities are that the improvements were effected at the expense of, if not by Kochunni Pillai. Except referring to the Commissioner's report, the learned Counsel for the respondent did not refer to any other evidence to support his claim for value of improvements. After the death of Kochunni Pillai, deft. 1 appears to have set up a claim to his karnavanship & commenced holding of the properties by leasing them, taking releases from the lessees & so forth, obviously for the purpose of setting up & supporting his title. The two trees that appear to have come into existence after Kochunni Pillai's death must have been brought into existence with the mala fide object of setting up a title against the true owner. Though even a person who may be in law a trespasser, may be entitled to value of improvements if he comes into possession & makes improvements bona fide, a person deliberately entering into & doing works in the property for his own purposes with a view to start & establish a false claim for title thereto, is not entitled to value of improvements. These two trees may be removed by the party in possession before surrender.

(15) The learned Counsel for the respondent also contended before us that the plff. has given up his separate rights under the will & has agreed to a partition of the properties in dispute per capita among the members of the tarwad. This matter has been exhaustively dealt with by the lower Court & found against the respondent. We are in agreement with the conclusion come to by the lower Court which is amply supported by the evidence in the case & the only one possible under the circumstances. It is not necessary for us to repeat the reasons.

(16) The appeal is allowed & the memo. of objections dismissed with costs.

K.S.

Appeal allowed.

A. I. R. 1952 Travancore-Cochin 199

KOSHI AND GOVINDA PILLAI JJ.

Mathai Thommen. Appellant v. Thomas Mathew and others, Respondents.

A. S. No. 164 of 1124 (T), D/- 19-7-1951.

(a) Specific Relief Act (1877), S. 27 (b) — Contract to sell land — Suit for specific performance — Position of subsequent purchaser.

When a person buys land with notice that another has already contracted to buy it the former stands in the position of a trustee for the latter of the land purchased by him and he could not profit by the conveyance to him except to stand in the shoes of the vendor and receive the purchase money from him, on payment of which he would have to convey the land to the latter. AIR 1916 Bom 95, Ref. **(Para 3)**

Anno: Spe. Rel. Act, S. 27 N. 3.

(b) Specific Relief Act (1877), S. 27 (b) — Contract to sell land — Part of purchase money allowed to remain with vendee — Purpose not mentioned — Direction in decree.

When a Court directs specific enforcement of sale of immoveable properties it should as far as possible try to place the parties in the same position they would have been had the agreement been performed out of Court. (Para 4)

Thus, where a contract to sell land is silent as to why a part of the purchase is allowed to remain with the vendee, in a suit for specific performance of the contract, the vendee should be asked to pay that amount before a conveyance is executed in his favour. (Para 4)

Anno: Spe. Rel. Act, S. 27 N. 3.

(c) Specific Relief Act (1877), S. 27 (b) — Contract to sell land — Suit for specific performance — Subsequent sale to third person — Proper decree.

The proper decree in a suit for specific performance of a contract to sell land when the same has been sold to a third party subsequent to the contract with the plaintiff is to direct the subsequent purchaser to execute a conveyance to the plaintiff. AIR 1916 Bom 95; 13 Ind Cas 176 (Mad) and AIR 1929 Nag 298, Ref. **(Para 5)**

Anno: Spe. Rel. Act, S. 27 N. 3.

K. P. Abraham, for Appellant; P. Narayana Pillai, for Respondent No. 1.

Cases referred to:

('16) 40 Bom 498: (AIR 1916 Bom 95) (Prs 3, 5)
('11) 22 Mad L J 124: (13 Ind Cas 176) (Pr 5)
('29) AIR 1929 Nag 298: (116 Ind Cas 70) (Pr 5)

JUDGMENT: Defendant 4 in O. S. No. 21 of 1119 on the file of the District Court, Parur, has preferred this appeal against the decree that Court passed in the suit for specific performance of an agreement by defendants 1 to 3 to sell certain items of immoveable properties to the plaintiff. The appellant purchased those properties subsequent to the contract for sale and the lower Court's decree directs enforcement of the agreement against the appellant as well as one whose title arose after it came into being. Hence this appeal by him.

(2) The main defence he raised to the suit was that he was a transferee for value who paid the consideration for the sale in his favour in good faith and without notice of the original contract. That defence has been found against by the learned Judge in the Court below and the appellant's learned Counsel did not try to repeat that contention before us. The one and the sole point urged before us to non-suit the plaintiff was that the plaintiff had by his notice Ex. B issued to defendants 1 to 3 abandoned his claim for specific performance of the contract and elected to limit his remedy to claim damages instead. No doubt the written statements filed on behalf of defendants 1 to 3 raise such a defence and what the appellant is now doing is to abandon the defence he himself raised and try to depend upon a plea raised by his vendors. There is nothing to preclude him from adopting such a course but we are afraid Ex. B does not lend itself to the construction sought to be put upon it. It states that the plaintiff is ready and willing to perform his part of the contract and invites defendants 1 to 3 to go over to the office of the Sub Registrar, Moovattupuzha, on 30-2-1119 to have the conveyance executed and registered and to receive the balance consideration payable as per the terms of the agreement. It further states that in the event of defendants failing to comply with the request the plaintiff will be taking such action as he is advised to take and that the defendants (defendants 1 to 3) and the properties will be held liable for all his losses and damages. Reading the notice as a whole, all that it intends to convey is that unless defendants 1 to 3 execute the conveyance as agreed to, the plaintiff will file a suit and that the defendants will be liable for all consequences thereof. The plaintiff has not stated that he will be content with receiving damages. The written statements the defendants filed in the suit as also the memorandum of appeal filed before this Court on behalf of the appellant proceed as if the provision for liquidated damages in a contract of sale would preclude a party thereto from seeking specific performance thereof. This is a wrong assumption as would be clear from S. 20 of the Specific Relief Act. Further S. 19 provides that any person suing for the performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance. Viewed in the light of these provisions occurring in the Specific Relief Act and the language of Ex. B we cannot persuade ourselves to accept the construction sought to be put upon the notice Ex. B by the appellant's learned Counsel that there is a definite abandonment there of the plaintiff's right to seek specific performance.

(3) This as stated already was the main point pressed in the appeal and for reasons stated above it cannot succeed. However there are a few other points to be referred to in respect of which our interference would seem to be called for. One of such points is that the lower Court's direction that the money paid into the Court towards the balance of consideration for the sale should be drawn by defendants 1 to 3 jointly. On their own showing defendants 1 to 3 had received consideration for the sale they executed in favour of defendant 4, vide para 14 of the written statement filed on behalf of defendants 1 to 3. No doubt defendants 1 and 2 tried to go back upon that case in a compromise petition they filed in Court on 20-5-1120 together with the plaintiff, but thereafter they disappeared from the scene and would seem to have remained 'ex parte' in the subsequent proceedings before the lower Court. Defendant 4 has proved that he paid the consideration for the sale deed (Ex. 1) in his favour to his vendors. There is no meaning in asking them to receive payment over again. This is one of the points raised in the memorandum of appeal and it appears to us to be a sound view that the balance consideration for the sale to the plaintiff should go to defendant 4 and not to defendants 1 to 3 Reference may in this connection be made to page 648 of Pollock and Mulla Indian Contract and Specific Relief Acts, Seventh Edn. When a person buys land with notice that another has already contracted to buy it the former stands in the position of a trustee for the latter of the land purchased by him and he could not profit by the conveyance to him except to stand in the shoes of the vendor and receive the purchase money from him, on payment of which he would have to convey the land to the latter. See also 'GANGARAM GANPATI v. LAXMAN GANOBA', 40 Bom 498. Defendants 1 to 3 are made respondents to this appeal and though the appellant has claimed this relief against them they have not chosen to enter appearance and contest the matter. In the circumstances, we set aside the lower Court's direction that defendants 1 to 3 shall receive the balance consideration money in Court or to be paid hereafter into the Court and make a direction instead that defendant 4 shall receive all such amounts.

(4) This naturally leads us to the question as to who should execute the conveyance. But before that there is a further point to be mentioned regarding the consideration. Admittedly the agreement was to sell the properties concerned for Rs. 3000/-. The advance paid when Ex. A was executed was only Rs. 200/- and the provision in that agreement is that Rs. 1000/- should be reserved with the vendee and the balance of Rs. 1800 should be paid when the conveyance is executed. The plaintiff has paid into Court only Rs. 1800/- and no mention is made in the plaint or in the lower Court's judgment or decree as to what should happen to the balance Rs. 1000 or when it should be paid. Ex. A, the agreement is silent as to why this amount was allowed to remain in the hands of the vendee and what was stated at the Bar was that the vendors were free to call for it at any time. When a Court directs specific enforcement of sale of immoveable properties it should as far as possible try to place the parties in the same position they would have been had the agreement been performed out of Court. We therefore think it only just and equitable that the plaintiff should be asked to pay that amount also before the defendants or the Court executes a conveyance in his favour. The plaintiff had asked for and been given mesne profits from the date of the suit. When he is getting mesne profits it is only fair that this amount of Rs. 1000/- is made to bear reasonable interest until it is paid into Court. We accordingly direct that that amount shall bear interest at six per cent. per annum till the plaintiff pays the same into Court. The conveyance in his favour shall take place only after that amount also is paid into Court. The conveyance in favour of defendant 4, Ex 1 shows that of the two thousand nine hundred rupees fixed as consideration, two thousand five

hundred alone was paid in cash and the balance consideraion was made good by his undertaking to pay Rs. 400, towards a prior charge. No reference was made in the argument as to whether this has been discharged or not. No doubt some new documents have been produced in this Court but no reference was made to them. The appellant should therefore before he draws any money from the lower Court satisfy that Court that the prior encumbrance referred to in Ex. I has been duly discharged.

(5) The lower Court's direction is that defendants 1 to 3 should execute the conveyance and that in the event of their failure the Court will execute it. Reference has already been made to the decision in 'GANGARAM GANPATI v. LAXMAN GANOBA', 40 Bom 498, which states that in circumstances similar to the present it is the subseqent vendee who should be asked to execute the conveyance. He obtains title by the sale in his favour, no doubt voidable at the instance of the person in whose favour there was a prior contract of sale. Besides the decision referred to, other cases have also laid down that the proper decree in a suit for specific performance of a contract to sell land when the same has been sold to a third party subsequent to the contract with the plaintiff is to direct the subsequent purchaser to execute a conveyance to the plaintiff. See 'SUBBIAH PILLAI v. VELAPPA NAICKAN', 22 Mad L J 124 and 'GAURISHANKAR v. IBRAHIM ALI', AIR (16) 1929 Nag 298 at p. 303 and foot-note (n) on page 716 of Pollock and Mulla Indian Contract and Specific Relief Acts, Seventh Edn. In this case however there is some dispute whether (what?) defendant 4 the appellant got under his conveyance exhausts the properties covered by Ex. A. In modification of the direction contained in the lower Court's decree we therefore direct that the conveyance in favour of the plaintiff will be executed by defendants 1 to 4 and that the Court will execute it in case they do not do it within two months of the receipt of the records from here by the lower Court.

(6) No other point arises in the appeal but there remains the plaintiff's memorandum of objections to be dealt with. By that memorandum the plaintiff seeks to enhance the rate of mesne profits. He had claimed Rs. 750/- per year but the lower Court has allowed only Rs. 250/-. We heard the relevant evidence read before us in Court and are not satisfied that there is ground for interference and accordingly dismiss the memorandum of objections with costs. While on this we would point out that when defendants 1 to 3 have ceased to have possession it is wrong to make them liable for mesne profits. The party liable to the plaintiff in respect of that relief is defendant 4, the appellant who admits that he has been in 'Oodukoor' possession of the properties sold to him since the date of the conveyance in his favour. The lower Court's decision will stand modified in this respect as well.

(7) In the result subject to the modifications made above the appeal and the memorandum of objections will both stand dismissed with costs. No doubt the appellant has succeeded to a certain extent but those are mostly incidental directions which we ourselves thought it proper to incorporate into the judgment.

Decree accordingly.

V.R.B.

Decree accordingly.

A. I. R. 1952 Travancore-Cochin 201

KUNHI RAMAN C. J. AND SANKARAN J.

Mahesh Chander, Petitioner v. The State.

O. P. No. 70 of 1951, D/- 17-7-1951.

† Criminal P. C. (1898), Ss. 54 and 59 — Arrest by police officer of Jammu and Kashmir in Travancore-Cochin for offence in former State — Legality.

The Police Officer referred to in S. 54 must be an Officer who is a member of the Police force enrolled under the Indian Police Act V (5) of 1861. That Act has not been extended to the State of Jammu and Kashmir and therefore a Police Officer of that State cannot be regarded as a member of the Police force coming within the category of Police Officers who are referred to in the Indian Police Act. **(Para 1)**

Where a person is arrested in Travancore-Cochin by a Sub-Inspector of Police of Jammu and Kashmir to which the Criminal P. C. is not extended, for an offence alleged to have been committed within the State of Jammu and Kashmir, the arrest cannot come within the purview of S. 59, Criminal P. C. and is not warranted by law. **(Para 1)**

Anno: Criminal P. C., S. 54 N. 3.

P. I. Simon, for Petitioner; Public Prosecutor, T. R. Balakrishna Iyer, for The State.

KUNHI RAMAN, C.J.: This is a petition for the issue of a writ of 'habeas corpus' directing Onkar Singh 'alias' Mahesh Chander now under arrest in Alleppey and under Police custody to be released from such custody on the ground that the arrest and detention of this person are illegal and unwarranted. The learned Public Prosecutor Sri Balakrishna Iyer appears in response to the notice taken by the Advocate-General when the petition came on for hearing on 3rd July 1951. It is conceded by the Public Prosecutor that the arrest of the individual mentioned in the petition was made by a Sub-Inspector of Police of the State of Jammu and Kashmir who is not a Police Officer competent to make an arrest under Section 54 of the Criminal Procedure Code, which has been extended to this State.

The Police Officer referred to in Section 54 must be an Officer who is a member of the Police force enrolled under the Indian Police Act V of 1861. That Act has not been extended to the State of Jammu and Kashmir and therefore a Police Officer of that State cannot be regarded as a member of the Police force coming within the category of Police Officers who are referred to in the Indian Police Act. It is also conceded by the learned Public Prosecutor that the Indian Code of Criminal Procedure has not been extended to the State of Jammu and Kashmir. In these circumstances, since the arrest was for an offence alleged to have been committed within the State of Jammu and Kashmir and consequently since the arrest made at alleppey cannot come within the purview of Section 59 of the Criminal Procedure Code, it is not warranted by law. The reason given for the prayer in the original petition cannot therefore be disputed. The arrest not being warranted by any provision of law this is a fit case for making a direction under Section 491 of the Criminal Procedure Code, since the party concerned is within the limits of the appellate criminal jurisdiction of this Court. We accordingly direct under Section 491 (1) (b), of the Criminal Procedure Code that Sri Onkar Singh 'alias' Mahesh Chander who is now reported to be in Police custody at Alleppey shall be set at liberty because the detention is not proper or legal. Issue a writ in these terms to the Division First Class Magistrate of Alleppy who shall see that the order is carried out expeditiously.

V.B.B.

Petition allowed.

A. I. R. 1952 Travancore-Cochin 202

KUNHI RAMAN, C. J. AND SUBRAMANIA IYER, J.

Paulo Varghese and others, Appellants v. Ittipe Abraham and others, Respondents.

A. S. No. 592 of 1121, D/- 14-3-1951.

† Contract Act (1872), Ss. 126 and 127, S. 2 (b)—Contract of guarantee—Debt contracted—Subsequent promise to see that debtor duly discharged his obligation — No guarantee.

After a debt had been contracted, A (the alleged surety) came forward and promised that he would see that the debtors duly discharged their obligation. The creditor did not suffer any detriment at the instance of the alleged surety.

Held (i) that this was an instance of a promise which was not supported by consideration and for that reason could not be enforced in a Court of law. (Para 2)

(ii) A promise of this description could not amount to a guarantee. (Para 2)

Anno: Contract Act, S. 126 N. 3.

Narayana Pillai, for Appellants; Sankaranaraya Kukkilliya, for Respondents.

KUNHI RAMAN, C.J.: This unfortunate litigation which started in the year 1111 is coming up for hearing in the stage of appeal before this Court today. The suit was for recovering a sum of money alleged to be due under a chitty bond executed by defendants 1 and 2. So far as the principal debtors are concerned, the plaintiff has been granted a decree but he wanted to impose a liability upon the legal representatives of one Itty Iype on the ground that Itty Iype was surety for the discharge of the debt. The Court below has found that there was no such guarantee and has dismissed the suit as against defendants 3 and 7 to 14. It is from this part of the decision that the present appeal is brought before this Court.

The allegation in the plaint regarding the contract of guarantee is to be found in paragraph 3 of the plaint. There it is alleged that Itty Iype promised that he would make defendants 1 and 2 discharge the debt to the plaintiff and that he (Itty Iype) would also be personally responsible for the discharge of the debt. Immediately following this averment, there is reference made to certain letters passed by Itty Iype containing this guarantee. At the trial there were four letters produced. These were Exs. A, C, D and E. The contesting defendants admitted Exs. C, D and F, but denied that Ex. A was passed by Itty Iype who was dead when the suit was filed. The Court below on dealing with the evidence, has recorded a finding in halting terms that Ex. A is not genuine. There is also another obstacle in the way of the plaintiff before he can ask for a decree being passed on the strength of the guarantee. From the averment in the plaint it does not appear that there was any consideration for the undertaking alleged to have been given by the surety. Again the nature of the undertaking which is evident from the wording of the four letters above menioned, is not that Itty Iype would be personally responsible for the discharge of the debt, but that he will see that the debtors repay the debt.

(2) Dealing in the first instance, with the finding of the Court below that Ex. A is not genuine, we are not satisfied that there is any valid reason given for the view taken by the trial Court. There is feeble reference made to the fact that P.W. 2 who swore that he had written the letter to the dictation of Itty Iype was employed as the driver of a motor bus which was the property of a Union in which the plaintiff has a financial interest. There is also a statement contained in paragraph 15 of the judgment of the Court below that P.W. 2 had given evidence on behalf of the plaintiff in other cases as well. These cannot certainly be regarded as valid reasons for disbelieving the evidence of P.W. 2. The whole of his evidence was read out in Court. We find that it was not successfully attacked in cross-examination. Under the circumstances the statement contained in the judgment of the trial Court that Ex. A is not genuine, cannot be accepted. We feel that the evidence of P.Ws. 1 and 2 support the case of the plaintiff that the document was signed by Itty Iype the scribe being P.W. 2.

The learned Munsiff in paragraph 16 of the judgment states that he minutely examined the alleged signature of Itty Iype in Ex. A with a microscope. Evidently the Munsiff means a magnifying glass, because it is not possible to study a signature through the microscope. It does not also appear that subordinate Courts in this territory are supplied with microscopes for scrutinising signature appearing in documents. This indicates that the trial Court did entertain some doubt about the genuineness of the signature and not that it was sure on looking at the signature that it could not possibly have been that of Itty Iype. In such circumstances, we see no reason why the evidence of P.Ws. 1 and 2 should have been brushed aside without adequate reason. Therefore, since it is a serious thing to indicate that plaintiff has come forward with a forged document, we feel constrained to set aside the view expressed in the judgment of the trial Court that Ex. A is not genuine.

Even if this document is genuine, the plaintiff would not have surmounted all the obstacles before he can get a decree against the legal representatives of Itty Iype As already stated, the averment in the plaint does not even indicate that there was any consideration for the promise alleged to have been given by Itty Iype subsequent to the incurring of the liability by the principal debtor. There is no suggestion of any benefit which the creditor was prepared to confer on the principal debtor at the request of the surety. The debt was already contracted and subsequently the alleged surety is stated to have come forward and said that he would be responsible for the discharge of the debt. The creditor did not suffer any detriment at the instance of the surety. This is an obvious instance of a promise which is not supported by consideration and for that reason cannot be enforced in a Court of law.

Even such a promise is not contained in the four letters which are relied upon in support of the plaintiff's case. As already indicated, the promise given by Itty Iype was that he will see that the debtors will duly discharge their obligation. A promise of this description cannot amount to a guarantee. For these reasons, we are of the view that the conclusion reached by the Court below that no liability was incurred by Itty Iype on the averments in the plaint and on the evidence adduced in support of the plaint is correct. Consequently, a decree cannot be passed on the basis of that contract of guarantee against the assets of Itty Iype in the hands of his legal representatives This appeal must, in the circumstances, be dismissed with costs to the contesting respondents.

Appeal dismissed.

V.B.B.

A. I. R. 1952 Travancore-Cochin 203

GANGADHARA MENON AND JOSEPH VITHAYATHIL, JJ.

Kannamma Unikali, Appellant v. Krishna Vasanthi and others, Respondents.

Second Appeal No. 413 of 1124, D/- 22-8-51.

(a) Debtor and Creditor — Promissory note — Suit on — Fact that amount much larger than one due under promissory note was sent by debtor to creditor, admitted — Discharge — Burden of proof — Evidence Act (1872), Ss. 101-103 and 114 — Contract Act (1872), S. 60.

Where 'A' owes certain amount to 'B' under a promissory note and it is admitted that 'A' had sent to 'B' an amount much larger than the one covered by the promissory note, it is for the plaintiffs suing on the promissory note to prove that the amount due under the promissory note has not been taken from the amount so sent. The mere fact that the promissory note is found to be in the possession of the plaintiffs is not sufficient for holding that the liability under it has not been discharged. (Para 5)

Anno: Evidence Act, Ss. 101-103 N. 29; Contract Act, S. 60 N. 2.

(b) Civil P. C. (1908), O. 41, R. 33 — Power under, can be exercised in favour of person not party to appeal.

When an appeal comes before the Court the whole suit out of which the appeal arises is within the control of the Court and the Court has ample discretion to pass any decree or order for preventing the ends of justice being defeated. (Para 6)

A suit was decreed against 'A' 'ex parte' and against 'B' after contest. Subsequently the decree was set aside as against 'A' and the suit was restored to file. The trial Court dismissed the suit. In appeal filed by the plaintiffs the first appellate Court allowed the appeal and decreed the suit against 'A'. In second appeal by 'A' while allowing the appeal and dismissing the suit against 'A'.

Held that Order 41, Rule 33 empowered the High Court to dismiss the suit as against 'B' also although the decree against him was not set aside by the trial Court when the suit was restored to file on 'A's' application even though 'B' was not a party to the second appeal. AIR 1933 Mad 529 and AIR 1915 Mad 227 (2), Rel. on. (Para 6)

Anno: C. P. C., O. 41, R. 33 N. 7.

T. K. Narayana Pillai, for Appellant; V. G. Sankaranarayana Pillai, for Respondent No. 1.

Cases referred to:

('15) AIR 1915 Mad 227 (2): (24 Ind Cas 924) (Pr 6)

('33) 65 Mad L J 15: (AIR 1933 Mad 529) (Pr 6)

JUDGMENT.: The 2nd defendant in O. S. No. 1647 of 1113 of the District Court of Quilon is the appellant in this case. The Suit is on Ex. A promissory note executed by defendants 1 and 2 on 22-12-1107 for Rs. 100 in favour of one Krishnan Vydian. Krishnan Vydian died on 11-11-1110. The 1st plaintiff is the wife and plaintiffs 2 to 5 are the children of Krishnan Vydian. The suit was filed on 21-12-1113.

At first the 1st defendant alone contested the suit. His plea was that the amount under Ex. A had been discharged. This plea was repelled by the Court and the plaintiffs were given a decree. In appeal filed by the 1st defendant the decree of the trial Court was confirmed. Subsequently the 2nd defendant filed a petition to set aside the ex parte decree against her. The decree was set aside as against her and the suit was restored to file. She also contended that the liability under Ex. A had been discharged. This time the trial Court accepted the plea and dismissed the suit with costs. In appeal filed by the plaintiffs the District Court set aside the decree of the trial Court and allowed the suit.

(2) In this second appeal the only question that arises for consideration is whether the liability under Ex. A has been discharged. Before considering the evidence relating to the plea of discharge it is necessary to refer to certain circumstances. Defendants 1 and 2 are Kaniyans and the 1st defendant has taken to astrology as his profession. As knowledge of Sanskrit was necessary for the study of astrology he approached Krishnan Vydian for this purpose and Krishnan Vydian who was well versed in Sanskrit took him as his pupil. After some time the 1st defendant decided to go to Ceylon to try his fortune there. It was for this purpose that he borrowed Rs. 100 from Krishnan Vydian, and himself and his mother, the 2nd defendant executed Ex. A promissory note in favour of Vydian. It is admitted that the 1st defendant earned a decent income in Ceylon and that he sent about Rs. 1,000 from there to Krishnan Vydian by money orders. He returned to his native place in Kumbhom 1108. It is contended that he then settled accounts with Krishnan Vydian and after setting off the amount due to Vydian under Ex. A got back the balance amount reserving, however with Vydian Rs. 343/- for the purpose of purchasing a property. On 1-9-1108 he took Ex. 111 sale-deed for a property from one Kochunni Ismail. That sale-deed was written in the handwriting of P.W. 2 who is the son-in-law of Krishnan Vydian, i.e., the husband of the 2nd plaintiff. Krishnan Vydian is an attestor to it. The ready cash consideration for Ex. 111 is Rs. 343/ and it is stated in the document that it was the balance amount left with Krishnan Vydian for payment to the 1st defendant out of the money sent by the 1st defendant to Krishnan Vydian from Ceylon "by money-orders."*

"I have received this amount from Kunjen Krishnan, being the balance amount due from him to you out of the amount sent by you to him from Ceylon by money-orders."

Two facts are clear from this statement, namely that the 1st defendant was sending money to Krishnan Vydian from Ceylon and that on 1-9-1108 there was a balance of Rs. 343/- due from Krishnan Vydian to the 1st defendant. If this statement is true there is every reason to believe that it is after setting off the amount due to Vydian under Ex. A that Rs. 343/- was found due to the 1st defendant from Krishnan Vydian. It is difficult to believe that it was without taking into account the money due to Krishnan Vydian under Ex. A that it was stated in Ex. 111 that the balance amount due to the 1st defendant from Krishnan Vydian was Rs. 343/-. There is no reason to believe that this statement is not true in view of the fact that Ex. 111 was written in the handwriting of Krishnan Vydian's son-in-law and that Krishnan Vydian himself is an attestor to the document. It is also significant that this statement is inserted in the document at the end after all the terms have been mentioned. It would seem that the

*(The original was in Malayalam, which is omitted.—Ed.)

sentence was inserted at the instance of Krishnan Vydian for the purpose of making it clear that there was no further amount belonging to the 1st defendant in the hands of Krishnan Vydian. In the light of the statement in Ex. 111, it is difficult to believe that the amount due to Krishnan Vydian under Ex. A was not taken by him from the amounts sent to him by the 1st defendant.

(3) It is argued by the respondents' learned Advocate that if as a matter of fact the liability under Ex. A has been discharged there was no reason why Ex. A should not have been returned to the 1st defendant. The 1st defendant's explanation is that Krishnan Vydian told him that the promissory note was missing. Ex. 11 is a letter which according to the defendants was sent by Krishnan Vydian to the 1st defendant on 3-8-1108. It is stated in Ex. 11, that the amount under Ex. A has been taken out of the money sent by the 1st defendant to Vydian from Ceylon, that the promissory note was missing and that if it would be found out it would be sent to the 1st defendant. It is true that Ex. 11 was filed in Court only on 4-10-1116. It is also true that in Ex. C reply notice sent by the 1st defendant on 9-12-1110 there is no reference to Ex. 11. It is, therefore, argued for the respondents that Ex. 11 was fabricated for the purpose of this case. The defendants' case is that Ex. 11 is written in the handwriting of Krishnan Vydian. Exs. 111, V and J which are registered documents contain the signature of Krishnan Vydian. In Ex. V, Krishnan Vydian has written his full name in his own hand. There is close resemblance between the signature in Ex. 11 and that in Exs. 111, V and J. Krishnan Vydian's signature is one that cannot be easily imitated. More than that, there is striking resemblance between the handwriting in Ex. 11 and that in Ex. V. Ex. 11 appears to have been written in a free hand. A comparison of each letter in Ex. 11 with the corresponding letter in Ex. V both with regard to the formation and shape shows that both are written in the same handwriting. It may be that the 1st defendant was not aware of the existence of Ex. 11 letter when he sent Ex. C reply notice and that Ex. 11 was discovered only afterwards. In any case this fact alone cannot detract from the effect produced by the striking resemblance between the handwriting in Ex. 11 and that in Ex. V. Krishnan Vydian's handwriting as seen from Ex. V has a peculiarity of its own and it is not easy to imitate the same. We, therefore, agree with the trial Court in its view that Ex. 11 is genuine.

(4) It is to be noted that Krishnan Vydian did not make any demand for the amount under Ex. A. He died only in Mithunam 1110. The suit was filed only on 21-12-1113. It is also significant that case of the two major daughters of Krishnan Vydian refused to join as plaintiff in the case. She was, therefore, impleaded as 3rd defendant.

(5) In the light of these circumstances, we are inclined to accept the defendant's evidence relating to the plea of discharge. D.W. 1 who is an attestor to Ex. 111 swears that it was after final settlement of accounts beween Krishnan Vydian and the 1st defendant that the balance of Rs. 343/- was struck on the date of Ex. 111. The 1st defendant as D.W. 2 also swears to this. D.W. 3 and D.W. 4 prove Ex. 11. The evidence of these witnesses taken along with the circumstances mentioned above proves that the liability under Ex. A has been discharged out of the amounts the 1st defendant had sent to Krishnan Vydian from Ceylon and that Ex. 11 letter was sent by Krishnan Vydian to the 1st defendant admitting that the liability had been so discharged. The lower appellate Court has not given due weight to the circumstances mentioned above. We do not agree with the view of the learned Judge that there is no resemblance between the handwriting in Ex. 11 and that in Ex. V.

The learned Judge has not also correctly appreciated the effect of the statement in Ex. 111 that on the date of that document as balance amount of Rs. 343/- was due to the 1st defendant from Krishnan Vydian. It has also to be observed that so long it is admitted that the 1st defendant had sent to Krishnan Vydian an amount much larger than the one covered by Ex. A it is for the plaintiffs to prove that the amount due under Ex. A has not been taken from the amount so sent. The plaintiffs have not discharged this burden. In the circumstances, the mere fact that Ex. A is found to be in the possession of the plaintiffs is not sufficient for holding that the liability under it has not been discharged. We, therefore, hold that the plea of discharge is true.

(6) Another question for decision is whether in view of the fact that the original decree in the case was set aside only as against the 2nd defendant this Court is competent to dismiss the suit as against the 1st defendant also. We are of opinion that Order 41, Rule 33, C. P. C., empowers us to dismiss the suit as against 1st defendant also although the decree against him was not set aside by the trial Court when the suit was restored to file on the application of the 2nd defendant even though he is not a party to this second appeal. Order 41, Rule 33, empowers the appellate Court to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection. We think that this is a fit case in which we should exercise this power.

Reference may be made in this connection to a decision of the Madras High Court reported in 'THIRUMALA v. ATHIMOOLA', 65 Mad L J 15. That was a case in which A obtained an ex parte decree against B and C. B applied to set aside the ex parte decree and it was set aside as against both B and C. In Revision filed by the plaintiff the High Court confirmed the order as to B but reversed the order setting aside the ex parte decree against C. When the suit against B was tried it was found that the document on which the suit was filed was not genuine. In appeal the High Court dismissed the suit not only against B but also against C although C was not a party to the appeal.

In 'KRISHNASAMI NAIK v. AIYAPPA NAIK', AIR (2) 1915 Mad 227, a suit was decreed against one of the defendants ex parte and against the other defendants after contest. One of the defendants that contested appealed and the appellate Court dismissed the suit against all the defendants including the one against whom the decree was passed ex parte. In second appeal the High Court held that it was a proper exercise of the power conferred on the appellate Court by Order 41, Rule 33. The reason of the rule is that when an appeal comes before the Court the whole suit out of which the appeal arises is within the control of the Court and the Court has ample discretion to pass any decree or order for preventing the ends of justice being defeated. In view of our finding that the liability under Ex. A has been discharged we do

not think it proper to allow the decree against the 1st defendant to stand.

(7) We, therefore, set aside the decree of the lower appellate Court and restore that of the trial Court and dismiss the suit with costs in all the Courts.

(8) The second appeal is thus allowed with costs.

V.B.B. *Appeal allowed.*

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KUNHI RAMAN, C. J.
AND SUBRAMANIA IYER, J.

Nesamani, Appellant v. Varghese, Respondent.

Civil Misc. Appeal No. 209 of 1950, D/- 22-11-1950.

(a) Constitution of India, Art. 385 — Legislature functioning when constitution came into force — President also continues to be president.

The clause in Article 385 that the body functioning immediately before the constitution as the Legislature shall exercise the powers and perform the duties conferred by the new Constitution would give a continuity of existence as a temporary measure to the Speaker as well especially when none of the circumstances in which his right to continue as such can be terminated viz., resignation, vote of no confidence or his ceasing to be a member of the legislature, have happened. **(Para 8)**

(b) Interpretation of statutes — Construction should be most agreeable to justice and reason.

One of the fundamental principles of interpretation of statutes is that the construction most agreeable to justice and reason should be adopted and the presumption is against the intention of the statute being to cause injustice or to result in absurdity. When there is a statute which is likely to encroach on vested rights, the provision must be strictly construed. (1863) 10 H L C 367; (1933) 1 K B 688; (1884) 12 Q B D 224; (1935) 2 K B 257, Rel. on. **(Para 9)**

(c) Constitution of India — Interpretation — Grounds of analogy — Intention should not be speculated.

Too great a stress cannot be laid in construing an Article of the Constitution on grounds of analogy. To adopt that as the basis may lead to absurd consequences. In construing the Articles, the duty of the Court is not to speculate about the intention of the Legislature, but to construe the Articles in the light of the words in them. **(Para 9)**

(d) Constitution of India, Art. 212(2) — Jurisdiction of Court of law to interfere with functions of officers of legislature.

When the matter in controversy has nothing to do with the exercise by an officer of the legislature of the powers vested in him, but is concerned with the interpretation of a relevent provision of law which is alleged to affect his legal right to continue in office, a Court of law does have jurisdiction to deal with the matter. **(Para 10)**

M. T. Paikadai, for Appellant; T. N. Subramania Iyer, Advocate-General, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

(1943) 2 DLR (Canada) 544 (Pr 10)
(1863) 10 H L C 367: (32 L J Ch 585) (Pr 9)
(1933) 1K B 688: (102 L J K B 91) (Pr 9)
(1935) 2 K B 257: (104 L J K B 455) (Pr 9)
(1884) 12 Q B D 224: (53 L J Q B 165) (Pr 9)
(1884) 12 Q B D 271: (53 L J Q B 209) (Pr 10)

KUNHI RAMAN, C. J.: This is an appeal from the decision of Mr. Justice Govinda Pillai in O. P. No. 11 of 1950. The learned Judge dismissed the petition and the petitioner has, therefore, come up in appeal before this Court.

(2) The question raised in the original petition related to the construction of Article 385 of the Constitution of India with reference to the position of the Speaker of the Legislative Assembly of this State. The Speaker is the sole respondent in this appeal. He is represented by the learned Advocate-General.

(3) The prayer in the original petition was for the issue of a writ in the nature of a quo warranto calling upon the respondent to show cause under what right or authority he is holding office and exercising the powers of the Speaker of the Legislative Assembly of the State. The contention urged on behalf of the appellant is that the office of the Speaker became vacant when the new Constitution of India came into force and that it should have been filled by a fresh election. The appellant has raised this question in the Legislative Assembly when it met under the new Constitution, but his objection was overruled by the respondent Speaker who held that a fresh election was not necessary. Having failed to gain his point, he is seeking legal redress by invoking the powers vested in the High Court to issue writs.

(4) To appreciate the contentions of the parties, it is necessary to set forth briefly how the Legislative Assembly of this State was formed before the new Constitution of India came into being and how the respondent became the Speaker of that Assembly. Under the Covenant entered into on the 29th of May 1949 by the Rulers of Travancore and Cochin with the Government of India, the Legislative Assembly of this State was constituted, the members of the Assembly having been elected by the constituencies in the State. The respondent was one of the members so elected. He was subsequently duly elected as the Speaker of the Legislative Assembly and as such he was exercising the powers and discharging the duties of that office when the new Constitution came into being.

(5) Part XXI of the new Constitution contains certain temporary and transitional provisions. A Legislative Assembly has to be elected under the new Constitution. The date for that election had not yet been fixed, and therefore, provision had to be made for the functioning of a Legislative Assembly during the period of the interregnum. This State is placed in the category, part B in the Ist schedule to the Constitution. For the sake of brevity and convenience, it will be referred to in this judgment as one of the Class B States in contra-distinction to the Class A States, for instance, like Madras and Bombay, which are placed in that category in the Schedule. The latter Class will be referred to hereinafter as Class A States.

(6) The Articles in the new Constitution which provide for provisional legislatures functioning in Class A and Class B States respectively are Articles 385. It would be convenient to read Article 385 in the first instance.

"Until the House or Houses of the Legislature of a State specified in Part B of the First Schedule has or have been duly constituted and summoned to meet for the first session under the provisions of this Constitution, the body or authority functioning immediately before the commencement of this Constitution as the Legislature of the corresponding Indian State shall exercise the powers and perform the duties conferred by the provisions of this Constitution on the House or Houses of the Legislature of the State so specified."

The appellant's case is based on the fact that there is no express reference made to the Speaker of the Legislature in this Article. Provision is made for "the body" or "the authority" functioning as the Legislature in Class B States continuing to do so provisionally under the new Constitution. In this State, since there was already a Legislative Assembly we are concerned only with the part of the Article dealing with the body which functioned as Legislature of the State. The object of Art. 385 is inter alia to provide for the continuance of the body as a temporary measure, before the election of a legislature under the new Constitution. This body is authorised to exercise the powers and perform the duties conferred by the new Constitution on the House or Houses of Legislature of the State.

(7) The Legislative Assembly of this State which, as already mentioned, was constituted under the Covenant, thus continues to function under Article 385. But what is contended on behalf of the appellant is that the continuance of the Legislative Assembly under the new Constitution does not automatically entitle the Speaker who was elected by the Assembly constituted under the Covenant to continue in office after the new Constitution came into being, because the Article does not contain any such express provision. The argument is sought to be implemented by referring to the provisions of Art. 382 of the Constitution which deals with the Legislatures in Class A States. The first Clause of that Article is almost similar in wording to Article 385. In Clause (3) of that Article there is express provision made for the Speaker of the Legislative Assembly of a province to be the Speaker of such Legislative Assembly while it functions under Clause (1). It is contended on behalf of the appellant that the omission of a similar provision in Art. 385 in the case of the Legislative Assemblies in Class B States is significant. Such omission according to the appellant's learned Counsel, indicates that the intention of the framers of the Constitution was to prolong the life of the earlier Legislative Assembly of a Class B State, but not to extend the term of the Speaker thereof elected under the earlier Constitution. The question for determination is whether this contention is well-founded.

(8) According to Ordinances Nos. 3 and 8 of 1124 M.E., promulgated in the State, the Speaker elected under the former Ordinance was to be declared the first Speaker of the Legislative Assembly. According to Section 6 (c) the circumstances in which the member holding the office of Speaker shall vacate office are the following:

(1) If he ceases to be a member of the Assembly.

(2) If he resigns.

(3) If he is removed for want of confidence by a resolution of the Assembly by a majority of all the then members. There are similar provisions in Article 179. According to Aricle 385 the body which functioned immediately before the commencement of the Constitution was the Legislative Assembly with the respondent as the Speaker, he being also a member of the Legislative Assembly. The natural meaning that can be attributed to the clause that this body shall exercise the powers and perform the duties conferred by the new Constitution would give a continuity of existence as a temporary measure to the Speaker as well, especially in view of the fact that the circumstances in which his right to continue as such can be terminated are clearly specified in the old Ordinance and none of those contingencies have admittedly happened. No doubt, the Ordinance is transitory, its operation being for a temporary period. But we are here concerned with the construction of Article 385 of the new Constitution. Since this Article authorises the Legislative Assembly constituted under the Ordinance to continue to exist and to function by exercising the powers and performing the duties mentioned in the Constitution the fact that the Ordinance remained in force only for a temporary period cannot affect the legal position.

(9) One of the fundamental principles of interpretation of statutes is that the construction most agreeable to justice and reason should be adopted and the presumption is against the intention of the statute being to cause injustice or to result in absurdity. When there is a statute which is likely to encroach on vested rights, it is a well-known rule that the provision must be strictly construed. This is mentioned in Maxwell's Interpretation of Statutes, 9th Edn. Page 289, Section 2:

"Statutes which encroach on the rights of the subject whether as regards person or property, are similarly subject to strict construction. It is a recognised rule that they should be interpreted, if possible, so as to respect such rights."

See 'WALSH v. SECRETARY OF STATE FOR INDIA', (1863) 10 H L C 367 at p. 386 Lord Westbury, 'MARSHALL v. BLACK', 'POOL CORPORATION', (1933), 1 K B 688; Bowen, L. J., 'HOUGH v. WINDUS', (1884) 12 Q B D 224; 'DRUCE & CO. v. BEAUMONT PROPERTY TRUST', (1935) 2 K B 257, at p. 264.

If the construction suggested on behalf of the appellant is adopted, the result will be that the Speaker, the termination of whose office could take place only if one of three contingencies happened which are not proved to have happened in this case, would be deprived of his office and that is a construction which would be repugnant to the principle adverted to above. If there are express words used in the provision relied upon by the appellant's learned Counsel the position may be different. But here he is asking the Court to draw an inference adverse to the Speaker by implication. Too great a stress cannot be laid in construing the Article of the Constitution on grounds of analogy. To adopt that as the basis may lead to absurd consequences. For instance, it may with equal force be argued on behalf of the respondent that there is an express provision in the proviso to Art. 382 which requires that in a newly elected Assembly in a Class A State, the Speaker and Deputy Speaker shall be elected. There is no such provision in Article 385 with regard to the Assembly in a Class B State which is authorised to continue to function under the new Constitution. It is not expressly laid down here that when it functions under the new Constitution it shall elect its Speaker. In construing these Articles, the duty of the Court is not to speculate about the intention of the Legislature, but to construe the Articles in the light of the words in them. This is put as follows in Maxwell's Interpretation of Statutes, page 4.

"The underlying principle is that the meaning and intention of a statute must be collected from the plain and unambiguous expressions used therein rather than from any notions which may be entertained by the Court as to what is just or ex-

pedient. The words cannot be construed contrary to their meaning as embracing or excluding cases merely because no good reason appears why they should be excluded or embraced. However unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect. When once the meaning is plain it is not the province of a Court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands according to the real sense of words."

In our judgment, by reason of the provision for the continuity of the existence of the State Legislative Assembly the Speaker who is an essential part of the Assembly is also intended to continue in office, in the absence of express words to the contrary.

(10) The learned Advocate-General raised an interesting contention to the effect that a Court of law has no jurisdiction to deal with the question raised in this appeal, because it is contrary to the provision of Art. 212, Clause (2) of the Constitution of India. Learned Counsel also referred to the passage in May's Parliamentary Practice relating to the jurisdiction of Courts and quoted as authorities in support of his proposition 'BRADLAUGH v. GOSSET', (1884) 12 Q B D 271; 'DICEY'S Law of the Constitution 1950, pages 68, 70 and 81; (1943) 2 DLR (Canada) 544 and certain other cases. We entertain no doubt that when the matter in controversy has nothing to do with the exercise by an officer of the legislature like the respondent of the powers vested in him, but is concerned with the interpretation of a relevant provision of law which is alleged to affect his legal right to continue in office, a Court of law does have jurisdiction to deal with the matter. It is unnecessary to dilate on this question in the view we have taken of the merits of the present appeal.

(11) The appeal must in the circumstances be dismissed with costs. Advocates' fee Rs. 150/-.

(12) The appellant's learned Counsel at this stage asks for a certificate under Art. 132 (1) of the Constitution of India according to which an appeal shall lie to the Supreme Court from any judgment ,decree or final order of a High Court in the territory of India whether in a civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution. We regret we are not satisfied that in this case there is any substantial question of law within the meaning of this Article and, therefore we decline to grant the certificate.

R.G.D. *Appeal dismissed.*

A. I. R. 1952 Travancore-Cochin 207

JOSEPH VITHAYATHIL J.

Skaria Mathai, Petitioner v. Narayanan Nair, Counter-Petitioner.

Criminal M. P. No. 306 of 1951, D/- 26-6-1951.

Criminal P. C. (1898), Ss. 145 and 344 — Proceedings under S. 145 — Stay of, pending civil suit — (Travancore Criminal P. C. S. 143).

Where after a civil suit is filed the plaintiff moves the criminal Court to start proceeding under S. 145, the proper course to adopt would be to move the civil Court itself for appropriate relief even if the disturbance of possession of property occurred after the filing of the suit. It is therefore proper in such a case to stay the criminal proceedings till the disposal of the suit. 1945 T L R 773; AIR (14) 1927 Mad 778; AIR (18) 1931 Pat 411, Disting. (Para 1)

Anno: Criminal P. C., S. 344 N. 11.

K. K. Mathew, for Petitioner; P. Narayana Pillai, for Counter-Petitioner.

Cases referred to:

('27) AIR (14) 1927 Mad 778: (28 Cri L J 812) (Pr 1)

('31) AIR (18) 1931 Pat 411: (33 Cri L J 147) (Pr 1)

('45) 1945 T L R 773 (Pr 1)

ORDER.: The petitioner is the counter-petitioner in M. C. No. 23 of 1124 on the file of the First Class Magistrate's Court, Thodupuzha. The petition is for stay of trial of that case till the disposal of O. S. No. 230 of 1124 of Thodupuzha Munsiff's Court. That is a suit filed by the petitioner in M. C. No. 23 of 1124 for specific performance of a contract of sale alleging that he is in possession of the property as per the contract of sale. The petitioner here who is the defendant in that case contends that he is in possession of the property as per sale in his favour from the original owner. One of the questions to be decided in that case is as to who is in possession of the property. It is after the filing of that suit that the plaintiff moved the Magistrate's Court for taking action under Section 143 of the Travancore Criminal Procedure Code. That Court started proceedings under that section and attached the property.

The question as to who is in possession of the property will have to be finally decided by the Civil Court. When the Civil Court was already seized of the matter there was no necessity for the plaintiff to move the Criminal Court for starting proceedings under Section 143 of the Travancore Criminal Procedure Code. The plaintiff could have moved the Civil Court itself to appoint a Receiver for the property and thus avoid any likelihood of a breach of the peace relating to the possession of the property. It is unnecessary to have the separate enquiries relating to the possession of the property.

It was contended for the counter-petitioner that the filing of a civil suit relating to the possession of the property is no reason for staying proceedings under Section 143 of the Criminal Procedure Code and reliance was placed on the ruling reported in 'THOMAS v. CHELLIAH NADAR', 1945 T L R 773; 'C. RAMIAH v. N. RAMIAH', AIR (14) 1927 Mad 778 and 'JAGANNATH ACHARYA v. RAJAGOPALACHARI', AIR (18) 1931 Pat 411. These were cases in which the Civil Suit was filed after proceedings were started in the Criminal Court. But, in this case, it is after the civil suit was filed that the plaintiffs moved the criminal Court to start proceedings under Section 143. I think that in such a case the proper course to adopt would be to move the civil Court itself for appropriate relief even if the disturbance of possession of property occurred after the filing of the civil suit.

I, therefore think that it is proper that the proceedings in the criminal Court are stayed till the disposal of the civil suit. It is, therefore, ordered that the proceedings in M. C. No. 23 of 1124 on the file of the First Class Magistrate's Court, Thodupuzha, be stayed till the disposal of O. S. No. 230 of 1124 of the Thodupuzha Munsiff's Court. The Receiver appointed in M. C. No. 23 of 1124 will, however, continue to be in possession of the property till the disposal of the civil suit or until otherwise ordered by the civil Court.

(2) Criminal Miscellaneous Petition No. 306 of 1951, is thus allowed.

V.R.B. *Petition allowed.*

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KOSHI AND GOVINDA PILLAI, JJ.

Sivasankaran, Appellant v. State.

A. S. No. 319 of 1125, D/- 30-7-1951.

(a) Civil P. C. (1908), O. 21, R. 94 — What passes at Court sale — Sale operating to convey judgment-debtor's share — Whole property delivered — Redelivery of property.

Where a property sold in execution and purchased by and delivered to the decree-holder was held by the judgment-debtor and the objector to the sale as tenants-in-common and it was found that the sale operated to convey only the share of the judgment-debtor to the decree-holder.

Held that the property ought to be re-delivered to the objector who was entitled to remain in possession of the entire property until the decree-holder obtained his share from him by seeking partition by metes and bounds. Case law discussed. (Para 8)

Anno: C. P. C., O. 21, R. 94 N. 8.

(b) Limitation Act (1908), Art. 144 — Co-owners—Possession of one co-owner is possession of all so far as stranger is concerned. 8 Coch L R 273, Rel. on. (Para 7)

Anno: Limitation Act, Arts. 142 and 144 N. 35.

P. Narayana Pillai, for Appellant; M. N. Parameswaran Pillai, Government Pleader, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('77-78) 3 Cal 198: (4 Ind App 247 P C) (Pr 4)

('84) 10 Cal 626: (11 Ind App 26 P C) (Prs 4, 5)

('96) 23 Cal 670: (23 Ind App 37 P C) (Pr 5)

('74) 11 Bom H C R 76 (Pr 5)

('81) 5 Bom 499 (Pr 4)

('17) 39 Ind Cas 23: (AIR 1916 Bom 130) (Pr 5)

('06) 29 Mad 294 (Pr 4)

8 Coch L R 273 (Prs 5, 6, 7)

23 Coch L R 309 (Pr 6)

7 Trav L R (App) 50 (Pr 3)

KOSHI, J.: Defendant 6 in O. S. No. 24 of 1103 on the file of the Trivandrum District Court has preferred this appeal against an order passed by the learned District Judge of that Court regarding the objection he raised to the Court auction sale and resultant delivery by Court, of an item of immovable property. The appellant's mother brought the above-named suit 'in forma pauperis' and for realising the Court-fee due on the plaint and on the memorandum of appeal preferred against the decision of the trial Court, the State took out execution against her and brought to sale the property in dispute here which was item (i) in the plaint. The State itself purchased the property and also obtained delivery. At that stage the appellant intervened with his objection that the property belonged to a 'sub-tarwad' composed of his mother and her four children, defendants 6 to 9, that the mother by herself had no saleable interest in the property and that the Court sale conveyed no title to the State, the auction purchaser. The objection petition also set out that as the senior male member of the 'sub-tarwad' the appellant was in possession of the property and that no delivery was actually effected in favour of the State. Alternatively it was claimed that in case the Court found that possession had passed to the State the property should be redelivered to the appellant.

(2) Admittedly, the property was bequeathed to the plaintiff in the suit and her children under a Will. The parties being Christians the lower Court rightly repelled the case that the legatees under the Will constituted a 'sub-tarwad'. The Court further found that under the terms of the concerned Will the plaintiff was only enitled to a 1/5 share of the property and that the sale certificate conveyed to the State the plaintiff's 1/5 share alone. Possession was found to have passed to the State of the entire property, but no redelivery as asked for by the appellant was granted. Instead the Court in the concluding paragraph of its order said:

> "In the circumstances I order that 4/5 of the decree schedule item 1 should be re-delivered to the petitioner on his applying for a commission to effect the division and after the division is made by the Court on receipt of the commissioner's report. If he does not apply for a commission in two weeks Sirkar may apply for commission to effect the division and to give possession to them of the 1/5 share of the property."

In the Court below, the position taken up by the State was that the Court auction sale operated to convey the entire interest in the property to the State. No attempt was however made before this Court by any cross appeal or memo of objections to reagitate that question. In other words, the State submitted to the lower Court's decision that by the Court sale it became entitled only to a 1/5 share of the property. The appellant's learned counsel made a faint attempt to show that the plaintiff in the suit and her children constituted a 'sub-tarwad'. As indicated earlier that case has no legs to stand upon. The more serious arguments raised in the appeal were that on the finding that the Court sale operated to convey only the mother's undivided 1/5 share in the property to the State the lower Court went wrong in refusing to redeliver the property to the appellant and that the Court's direction to effect a division in the present proceeding went beyond its powers.

(3) In our opinion, the appellant's learned counsel is plainly right in both these contentions. So long ago as 1888 in the case reported as 'RAMAN PADMANABHA v. MADHAVAN RAMA IYER', 7 T L R App 50 a Division Bench of the Travancore High Court had pointed out that in circumstances similar to the present the Court auction purchaser cannot be given actual possession pursuant to his sale certificate and that his remedy was to obtain possession of his share after effecting a division of the property by metes and bounds. In that case the sale was with respect to an undivided half-share in joint family property and the Court had directed a division to be effected by the 'Amin' entrusted with the task of effecting delivery pursuant to the sale certificate. Unlike here it was only the share so divided that the purchaser was put in actual possession of. Still the learned Judges remarked that the order of the Zilla Judge to make a partition of the property between the appellant and the respondent was illegal and 'extra judicial'.

The operative portion of the order of the High Court in that case reads:

"In a case of this kind possession ought to be given under S. 242, Civil Procedure Regulation by a proclamation leaving the joint tenants to effect a partition of the property by metes and bounds."

The view the learned Judge took has ample support in the decisions of the Privy Council and of the older High Courts in India.

(4) In 'DEENDYAL v. JUGDEEP NARAIN SINGH', 3 Cal 198, the Privy Council said that the purchaser at a Court sale of the right, title and interest of one co-sharer acquires merely the right to compel a partition as against the other co-sharers which the judgment-debtor possessed. Six years later their Lordships reiterated this position in 'HARDI NARAIN SHAU v. RUDER PERKASH MISSOR', 10 Cal 626 (P C). What was held there was that by the sale in that case not the father's share, but the interest which he had, namely, the right which he would have had to a partition and to what would have come to him passed to the purchaser.

In 'BALAJI ANANT v. GANESH JANARDAN', 5 Bom 499, the Bombay High Court took a similar view. In that case it was pointed out that the purchaser's remedy was by a suit for partition and that he ciuld not claim to be put in joint possession with the other members of his judgment-debtor's undivided Hindu family, of the family property. In 'YELUMALAI CHETTI v. SRINIVASSA CHETTI', 29 Mad 294, the Madras High Court also expressed a similar view of the purchaser's right and also pointed out that the Court cannot on a mere application for execution by such purchaser enforce his right by an order for partition.

(5) These are no doubt cases relating to the purchase of the rights of an undivided member of a Hindu joint family. The learned Government Pleader stated in his argument that in the case in hand the parties were tenants-in-common and the rule of the above decisions cannot be applied to the present case. The same argument was raised in other cases and we shall first refer to the words Varugis J. (as he then was) employed to repel it in 'MARIAM v. PONNU NAYANAN PILLAI', 8 Coch. L R 273. After referring to the Privy Council decision in 'HARDI NARAIN v. RUDER PERKASH', 10 Cal 626 and to a decision of the Bombay High Court to which we shall presently refer, the learned Judge said:

"For the counter-petitioners it is urged that the cases above cited were cases of joint Hindu families and that the law is different in the case of tenants-in-common. We are not aware that there is any distinction in respect of the right to possession between a joint tenant and tenants-in-common."

The learned Judge then proceeded to quote from the Bombay decision he cites in his judgment viz., 'NARO GOPAL v. PARAGOWDA BASAGOWDA', 39 Ind Cas 23 (Bom) a decision by Sir Basil Scott, C.J. and Mr. Justice Heaton. There the transfer of the undivided interest of a member of a joint Hindu family was effected at a private sale and the question for decision was what the alienee's rights were. It was held that he only acquired a right to partition and not to possession before partition. In his judgment the learned Chief Justice Sir Basil Scott Kt., observed

"that an alienation by a joint tenant effects a severance as a result of which the alienee before division by metes and bounds becomes a tenant-in-common. See 'JOGESWAR NARAIN DEO v. RAM CHANDRA DUTT', 23 Cal 670 (P.C.) and 'UDARAM SITARAMA v. RANU PANDUJI', 11 B.H.C.R. 76."

It is the sentence above quoted occurring at page 25 of the report in '39 Ind Cas 23 (Bom) that Varugis J. extracted in his judgment in '8 Coch. L R 273'. That one sentence effectively disposes of the argument that the law on the point is different for joint tenants and tenants-in-common. The alienee of the right, title and interest of a joint tenant is only a co-tenant with the other joint tenants of the alienor's family.

(6) In the case last mentioned '8 Coch L R 273' it was the undivided interest of a member of a Christian family that was sold in Court auction. The property belonged to the members of that family in co-ownership and what was held was that the auction purchaser of the undivided interest should seek his remedy in a suit for partition. The lower Court had said that the only remedy of the co-owner who objected to the auction-purchaser being given possession was to recover joint possession and added that whichever party may feel inconvenienced by such joint possession may sue for partition and determine the joint possession. That view was held to be wrong. The decision in '8 Coch L R 273' was followed in 'MEENKA v. ANNA', 23 Coch L R 309. There also the original owners were Christians and they were co-owners with respect to the property in dispute.

(7) A further point raised by the learned Government Pleader was that on the date delivery was effected in favour of the State, the plaintiff, to realise whose dues to the State by way of Court-fees the sale was held, was in actual possession of the property and that therefore the State was entitled to remain in possession until the appellant or other co-owners obtained their respective shares in partition. The question as to whether the mother or her eldest son, the appellant, was in actual possession was one of the points in dispute before the learned Judge in the Court below and the learned Judge did not think it necessary to record a finding with respect to it. Further, as pointed out in '8 Coch L R 273' the possession of one co-owner is possession of all so far as the stranger is concerned.

(8) In view of the long current of decisions referred to above we have no hesitation to hold that the lower Court's order cannot be sustained and we accordingly set it aside. The property will be redelivered to the appellant and he will be entitled to remain in possession of the entire property until the State or other co-owners obtain their respective shares from him by seeking partition by metes and bounds.

(9) Regard being had to the law as laid down in the cases referred to in this judgment and the mischievous results what is known as 'Oodukur' possession ordinarily leads to, we cannot accede to the learned Government Pleader's suggestion to leave the parties in 'Oodukur' possession of the property. We are free to confess we are no admirers of that form of joint holding of lands and do not desire to bring such holdings into existence as a result of our decisions. Further to do so here would be to run counter to what we ourselves have said as to the rights of, and remedies open to a Court auction purchaser of an undivided share in common properties whether the properties happened to be held by the original owners as joint tenants or tenants-in-common.

(10) The lower Court will pass appropriate orders regarding the profits collected by the receiver and the profits for the period between the date of delivery to the State and the date on which the receiver took possession of the property in the light of our decision in this appeal.

(11) The appellant will receive his costs here and in the Court below from the State.

V.R.B. Order set aside.

✻ A. I. R. 1952 Travancore-Cochin 210

(FULL BENCH)

KOSHI, C. J., GOVINDA PILLAI AND JOSEPH VITHAYATHIL JJ.

State v. Kunjan Pillai Aiyappan Pillai, Counter-Petitioner.

Criminal M. P. No. 240/1124 (T) in Ref. Trial No. 20 of 1123 and Criminal Appeal No. 136 of 1123, D/- 18-3-1952.

† ✻ **Criminal P. C. (1898), Ss. 369 and 561-A and 471 — Power of High Court to review or alter its judgment in Criminal case — Travancore Criminal P. C., Ss. 305, 470 and 384.**

Section 369 applies to the High Court also. Sec. 561A does not confer any new power on the High Court. It only reserves the power which the High Court possessed even before the section was enacted. The words 'save as otherwise provided by this Code' in Section 369 cannot have reference to Section 561A. These words refer to the express provisions of the Code which empower the Court to alter or review its judgment in certain specified cases. The High Court has no power to review or alter its judgment in a criminal case except in the case mentioned in Section 369 or where the Court has acted without jurisdiction or where it has decided the case without giving an opportunity to a party for being heard, and S. 561A does not confer on the High Court any such power. In the case of absence of jurisdiction the judgment can be treated as one not valid in law and the passing of a fresh judgment cannot in strict sense be regarded as altering or reviewing a prior judgment. With regard to cases in which the parties were not given an opportunity for being heard it may be taken to be an implied condition of such judgment or order that it should be open to reconsideration at the instance of the party prejudicially affected. The power of the Court to reconsider the matter is implied in the very nature of an 'ex parte' decision.

Where the direction in the judgment of the High Court allowing the accused to be entrusted to the custody of his relatives was made on the basis of the interpretation of the proviso to S. 384, Travancore Code of Criminal Procedure and Rule 7 of the Rules passed under the Travancore Lunacy Act, even if the direction in the judgment is not strictly in accordance with law this is not a case in which the Court has acted without jurisdiction or where there has been an abuse of the process of Court or where any grave injustice was done to any party. 15 T L J 85; 20 T L J 378, Overruled. (Paras 5, 6, 30, 31, 33)

Anno: Criminal P. C., S. 369 N. 5; S. 561A N. 1, 2; S. 471 N. 2.

Public Prosecutor, M. N. Parameswaran Pillai, for the State; Mariakutty John, for Counter-Petitioner.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('17) AIR 1917 P C 179: (41 Mad 412 PC) (Pr 31)
('45) AIR 1945 P C 18: (46 Cri L J 413) (Pr 5)
('45) AIR 1945 P C 94: (46 Cri L J 662) (Pr 5)
('85) 7 All 672 (Pr 14)
('23) AIR 1923 All 473 (2): (24 Cri L J 766) (Pr 20)
('35) AIR 1935 All 60: (35 Cri L J 1485) (Pr 17)
('35) AIR 1935 All 466: (36 Cri L J 1286) (Pr 18)
('48) AIR 1948 All 106: (49 Cri L J 56) (Pr 19)
('86) 10 Bom 176 (Pr 14)
('99) 23 Bom 50 (Pr 21)
('46) AIR 1946 Bom 276: (47 Cri L J 700 F B) (Pr 21)
('87) 14 Cal 42 (FB) (Prs 8, 14, 16)
('12) 15 Cal L J 517: (13 Cri L J 609) (Prs 7, 12, 15)
('17) 44 Cal 816: (AIR 1918 Cal 850: 18 Cri L J 497) (Prs 7, 15)
('21) 48 Cal 522: (AIR 1921 Cal 30: 22 Cri L J 213 S B) (Prs 7, 15)
('34) 61 Cal 155: (AIR 1933 Cal 870: 34 Cri L J 1100) (Prs 10, 11, 12, 16)
('25) AIR 1925 Lah 355: (26 Cri L J 1169) (Pr 23)
('27) AIR 1927 Lah 139: (28 Cri L J 239) (Pr 24)
('28) AIR 1928 Lah 462: (10 Lah 1: 29 Cri L J 669) (Prs 16, 17, 24)
('39) AIR 1939 Lah 244: (40 Cri L J 763) (Pr 24)
('12) 23 Mad L J 371: (13 Cri L J 710) (Pr 22)
('22) AIR 1922 Mad 54 (2): (23 Cri L J 71) (Pr 2)
('22) AIR 1922 Mad 502: (23 Cri L J 583 F B) (Pr 22)
('23) AIR 1923 Mad 276 (1): (23 Cri L J 746) (Pr 22)
('25) AIR 1925 Mad 438: (26 Cri L J 707 F B) (Pr 22)
('26) AIR 1926 Mad 139: (27 Cri L J 126) (Pr 22)
('31) AIR 1931 Nag 169: (32 Cri L J 1222) (Pr 25)
('36) AIR 1936 Nag 132: (38 Cri L J 390) (Pr 25)
('37) AIR 1937 Nag 181: (38 Cri L J 384) (Pr 25)
('45) AIR 1945 Nag 77: (46 Cri L J 745) (Prs 2, 33)
('40) AIR 1940 Oudh 369: (41 Cri L J 711) (Pr 28)
('47) AIR 1947 Oudh 221: (1947 A W R C C 130) (Pr 28)
('31) AIR 1931 Pat 81: (32 Cri L J 551) (Prs 26, 31)
('34) AIR 1934 Pat 551: (36 Cri L J 100) (Pr 26)
('44) AIR 1944 Pat 209: (46 Cri L J 30) (Pr 27)
3 Cochin 7 (Pr 29)
8 Cochin 1 (Pr 29)
15 T L J 85 (Prs 7, 8, 9, 10, 11, 12, 15)
15 T L J 624 (Pr 9)
20 T L J 378 (Prs 9, 10, 11)
26 T L J 341 (Pr 10)
26 T L J 373 (Pr 10)
29 T L J 340 (Prs 11, 12)

30 T L J 117 (Pr 12)
('44) 1944 T L R 113 (Pr 12)
('44) 1944 T L R 280 (Pr 12)
('45) 1945 T L R 944 (Pr 12)
('50) Cri R P No 178 of 1950 (Trav-Co) (Pr 32)
(1871) 3 P C 465: (40 LJPC 1) (Pr 7)

JOSEPH VITHAYATHIL, J.: The question raised in this petition relates to the jurisdiction of the High Court to review or alter its judgment in a criminal case. The Petition is filed by the State under Section 470 of the Travancore Code of Criminal Procedure to modify the direction in the judgment in Referred Trial No. 20 of 1123 and Criminal Appeal No. 136 of 1123 on the file of the erstwhile Travancore High Court. The judgment in that case was by a Bench of that Court consisting of Sankarasubbier & Habeeb Mohammed, JJ. The accused was convicted by the Sessions Court of Parur of offences punishable under Sections 301, 326 and 324, T. P. C., for murdering his wife's brother and for causing grievous hurt to his wife and simple hurt to another brother of his wife, and was sentenced to rigorous imprisonment for life for the offence under Section 301, rigorous imprisonment for one year for the offence under Section 326 and rigorous imprisonment for 3 months for the offence under Section 324, the sentences being directed to run concurrently.

The High Court, while upholding the finding of the Sessions Judge that the accused committed the acts attributed to him, accepted the defence plea of insanity and set aside the conviction and sentence entered by the Sessions Judge and made the following direction under Section 384 of the Travancore Code of Criminal Procedure:

"We allow the appellant to be detained in the custody of the relatives under whose care he has already been entrusted by order dated 22-11-1123 on Criminal M.P. No. 479 of 1123, the said relations undertaking to produce the appellant whenever they are called upon to do so by Government. A report as contemplated by Section 384, Criminal P.C., that the appellant is entrusted to the care of his relatives will be sent up to Government and it is for the Government to decide whether the appellant has to be left in the custody of his relations or to be detained in any Asylum as contemplated by the Lunacy Act. We, however, recommend to Government that this is a fit case in which the accused may be allowed to continue under the custody and care of his relations. The appeal is thus allowed. The Referred Trial is disposed of by refusing to confirm the sentence of rigorous imprisonment for life passed by the lower Court. The appellant will be handed over to the custody of two of his relatives on their executing a bond each for Rs. 1,000 to the satisfaction of the Registrar, High Court, undertaking to produce the appellant whenever called upon to do so by Government."

Accordingly two relatives of the accused executed a bond undertaking to produce him whenever called upon to do so by Government and he was entrusted to their care. A report to that fact was also sent to Government.

(2) In this petition it is contended on behalf of the State that the High Court had no jurisdiction to keep the accused in the custody of his relatives and that the Court was bound under Section 384, Criminal Procedure Code to detain him under safe custody in such place and manner as the Court thought fit. It is argued that keeping the accused in the custody of his relatives is not the same thing as detaining him in safe custody. This question was considered by the learned Judges when they made the direction mentioned above. This is what they say in the judgment:

"The next question is the further direction we have to give in this case. We have to act under Section 384 of the Criminal Procedure Code. That section says that in such cases the Court shall order such person to be detained in safe custody in such place and manner as the Court thinks fit and shall report the action taken to Government. Before the amendment of the Criminal Procedure Code the corresponding section of the old Code used the word 'kept' while Section 384 of the new Code uses the word 'detained'. When the old Code was in force in India the Madras High Court held in 'A. B. MAHOMMED v. EMPEROR', AIR 1922 Mad 54 (2) that it was open to the Court to hand over the insane accused to the care of his relations. But it was pointed out in 'PROVINCIAL GOVT., C. P. & BERAR v. KRISHNA GOPAL', AIR 1945 Nag 77, that after the amendment it is the duty of the Court to detain the accused in safe custody and that detention is not the same thing as entrustment to the care of relations."

But relying on the proviso to Section 384, Criminal Procedure Code which says that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as Government may have made under the Travancore Lunacy Act of 1110, and the rules passed by Government under Section 63 of the Lunacy Act the learned Judges made the direction mentioned above. Rule 7 provides that when passing a detention order the Court may allow the lunatic to be detained in the custody of a relation or guardian on such condition as the Court may deem fit. The learned Judges therefore held that it was open to the Court when passing a detention order to allow the accused to be kept in the custody of a relative or guardian pending orders from Government and that it was not incumbent upon the Court to direct the detention of the accused in a lunatic asylum.

(3) It is argued on behalf of the State that the learned Judges omitted to note that the proviso to Section 384 applies only when the Court orders the detention of the accused in a lunatic asylum and that it does not empower the Court to entrust the accused to the care of his relatives. The proviso reads thus:

"Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as our Government may have made under the Travancore Lunacy Act, 1110."

The words "in a lunatic asylum" were omitted when the proviso was extracted in the judgment. This, according to the learned Public Prosecutor, is a mistake committed by the Court as a result of misreading the proviso. He, therefore, prays that the direction in the judgment may be modified so as to bring into conformity with the proviso to Section 384 of the Code of Criminal Procedure.

(4) When the petition came before a Bench consisting of Habeeb Mohammad and Mathew Muricken, JJ., a preliminary objection was raised on behalf of the accused that the Court has no jurisdiction to alter or review its judgment in a criminal case. The question being an important one the learned Judges referred the petition to a Full Bench.

(5) The two sections of the Travancore Code of Criminal Procedure which have to be considered when deciding the question raised in this reference are Sections 305 and 470 corresponding to Sections 369 and 561 (A) respectively of the Indian Code.

Section 305 reads thus:

"Save as otherwise provided by this Code or by any other law for the time being in force no Court, when it has signed its judgment, shall alter or review the same except to correct a clerical error."

Section 470 reads thus:

"Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

It is not disputed that Section 305 applies to the High Court also. The question therefore for consideration is whether in the light of the express provision in that Section (S. 305) that no Court shall, when it has signed its judgment, alter or review the same except to correct a clerical error, the High Court can alter or review its judgment. The argument advanced on behalf of the petitioner is that Section 305 must be read subject to Section 470. The argument is based on the use of the words 'save as otherwise provided by this Code' in Section 305 and the words "nothing in this Code shall be deemed to limit or affect the inherent power of the High Court" in Section 470. But Section 470 does not confer any new power on the High Court. It only reserves the power which the High Court possessed even before the section was enacted. This is what Lord Peter says in 'EMPEROR v. NAZIR AHMED.' AIR 1945 P C 18.

"It has sometimes been thought that S. 561-A has given increased powers to the Court which it did not possess before that section was enacted. But this is not so. The section gives no new powers, it only provides that those which the Courts already inherently possess shall be preserved and is inserted, as their Lordships think, lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Criminal Procedure Code, and that no inherent power had survived the passing of that Act."

To the same effect is the observation of Lord Russel of Killowen in 'JAIRAM DAS v. EMPEROR', AIR 1945 P C 94. His Lordship observes thus:

"Section 561-A of the Code confers no powers. It merely safeguards all existing inherent powers possessed by a High Court necessary (among other purposes) to secure the ends of justice."

(6) If the High Court had no power before the enactment of Section 470 of the Travancore Code to review or alter its judgment such power has not been conferred on the High Court by that section. The words 'save or otherwise provided by this Code' in Section 305 cannot have reference to Section 470. These words refer to the express provisions of the Code which empowers the Court to alter or review its judgment in certain specified cases. They are Sections 326 (Sentence of whipping which cannot be executed), 359 (Further Enquiry by the District Magistrate), 395 (Sentence for contempt when an apology has been accepted) and 400 (Variation of orders for maintenance). Except in special cases expressly provided for in the Code or by any other law in force Section 305 absolutely prohibits the High Court from altering or reviewing its judgment unless it be for correcting a clerical error. At the same time Section 470 declares that nothing in the Code shall be deemed to limit or affect the inherent power which the High Court possessed at all times to make such orders as will be necessary to give effect to any order passed under the Code or to prevent abuse of the process of Court or otherwise to secure the ends of justice.

The question therefore resolves itself into one of considering whether apart from the provisions of the Code and in spite of Section 305 the High Court possesses an inherent power to alter or review its judgment for the purpose of giving effect to any order or to prevent an abuse of the process of Court or otherwise to secure the ends of justice. We shall consider the views of the various High Courts in India on this question.

(7) So far as the Travancore High Court is concerned the earliest case in which the question was considered is 'MATHU KORA v. PADMANABHAM KUNJU KUNJU', 15 T L J 85. In that case the accused was convicted by the Sub-Magistrate. Appeal from that conviction was filed in the District Magistrate's Court, but it was transferred by an order of the High Court to the file of the Sessions Court, and the appeal was decided by that Court. From this decision a revision was filed in the High Court and the High Court in ignorance of its own order transferring the appeal to the Sessions Court set aside the decision of that Court on the ground that the appeal lay to the District Magistrate and that the Sessions Judge had no jurisdiction to hear the appeal, and directed the appeal to be presented before the proper Court.

A petition was filed in the High Court to vacate this order. The Criminal Procedure Code that was in force at the time was the Code of 1067. Section 275 of that Code corresponds to Section 305 of the present Code. But there was no provision in that Code corresponding to Section 470 of the present Code. The High Court held that it had inherent power to review its judgment for rectifying a mistake and for preventing an abuse of the process of Court. This view was taken mainly on the basis of the observations of Mookerji, J. in 'PULIN BEHARI DAS v. EMPEROR', 15 Cal L J 517; 'BUDHU LAL v. CHATTU GOPE', 44 Cal 816 and 'PIGOT v. ALI MUHAMMAD MANDAL', 48 Cal 522.

In the first of those cases Mookerji, J., observed thus:

"Criminal Courts, no less than Civil Courts, exist for the administration of justice, and Courts of both descriptions have inherent power to mould the procedure, subject to the statutory provisions applicable to the matter in hand, to enable them to discharge their functions as Courts of Justice."

In the 2nd case the learned Judge explained the position thus:

"I am not unaware that the Criminal Procedure Code does not contain a provision corresponding to Section 151 of the Civil Procedure Code; but that section does not lay down any new principle, it merely embodies a legislative recognition of the inherent power of the Court to make such orders as may be necessary for the ends of justice. This inherent power is in no sense restricted in application to civil cases; it is equally applicable to criminal matters. This power is not capriciously or arbitrarily exercised. It is exercised 'ex debito justitia', to do that real and substantial justice for the administration of which alone Courts exist; but the Court in the exercise of such inherent power must be careful to see that its decision is based on sound general principles and is not in conflict with them or with the intention of the legislature as indicated in statutory provisions."

In the third case also the learned Judge exhaustively dealt with the question of inherent power of the Court and laid special emphasis on the following observations of Lord Cairns in 'RODGER v. COMPTOIR D'ESCOMPTE DE PARIS', (1877) 3 P C 465:

"One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any suitors, and when the ex-

pression 'the act of the Court' is used it does not mean merely the act of the primary Court, or any intermediate Court of appeal but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case."

It has to be noted that the questions that arose for consideration in these three cases did not relate to the power of the High Court to alter or review its own judgment. The question related to the power of the High Court to pass such orders as are necessary to secure the ends of justice. It has also to be noted that Section 369 of the Indian Code of Criminal Procedure as it stood when these cases were decided expressly excluded the High Court from its purview. The section reads thus:

"The Court, other than the High Court when it has signed its judgment, shall alter or review the same except as provided under Sections 395 and 484 or to correct a clerical error."

It was by the amendment of 1923 that the High Court also was brought within the scope of the section, except in the case of powers conferred by Letters Patent. Section 561-A was also inserted in the Code only in 1923.

(8) Reference is made in 'MATHU KORA v. PADMANABHAM KUNJU KUNJU', 15 T L J 85, to an early decision of the Calcutta High Court by a Full Bench of five Judges, namely, 'In the matter of GIBBONS', 14 Cal 42, in which it was held that the High Court has no power to alter or review its judgment. But that decision was not followed by the learned Judges who preferred to decide the question on the basis of the observations of Mookerji, J., referred to above.

(9) 'MATHU KORA v. PADMANABHAM', 15 T L J 85 was followed in 'KESAVA PILLAI v. SIRKAR', 15 T L J 624. In that case it was held that the High Court has inherent power in criminal cases to make any order that is necessary to secure the ends of justice. That was, however, not a case in which the High Court altered or reviewed its judgment, it was a case in which the High Court expunged certain remarks in the judgment of the Sessions Court. The next decision of the Travancore High Court dealing with the question is reported in 'CHANDI v. CONICHERIATHU', 20 T L J 378. In that case it was held that the

"remedy by way of review in a criminal case by the exercise of the inherent powers of the High Court is a very extraordinary remedy to be used only in extreme cases like the case reported in 'MATHU KORA v. PADMANABHAM', 15 T L J 85, where the refusal to exercise the inherent power would have brought about a deadlock."

(10) The question was again considered in 'ITTYCHERIA v. SIRKAR', 26 T L J 373. In that case Chief Justice Abraham Verghese observed thus:

"This question raises another point i.e., whether the High Court can revise an order passed by a Division Bench thereof. Certain High Courts have held that there is no such power of revision. There is no special provision for that purpose in the Criminal Procedure Code. Certain other High Courts have held that there is inherent power in the High Court to revise its own decision when such case has been disposed of without jurisdiction, and that there is no such power if the order was passed wrongly with jurisdiction. This High Court is one of those which held that opinion. See 'MATHU KORA v. PADMANABHAM KUNJU KUNJU', 15 T L J 85 and 'CHANDI v. CONICHERIATHU', 20 T L J 378.

The petition for review was placed before the Division Bench which disposed of the case and the judgment of the Division Bench is reported in 26 T L J 341. The learned Judges followed the decision of the Calcutta High Court in 'DAHU RAUT v. EMPEROR', 61 Cal 155, in which it was held that the High Court has no power to alter or review its judgment, even if passed without jurisdiction except to correct a clerical error. It was also observed by the learned Judges that even applying the principle of the rulings of the Travancore High Court in 'MATHU KORA v. PADMANABHAM KUNJU KUNJU', and 'CHANDY v. CONICHERIATHU', no exceptional or extraordinary circumstances as contemplated in those decisions existed in the case before them and that the exercise of inherent power by the High Court should not be capricious or arbitrary and should not be in conflict with the intention of the legislature as indicated in statutory provisions.

(11) The next case of the Travancore High Court in which the question was discussed is 'DANIEL v. CHACKO', 29 T L J 340. In that case a petition to review the judgment passed by the High Court in Criminal revision was admitted by Chatfield, C. J., and Venkata Rao, J. Chatfield, C. J., made the following observation while admitting the review petition:

"I would agree with the last mentioned case CHANDI v. CONICHERIATHU', 20 T L J 378 and would hold that there is no general power of review vested in this Court as regards its judgment in criminal cases but that such a jurisdiction may be exercised in exceptional cases to prevent abuse of the process of the Court or otherwise to secure the ends of justice."

The petition was subsequently heard by Sankarasubbier and Madhavan Pillai, JJ. After citing with approval 'DAHU RAUT v. EMPEROR', 61 Cal 155, Sankarasubbier, J., observed thus in his order on the question of the inherent power of the High Court to review its judgment:

"The next question for consideration is whether this Court has inherent jurisdiction to review its judgment passed in criminal cases and if so what is the extent of such power. The absence of a provision in the Criminal Procedure Code like Section 115 in the Civil Procedure Code is not by itself an indication that this Court has no inherent power to set right matters in criminal cases though they have been once decided by them. Section 115, Criminal P.C., merely declares that such inherent powers as the Court may have shall not be deemed to be limited or affected by anything mentioned in the Code.

"The section therefore assumes that Courts have such inherent powers. In other words the power which a Court must have to meet out that real and substantial justice for the administration of which alone Courts exist is always inherent in a Court. Hence there is no sufficient reason for denying the existence of such inherent power in criminal matters. At the same time the inherent power cannot be exercised in such a way as to override an express provision of law, like S. 275, Criminal Procedure Code. It is for the above reasons that it was pointed out both in 'MATHU KORA v. PADMANABHAM KUNJU KUNJU', 15 T L J 85 and 20 T L J 378, that it is only for the purpose of rectifying mistakes and preventing abuse of process that the inherent powers can be invoked. As stated in 20 T L J 378, the refusal to invoke the inherent power must have the effect of bringing about a deadlock."

Madhavan Pillai, J., was of opinion that the High Court could not call into assistance its inherent power to override the express provision of law contained in Section 275, Criminal Procedure

Code (Section 305 of the Code of 1117) and preferred to follow the decision of the Calcutta High Court in 'DAHU RAUT v. EMPEROR', 61 Cal 155. The learned Judge also observed that the decision in 'MATHU KORA v. PADMANABHAM KUNJU KUNJU', should be reconsidered and that even if the dictum in that case should be allowed to stand it should be permitted to operate only in a very extraordinary or extreme case like the case reported in 15 T L J 85, where the refusal to exercise the inherent power was found to have brought about a deadlock.

(12) The next case in which the question was considered by the Travancore High Court is 'FERNANDEZ v. FERNANDEZ', 30 T L J 117 in which Sankarasubbier, J., dismissed a petition to review his order in a Criminal Revision Petition with the following observation:

"It is well settled that a criminal Court has no power of review except to correct a clerical error or to avoid a deadlock which the omission to grant the review will entail."

In 'LEKSHMI AMMA v. LEKSHMI AMMA', 1944 TLR 113, Madhavan Pillai, J., reiterated the view expressed by him in 'DANIEL v. CHACKO', 29 TLJ 340 and observed thus:

"I have in 'DANIEL v. CHACKO', held, after a review of all existing judicial precedents that Section 275, Criminal Procedure Code (corresponding to Section 305 of the present Code) is comprehensive enough to include within its scope even this Court, so that according to that section, this Court also has no power to alter or review its judgment except as provided therein. I did also doubt in that case, the possibility of this Court calling into assistance the inherent power to override the express provision of law in Section 275, even assuming that inherent power exists in this Court in criminal matters. I see no reason even now to modify the foregoing opinion of mine."

In that case the question that came up for consideration was whether a Subordinate Court has jurisdiction to alter or review its judgment in a criminal case.

In 'Re CHANDY' 1944 T L R 280, Nokes and Madhavan Pillai, JJ., expressed the view that the High Court has no power to alter or review its judgment. After reviewing the decisions of the Indian High Courts and of the Travancore High Court on the question Nokes, J., observed that the decision in 'KORA v. KUNJU', 15 T L J 85, required reconsideration by a Full Bench. Madhavan Pillai, J., also agreed with this view and observed thus:

"Having regard to the exact origin of the dictum in 'MATHU KORA v. PADMANABHAM KUNJU KUNJU', the same being found by me to be based solely on the observations of Mookerji, J., in 'PULIN BEHARI DAS v. EMPEROR', 15 Cal L J 517, the authority of which even in British India has been considerably attenuated by the amendment in 1933 of Section 369 of the British Indian Criminal Procedure Code and by the later Calcutta decision in 'DAHU RAUT v. EMPEROR', 61 Cal 155, it seems to me that the only opinion consistent with Section 275, Criminal Procedure Code (Section 305 new Code) is the one expressed by my brother in his order, viz., that, under the Code of Criminal Procedure there is no power to review a judgment or order in a criminal matter."

In 'KALYANIKUTTY AMMA v. SIRKAR', 1945 T L R 944, which was cited at the bar the question of the power of the High Court to alter or review its judgment did not arise for consideration. That case related to the power of the High Court under Section 470, Criminal P.C., to interfere in proceedings that are pending in subordinate Courts.

(13) It is thus seen, on a review of the decisions of the Travancore High Court relating to the power of the High Court to alter or review its judgment in a criminal case, that the tendency of the later decisions of that Court was to deny the existence of such power in the High Court.

(14) We shall now consider the position taken by the other Indian High Courts on the question. A Full Bench of five Judges of the Calcutta High Court considered the question 'In the matter of GIBBONS', 14 Cal 42, already referred to. All the five Judges held that the High Court has no power to review or alter its judgment. Potharam, C. J., who wrote the leading judgment observed thus:

"Speaking for myself, and, indeed, in this matter I think for the whole of the Judges constituting this Bench, I have no doubt whatever that, in cases of this kind, no power of review resides in the Court or in my bench of the Court. This is an opinion which I have expressed before in the High Court at Allahabad 'QUEEN EMPRESS v. DURGA CHARAS', 7 All 672 and it is an opinion which has been expressed in the High Court at Bombay 'QUEEN EMPRESS v. FOX', 10 Bom 176 and in opposition to which so far as I know there is no reported case to be found."

His Lordship concludes with the following observation:

"The verdict and judgment of a Division Bench of this Court, coupled with the sentence, are, in my opinion, absolutely final. As soon as they have been pronounced and signed by the Judges, this Court is 'functus officio' and neither the Court itself nor any Bench of it, has any power to revise that decision or interfere with it in any way."

It has to be noted that this case was decided before Section 369 of the Indian Code of Criminal Procedure was amended. The section as it stood then contained the words "other than a High Court." Yet their Lordships held that the section applied to the High Court also and that it had no power to review or alter its judgment.

(15) The cases in which Mukerji, J., made the observations which are quoted with approval in 'MATHU KORA v. PADMANABHAM KUNJU KUNJU', 15 T L J 85, namely, 'PULIN BEHARI DAS v. EMPEROR', 15 Cal L J 517; 'BUDHULAL v. CHATTU GOPE', 44 Cal 816 and 'PIGOT v. ALI MOHAMMAD', 48 Cal 522, were not, as stated above, cases in which the question of the power of the High Court to review or alter its judgment came up for consideration. Those cases also were decided before Section 369 of the Indian Code of Criminal Procedure was amended.

(16) In 'DAHU RAUT v. EMPEROR', 61 Cal 155, a Division Bench of the Calcutta High Court followed the decision 'in the matter of GIBBONS', 14 Cal 42 and held that the High Court when it has signed its judgment has no power to alter or review it except to correct a clerical error. Lort-Williams, J., observed thus in that case:

"After we had signed the orders we were 'functus officio' and, when we ceased to sit together, the Bench, of which we were members, ceased to exist and could not ever be revived. If one Bench had power to decide that the orders of another bench were made without jurisdiction and were void 'ab initio', a third Bench would have power to decide that the orders of the second Bench also were made without jurisdiction and so on 'ad infinitum'."

McNair, J., the other learned Judge who took part in that decision observed thus:

"With great respect I am entirely in agreement with the view that was expressed by the Lahore High Court in 'RAJU v. THE CROWN', 10 Lah 1, that Section 561 (A) in no way adds to the powers of the High Court. It merely declares that such inherent powers as the Court may possess shall not be deemed to be limited or affected by anything contained in the Code. The inherent powers of the Court did not include the power to revise an order which has been made in the Criminal Appellate Jurisdiction. We are, therefore, compelled to look to Section 369 to see whether the power of review is contained in that section.

"I have no doubt that the intention of this section is to debar the High Court from reviewing its own judgment in criminal matters. The only exception which is permitted is in the case of a clerical error. It is essential even in civil matters that there should be finality in the orders of the Court, and in criminal matters it is obvious that such finality is of even greater importance. In my opinion the object of this section is to procure such finality. The provisions of Section 369 were carefully considered by the Full Bench of this Court in 'In the matter of GIBBONS', 14 Cal 42, where it was held that no power of review resides in the Court or in any Bench of the Court."

(17) So far as the Allahabad High Court is concerned a single Bench of that Court held in 'KUNJI LAL v. EMPEROR', AIR 1935 All 60, that the High Court has no power to alter or review its judgment in a criminal case. Bennet, J., observed thus in that case:

"I am of opinion that review is a definite method of procedure and that if the legislature intended by the Amending Act, Act 18 of 1923, to make a provision in the Code for a review there would have been a definite section dealing with a right of review and laying down the conditions under which that right could be exercised. In the case of Civil Procedure Code there is a definite provision for review in Section 114 and there is an order of the Code, Order 47, dealing with the circumstances under which a review is permitted. If a review were intended by the Criminal Procedure Code there would have been some definite provision of this nature."

The learned Judge referred to the decisions of the various Indian High Courts and came to the following conclusion:

"The above authorities make it clear that prior to 1923 all the High Courts were in agreement that no power of review lay in criminal cases. The judgment of the Lahore High Court in 'RAJU v. EMPEROR', AIR 1928 Lah 462, gives good reasons for holding that the alterations in the Code in 1923 do not have the effect of allowing any power of review."

(18) This case was followed in 'BANWARILAL v. EMPEROR', AIR 1935 All 466. In that case it was observed by Kendall, J., that Section 369 was amended in 1923 in such a way as to show that the High Court had no power of altering or reviewing a judgment except to correct a clerical error and that the legislature did not attempt or intend to deprive the High Court of any inherent power which it had hitherto possessed. With regard to the effect of introducing Section 561 (A) into the Code the learned Judge observed thus:

"That section does not in terms invest the Court with any powers which it did not possess before. But it does refer to an inherent power which the High Court is already in possession. We have given above the authority for holding that the High Court possessed no inherent power to review its judgment before the amendment of 1923. Consequently, it cannot be said that Section 561-A either modifies the provisions of Section 369 or clothes the Court with any fresh power."

(19) The learned Public Prosecutor referred to a decision of the Allahabad High Court, namely, 'SRI RAM v. EMPEROR', AIR 1948 All 106, in support of his position. That was a case in which a mandatory provision of law was overlooked in a trial in respect of an offence under the Hoarding and Profiteering Prevention Ordinance. The accused was convicted by the Magistrate and in revision the sentence was reduced. Subsequently it was brought to the notice of the High Court by a petition that the amendment to Section 14-A of the Hoarding and Profiteering Prevention Ordinance made by a later Ordinance was overlooked at the trial and that in accordance with that amendment the Magistrate was bound to try the case in a summary way unless he was specially directed by the District Magistrate to try the case in the ordinary manner. Objection was taken that since the High Court had already disposed of the revision petition it had no power to review or alter its judgment.

The learned Judges repelled that contention and held that under Section 561-A it could exercise its inherent power to secure the ends of justice, and since a mandatory provision of law has been overlooked at the trial the Court corrected the error. This cannot, however, be said to be a case in which the High Court reviewed or altered its judgment. The question raised in the subsequent petition was neither raised nor considered in the revision petition that had been disposed of by the High Court. This decision cannot therefore be taken to be an authority for the position that the High Court has inherent power to review or alter its judgment. This is what the learned Judges observed in that case:

"Where a revision has been decided, we are not of the opinion that a second revision would lie or that a party has a right to have the matter reheard or reargued, but where as in this case, a mandatory provision of law has been overlooked, we think this Court has power to correct an obvious error."

(20) In 'KALE v. EMPEROR', AIR 1923 All 473 (2), the Allahabad High Court held that even if any new materials were discovered which, if they had been placed before the Court, might have induced the Court to come to a different conclusion; the High Court had no power to review its judgment and that the only remedy was to apply to Government

(21) The Bombay High Court also has taken the view that the High Court has no power to review or alter its judgment (vide 'QUEEN EMPRESS v. GANESH RAMAKRISHNA', 23 Bom 50 and 'NANDLAL CHUNILAL v. EMPEROR', AIR 1948 Bom 276 (F B).) In the last case on a reference made by the Sessions Judge under S. 438, Criminal P. C., the High Court passed an order to the following effect without issuing notice: "No order in this reference". Subsequently the applicant at whose instance the reference was made filed a revision petition in respect of the same matter. It was held that since the effect of allowing the revision petition would be altering or reviewing the prior judgment of the Court the petition was barred by Section 369.

(22) The view taken by the Madras High Court is also the same. Vide 'APPAYYA v. VENKATAPAYYA', AIR 1923 Mad 276 (1). In 'SANKARALINGA MUDALIAR v. NARAYANA MUDALIAR'.

AIR 1922 Mad 502 (FB), 'VEERAPPA NAIDU v. AVUDAYAMMAL'. AIR 1925 Mad 438 (F B) and 'MARUDAYYA THEVAR v. SHANMUGASUNDARA THEVAR', AIR 1926 Mad 139, the Madras High Court held that Section 561A confers no new powers on the High Court and that the Court cannot by invoking its inherent powers extend the powers given to it by statute. These cases however, did not relate to the power of the High Court to review its judgment. In 'RANGA RAO v. EMPEROR', 23 Mad L J 371, the Madras High Court held that in a case in which a reasonable opportunity was not given to the accused to be heard the dismissal of the appeal would be without jurisdiction and that the Court had power to rehear the appeal.

(23) The Lahore High Court also has taken the same view. In 'MOHAMMAD SADIQ v. EMPEROR', AIR 1925 Lah 355 that Court held that when an appeal was dismissed without the appellant or his pleader being given a reasonable opportunity of being heard the order dismissing the appeal was one passed without jurisdiction and that the Court had inherent power to rehear the appeal. The learned Judges however made it clear that they were not holding that the Court has, under S. 561A, inherent power to review its judgment or order.

(24) In 'MATHRA DAS v. EMPEROR', AIR 1927 Lah 139, a Single Judge of the Lahore High Court i.e., Broadway, J. took the view that S. 369 did not limit the power of the High Court to make such orders as may be necessary to secure the ends of justice. This decision was however dissented from in 'RAJU v. EMPEROR', AIR 1928 Lah 462. In that case it was held that S. 561A does not confer any new powers on the High Court and that it merely declared that such inherent power as the High Court possessed shall not be deemed to be limited or affected by anything contained in the Code. It was also held that

> "there never has been an inherent power in the High Court to alter or review its own judgment in a criminal case once it has been pronounced and signed except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on the merits."

The learned Judges also observed that

> "with this view all the Courts in India are in accord, and it is not disputed that this was the law prior to the addition of S. 561A to the Criminal Procedure Code by the Act of 1923."

Ffrode J. who wrote the leading judgment also observed that he consulted Broadway J. who decided the case reported in A. I. R. 1927 Lah 139 and that the latter authorised him to say that he was not satisfied with his judgment in that case and that he was inclined to the view expressed by Ffrode J. This decision was followed in 'EDWARD FEW v. EMPEROR', AIR 1939 Lah 244.

(25) The view taken by the Nagpur High Court is also the same. In 'GANAPAT v. EMPEROR', AIR 1931 Nag 169, a single Judge of that Court held that when the High Court has once passed a judgment or order it is final under Section 369 and that the provisions of Section 561A cannot be invoked for reconsidering the question of sentence. In 'DIWAN SINGH v. EMPEROR', AIR 1936 Nag 132, a Division Bench of that Court held that the High Court has no power to alter or review its own judgment in a Criminal case once it has been pronounced and signed except in a case where it was passed without jurisdiction or in case of default of appearance without an adjudication on the merits, or to correct a clerical error. In 'BASHIRUDDIN AHMED v. EMPEROR', AIR 1937 Nag 181, it was held that when the Court has sentenced the accused it becomes 'functus officio,' that it has no jurisdiction to let the accused on bail and that the inherent power of the High Court under S. 561A cannot be invoked with respect to a matter which is expressly dealt with by the Code.

(26) The Patna High Court held in 'ASST. GOVT. ADVOCATE v. UPENDRANATH', AIR 1931 Pat 81, that Section 561A did not confer on the High Court power to alter or review its judgment in a criminal case but that where an order is passed 'ex parte' it must be regarded as a tacit term of such order that though unqualified in expression it should be open to reconsideration at the instance of the party prejudicially affected and that therefore the Court has power to rehear the matter. In 'EMPEROR v. RASHBIHARI SINGH', AIR 1934 Pat 551, the High Court dismissed an appeal by the accused from the conviction and sentence of the Sessions Judge. Subsequently a reference was made to the High Court about the legality of the sentence which was not brought to the notice of the High Court when the appeal was heard. It was held that the High Court had power to set right the mistake in the exercise of its inherent jurisdiction.

(27) In 'MOHAN SINGH v. EMPEROR', AIR 1944 Pat 209, it was held that where the High Court has pronounced its judgment and signed it, it becomes 'functus officio' and that neither the Judge who passed the judgment nor any other Bench of the High Court has any power to review or alter it except for correcting clerical errors, if any.

(28) The Oudh Chief Court has also taken the same view on the question. In 'JODHA v. EMPEROR', AIR 1940 Oudh 369, it was held

> "that the High Court has not and never has had any inherent power to review its own judgment and that Section 561A, Criminal Procedure Code does not confer on it any power so to do."

To the same effect is the decision in 'MANI RAM v. EMPEROR', AIR 1947 Oudh 221.

(29) The position taken by the Cochin High Court is also the same. In 'NARAYANA MALLAN v. BHAIRAVAN SIPPU', 3 Cochin 7, the then Chief Court held that it had no power to review its judgment in a criminal appeal or an order dismissing an application for revision and that if after passing a judgment convicting the accused the Court entertained any doubt as to the propriety of the conviction the only course to adopt was to report the case to the local Government for action being taken under Section 401 of the Code of Criminal Procedure. This case was followed in 'KRISHNA WARRIER v. PARUKUTTY AMMA'. 8 Cochin 1.

(30) It will thus be seen that practically all the High Courts in India are unanimous in their view that the High Court has no power to review or alter its judgment in a criminal case except in the case mentioned in Section 369 of the Indian Code of Criminal Procedure or where the Court has acted without jurisdiction or where it has decided the case without giving an opportunity to a party for being heard,—and that Section 561-A does not confer on the High Court any such power. It is true that the Travancore High Court held in some early cases that the High Court has such power. But in the later decisions of that Court the correctness of this view was doubted and a desire was expressed to fall in line with the other High Courts of India on this question. We do not think that there is any reason why this Court should adopt a view different from that adopted by all the other High Courts in India. Some of the High Courts have held that when a judgment is passed by the High Court without jurisdiction or without giving an

opportunity to the parties to be heard the judgment can be reviewed. In the case of absence of jurisdiction the judgment can be treated as one not valid in law and the passing of a fresh judgment cannot in strict sense be regarded as altering or reviewing a prior judgment.

(31) With regard to cases in which the parties were not given an opportunity for being heard it may be taken to be an implied condition of such judgment or order that it should be open to reconsideration at the instance of the party prejudicially affected. The power of the Court to reconsider the matter is implied in the very nature of an 'ex parte' decision. It was so observed by the Privy Council in 'KRISHNASWAMI PANIKONDAR v. RAMASWAMY CHETTIAR', AIR 1917 PC 179. Although this observation was made by the Privy Council with reference to proceedings in a civil suit the same principle must apply to proceedings in a criminal case also as held by the Patna High Court in 'ASST. GOVERNMENT ADVOCATE v. UPENDRA NATH', AIR 1931 Pat 81. These two cases will not therefore be real exceptions to the rule contained in Section 369. It was therefore to be held that except in cases where the Court has acted without jurisdiction or where the case was decided without an opportunity being given to the party to be heard the High Court has no power to alter or review its judgment in a criminal case save in matters specially provided for in Section 369 (Indian Code of Criminal Procedure).

(32) Reference was made by the learned Public Prosecutor to a case in which this Court reviewed its judgment in a criminal revision, namely, 'STATE v. MATHAI KARUTHA KUNJU', Criminal R. P. No. 178/1950. That was a revision from an order of acquittal. This Court set aside the order of acquittal, and, instead of remitting the case to the Court below for fresh disposal, convicted the accused. The State filed petition to review this order on the ground that the revisional Court has no power to convert a finding of acquittal into one of conviction. In allowing the petition this Court observed that it was under the impression that the State had preferred an appeal from the order of acquittal that it happened to convict the accused. The conviction was therefore set aside and the case was remitted to the Court below for fresh disposal. This was really a case in which the Court had no jurisdiction to convict the accused and will come within the category of cases of want of jurisdiction. We cannot, therefore, regard this as an authority for the position that the High Court has got inherent power to review or alter its judgment notwithstanding the provision in Section 369, Code of Criminal Procedure. We, therefore, hold that the High Court has no power to review or alter its judgment in a criminal case except in matters specially provided for in the Code of Criminal Procedure and in cases in which the Court has passed the judgment without jurisdiction or without giving an opportunity to the parties for being heard.

(33) So far as this particular case is concerned the direction in the judgment allowing the accused to be entrusted to the custody of his relatives was made on the basis of the interpretation of the proviso to Section 384, Travancore Code of Criminal Procedure and Rule 7 of the Rules passed under the Travancore Lunacy Act. The interpretation put upon the proviso does not appear to be in consonance with the rulings of the Indian High Courts on the point. The learned Judges themselves have cited with approval the ruling in 'PROVINCIAL GOVT., C. P. & BERAR v. KRISHNA GOPALA', AIR 1945 Nag 77 to the effect that after the amendment of the Criminal Procedure Code the Court will not be justified in entrusting the accused to the care of his relations. But the learned Judges relied on Rule 7 of the rules passed under the Lunacy Act which, according to them, authorises the Court while passing a detention order to allow the lunatic to be kept in the custody of his relations. We are not called upon to canvass the correctness of this view. It is clear from the judgment that the learned Judges have applied their mind to the question of interpreting the proviso. They also considered the applicability of Rule 7 of the rules passed under the Lunacy Act.

The complaint of the learned Public Prosecutor is that the Court ought to have detained the accused in safe custody and reported the matter to Government for appropriate action being taken by Government with regard to the accused. According to the direction in the judgment the relations of the accused to whose care he has been entrusted have to give an undertaking to produce the accused whenever called upon to do so by Government and have to execute a bond for that purpose. It is seen from the bond executed by them that they have undertaken to produce the accused before Government when they are called upon to do so. If therefore Government want the production of the accused they have only to call upon the persons who have executed the bond either directly or through the High Court to produce the accused. In the circumstances, even if the direction in the judgment is not strictly in accordance with law we do not think that this is a case in which the Court has acted without jurisdiction or where there has been an abuse of the process of Court or where any grave injustice was done to any party. In this view of the case also there is no reason why the petition filed on behalf of the State should be allowed. We therefore dismiss the Criminal Miscellaneous Petition.

(34) KOSHI, C. J.: I concur.

(35) GOVINDA PILLAI. J.: I too agree.

D.H. Petition dismissed.

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FULL BENCH

KOSHI, GOVINDA PILLAI AND JOSEPH VITHAYATHIL, JJ.

George Chadayammury, Petitioner v. State.

O. P. No. 8 of 1951 and Criminal R. P. No. 66 of 1951, D/- 10-12-1951.

(a) Public Safety — Cochin Criminal Law Amendment Act (XXVII (27) of 1124), S. 3 — Notification under — Prosecution after repeal of Act.

(Koshi and Govinda Pillai JJ. in the order of reference): The omission of the word 'notification' in S. 73(2) of the Travancore-Cochin Public Safety Measures Act (V (5) of 1950) is of no moment in view of S. 23 of the Travancore-Cochin Interpretation and General Clauses Act (1125). Hence where the notification declaring the Communist party unlawful under S. 3 of the Cochin Criminal Law Amendment Act (XXVII (27) of 1124) was in force when the meeting of the Communist party was held but the Act was repealed by Act V of 1950 when the action was taken under S. 4 against the accused it cannot be said that the prosecution was started under a defunct notification. By transgressing the law as enacted in S. 4(1) and (2) of the Cochin Criminal

Law Amendment Act (XXVII (27) of 1124) the accused persons had incurred a liability in the sense of S. 73(3) of the Public Safety Measures Act and Cl. (c) expressly authorises the institution of an investigation or a legal proceeding in respect thereof notwithstanding the repeal of the law under which the liability was incurred.

(Paras 2, 3)

(b) Public Safety — Cochin Criminal Law Amendment Act (XXVII (27) of 1124), Ss. 3, 31, 33 and 40—Declaration under S. 3—Finality.

Subject to the Order of the High Court on application, if any, made under S. 31 a declaration under S. 3 is final and conclusive for all purposes and a person prosecuted under Section 4 being a member of an association declared to be unlawful or for other activities in connection therewith could not question its validity. To make an order under Section 3 is an executive act and it cannot be canvassed directly or indirectly in Court except as the law makes provision in that behalf. Apart from the language of S. 3, sub-ss. (2) and (3) of S. 33 also make that point clear. To hold otherwise would be to hold that even when the High Court refuses to set aside the order a subordinate Criminal Court can examine its validity if and when a prosecution happens to be launched under S. 4. Section 40 does not justify an inference to the contrary. 'Case law rel. on.' (Paras 10, 11)

(c) Constitution of India, Art. 13(1) — Retrospective effect.

If the charge under S. 4 of Cochin Criminal Law Amendment Act included in its scope a count regarding membership of the Cochin Communist Party (declared unlawful) prior to 26-1-1950 a prosecution can be proceeded with even if it is assumed that S. 3 of the Cochin Criminal Law Amendment Act is rendered void by Art. 13(1) of the Constitution. AIR 1951 S C 128, Ref. (Para 9)

† (d) Constitution of India, Art. 19(1)(c) and (4) — Public Safety — Cochin Criminal Law Amendment Act (XXVII (27) of 1124), S. 3 and notification under — Validity.

Section 3 of the impugned Act enacts a provision directly affecting one of the seven fundamental rights guaranteed by Art. 19(1) viz. that recognised by Art. 19(1)(c) to form associations or Unions. Legislation seeking to prevent activities of associations falling within the category of those mentioned in the impugned section is certainly legislation in the interests of public order or morality. Section 3, however, oversteps the bounds of permissible legislation and it has, therefore, to be declared to have become void when the Constitution came into force. When a law became void obviously a notification issued under that law would also become void. Once a prosecution is launched against an association declared to be unlawful the criminal Court cannot question the validity of the notification and it cannot therefore be said that the law gives persons hit by it an opportunity for a fair trial. Serious inroads are made regarding the right to property also. There is no time limit prescribed for the duration of a notification issued under S. 3. Government alone have authority to decide how long an association declared to be unlawful should continue to remain under the ban imposed by them. The cumulative effect of the absence of a provision for proper notice or sufficient publicity and the imposition of a time limit to seek a review of the Government order by the High Court is to make the law overstep the bounds of permissible legislation in such a manner that sub-cl. (4) of Art. 19 could not save it. In other words it offends Cl. (4) of Art. 19 as an unreasonable restriction on the exercise of the right conferred by Art. 19(1)(c). 'AIR 1951 Mad 147, Rel. on; AIR 1951 S C 467, Foll. (Paras 13, 17, 18, 19)'

(e) Constitution of India, Art. 19(1)(c) and (4) — Reasonableness — Test.

As for the test of reasonableness it is well-settled that the Court is to be the judge of reasonableness. In deciding on the reasonableness or otherwise of the restrictions imposed by a law the substantive as well as the procedural provisions of the law should be examined. 'AIR 1950 S C 27; AIR 1950 S C 211, Foll. (Paras 14, 15)

K. G. Kunjukrishna Pillai & K. K. Madhavan, for Petitioner; T. N. Subramania Ayer, Advocate-General, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('50) AIR 1950 S C 211: (52 Cri L J 550) (Prs 12, 15)'
('50) AIR 1950 S C 129: (51 Cri L J 1525) (Pr 12)'
('50) AIR 1950 S C 27: (51 Cri L J 1383) (Pr 14)'
('50) AIR 1950 S C 124: (51 Cri L J 1514) (Pr 12)'
('51) AIR 1951 S C 128: (52 Cri L J 860) (Pr 9)'
('51) AIR 1951 S C 467: (52 Cri L J 54) (Pr 23)'
('50) AIR 1950 Bom 363: (52 Cri L J 120 F B) (Pr 12)'
('51) AIR 1951 Bom 188: (52 Cri L J 30 F B) (Pr 9)'
('50) AIR 1950 Cal 274: (51 Cri L J 1110 S B) (Pr 12)'
('51) AIR 1951 Mad 147: (52 Cri L J 515 F B) (Prs 4, 5, 11, 16, 20)'
('50) AIR 1950 Pat 322: (52 Cri L J 610 F B) (Pr 12)'
(1917) 1917 A C 260: (86 L J K B 1119) (Pr 22)'
(1942) 1942 A C 206: (110 L J K B 724) (Pr 22)'
(1918) 1 K B 101: (87 L J K B 122) (Pr 23)'
(1877) 95 U S 714: (24 Law Ed 565) (Pr 20)'

Order of Reference by Koshi and Govinda Pillai JJ.

One George Chadayammury, accused No. 10 in C. C. No. 75 of 1950, on the file of the Special First Class Magistrate, Trichur, is the petitioner in the Original Petition as also in the Criminal Revision Petition. Both the petitions are directed towards the same end, namely, the quashing of the charge which the learned Special First Class Magis-

trate of Trichur framed against the petitioner on 28-11-1950 under S. 4 (1) and (2) of the Cochin Criminal Law Amendment Act (Act XXVII of 1124). In exercise of the powers conferred on them by S. 3 of the said Act as continued in force by the Travancore-Cochin Administration and Application of Laws Act (Act VI of 1125) the Government by a notification published in a 'Gazette Extra-ordinary dated 2-1-1950 declared the Cochin Communist Party to be an unlawful association within the meaning of the said Act.

The prosecution case against the petitioner and the other accused in the case is that even after the said notification they continued to be active members of the prescribed Communist party propagating its faith and teachings, that on 26-3-1950 a meeting of the said party was held under the leadership of the petitioner and another in furtherance of its unlawful objects and activities and that by those acts all the accused persons contravened S. 4 (1) and (2) of the Cochin Criminal Law Amendment Act, XXVII of 1124. The main ground on which the charge is sought to be quashed is that after the commencement of the Constitution of India S. 3 of the Cochin Criminal Law Amendment Act became void as the said section was inconsistent with and contravened the fundamental rights guaranteed to the citizens of India by Arts. 14 and 19 of the Constitution. A subsidiary ground mentioned is that the notification declaring the Cochin Communist party an unlawful association was not in force when the law was put in motion against the accused persons in the case and that the case was therefore started without the sanction of the requisite notification.

(2) Though, for reasons which we shall presently state, after mature deliberation we have come to the conclusion that we should place these petitions for decision by a Full Bench of this Court, we think it necessary to point out that in our opinion there is no substance in the subsidiary point raised. The facts necessary for a proper understanding of that point are as follows: Mention has already been made that the main act complained of in the case, namely, holding a meeting of the Cochin Communist party is one that took place on 26-3-1950. The notification was admittedly in force when the meeting was held. But action thereunder was taken against the accused only on 2-4-1950. That was the date when the First Information Report was registered or sent to the Court. Meanwhile on 30-3-1950 the Cochin Criminal Law Amendment Act, XXVII of 1124 was repealed by the Travancore-Cochin Public Safety Measures Act (Act V of 1950). The latter Act is really a repealing and re-enacting measure. In fact it is a consolidated piece of legislation intended to replace several enactments passed by the Travancore and Cochin Legislatures.

The argument that the notification issued on 2-1-1950 under the Cochin Criminal Law Amendment Act, XXVII of 1124 declaring among others the Cochin Communist party an unlawful association was not in force when the case was registered is based on the ground that the "repeal and saving" section of the new Act did not keep alive or seek to continue in force 'notifications' issued under any of the repealed Acts but only 'orders' made under such Acts. Section 73 (2) of the Travancore-Cochin Public Safety Measures Act which contains the relevant provision is in these terms:

> "All orders made or deemed to be made under the enactments referred to in sub-section (1) and in force immediately prior to the commencement of this Act shall continue in force and be deemed to have been made and shall have effect as if they have been made under this Act, and all appointments made, licenses or permits granted and directions issued under any such order and in force immediately before such commencement shall likewise continue in force and be deemed to be made, granted or issued in pursuance of this Act."

It was pointed out on behalf of the petitioner that the Cochin Criminal Law Amendment Act referred both to 'notifications' and 'orders' and that in view thereof the omission of the term 'notification' in S. 73 (2) was significant. The petitioner's contention is that with the enactment on 30-3-1950 of the Public Safety Measures Act the notification of 2-1-1950 had ceased to be in force and that the whole proceeding should therefore be quashed as founded on a defunct notification. The learned Advocate-General who appeared before us on behalf of the State urged several grounds to show that the contention was without substance. We however think it necessary to refer only to one of those grounds. According to the Advocate-General the omission of the term notification from S. 73 (2) is of no moment. Under S. 23 of the Travancore-Cochin Interpretation and General Clauses Act, 1125 when an Act is repealed and re-enacted with or without modification, a notification issued under the repealed Act shall, so far as it is not inconsistent with the provisions re-enacted continue in force and be deemed to have been made under the provision so re-enacted, unless and until it is superseded by any notification under the provisions so re-enacted.

In view of S. 23 of the Travancore-Cochin Interpretation and General Clauses Act S. 73 (2) of the Public Safety Measures Act is perhaps a superfluity. We cannot however accede to the suggestion made on behalf of the petitioner that in view of S. 73 (2) the provision in the General Clauses Act (to use a short term) should not be invoked here. In our opinion the point mentioned by the Advocate General is sound and that is sufficient to meet the argument that the prosecution was started under a defunct notification.

(3) Section 73 (3) (a) of the Public Safety Measures Act provides 'inter alia' that the repeal of the enactments referred to in sub-section 1 (which includes the Cochin Criminal Law Amendment Act, XXVII of 1124 also) shall not affect any liability incurred under any enactment so repealed and in clause (c) thereof among other things it is provided that in respect of a liability incurred under a repealed Act an investigation or a legal proceeding may be instituted as if the new Act has not been passed. By transgressing the law as enacted in S. 4 (1) and (2) of the Cochin Criminal Law Amendment Act, XXVII of 1124 the accused persons had incurred a liability in the sense of S. 73 (3) (a) of the Public Safety Measures Act and clause (c) expressly authorises the institution of an investigation or a legal proceeding in respect thereof notwithstanding the

repeal of the law under which the liability was incurred. These considerations are in our opinion sufficient to dispose of the subsidiary point.

(4) The main point is whether S. 3 of the Cochin Criminal Law Amendment Act XXVII of 1124 was rendered void by reason of Art. 13 (1) of the Constitution. Before the Constitution it was certainly valid law, as there were no constitutional limitations on the legislative sovereignity of the Cochin Legislature. The immunity from judicial review has become a thing of the past with the commencement of the Constitution and Courts cannot countenance any legislative infringement of a fundamental right whether that law was in existence at the commencement of the Constitution or was brought into existence subsequent thereto unless the infringement keeps itself within the bounds of permissible legislation.

Section 2 (vi) of the Cochin Criminal Law Amendment Act, XXVII of 1124 refers to two kinds or classes of unlawful associations. The test for one class is whether the association is one indulging in activities referred to in Clause (a) thereof. The other class is that declared to be unlawful by Government under powers conferred on them by S. 3. That section specifies the grounds on which Government could declare an association unlawful: According to the provisions of the impugned Act that declaration is final and cannot be challenged in a prosecution started in respect of activities in violation thereof. The only safeguard is that under S. 31 of the Act, under which the aggrieved party can within two months from the date of the declaration move the High Court to set it aside. The main question in these petitions is whether this safeguard is sufficient to bring the impugned provision within the limits of permissible legislation.

The petitioner's learned Counsel relied for purposes of his argument mostly on the recent Full Bench decision of the Madras High Court in 'V. G. ROW v. STATE OF MADRAS', AIR 1951 Mad 147 where both S. 16 of the Indian Criminal Law Amendment Act (XIV of 1908) and the corresponding provision (S. 15 (2) (b) in the Indian Criminal Law Amendment (Madras) Act (Act XI of 1950)) were declared void as offending Art. 19 (1) (c) and (4) of the Constitution. The majority among the learned Judges repelled the contention that the Madras Act offended Art. 14 as well, though one of the learned Judges accepted that argument also. As indicated earlier as we are not proceeding to give a decision on these petitions ourselves we do not consider it necessary to refer to the various grounds urged before us on behalf of the petitioner or the counter-arguments the learned Advocate General adduced on behalf of the State. We shall straightaway proceed to state the reasons which weigh with us in referring the case for decision by a Full Bench.

(5) Several of the objectionable features which induced the learned Judges of the Madras High Court to hold that the Indian Criminal Law Amendment (Madras) Act, XI of 1950 is void to the extent it authorises Government to declare certain associations unlawful are present in the case of the Cochin Criminal Law Amendment Act, XXVII of 1124 also. The Advocate General's attempt was to make out that the Madras decision cannot apply to the disposal of the petitions before us as the Cochin enactment contained a provision for a judicial review of the Government's declaration of an association as unlawful. It was contended that in that respect the Cochin Legislation was a great improvement on its counterparts elsewhere. The Criminal Law Amendment (Madras) Act, 1950 contains no provision for a judicial review of the declaration but it makes provision for reference to an Advisory body constituted under the Act.

The Advocate General's argument that the Cochin Act was a great improvement on the Criminal Law Amendment Acts elsewhere was sought to be met by the petitioner's learned Counsel by stating that the absence of a provision for personal service of the notice of the declaration on the members, or on the office-bearers, or the association declared unlawful or by leaving a copy of the declaration at the office of the association or by publication otherwise than by Gazette Notification also and the imposition of a time limit to apply for a judicial review made the safeguard embodied in S. 31 almost illusory. That no doubt is a matter for serious consideration. Assuming the Advocate General's argument is worthy of acceptance we are afraid by distinguishing the Madras case from the case before us now in that manner we will be indirectly or impliedly branding as unconstitutional the corresponding provision in the Travancore-Cochin Public Safety Measures Act (Section 23) entitling the Government to declare an association as an unlawful association within the meaning of the said Act.

The new Act, that is the Travancore-Cochin Public Safety Measures Act, V of 1950 contains no provision for a judicial review of the declaration nor does it provide for a reference to any Advisory Board. Section 23 of the said Act is a reproduction of S. 16 of the Indian Criminal Law Amendment Act, XIV of 1908 with words added to widen the scope and amplitude. Section 16 of the Indian Criminal Law Amendment Act XIV of 1908 has with one voice been condemned by all the three learned Judges constituting the Full Bench in 'V. G. ROW v. STATE OF MADRAS', AIR 1951 Mad 147 as absolutely void. Rajamannar C. J. said:

> "One could not find a better illustration of the exercise of naked arbitrary power than the original Criminal Law Amendment Act. The Government had only to issue a notification on a subjective satisfaction that an association was unlawful and it was infallible and conclusive. It is impossible to say that the restriction imposed by the original Act is in any sense reasonable within the meaning of Art. 19 (4) of the Constitution."

Words similar if not more severe, have been used by the other two learned Judges, Satyanarayana Rao and Viswanatha Sastri, JJ., in condemning S. 16 of the Indian Criminal Law Amendment Act (XIV of 1908). When the provision in our present law is equally if not more stringent than that existed in the original Criminal Law Amendment Act in India the attempt to sustain the prosecution against the petitioner and his co-accused by distinguishing the Madras case, even if successful, we are afraid, is sure to give rise to serious and far-reaching consequences. At one stage in the

argument a point was raised that S. 23 of the Travancore-Cochin Public Safety Measures Act V of 1950 is void but it was later conceded that the point did not directly arise in this case.

(6) However as the case raises important and novel questions and even a decision in favour of the State distinguishing the Madras case will inevitably involve implied or indirect condemnation of an existing law we think the proper course for us will be to refer both the petitions for an authoritative decision by a Full Bench of this Court, and we order accordingly.

Judgment of Full Bench

(7) KOSHI J.: The Full Bench as constituted now first sat to hear these petitions on 11-10-1951 when the learned Advocate General applied for their adjournment for a fortnight on the ground that in the light of the reference order, and judicial pronouncements elsewhere on legislations similar to those directly or indirectly impugned in this proceeding. Government intended to amend the Travancore-Cochin Public Safety Measures Act, 1950 and that in view thereof a postponement of the hearing of the petitions was from the point of view of the State very desirable. The petitioner's learned Counsel strenuously opposed the motion but ultimately we granted the adjournment. The discussion that followed the motion for adjournment did not rule out the possibility of the withdrawal of the prosecution giving rise to these petitions. Exigencies of Court work did not permit this Bench to meet again before 13-11-1951. Meanwhile, on 24th October 1951 His Highness the Raj Pramukh promulgated the Travancore-Cochin Public Safety Measures (Amendment) Ordinance, 1951.

When the hearing was resumed on 13-11-1951 the learned Advocate General invited our attention to the said Ordinance and indicated that he will be contending that the unconstitutional nature, if any, of the legislation impugned before us stood cured by it. In answer to a query from the Bench we were informed that the State had no idea of withdrawing the prosecution. The petitioner's Counsel then commenced his arguments, but before it proceeded beyond the preliminary stage the Advocate-General intimated to the Court that he was withdrawing his earlier submission that the new Ordinance will have to be taken into account in the decision of these petitions and that he will be confining his arguments to show that S. 3 of the Cochin Criminal Law Amendment Act, XXVII (27) of 1124, under which the notification forming the basis of the prosecution in question was issued was not rendered void by Art. 13 (1) of the Constitution.

Article 20 (1) of the Constitution states that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. As the charge sought to be quashed relates to events that happened long before the Ordinance was promulgated the course adopted by the learned Advocate-General in withdrawing his earlier submission was, in our opinion, proper.

(8) Both sides are hence agreed that the decision of these petitions must depend upon whether the Constitution has rendered S. 3 of the Cochin Criminal Law Amendment Act void on the ground that it was inconsistent with the provisions in Part III of the Constitution guaranteeing certain fundamental rights. That in fact as the reference order indicates is the central point in the case. Before we proceed to discuss that question certain other points mentioned by the Advocate-General have to be disposed of.

(9) In dealing with these points it is necessary to set out the meaning of the term "unlawful association" as given in S. 2 (vi) of the Cochin Criminal Law Amendment Act, S. 3 which confers power on Government to declare an association unlawful and S. 4, the penal provision under which the prosecution against the petitioner and other accused persons in the case has been launched.

S. 2 (vi) "Unlawful association" means an association:

(a) which encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts, or

(b) which has been declared to be unlawful by Government under the powers hereby conferred.

S. 3. If Government are of opinion that any association interferes or has for its object interference with the administration of the law or with the maintenance of law and order, or that it constitutes a danger to the public peace, Government may, by notification in the Cochin Government Gazette, declare such association to be unlawful.

S. 4. (1) Whoever is a member of an unlawful association or takes part in meetings of any such association, or contributes or receives or solicits any contribution for the purpose of any such association, or in any way assists the operations of any such association, shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both.

(2) Whoever manages or assists in the management of an unlawful association, or promotes or assists in promoting a meeting of any such association, or of any members thereof as such members, shall be punished with imprisonment for a term which may extend to three years or with fine, or with both.

(3) An offence under sub-section (1) shall, notwithstanding anything contained in the Code of Criminal Procedure, II of 1086, be non-bailable.

According to the Advocate-General the charge framed by the Court comprises two counts: (i) Membership of the Cochin Communist Party (declared unlawful) prior to 26-1-1950 i.e., before the Constitution came into force; and (ii) Membership of the said Party thereafter and on the date the meeting complained of took place viz., 26-3-1950 and the activities connected with convening and conducting that meeting.

On the above analysis of the charge the Advocate-General argued that the charge in respect of count (i) cannot be affected by the Constitution and that assuming S. 3 of the Impugned

Act was rendered void by Art. 13 (1) of the Constitution a prosecution in respect of an offence committed before 26-1-1950 can still be proceeded with. The recent decision of the Supreme Court of India in 'KESAVAN MADHAVA MENON v. STATE OF BOMBAY', AIR 1951 S C 128 and the Bombay Full Bench decision 'IN RE KESAVA MADHAVA MENON', AIR 1951 Bom 188, which gave rise to it were relied upon in support of the argument.

The petitioner's learned counsel did not dispute that the argument must prevail if the charge included in its scope also count (i) above as mentioned by the Advocate-General. He however strenuously contended that the charge was in respect of the membership of the proscribed association on the date of the alleged meeting and the part the accused took in it. According to him it would at best include also an accusation regarding membership of the said association thereafter but not more. It was argued that the language of the charge did not admit of the construction the learned Advocate-General sought to put upon it that it also related to membership before 26-1-1950. That date is not mentioned in the charge and our own reading of the document is that it does not include a charge for membership of the Cochin Communist Party prior to 26-1-1950. Nothing was in our opinion further from the mind of the Court which framed the charge than to include such a count also within its scope.

Probably nobody ever thought of it before the Advocate-General mentioned it before this Bench. To satisfy ourselves whether the Court could have meant to include membership prior to 26-1-1950 also within the ambit of the charge we carefully examined not only that document but the entire records of the case including the charge-sheet filed by the Police as also the evidence recorded by the Magistrate. Clearly the prosecution was concentrating its attention on the meeting of 26-3-1950 and the activities of the accused in connection therewith. We are therefore unable to accede to the argument that the charge as framed by the Magistrate includes a Count relating to the membership of the proscribed association before the Constitution came into force. In view of this conclusion the further argument that our extraordinary powers under Art. 226 should not be invoked to quash the charge in part while we cannot touch the other part does not arise for consideration.

(10) A further point raised by the Advocate-General was that the declaration under S. 3 of the Cochin Criminal Law Amendment Act was not final and that it was justiceable even apart from S. 31 of the Act. Sections 31 to 35 contain provisions for judicial review of orders made under section 3 and S. 31 so far as is relevant for our present purpose is in these terms:

> Any person aggrieved by an order passed by Government under S. 3 declaring an association unlawful may, within two months from the date of such order, apply to the High Court to set aside such order and the High Court shall decide:
>
> (a) Whether the association declared unlawful has interfered with or has for the object interference with the administration of law or with the maintenance of law and order or whether it constitutes a danger to the public peace or not;
>
> (b) ....

Section 32 enacts that every application under S. 31, shall be heard and determined by a Division Court of three Judges. Section 33 (1), so far as relevant, provides that if it appears to the Division Court on an application under S. 31 that the association in respect of which an order under S. 3 has been passed has not interfered with or has not for its objects interference with the administration of law or with the maintenance of law and order or that it did not constitute a danger to the public peace shall set aside that order. Sub-section 2 enacts that where there is a difference of opinion among the Judges forming the Division Court, the decision shall be in accordance with the opinion of the majority of those Judges and sub-section (3) is to the effect that where there is no such majority which concurs in setting aside the order in question, the order shall stand. Section 34 lays down certain special rules of evidence when the application under S. 31 is with reference to any newspaper (provisions relating to such applications have been omitted in Ss. 31 and 33 as set out above), and S. 35 relates to the procedure in the High Court with respect to applications under S. 31. That section reads:

> The High Court shall, as soon as conveniently may be, frame rules to regulate the procedure in the case of applications made to it under S. 31, the amount of the costs thereof and the execution of orders passed thereon, and until such rules are framed the practice of such Court in proceedings other than suits and appeals shall apply, so far as may be practicable, to such applications.

The reference order makes it clear that the arguments before the Division Bench proceeded on the basis that subject to the order of the High Court on application, if any, made under S. 31, a declaration under S. 3 was final and conclusive for all purposes and that a person prosecuted under S. 4 for being a member of an association declared to be unlawful or for other activities in connection therewith could not question its validity.

To make an order under S. 3 is an executive act and it cannot be canvassed directly or indirectly in Court except as the law makes provision in that behalf. Apart from the language of S. 3, sub-ss. (2) and (3) of S. 33 also make that point clear. To hold otherwise would be to hold that even when the High Court refuses to set aside the order a subordinate Criminal Court can examine its validity if and when a prosecution happens to be launched under S. 4. The omission of S. 3 from S. 40 is in our opinion not relevant to the point. The finality of an order under S. 3 is made clear by its own language & also by sub-sections (2) and (3) of Sec. 33. There was, therefore no need to include S. 3 in S. 40.

(11) Section 3 of the Cochin Criminal Law Amendment Act is in the same terms as S. 16 of the Criminal Law Amendment Act, XIV (14) of 1908, and with reference to orders passed under the said S. 16, it is regarded as settled law that such orders are final and conclusive and not justiceable. Though we think it unnecessary to refer to authorities bearing on the point we shall just mention that in the

case referred to in the order of reference 'V. G. ROW v. STATE OF MADRAS', AIR 1951 Mad 147, it was assumed by all concerned that the order was conclusive and final. We have already mentioned that S. 40 of the Cochin Criminal Law Amendment Act, does not justify an inference to the contrary and that provision was the sole distinguishing feature the learned Advocate-General relied upon in support of his position that an order under S. 3 of the Cochin Criminal Law Amendment Act is open to judicial review even otherwise than as expressly provided by the enactment.

(12) In this context mention may also be made that with reference to orders made under similar enactments in other States the view uniformly held by Courts is that they are not open to challenge on the merits. Among the cases we have in mind mention may be made of: (1) 'ROMESH THAPPER v. STATE OF MADRAS', AIR 1950 SC 124; (2) 'BRIJ BHUSHAN v. STATE OF DELHI', AIR 1950 SC 129; (3) 'N. B. KHARE v. STATE OF DELHI', AIR 1950 SC 211; (4) 'BRAJNANDAN SHARMA v. STATE OF BIHAR', AIR 1950 Pat 322; (5) 'JESHINGBHAI v. EMPEROR', AIR 1950 Bom 363 and (6) SUNIL KUMAR v. WEST BENGAL GOVERNMENT', AIR 1950 Cal 274.

The first case related to an order under the Madras Maintenance of Public Order Act, 1949, the second and the third cases to orders under the East Punjab Public Safety Act, 1949, the fourth case to an order under the Bihar Maintenance of Public Safety Act, 1949, the fifth case to an order under the Bombay Public Security Measures Act, 1927 and the sixth case to an order under the Bengal Criminal Law Amendment Act VI of 1950. We wish we were able to accept the Advocate-General's point of view regarding the nature of an order under S. 3 of the Cochin Criminal Law Amendment Act. Were we able to do that that would have knocked the bottom out of the case the petitioner was attempting to make out. The whole edifice of his case was built on the argument that an order under S. 3 is not impugnable in prosecutions under S. 4 or under other penal provisions of the Act. If the concession with regard to it is acceptable the question whether we should seek to invoke the extraordinary jurisdiction vested in us under Art. 226 would become more prominent than otherwise. For reasons already stated we cannot however found our order on the view that the validity of the order can be examined by the ordinary Criminal Court trying a case for contravention thereof.

We have, therefore, necessarily to examine the question whether S. 3 of the Cochin Criminal Law Amendment Act, which invests Government with authority to declare an association unlawful on its subjective satisfaction that grounds mentioned in the section for taking such action exist in a given case has become void under the Constitution.

(13) The contention of the petitioner's learned counsel on the main point in the case was that S. 3 of the Cochin Criminal Law Amendment Act offended both Art. 14 and Art. 19 (1) (c) of the Constitution and that therefore the section as also the notification issued thereunder had become void. The prosecution instituted for any transgression of the notification was according to the learned Counsel for the petitioner unsustainable. Though Arts. 14 and 19 were both said to have been offended the gravamen of the attack was that the Cochin Criminal Law Amendment Act, particularly S. 3 was a direct inroad on the freedom to form associations or unions recognised by Art. 19 (1) (c) and that the infringement had overstepped the limits of permissible legislation sanctioned by sub-clause (4) of Art. 19.

That S. 3 of the impugned Act enacts a provision directly affecting one of the seven fundamental rights guaranteed by Art. 19 (1) viz., that recognised by Art. 19 (1) (c) to form associations or unions admits of no doubt. We have, therefore, to examine whether the saving provision in Art. 19 (4) would prevent it from becoming void. Art. 19 (4) is in these terms:

> "Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause."

Under it the restrictions should be reasonable and they must have been imposed in the interests of public order or morality. It cannot for a moment be contended that legislation seeking to prevent activities of associations falling within the category of those mentioned in the impugned section is not legislation in the interests of public order or morality. It cannot, therefore, be held that the law or the notification is invalid on that ground. One of the conditions of Cl. (4) of Art. 19 is thus satisfied. Whether the law would be abused is a different question altogether.

(14) As for the test of reasonableness it is well settled that the Court is to be the judge of reasonableness. We need here only refer to what Das J. of the Supreme Court said in 'GOPALAN v. STATE OF MADRAS', AIR 1950 S C 27. At page 109 of the report the learned Judge has observed:

> "Whether any law has in fact transgressed these limitations is to be ascertained by the Court and if, in its view, the restrictions imposed by the law are greater than what is permitted by Cls. (2) to (6) whichever is applicable the Court will declare the same to be unconstitutional and, therefore, void under Art. 13. Here again there is scope for the application of the 'intellectual yardstick' of the Court. If however, the Court finds, on scrutiny, that the law has not overstepped the constitutional limitations, the Court will have to uphold the law, whether it likes the law or not."

This view of the Court's function has since been followed in subsequent decisions both in the Supreme Court and in the various High Courts in India.

(15) A further preliminary fact to be noticed in this connection is that in deciding on the reasonableness or otherwise of the restrictions imposed by a law the substantive as well as the procedural provisions of the law should be examined. In 'DR. KHARE'S CASE', AIR 1950 S C 211, the learned Chief Justice of India observed (page 214):

> "The law providing reasonable restrictions on the exercise of the right conferred by Art. 19 may contain substantive provisions as well as procedural provisions while the reasonableness of the restrictions has to be

considered with regard to the exercise of the right, it does not necessarily exclude from the consideration of the Court the question of the reasonableness of the procedural part of the law... ... ... It seems that the narrow construction sought to be put on the expression to restrict the Court's power to consider only the substantive law on the point is not correct."

Mukerjee J. who dissented from the majority of the Judges in that case agreed with the learned Chief Justice on this point.

(16) How far the impugned provision has kept itself within bounds or overstepped the bounds has to be decided against the background of these well-settled propositions. In applying them to the law impugned here we may with respect state that we got valuable help from the decision in 'V. G. ROW'S CASE', AIR 1951 Mad 147. No doubt with respect to the machinery provided for review of the order passed by Government, the provisions in the Madras Criminal Law Amendment Act XI (11) of 1950 and the Cochin Criminal Law Amendment Act XXVII (27) of 1124, are different. The scope of the review & the extent of the authority of the two tribunals are also different. But there are very many features common to both enactments. We cannot, therefore, accede to the argument of the learned Advocate-General that that decision cannot be helpful here or to agree with him that it does not lay down correct law.

It is not true that the learned Judges in that case did not examine the validity of the provision conferring authority on Government to declare associations of the kind specified in the enactment unlawful or the validity of the notification issued under that provision. An order made by Government forfeiting certain amounts of the prescribed association was also challenged there, but the main question considered related to the constitutionality of the law & the legality of the notification issued thereunder.

(17) At this stage we may state that after a careful examination of the provisions of the impugned Act we have come to the conclusion that S. 3 oversteps the bounds of permissible legislation and that it has, therefore, to be declared to have become void when the Constitution came into force. When the law under which the notification was issued became void obviously a notification issued under that law would also become void. The prosecution against the petitioner (and the other accused in the case) was therefore initiated without the sanction of any valid law and the charge has therefore to be quashed.

(18) The Cochin Criminal Law Amendment Act XXVII (27) of 1124 was intended to be a piece of permanent and peace time legislation. Notwithstanding its preventive aspect it is mainly punitive. Transgressions of a notification issued under it are to be visited with punishment ranging from imprisonment for a period of six months to imprisonment for three years with or without fine. Once a prosecution is launched against an association declared to be unlawful the criminal Court cannot question the validity of the notification and it cannot therefore be said the law gives persons hit by it an opportunity for a fair trial. Serious inroads are made regarding the right to property also. There is no time limit prescribed for the duration of a notification issued under S. 3. Government alone have authority to decide how long an association declared to be unlawful should continue to remain under the ban imposed by them.

No 'locus penitentiae' is given to those who were connected with the association when it was declared unlawful to withdraw from membership within a reasonable time of its notification as such. Two radically different modes of procedure are to be followed with respect to prosecutions falling under the two categories of unlawful associations mentioned in clauses (a) and (b) of S. 2 (vi). While in respect of a prosecution against an unlawful association falling under Cl. (a) the normal mode of procedure is to be followed, with respect to a case against an association declared to be unlawful by Government, the accused practically stands condemned even when the prosecution commences. The law is not that there will be a presumption in favour of the prosecution that the association concerned is unlawful, but that the accused cannot question the validity of the declaration of the Government to that effect.

(19) With respect to a law which contains such Draconian provisions and serious inroads on the liberty of the citizen the law does not enjoin upon Government to specify the grounds on which the declaration is made or the reasons for making it or other particulars, if any, that may have a bearing on the necessity for the declaration. Nor is there a provision for service of the notice of the declaration directly on the associations concerned or on the members thereof. Where an association heretofore lawful is made unlawful, the most elementary principles of justice and fair play require some notice of the illegality to be given to the members of the association so that they may regulate their conduct accordingly. The only publicity sought to be given to the notification is by publication in the Official Gazette. This together with the imposition of a time limit for approaching the High Court to get the declaration cancelled makes the safeguard of a judicial review really illusory. In our opinion the cumulative effect of the absence of a provision for proper notice or sufficient publicity and the imposition of a time limit to seek a review of the Government order by the High Court is to make the law overstep the bounds of permissible legislation in such a manner that sub-clause (4) of Art. 19 could not save it. In other words it offends cl. (4) of Article 19 as an unreasonable restriction on the exercise of the right conferred by Art. 19 (1) (c). With the coming into force of the Constitution the law (section 3 of the impugned Act) as also the notification issued under it became void.

(20) Here we may with advantage refer to the opinions the learned Judge in 'V. G .ROW'S CASE', AIR 1951 Mad 147 expressed regarding the absence of a provision for direct notice. At page 180 of the report Rajamannar C. J. is seen to have stated as follows:

"The first and, in my opinion, the most important defect in the procedural part of the Act which renders the restriction unreasonable is the absence of any provision for the communication of the order of the Government declaring an association to be unlawful to the association and its members. The Act provides only for a notification in the official

gazette. Though it is true such a notification may in certain cases be treated as amounting to constructive notice of the order of the Government yet in a case where drastic consequences ensue by reason of the order, the interest of the citizens requires a more direct notice. Section 16 (1) (b) provides that the notification shall fix a reasonable period for any office-bearer or member of the association or any other person interested to make a representation to the State Government in respect of the issue of the notification. Presumably after the lapse of the period so fixed, there will be no right of representation.

"It is easily conceivable that the members of an association may not have knowledge of the notification declaring it to be unlawful till after the lapse of the period fixed. Though all persons in a State are presumed to know the law of the land and ignorance of law is no excuse, I do not think there is anything which makes it incumbent on every citizen to pursue regularly the official gazette. In the case of preventive detention or internment or externment, the order is served on the person concerned. I do not mean to say that personal service is the only mode of service. In cases of evasion or absconding or in other cases where it is impracticable to have personal notice, other modes of service may be resorted to. We are familiar with the alternative modes of notice provided under the Civil P. C.

In the case of an association which is registered or has a distinctive name and a definite place set apart for its use, the notification can be served on any office-bearer of the association or if no such office-bearer is available for service by affixture at the reputed place of the association. Without some such notice, it appears to me to be unreasonable to say that the association and its members would be precluded from making a representation to the Government against the issue of the notification after a fixed time. Section 15 (1) of the Act defines an association as "any combination or body of persons, whether the same be known by a distinctive name or not."

"The learned Advocate-General contended that it would be open to the Government to issue a notification declaring "A, B and others" an unlawful association when the association is not known by a distinctive name, and it would be open to the Government to launch a prosecution against C, a person other than A & B provided they can prove at the hearing of the case that C was associated with A and B. The necessity of a personal notice in such a case on the members alleged to form an association becomes all the more apparent, when in addition to the lack of a distinctive name, the association has no definite place. The opportunity evidently intended to be given to the association and its members to show cause against the issue of the notification will be illusory in the absence of a direct communication."

At page 155, Satyanarayana Rao J. says:

"In the first place there is no provision in the Act for service of the grounds on any of the members or office-bearers of the association. The learned Advocate General attempted to argue that the issue of a notification which contains the grounds on which the declaration is made is itself a good substitute for services of the grounds on the members or office bearers of the association. In support of this contention, however, no authority has been cited before us. An association is defined in S. 15 (1) of the Act as "any combination or body of persons whether the same be known by any distinctive name or not." If the association has a distinctive name and has a place of business, the ordinary mode of serving the notice may be to leave a notice at the place where the association carries on its business.

"If it has no distinctive name the association can be described only by the names of persons who form the combination or the names of the body of persons. The Government, therefore, must know in such an event, the names of the persons who constitute the combination or association. A combination cannot be of known and unknown persons so as to make both the known and the unknown persons punishable under S. 17 by virtue of the notification. If the persons are unknown it is difficult to see how the Government could be in a position to state in their grounds that the association has for its object all or any of the objects specified in S. 15 (2) (b). In my view it is impossible to accept the argument that the issue of a notification tantamounts to service of the grounds on the aggrieved persons."

At pp. 173 and 174, Viswanatha Sastri J. observes:

"There is no provision in the Act for service of the notice of the declaration on the Association through its office-bearers or members at its place of business. Such a provision is common in other enactments. The suggestion that the members of the association might be unknown to the Government does not carry weight, for it is unreasonable to penalise persons whom you do not even know for an alleged transgression of the law. A time for making representations against the declaration of the Government is fixed in the notification but in the absence of a service of the notice on the association or its office-bearers or members, the time might pass by without their being aware of the notification at all.

"I am aware that in some cases, as for example, in the Income-Tax Act, statutory provision is made for the publication of a general notification so as to fix all citizens with notice. I am also aware that citizens who were in enemy country during war time and who actively assisted the enemy have been condemned as war criminals without personal service of the proceedings but after publication in official gazettes. But this rule of constructive service by publication is the exception rather than the rule. 'PENNEYER v. NETT', (1877) 95 U S 714."

(21) The Cochin enactment, as already noticed, does not make it incumbent on Government to state the grounds or the reasons for making a declaration under S. 3 and the notification impugned here merely reproduces the relevant clauses of the section with the conjunctive 'and' substituted for the disjunctive 'or' in two places.

(22) Unlike the Madras Criminal Law Amendment Act, 1950, the Cochin Criminal Law Amendment Act provides a safeguard to the aggrieved party to approach the High Court for cancellation of the notification issued by Government. High judicial opinion in England has doubted whether a Court of law would be an appropriate tribunal in such matters, Per Lord Finlay L. C. in 'REX v. HALLIDAY', (1917) AC 260 at p. 269 and per Lord Wright in 'LIVERSIDGE v. SIR JOHN ANDERSON', (1942) A C 206 at p. 267. We shall for the present assume that the provisions in the Cochin enactment afforded sufficient protection to an aggrieved citizen once a motion happened to be made for cancellation of the order. However the opportunity for making such motion was few and far between when there was no provision for direct notice or better publicity and the time limit imposed to approach the High Court began to run from the date of the notification itself and not from the date of the knowledge thereof.

(23) Very recently in 'HARLA v. THE STATE OF RAJASTHAN', AIR 1951 S C 467 it fell to a Division Bench (Mahajan and Bose JJ.) of the Supreme Court to consider the difference between Acts and Orders in respect of promulgation and publication. We think it appropriate to extract some passages from the judgment in that case here. Bose J. who gave the decision after referring to the facts of the case first said as follows:

"In the absence of any special law or custom, we are of opinion that it would be against the principles of natural justice to permit the subjects of a State to be punished or penalised by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge. Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is; or, at the very least, there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence."

Later, after referring to the provisions of the English Law regarding the promulgation and publication of Acts of Parliament and Royal Proclamations the learned Judge stated the reasons for the difference in the following words:

"The principle underlying this question has been judicially considered in England. For example, on a somewhat lower plane, it was held in 'JOHNSON v. SARGANT', (1918) 1 K B 101: 87 L J K B 122, that an order of the Food Controller under the Beans, Peas and Pulse (Requisition) Order, 1917, does not become operative until it is made known to the public and the difference between an Order of that kind and an Act of the British Parliament is stressed. The difference is obvious.

Acts of the British Parliament are publicly enacted. The debates are open to the public and the Acts are passed by the accredited, representatives of the people who in theory can be trusted to see that their constituents know what has been done. They also receive wide publicity in papers and, now, over the wireless. Not so Royal Proclamations and orders of a Food Controller and so forth. There must therefore be promulgation and publication in their cases. The mode of publication can vary; what is a good method in one country may not necessarily be the best in another. But reasonable publication of some sort there must be."

The above case lends considerable support to the view we take here that the provision in the Cochin Criminal Law Amendment Act, 1124 regarding the publication of a notification under S. 3 is open to grave objections.

(24) In the view we take that S. 3 transgresses all reasonable bounds recognised by sub-cl. (4) of Art. 19 and that the section hence became void when the Constitution came into force it is unnecessary for the present case to consider how far that section offends Art. 14. We therefore leave that matter open.

(25) As a result of the conclusion we have arrived at in the foregoing paragraph we hold that S. 3 of the Cochin Criminal Law Amendment Act, XXVII of 1124 became void on 26-1-1950. The notification issued by Government thereunder on 2-1-1950 ceased to be valid on the said date (26-1-1950) and the prosecution for transgression thereof in respect of acts after the said date is clearly unsustainable. The petitioner's prayer to quash the charge framed in the case (CC. 75 of 1950 on the file of the Trichur Special First Class Magistrate's Court) has therefore to be allowed and we order accordingly. O.P. 8 of 1951 and Crl. R. P. 66 of 1951 both succeed.

(26) In passing the above order quashing the charge framed in the case as a whole we have not omitted to notice that one alone out of the several accused persons has filed these petitions. The records of the cases were called for and in the exercise of its revisional jurisdiction this Court is of its own motion competent to pass such an order. We do not however know whether the detention in jail of the petitioner and the other accused who have been apprehended is on account of this case alone. As such we do not pass any order for their immediate release. A copy of this order will be immediately forwarded to the Special First Class Magistrate, Trichur, for appropriate action. Order accordingly. Leave granted.

D.H. *Order accordingly.*

A. I. R. 1952 Travancore-Cochin 226

GANGADHARA MENON AND JOSEPH VITHAYATHIL, JJ.

Ananthanarayana Iyer, Appellant v. Harihara Iyer Ganapathy Subbier and another, Respondents.

Second Appeal No. 679 of 1124, D/- 7-8-51.

Civil P. C. (1908), O. 21, R. 16, Proviso 2 — Tranvancore Civil P. C., O. 21, R. 14, Proviso 2 — "Decree for the payment of money" — Money decree passed against assets of deceased person.

The words 'for the payment of money' in Proviso 2 clearly indicate that the proviso is confined to cases of personal decrees. The proviso can therefore apply only to a case where there is a personal decree for payment of

money. AIR 1932 All 704; 1947 T L R 603, Rel. on. (Para 2)

Where a money decree is passed against the assets of the deceased 'P' the mother of the defendants there is no personal decree against the defendants. Hence, even if the assignment of the decree in favour of one of the defendants is benami, the assignee is not debarred from executing the decree on account of the second proviso. (Para 2)

Anno: C. P. C., O. 21, R. 16 N. 17.

S. Boothalingam Iyer, for Appellant; M. Madhavan Nair, for Respondent No. 3.

Cases referred to:

('32) AIR 1932 All 704: (54 All 448) (Pr 2)
('47) 1947 TLR 603 (Pr 2)

JUDGMENT: The 4th defendant is the second appellant. The matter arises in execution. The 3rd respondent obtained an assignment of the decree and sought for recognition of the assignment and execution of the decree. The 4th defendant objected on the ground that the assignment is a benami one taken by the 1st defendant in the name of his wife and that under the second proviso to R. 14 of O. XXI C.P.C. such an assignment could not be recognised. The Courts below overruled the objection. The 4th defendant has therefore come in second appeal.

(2) The second proviso to O. XXI, R. 14 of the Travancore Civil P. C. corresponding to O. XXI, R. 16 of the Indian Code is as follows:

"Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others."

The words 'for the payment of money' clearly indicate that the proviso is confined to cases of personal decrees. The proviso can therefore apply only to a case where there is a personal decree for payment of money. Vide 'MT. ASIA BIBI v. AZIR AHMAD', AIR 1932 All 704 and 1947 TLR 603. The decree in this case is a money decree passed against the assets of the deceased Parvathy Ammal the mother of defendants 1 to 4. There is no personal decree against the 1st defendant. Therefore even if the assignment is benami as contended for by the appellant the assignee is not debarred from executing the decree on account of the second proviso in O. XXI. R. 14. The order recognising the assignment and allowing the assignee to execute the decree is correct and does not call for any interference. The appeal is groundless and it is dismissed with costs.

V.B.B. *Appeal dismissed.*

A. I. R. 1952 Travancore-Cochin 227

GOVINDA PILLAI, J.

State v. Velappan Kochunny, Counter-Petitioner.

Criminal R. P. No. 370 of 1950, D/- 14-11-50.

Criminal P. C. (1898), S. 497 (1) — Section speaks of reasonable grounds and not evidence — (Cochin Criminal P. C., S. 397 (1)).

When an application for bail is made in the initial stage of the case, the Magistrate may expect the prosecution to satisfy him that there is a genuine case, and that it will be able to produce 'prima facie' evidence in support of the charge, but he cannot expect at that stage to have evidence establishing the guilt of the accused beyond reasonable doubt. Section 497(1) speaks only of reasonable grounds and not evidence. The Court is not to go at a tangent in order to find out possible excuses for granting bail. AIR 1933 Bom 492 and AIR 1934 Sind 131, Rel. on. (Para 2)

Anno: Cr. P. C., S. 497 N. 5, Pts. 7 and 8.

Government Pleader, for the State; M. Bhaskara Menon, for Counter-Petitioner.

Cases referred to:

('33) AIR 1933 Bom 492: (35 Cri L J 539) (Pr 2)
('35) 36 Cri L J 711: (AIR 1934 Sind 131) (Pr 2)

ORDER: This petition is filed on behalf of the State to revise an order passed by the Second Class Magistrate, Kanayannur, Ernakulam, granting bail to the accused in C. R. 105 of 1950 of Ernakulam North Police Station and to set aside the order. At the time the Magistrate granted bail the Police had not laid the charge against the accused. Subsequently the charge sheet was filed.

The prosecution case was that the accused who was a Police Constable attached to the Ernakulam North Police Station was going in mufti after duty at about 8.30 P.M. on 1-9-1950 to take his meals, that he was then informed by the first witness in the charge that gambling was going on in one Govindan Kesavan's house near the Padmana Talkies, that he straightaway went there, entered the house and demanded of the persons there to place the money they had before him, that all except two persons there believed him to be a thief and so raised an alarm, that Govindan Kesavan who was taking his meals inside rushed to the place and caught hold of the accused when he unsheathed his dagger and stabbed Kesavan twice on the left chest and once on the left arm pit, that he also stabbed two others who tried to intervene, that he left the place then and that as the result of the injuries sustained Kesavan died the same night at 11-30.

(2) The accused, after his arrest moved for bail. The learned Magistrate granted the same. The charge against the accused is under Ss. 281, 304 and 428 of the Cochin Penal Code. The Magistrate in granting bail stated that the accused, though was not within his rights to go to the house without a warrant issued by a proper authority for the arrest of the gamblers in a private residence, could be deemed to have been acting in good faith, that he had inflicted the stabs without premeditation, that he might have the plea of self-defence, that such plea is not to be weighed in "golden balance" and that the offence might not come under S. 281.

Section 397(1) of the Cochin Criminal P. C. lays down that if there appear reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life he is not to be released on bail. When an application for bail is made in the initial stage of the case, the Magistrate may expect the prosecution to satisfy him that there is a genuine case, and that it will be able to produce 'prima facie' evidence in support of the charge, but he cannot expect at that stage to have evidence establishing the guilt of the accused beyond reasonable doubt vide 'KESHAV VASUDEO v. EMPEROR', AIR 1933 Bom 492. As pointed out in 'EMPEROR v. MUHAMMAD PANAH', 36 Cri L J 711 (Sind) the section speaks only of reasonable grounds and not evidence. The Court is not to go at a tangent in order to find out possible excuses for granting bail. I got the case diary in the case and perused the same. At this stage I can only say that the learned Magistrate has proceeded on faniciful grounds. A police Constable like every other person, is expected to know that the infliction of injuries with a dagger

on vital parts of the body is likely to cause death of the injured. The attitude taken by the Magistrate in this case is deplorable that it appears that he has not taken a detached view of the materials placed before him. I am satisfied that at this stage the accused had not made out a case for bail. The order passed by the lower Court is set aside and bail to the accused refused. The learned Magistrate will see that the accused is taken to custody forthwith and the enquiry expedited. It is open to the accused to apply for bail after the occurrence witnesses are examined by the Magistrate.

V.R.B. *Order set aside.*

A. I. R. 1952 Travancore-Cochin 228

GANGADHARA MENON AND VITHAYATHIL, JJ.

Kuncheria Kochouseph, Appellant v. Ouseph Chandy, Respondent.

Second Appeal No. 93 of 1125, D/- 4-9-1951.

(a) Travancore Judgment-debtor's Temporary Relief Proclamations (Dated 1-8-1110 and 30-10-1110) — Applicability.

Where on the date of the Proclamations the defendant was a trader and not an agriculturist the Proclamations could not apply to him and the decree-holder is not entitled to an extension of the period of limitation by reason of the Proclamations. (Para 2)

(b) Civil P. C. (1908), S. 48 and O. 38, R. 11 — Attachment before judgment — Application for execution — Applicability of the section.

The only effect of an attachment before judgment is that if a decree is subsequently passed in favour of the plaintiff it will not be necessary to reattach the property in execution. Even in cases in which there has been an attachment before judgment an application to proceed against the property attached is an application in execution. Therefore Section 48(1) applies to a case in which an execution application is filed for proceeding against the property attached before judgment. Case law discussed. (Para 5)

Anno: C. P. C., O. 38, R. 11 N. 2.

(c) Civil P. C. (1908), S. 48 and O. 38, R. 11 — Attachment before judgment not a process in execution.

So long as an attachment remained in force an application for sale of the property attached could not be treated as a substantive execution application coming within the purview of Section 48 but only as a step in aid of execution. This principle however will not apply to attachments before judgment. An attachment before judgment cannot be regarded as a process in execution. Case law discussed. (Para 7)

Anno: C. P. C., O. 38, R. 11 N. 2.

K. P. Abraham, for Appellant; T. S. Krishnamurthi Iyer, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('70) 4 Beng L R 63: (13 W R 9 F B) (Pr 7)
('11) 38 Cal 448: (10 Ind Cas 305) (Pr 7)
('98) 8 Mad L T 367: (7 Ind Cas 707) (Pr 7)
('24) 47 Mad 483: (AIR 1924 Mad 494 (F B)) (Pr 4)
('44) AIR 1944 Mad 561: (ILR (1945) Mad 80 FB) (Pr 5)
30 Cochin 258 (Pr 4)
6 Trav L J 252 (Prs 4, 6, 7)
('29) 19 Trav L J 906 (Pr 7)
20 Trav L J 898 (Prs 4, 6)
14 Trav L J 69 (Pr 7)
24 Trav L J 587 (Pr 5)
('38) 28 Trav L J 782 (Pr 4)
11 Trav L R 13 (Pr 7)
11 Trav L R 213 (Pr 7)

VITHAYATHIL, J.: The decree-holder in O. S. No. 1722 of 108 of the Alleppey Munsiff's Court is the appellant in this second appeal. The appeal relates to an order in execution and the point raised is one of limitation. The decree is a simple money decree against three defendants who were made jointly and severally liable for the decree debt. The decree is dated 11-12-1108. The last execution application was filed on 30-12-1120 i.e., more than 12 years from the date of the decree. It is not disputed that the previous execution application has been judicially disposed of on 14-12-1118. The decree-holder pleaded that he was entitled to an extension of six months in the period of limitation by reason of the Travancore Judgment-debtor's Temporary Relief Proclamation dated 1-8-1110 and 30-10-1110. Under these Proclamations execution of decree against agriculturists was stayed for a period of six months and it was also provided in the Proclamations that this period should be excluded in computing the period of limitation prescribed in respect of execution of decrees.

If this period is excluded the execution application will be in time. The 1st defendant contended that he is not an agriculturist, that the Proclamations could not apply to him and that therefore the decree-holder is not entitled to an extension of the period of limitation for executing the decree against him. The trial Court held that the 1st defendant is an agriculturist, that the Proclamations applied to him and that therefore the decree-holder was entitled to an extension of six months in the period of limitation for executing the decree. In appeal filed by the 1st defendant the District Court held that the 1st defendant was not an agriculturist during the period of the Proclamations were in force, that therefore the Proclamation would not apply to him and that the decree-holder was not entitled to an extension of the period of limitation. The lower appellate Court therefore held that the execution of the decree was barred as against the 1st defendant. As the other defendants did not contend that they are not agriculturists the lower appellate Court held that the Proclamations would apply to them and that therefore execution of the decree was not barred as against them.

(2) On the question whether the 1st defendant was an agriculturist during the period the Proclamations were in force we agree with the view of the lower appellate Court. In the Proclamations "Agriculturist" is defined as "any person whose main occupation or main source of livelihood is agriculture." In the plaint in this case which was filed in 1100 and in the decree the 1st defendant is described as a trader. What P. W. 1 swears is that when he gave evidence namely in 1122, the occupation of the 1st defendant was agriculture. In the chief examination itself he admits that 12 years previously the occupation of the 1st defendant was trade. What P. W. 2 the plaintiff swears is that on the date of the suit the 1st defendant was a trader and that at the time of his giving evidence i.e. 1122 agriculture was the source of livelihood of the 1st defendant. The 1st defendant swears that his occupation is trade, that he got some properties only in 1118 under a

partition deed executed by his father and that until then his only source of livelihood was trade. It is therefore clear that on the date of the Proclamations the 1st defendant was a trader and not an agriculturist. The Proclamations could not therefore apply to him and the decree-holder is not entitled to an extension of the period of limitation by reasons of the Proclamations.

(3) In this Second Appeal a new point was argued by the learned Advocate for the appellant although it was not taken in the appeal memorandum. A property has been attached before judgment in this case and one of the prayers contained in the execution application dated 30-12-1120 is for sale of this property. It is argued for the appellant that so far as this prayer is concerned the execution application cannot be held to be barred by limitation. According to him the attachment before judgment continues to be in force even though the execution application has been dismissed and that the application to sell the property attached is only a step-in-aid of execution and not a fresh application contemplated by S. 48, C.P.C.

(4) With regard to the question whether upon the dismissal of an execution application the attachment before judgment will cease there is difference of opinion among the various High Courts in India. The Madras High Court has taken the view that when an execution application is filed for sale of the property attached before judgment the attachment before judgment becomes an attachment in execution and that therefore upon the dismissal of the execution application by reason of the decree-holder's default the attachment will cease under O. 21 R. 57. It was so held by a Full Bench of five Judges in 'MAYAPPA CHETTIAR v. CHITHAMBARAM CHETTIAR', 47 Mad 483. The Bombay and Nagpur High Courts have also taken this view. But the Calcutta, Allahabad and Patna High Courts have taken a different view. The Travancore High Court also has taken the latter view, Vide 'EAPEN THOMAS v. ITTY KURIEN', 6 Trav L J 252; 'USSAN KANNU v. SAHUL AMEETHU', 20 Trav L J 898 and 'KRISHNAN v. GNANBHARANAM', 28 Trav L J 782. The Cochin High Court has preferred to follow the Madras, Bombay and Nagpur High Courts, vide 'KRISHNAN NAMBOORI v. MADHAVAN NAMBOORI', 30 Cochin 258 (F. B.).

(5) It is however not necessary to decide this question in this appeal. In this case we are only concerned with the question whether S. 48 (1), C.P.C. applies to a case in which an execution application is filed for proceeding against the property attached before judgment. Section 48(1) reads thus:

"Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiry of 12 years from (a) the date of the decree sought to be executed or (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree."

According to the argument of the learned advocate for the appellant when there has been an attachment before judgment an application to proceed against the property attached can be made at any time and in such cases no question of limitation will arise. We are unable to accept this view.

We are of opinion that even in cases in which there has been an attachment before judgment an application to proceed against the property attached is an application in execution. The only effect of an attachment before judgment is that if a decree is subsequently passed in favour of the plaintiff it will not be necessary to reattach the property in execution. 'PARVATHI BAI v. KANTHIMATHI AMMAL', 24 Trav L J 587 is a direct authority on the point. It was held in that case that an attachment before judgment would not 'proprio vigore' keep alive the decree and that if the decree has otherwise became barred the attachment before judgment would be nugatory. Their Lordships observed thus in that case:

"The object of the limitation law is to give quietus to disputes and if attachments before judgments are to continue for ever, then an application for execution for the first time could be made any time after the decree, but this is obviously a contingency that the legislature could not have contemplated."

The same view was taken by the Madras High Court in 'HAMEED ROWTHER v. ARUNACHALAM PILLAI', AIR 1944 Mad 561 (F B). In that case their Lordships observed thus:

"We are unable to accept the argument that once there has been an order of attachment before judgment the decree which is subsequently passed remains alive until the order of attachment is cancelled."

(6) The learned advocate for the appellant relied on two rulings of the Travancore High Court reported in 'EAPEN THOMAS v. ITTY KURIEN', 6 Trav L J 252 and 'ARUNACHALAM CHETTIAR v. VARKI THARAKAN', 20 Trav L J 898, in support of his position. The question that arose for consideration in 6 T L J 252 was whether S. 272 Paragraph 2 of the Travancore Civil P. C. of 1065 would apply to attachments before judgment. Paragraph 2 of S. 272 reads thus:

"If the judgment-creditor fails to bring to sale any property attached in execution of a decree for money within three years from the date of the attachment, the Court may order the withdrawal of the attachment, unless for any special reasons to be recorded, it considers that the attachment should continue."

It was held in that case that this provision would not apply to attachments before judgment. In 'USSAN KANNU v. SAHUL AMEETHU', 20 Trav L J 898 also it was held that an attachment before judgment would remain in force notwithstanding the dismissal of the execution application. The question whether the provision contained in S. 41 of the Travancore Civil P. C. (S. 48 of the Indian Civil P. C.) is applicable to an execution application for sale of the property attached before judgment was not considered in these cases.

(7) It was next argued for the appellant that an attachment operates 'de die in diem' as a process in execution of the decree and that therefore further process for sale of the property attached might be applied for at any time and that no question of limitation would arise in such cases. In support of this position reference was made to the rulings reported in 'UPENDRA KAMMATHI v. VENUGOPALA PRABHU', 11 Trav L R 13; 'THANUMALAYAPERUMAL v. ANANDAM KOSHALAMANAKA', 11 Trav L R 213; 'ANANTHAPADMANABHAN ASARI v. KRISHNA PILLAI', 19 Trav L J 906; and 'ELIYAVOO v. OUSEPH', 24 Trav L J 69; 'ZAMINDAR GARU v. VENKATA SUBHARAVADU', 8 Mad L T 367. These cases relate to attachment in execution and it was held in these cases that so long as an attachment remained in force an application for sale of the property attached could not be treated as a substantive execution application but only as a step in aid of execution.

We do not think that this principle will apply to attachment before judgment. An attachment

in execution is a process in execution, and so long as the attachment subsists the process also may be said to be continuing. It is on this ground that an application for sale of the property attached is regarded only as a step-in-aid of execution and not a substantive execution application coming within the purview of S. 48 C.P.C. But an attachment before judgment cannot be regarded as a process in execution. As observed by Mitter J. in 'SRI RAM MANIK v. TINCOURI BAI', 4 Beng L R 63:

"an attachment prior to a decree is not an attachment for the enforcement of the decree, but it is a step taken merely for the purpose of preventing the debtor from delaying or obstructing such enforcement when the decree subsequently passed shall be sought to be executed. An attachment of the decree is, on the other hand, an attachment made for the immediate purpose of carrying the decree into execution and it pre-supposes an application on the part of the decree-holder to have his decree executed."

The distinction between an attachment before judgment and an attachment in execution has been thus pointed out in 'BASIRAM MALO v. KATTAYAYANI DEBI', 38 Cal 448:

"An attachment before judgment does not for all purposes stand on the same footing as an attachment in execution proceedings. This indeed is obvious from first principles. The attachment does not of necessity ensure the property to the person who attaches. He becomes entitled to proceed against it only if he eventually gets a decree; it is not competent to him to proceed against the property attached until he has also taken the preliminary steps which the law requires for its enforcement, in other words, he must apply for execution, just like any other creditor."

These observations are quoted with approval in 'EAPEN THOMAS v. ITTY KURIEN', 6 Trav L J 252. The rulings cited by the learned advocate for the appellant cannot therefore apply to the case of an attachment before judgment. If on the other hand, an attachment before judgment is regarded as a process in execution O. 21 R. 57 will apply to it and therefore upon the dismissal of the execution application the attachment will cease.

(8) For the above reasons we hold that the execution application dated 30-12-1120 is barred under S. 48, C.P.C. even in respect of the prayer for sale of the property attached before judgment.

(9) We therefore confirm the order of the lower appellate Court and dismiss the Second appeal with costs.

D.H. *Appeal dismissed.*

A. I. R. 1952 Travancore-Cochin 230

KOSHI AND GOVINDA PILLAI, JJ.

Kesavan Karunakara Pillai, Appellant v. Raman Kesava Pillai and another, Respondents.

A. S. No. 196 of 1950, D/- 6-9-1951.

Transfer of Property Act (1882), S. 52 — Applicability to revenue sale — (Travancore Revenue Recovery Act (I (1) of 1066), Ss. 2 and 39.

The doctrine of 'lis pendens' cannot be extended so as to effect a revenue sale under the Revenue Recovery Act held during the pendency of a suit regarding title or ownership of the property sold. It would create an impossible position if the Court were to hold that the State cannot sell a property for arrears of land revenue due thereon when a dispute about its ownership is pending before a Civil Court. The State cannot be expected to wait for the collection of its dues until the dispute is settled once for all. To extend the application of the doctrine of 'lis pendens' to a sale held under such circumstances would be to defeat the land revenue laws of the State, and to run counter to their intendment. 1949 Trav L R 36, Dissent from; Case law discussed. (Para 18)

Anno: T. P. Act, S. 52 N. 32 Pts. 1 and 2.

V. Ramchandra Iyer, for Appellant; P. Narayana Pillai, for No. 1; K. C. Chacko, Government Pleader, for No. 2 (State), for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('86) 12 Cal 414: (12 Ind App 171 P C) (Pr 3)
('88) 15 Cal 756: (15 Ind App 97 P C) (Pr 3)
('98) 25 Cal 179: (24 Ind App 170 P C) (Prs 3, 18)
('29) AIR 1929 All 601: (118 Ind Cas 660) (Pr 17)
('29) AIR 1929 Bom 200: (116 Ind Cas 271) (Pr 17)
('99) 26 Cal 966: (4 Cal W N 317) (Prs 8, 9, 17)
('03) 26 Mad 230: (12 Mad L J 368) (Prs 10, 12, 13)
('14) 37 Mad 49: (AIR 1914 Mad 590) (Prs 10, 12)
('26) AIR 1926 Mad 1161: (51 Mad L J 475) (Prs 13, 15)
('39) AIR 1939 Mad 256: (181 Ind Cas 57) (Pr 9)
('22) AIR 1922 Pat 542: (1 Pat 287) (Pr 17)
('29) AIR 1929 Rang 175: (7 Rang 113) (Prs 14, 18)
('27) AIR 1927 Rang 289: (5 Rang 458) (Pr 14)
25 Cochin L R 750 (Prs 15, 17)
('50) 1950 Trav-C L R 333: (AIR 1952 Trav-C 61) (Prs 5, 7, 9)
('37) 28 Trav L J 226 (F B) (Pr 6)
4 Trav L R 81 (F B) (Prs 6, 18)
('45) 1945 Trav L R 927 (Pr 5)
('49) 1949 Trav L R 36 (Prs 2, 5, 7, 8, 9, 17)
(1857) 1 De G and J 566: (44 E R 842) (Pr 18)

KOSHI, J.: This is an appeal against a judgment and decree of the Parur District Court setting aside a revenue sale. Plaintiff who is Respondent 1 in the appeal has been allowed to recover the property sold with past and future mesne profits. Defendant 2 the purchaser at the revenue sale has brought this appeal. The State who was Defendant 1 in the suit is Respondent 2 here. The circumstances that led to the institution of the suit are set out in paragraphs 2, 3 and 4 of the trial Court's judgment in the following terms:

"The plaint property is 28 cents in Parur Pakuthy comprised in S. No. 313/3A 2 acres 69 cents. In a family partition of 1066, the entire survey number was allotted to the share of the plaintiff's branch and mutation was effected in the name of its 'karanavan', Raman Parameswaran Pillai. While thus the plaintiff's branch was in possession, a dispute arose about 65 cents in the northern portion of the said survey number between the plaintiff's branch and another branch in the same 'tarwad'. This led to proceedings under S. 143, Criminal P.C. which resulted in a

declaration of the possession of the rival branch. Thereupon, plaintiff's branch instituted O. S. 761/1112 of the Parur Munsiff's Court for declaration of title and recovery of possession. The trial Court decreed the suit, while the first appellate Court dismissed it. In second appeal however the High Court restored the judgment of the trial Court.

"Meanwhile in 1113, the rival branch executed a partition deed dividing also the said 65 cents along with their admitted properties. Pursuant to it, mutation was effected for the said 65 cents in favour of Krishnan Kochunni Pillai and other of the rival branch. Tax due to Sirkar for 1115 and 1116 was defaulted. For realization of the said arrears steps were taken under the Revenue Recovery Act, and ultimately the plaint 28 cents in the western portion of the said 65 cents was sold in auction. It was purchased on 27-9-1116 for Rs. 8/- by the 2nd defendant a sister's husband of Kochunni Pillai.

"The mutation and sale proceedings are impeached as irregular and illegal. The attachment, sale etc., were conducted with material irregularity and they have resulted in substantial damage to plaintiff's branch. A petition to set aside the sale, moved before the Peishkar was rejected on 20-11-1120. The annual profits from the property come to Rs. 9/-. The property was delivered in 'Dhanu' 1120. Past profits from that date also are claimed."

(2) Both the defendants, the State as also the purchaser contested the suit and though the sale was impeached on various grounds the lower Court repelled all those grounds except one. The ground which found favour with the learned Judge was that the revenue sale was vitiated by the doctrine of 'lis pendens' in so far as it was held during the pendency of O. S. 761/1112. The learned Judge felt bound to follow the decision in 'JANAKI AMMA v. DIWAN OF TRAVANCORE', 1949 Trav L R 36, where a Division Bench composed of Krishna Pillai, C. J., and Mr. Justice Habeeb Mohamed had held that the doctrine of 'lis pendens' applies both to voluntary and involuntary sales including revenue sales.

In repelling the other grounds urged to impugn the sale the lower Court not only found that there were no irregularities but also that the plaintiff was aware of the transfer of the registry in the name of the 'karanavan' of the rival branch so early as 1114 and that he was also aware that the tax was in arrears for 1115 and 1116. Notwithstanding those findings, on the authority of the decision referred to the plaintiff's suit was allowed, the only variations made with respect to the reliefs claimed in the plaint being that the rate of mesne profits was reduced to Rs. 2/- per year and that the parties were directed to bear their respective costs.

(3) The sole question for our decision in this appeal is whether the principle of 'lis pendens' can be extended to affect sales by revenue authorities for realisation of land revenue assessment on the property. The rule of 'lis pendens' is contained in Section 52 of the Transfer of Property Act, 1882, and though that Act is not law in Travancore its principles have invariably been adopted by Courts in that State when questions covered by its provisions came up for decision. Even in jurisdiction where the Transfer of Property Act is in force it is settled law that the section as such does not apply to involuntary sales though the principle underlying the rule embodied in the section applies to such alienations as Court sales, etc. The inhibition of the section is only against any of the litigant parties dealing with the property forming the subject of the litigation so as to affect the rights of any other party thereto under any decree or order which may be made therein. In Mulla's Commentaries (Third Edition) to Section 52 it is pointed out at page 253 that the extension of the principle to involuntary alienations is the effect of three Privy Council cases, 'NILAKANT BANERJI v. SURESH CHANDRA', 12 Cal 414; 'RADHAMADHUB v. MONOHUR MUKERJI', 15 Cal 756 and 'MOTILAL v. KARRAB-UD-DIN', 25 Cal 179 and of an overwhelming mass of authorities both before and after the pronouncements of the Privy Council. The position regarding the application of the principle to compulsory sales for recovery of Government dues is set out with clarity in Chitaley's commentaries on the Transfer of Property Act (Third (1950) Edition) at pp. 731 and 732 as follows:

"A compulsory sale for the recovery of Government dues is sometimes 'free of all incumbrances' under the particular law applicable to the case, and is sometimes subject to incumbrances, like an ordinary sale in execution of a decree of a Civil Court, conveying only the right, title and interest of the judgment-debtor. In the former case the moment the sale takes place, the mortgage or other incumbrance is 'extinguished.' Consequently, the sale, even though it takes place, pending a suit on the mortgage or other encumbrance, is not affected by lis pendens.' In the latter case, the sale would be governed by the general doctrine of lis pendens."

(4) Section 2 of the Travancore Revenue Recovery Act, 1 (I) of 1066 enacts that the land, the building upon it and its products shall be regarded as security for the public revenue on such land. The term "public revenue" due on land is defined in Section 1 (a) as to include:

"the assessment in-kind or in money charged on lands and payable to Government, and all fees and cesses, whether in kind or money, which, whether charged on land, or not, are recovered as assessment on land."

Section 5 provides that when public revenue due on land may be in arrear, such arrear, together with interest, if any, and costs of processes, may be recovered by the sale of the defaulter's moveable or immoveable property or both in the manner provided by the Act. The next section relevant for our purpose is Section 39 which provides 'inter alia' that all lands brought to sale on account of arrears of revenue due thereon shall be sold free of all encumbrances.

(5) The decision of the case must depend on the true construction of these provisions and how far they would permit the extension of the principle of 'lis pendens' to sale of lands for arrears of land revenue. My learned brother Mr. Justice Govinda Pillai sitting as a Single Judge had in 'IRAVI KRISHNAN KARTHAVN v. KUMARASWAMY NAMBUDIRIPAD', 1950 Trav C L R 333, occasion to consider the correctness of the view held in 'JANAKI AMMA v. DIWAN OF TRAVANCORE', 1949 Trav L R 36, as to the application of the principle of 'lis pendens' to revenue sales and found himself unable to subscribe to that view. In '1950 Trav C L R 333', it has been pointed out that the said view runs counter to more than one Full Bench ruling of the Travancore High Court, that the effect of the view would be to render nugatory the provisions in Sections 2 and 39 of the Revenue Recovery Act and that the case mainly relied upon by the learned Judges in '1949 Trav L R 36', related to a statutory provision which was substantially different from that obtaining in the Revenue Recovery Act of Travancore. I am in full agreement with these criticisms of the decision in '1949 Trav L R 36.

At the same time I doubt whether the view could properly have been brushed aside as 'obiter dictum.' From the way in which the discussion is wound up at p. 39, it appears to me to be fairly clear that that view governed the decision of the case. The discussion is concluded in these terms: "We have no doubt that the sale is vitiated by 'lis pendens' and liable to be set aside." The other ground of the decision in that case, if I may say so with respect, is equally shaky. The fact that the 'pattah' stood in the name of a junior member and that notice of the sale proceedings was given to him alone is hardly a ground to vacate a revenue sale. If the sale is otherwise valid the actual and real owner of the property will be bound, even if the sale was conducted against another, who was the 'Thandapper-holder.' Every holder of interest in land is bound to see that the Crown demands, especially of revenue are satisfied on pain of his interest being sold out for the arrears of such demand. The revenue authorities are not bound to notify all such persons of the sale, per Abraham, J., in 'JOHN v. PHILIP', 1945 Trav L R 927 at p. 932. It is settled law that the revenue authorities are bound to give notice of the sale proceedings only to the 'Thandapper' or Registry-holder.

(6) The decisions in 'KANAKKU EASWARAN NARAYANAN v. CHENNAN CHENNAN', 4 Trav L R 81 (FB) and 'NARAYANAN v. NAYINA MUHAMMATHU', 28 Trav L J 226 (FB), clearly lay down that a sale held for arrears of land revenue will extinguish prior encumbrances. The former decision was given at a time when there was no Revenue Recovery Regulation or Act in Travancore and it is therefore instructive to notice how the law, bottomed on first principles, was expounded in that case. The first question referred for decision to the Full Bench was whether a sale of land for arrears of revenue due to Sirkar is free of all prior encumbrances on it? The Full Bench said:

> "Our answer to the first question is in the affirmative. Revenue being the first and paramount charge on the land, a sale for arrears of revenue is free of all prior encumbrances. Public interests require that all private demands must give priority to the revenue due to Government, for the obvious reason that no Government, can be carried on without revenue. It may be that in the absence, in this State, of a Regulation defining the procedure to be observed in realising arrears of revenue, encumbrancers may find it difficult to protect their interests by paying the arrears. All we mean to decide is that, if a sale has been properly made after public notice, it is free of all encumbrances. We need hardly add that the object of public notice is to give an opportunity to the defaulter or those who claim through or under him, such as encumbrancers, etc., to pay arrears and thereby prevent the sale of land."

(7) The latter decision points out that the principles enunciated in the former decision have been recognised both in the Revenue Recovery Act of 1066 and in the subsequent decisions of the Travancore High Court. It is unfortunate that in 'JANKI AMMA v. DIWAN OF TRAVANCORE', 1949 Trav L R 36, the attention of the learned Judges was not invited to these Full Bench decisions. If the effect of a revenue sale is to put an end to all charges whether those charges have ripened into a decree of Court or not I fail to see how the rule of 'lis pendens' can be held to apply such a sale. My learned brother has referred to this aspect in paragraph 3 of his judgmen in 'KRISHNAN KARTHAVAN v. KUMARASWAMY NAMBUDRIPAD', 1950 Trav C L R 333, and I fully share the view expressed in that paragraph that to hold that the principle of 'lis pendens' will apply to revenue sales would be to render Sections 2 and 39 of the Revenue Recovery Act nugatory.

(8) Reference has already been made to the relevant portion of Section 39 of the Travancore Revenue Recovery Act. The case mainly relied upon in 'JANAKI AMMA v. DIWAN OF TRAVANCORE', 1949 Trav L R 36, is a decision of the Calcutta High Court reported in 'HAR SHANKAR PRASAD v. SHEW GOBIND SHAW', 26 Cal 966. There the sale was held under Sections 13 and 34 of the Bengal Land Revenue Sales Act 11 (XI) of 1889. Section 54 of the said Act reads thus:

> "When a share or shares of an estate may be sold under the provisions of Section 13 or Section 14, the purchaser shall acquire the share or shares subject to all encumbrances and shall not acquire any rights which were not possessed by the previous owner or owners."

(9) Section 13 relates to the sale of separate shares and Section 14 to the sale of entire estate under certain conditions. The two extracts from the decision in 'SHANKAR SINGH v. SHEW GOBIND SHAW', 26 Cal 966, incorporated into his judgment in 'KRISHNAN KARTHAVAN v. KUMARASWAMY NAMBUDRIPAD', 1950 Trav C L R 333, by my learned brother clearly show that the decision turned on the specific provision in Section 54 of the Bengal Land Revenue Sales Act which expressly states that the purchaser shall acquire the share or shares subject to all encumbrances and shall not acquire any rights which were not possessed by the previous owner or owners. The other decisions relied upon in 'JANAKI AMMA v. DIWAN OF TRAVANCORE', 1949 Trav CLR 36, followed the Calcutta decision without any serious discussion. The effect of the difference in the laws is well brought out in 'PONNUSWAMI CHETTIYAR v. ELLASARI OBUL REDDY', AIR 1939 Mad 256, referred to in 1950 Trav C L R 333.

(10) In that case the sale was for arrears of rent due from a 'ryot' to the landholder and it was held that by virtue of the provisions in Sections 5 and 125 of the Madras Estates Land Act (1 (I) of 1903) the sale was not affected by pending suit on a mortgage executed by the 'ryot' who was in default. In repelling the argument that the sale was affected by the doctrine of 'lis pendens' Wadsworth, J., said:

> "This contention overlooks the fact that the sale by the Collector was in fact a sale held to enforce the paramount right of the landholder to his rent, which under Section 5, Estates Land Act, is a first charge on the land. It also ignores the fact that by virtue of S. 125 of the same Act when the land is sold for arrears of rent in respect thereof the purchaser takes free of all encumbrances..... .... In such circumstances it is difficult to see how a decree under a mortgage over land which is subject to a prior statutory charge for the rent due to the landholder can affect a sale at the instance of the landholder for the realisation of his dues charged upon the land. No precise case under the Estates Land Act has been cited on this point but there is ample authority for a similar proposition with regard to sales for arrears of land revenue due to the crown pending a mortgage suit against the 'ryot.' It is well established that such a sale for arrears of land revenue is not affected by 'lis pendens': Vide 'VELLAPPAYAL AMBALAM v. KARUPPIAH PILLAI', 37 Mad 49 and the observations in 'KADIR MOHIDEEN v. MUTHU KRISHNA IYYAR', 26 Mad 230 at p. 236. I have no hesitation

in holding that the sale by the Collector for arrears of rent of the land on which those arrears were due to the landholder, is not affected by a pending suit on a mortgage executed by the 'ryot' who is in default."

(11) It is clear from this extract that the provisions in Sections 5 and 125 of the Madras Estates Land Act correspond respectively to the provisions in Sections 2 and 39 of the Travancore Revenue Recovery Act.

(12) The decision in 'VELLAPPAYAL AMBALAM v. KARUPPIAH PILLAI', 37 Mad 49, is a decision by a Division Bench composed of Benson and Sundara Ayyar, JJ. There it was held that under Section 42 of the Madras Revenue Recovery Act (11 (XI) of 1864) a sale for arrears of water-cess due under the Madras Act VII (7) of 1865 conveys a title to the purchaser free of encumbrancers, water-cess being included in the term 'public revenue' as per Section 1 of the Revenue Recovery Act 11 (XI) of 1864. Wadsworth, J., has also relied upon the observations of Benson and Bhasyam Iyengar, JJ., in the well-known case of 'KADIR MOHIDEEN v. MUTHUKRISHNA AYYAR', 26 Mad 230 at p. 236. In that case a co-owner's interest in the mortgaged property was sold for arrears of income-tax after a decree for sale was passed on the mortgage. The learned Judge while holding that the sale for arrear of income-tax assessment did not extinguish subsisting encumbrancers made some observations regarding the effect of a sale for arrears of land revenue which have since become classical. Those observations run thus:

"If the second defendant had been a purchaser at a revenue sale for arrears of land revenue which accrued due in respect of the land purchased by him the case would be quite different and the doctrine of 'lis pendens' would not apply; for in that case the revenue sale would be in enforcement of a right of the Crown paramount to the mortgage right sought to be enforced by the decree of the Civil Court, and not simply of the right, title and interest of the defaulter as in the case of a sale for arrears of income-tax."

(13) Yet another Madras case which contains observations relevant on the point under discussion is that reported as 'THAMMAYYA v. RAMANNA', AIR (13) 1926 Mad 1161. That case also is a decision by a Single Judge. There during the pendency of a mortgage suit the mortgaged property was sold for arrears of Abkari Revenue and Devadoss, J., held that the doctrine of 'lis pendens' affected the sale. The learned Judge is however seen to have observed that the case will be different if it was a revenue sale for arrears of land revenue and that according to the Revenue Recovery Act land revenue was the first charge on the property and that any sale for arrears of land revenue would convey good title to the purchaser free of any encumbrance on the land. These observations were made with reference to the provisions of the Madras Revenue Recovery Act analogous to those we obtain in Sections 2 and 39 of the Travancore Act. Before concluding his judgment the learned Judge has quoted the relevant extract from the decision in 'KADIR MOHIDEEN v. MUTHU KRISHNA', 26 Mad 230.

(14) There are two decisions of the Rangoon High Court which throw light on the point. In the first case 'MOHAMAD SALAV v. R. M. V. V. M. CHETTYAR FIRM', AIR 1927 Rang 289, though the decision ultimately turned on another ground the judgment of the learned Judge (Chari, J.,) who heard the suit on the original side contains a fairly exhaustive review of the Madras case law bearing on the point and his views that the Rangoon Municipal 'Property Tax' was meant as a kind of substitute for land tax and that the Legislature intended to put the municipal property tax in the same position as land tax were adopted in the second case 'ABDUR RAUF v. N. P. L. S. P. CHETTYAR FIRM', AIR 1929 Rang 175, by a Division Bench composed of Rutledge, C.J., and Brown, J. In the latter case it was held that the 'property tax' stood on the same basis as land tax, that a sale for arrears thereof had the effect of extinguishing subsisting encumbrances and that the doctrine of 'lis pendens' did not apply to such sales.

(15) Before leaving this aspect reference may usefully be made to a decision of the Cochin High Court reported in 'SUPPAYYA VISWANATHA AYYAR v. DIWAN OF COCHIN', 25 Coch L R 750. What the learned Judges stated there regarding the effect of a revenue sale and how far the doctrine of 'lis pendens' applies to such sales are really 'obiter.' The revenue sale in question there was held during the pendency of a suit which did not affect immoveable property. All the same Sesha Ayyar, J., who delivered the judgment in that case referred to the relevant Madras decisions on the point and his observations occurring at page 763 are instructive. They are as follows:

"It is thus clear that the sale of a land for arrears of revenue is in exercise of the paramount right of the Government. The rights of persons having any interest in a property are subject to the paramount right of the Government. The doctrine of 'lis pendens' relates only to the adjudication of the rights of private persons and cannot affect the paramount rights of the Government. When a plaintiff has filed a suit relating to a land, he cannot, by invoking the doctrine of 'lis pendens' avoid an encumbrance on the property created before the suit was instituted. But even such encumbrances are avoided by the sale for the arrears of revenue in respect of that land.

The Madras High Court has in the case reported in THAMMAYYA v. RAMANNA', 51 Mad L J 475: AIR 1926 Mad 1161, in dealing with the question whether the doctrine of 'lis pendens' would apply to a sale of a property for Abkari dues, stated that the case would be different if it was a revenue sale for arrears of land revenue, for under the Revenue Recovery Act land revenue is the first charge on the property and any sale for arrears of land revenue would convey a good title to the purchaser free of all encumbrances on the land."

(16) It may be added that the provisions in Sections 3 and 48 of the Cochin Revenue Recovery Act more or less correspond to the provisions in Sections 2 and 39 respectively of the Travancore Revenue Recovery Act.

(17) What the authorities so far referred to lay down is that as land revenue is a paramount charge on the land and its products and as the law provides that a sale in enforcement of that paramount claim shall extinguish all subsisting charges the doctrine of 'lis pendens' cannot be extended to sales held to realise land revenue dues. I have mentioned that the decision in 'JANAKI AMMA v. DIWAN OF TRAVANCORE', 1949 Trav L R 36, follows mainly the decision in 'SHANKAR PRASAD v. SHEW GOBIND SHAW', 26 Cal 966. The latter is a decision based on a different provision of law.

The Patna case referred to in '1949 Trav L R 36', namely, 'MATHURA PRASAD v. DASAI', AIR 1922 Pat 542 followed the Calcutta decision in '26 Cal 966', as the statute law applicable was the

same as in Bengal. In 'VISWANATHA AYYAR v. DIWAN OF COCHIN', 25 Coch L R 750, referred to above this case was dissented from, but that dissent would seem to have been without noticing the difference in the law. The third case '1949 Trav L R 36', followed is a Single Bench decision of the Bombay High Court reported in 'NARAYANAN KONDAJI v. GOVINDA KRISHNA', AIR 1929 Bom 200. There the sale was held under the provisions of the Criminal Procedure Code of the properties of an absconding accused person. What was held there was that the purchaser cannot obtain more than what the owner himself could have conveyed to him on the date the Government attached the property. It is the same principle that was held applicable to sales for Income-tax Abkari or Forest dues, etc., in the cases cited above.

The next decision followed in '1949 Trav L R 36' is a Single Bench decision of the Allahabad High Court in 'DODEY RAM v. MT. GULKANDO', AIR 1929 All 601. There the decision only shows that the sale was for Government dues. The character of the dues is not clear from the decision. As pointed out in 1950 Trav L. R. 333 all these three cases, (Patna, Bombay and Allahabad), blindly follow the Calcutta decision referred to. The ground of distinction drawn in Chitaley's Commentaries set out in the Extract quoted earlier is clearly borne out by decided cases. I do not, therefore, hesitate to say that the decision in '1949 Trav L R 36', does not lay down the law correctly.

(18) There is however one more aspect to be referred to here. So far I was dealing with cases where revenue sales took place during the pendency of suits to enforce mortgages or charges over the properties sold. In this case it was a suit for a declaration as to title that was pending when the revenue authorities sold the plaint property. If it were a private sale that took place pending that suit it is undoubted law that the purchaser would have taken it only subject to the result of the litigation. The Privy Council decision in 'MOTI LAL v. KARRABULDIN', 25 Cal 179 referred to earlier shows that the same result would have followed even if the sale was held by a Court in enforcement of a mortgage decree for sale. For obvious reasons the provision in Section 39 cannot be called to aid in this case where the revenue sale took place pending a suit regarding the title to the property and not pending a suit to enforce a mortgage or charge.

We have not been referred to nor have I been able to come across any decision myself which holds that the doctrine of 'lis pendens' can or cannot be extended to a revenue sale held under similar circumstances. The object of the law relating to 'lis pendens' which affects a purchaser as stated in the leading case in 'BELLAMY v. SABINE', (1857) 1 De G & J 566:44 E R 842, is that:

> "the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute so as to prejudice the opposite party."

To use the language of Story's Equity Jurisprudence:

> "he who purchases during the pendency of a suit is held bound by the decree that may be made against the person from whom he derives title."

In these well recognised statements of the principle underlying the rule of 'lis pendens' as also in the rule embodied in Section 52 of the Transfer of Property Act the prohibition is only against litigant parties dealing with properties in dispute and not against paramount claim like that of the State or a Local Body being enforced. In the case in 'ABDUR RAUF v. N. P. L. S. P. CHETTYAR FIRM', AIR 1929 Rang 175, the learned Judges said:

> "We do not consider that the doctrine applies to this case at all. It would indeed, be a dangerous extension of the doctrine to hold that neither Government nor a Local Body could recover its taxes or rates from a defaulter so long as a law suit was pending between the defaulter and some of his other creditors."

In my view the reason equally holds good for not extending the application of the doctrine of 'lis pendens' so as to affect a revenue sale held during the pendency of a suit regarding title or ownership of the property sold. It would create an impossible position if the Court were to hold that the State cannot sell a property for arrears of land revenue due thereon when a dispute about its ownership is pending before a Civil Court. The State cannot be expected to wait for the collection of its dues until the dispute is settled once for all. This is exactly what the case in 'KANAKKU EASWARAN NARAYAN v. CHANNAN CHENNAN', 4 Trav L R 81 (FB), said. To extend the application of the doctrine of 'lis pendens' to a sale held under circumstances similar to the present would be to defeat the land revenue laws of the State, and to run counter to their intendment. I accordingly hold that the revenue sale in question cannot be held to be bad for the reason stated by the lower Court.

(19) The appeal is therefore allowed, the lower Court's decision set aside and the plaintiff's suit dismissed with costs in both the Courts. In the lower Court the two defendants will between them share some sets of Advocate's fee while the State will bear its costs in the appeal.

(20) GOVINDA PILLAI, J.: I agree.

V.R.B. *Appeal allowed.*

A. I R. 1952 Travancore-Cochin 234

KOSHI AND GANGADHARA MENON JJ.

Ramayyan, Appellant v. Devaki Amma and others, Respondents.

A. S. No. 61 of 1123 (c), D/- 22-6-1951.

(a) Provincial Insolvency Act (1920), S. 35 — Practice and procedure — Burden of proof.

Where an application for annulment challenges the debt, whole stock and barrel and when the creditor's eligibility to lay the application in insolvency is founded upon that debt, it is for him to show that the debt was not only genuine, but also one for the non-payment of which the debtor could have been personally proceeded against. (Para 4)

Anno: Prov. Ins. Act, S. 35 N. 6.

(b) Provincial Insolvency Act (1920), Ss. 35, 6 — Adjudication on basis of debt for which debtor was not personally liable to petitioning creditor — Validity.

It is a common place of the insolvency law that an act of insolvency to serve as the basis of adjudication upon a creditor's petition must be an act committed by his debtor and unless there is a personal liability in respect of the debt there is no such relation of the debtor as will serve to support an adjudication order. 32 Cochin L R 263, Rel. on. (Para 7)

An insolvency proceeding is essentially a proceeding 'in personam' and only the personal

debts due by the insolvent can be proved therein. (Para 7)

When the debtor was not personally liable for the debt due to the petitioning creditor and when there is no evidence of any other debt being in existence when the sale deed (alleged to be an act of insolvency) in favour of the vendee was executed, it can on no account be treated as an act of insolvency. (Para 7)

Anno: Prov. Ins. Act, S. 6 N. 2; S. 35 N. 2.

T. S. Venkiteswara Iyer and C. S. Anantha-krishna Iyer, for Appellant; C. P. Madhavan Nair and M. Narayanan Menon, for Respondents.

Case referred to:
32 Cochin L R 263 (Pr 7)

JUDGMENT.: This is an appeal from an order annulling the adjudication order passed in I. P. No. 10 of 1120 on the file of the Trichur District Court. The petitioning creditor, who is the appellant before this Court, held a usufructuary mortgage for an amount of Rs. 8,000/- over the debtor's properties in the erstwhile Cochin State. The document in that behalf was executed by the debtor's natural guardian, his mother. It would appear the mother as guardian had borrowed another sum of Rs. 2,000/- from the mortgagee on behalf of her minor son and executed a pro-note in respect thereof. This pro-note was dated 28-10-1119. Not long afterwards the minor came of age and on 13-8-1120 he assigned the mortgaged properties to the 1st respondent in this appeal for a consideration of Rs. 12,250/-. The appellant's mortgage debt was reserved for payment by the vendee, but no provision was made for the debt due under the promissory note. Founding this sale in favour of the 1st respondent as an act of insolvency, the appellant on 6-11-1120 filed an application, since registered as I. P. No. 10 of 1120, to get the debtor adjudged an insolvent. The debtor's mother was also made a counter-petitioner to that application and in due course the Court adjudged the debtor an insolvent. This order was passed on 6-2-1121. Both counter-petitioners remained ex parte in that proceeding. A vesting order in favour of the Official Receiver, Trichur, is embodied in the adjudication order. The adjudication order was soon followed by an application under Sections 53 and 54 of the Insolvency Act by the Official Receiver to annul the sale deed in favour of the 1st respondent. This application was laid on 26-5-1121. The 1st respondent in her turn filed the application giving rise to this appeal on 21-6-1121 to annul the adjudication order on the ground that the promissory note alleged to have been executed by the debtor's mother in favour of the petitioning creditor was a bogus and fictitious one. The Official Receiver's application and the petition to annul the adjudication order were heard together by the learned Additional District Judge, Trichur and he allowed the application to annul the adjudication order. The present appeal is directed against the order. Consequent on the annulment of the adjudication order the learned Judge dismissed the Official Receiver's application under Sections 53 & 54 and the appeal therefrom is A. S. No. 64 of 1123 which was heard along with the present appeal. We are disposing of that appeal by a separate judgment.

(2) The Courts' powers to annul an adjudication order are defined in Section 35 of the Insolvency Act and that section, so far relevant, reads thus:

"Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full, the Court shall on the application of the debtor or any other person interested, by order in writing, annul the adjudication and ....."

(3) Though the ground specifically mentioned in the application for annulment was that the debt evidenced by the promissory note was a fictitious debt, the learned Judge in the Court below has founded his order for annulment on the ground that as the debt was one for which the debtor was not personally liable, the Court ought not to have adjudicated him an insolvent. The learned Judge's finding is to the effect that the debt was not fictitious but true.

(4) A point was raised that the decision is rested on a ground not mentioned in the application, but we do not think that there is any substance in it. The application challenges the debt, whole stock and barrel and when the creditor's eligibility to lay the application in insolvency is founded upon that debt it is for him to show that the debt was not only genuine, but also one for the non-payment of which the debtor could have been personally proceeded against. The only question for our consideration therefore is whether the learned Judge's view that the debtor was not personally liable for the debt due under the promissory note executed by his natural guardian is not right.

(5) It was conceded by the learned Counsel for the appellant that at its inception the debt was not one for which the debtor had any personal liability. The appellant's case however is that since the debtor came of age he had expressly undertaken personal liability and that therefore on the date of the petition in insolvency there was personal liability for the debtor. Hence according to the appellant the adjudication order was quite proper. However, one will look for in vain in the insolvency petition or the adjudication order for any mention that the debt was one for which the debtor had rendered himself personally liable. Even the appellant's Counsel did not dispute this position, but he invited our attention to an affidavit the appellant filed in the insolvency proceeding in proof of the alleged act of insolvency wherein he said express mention was made of the facts and circumstances under which the debtor took upon himself personal liability for the debt. That affidavit is not placed on the record of the present proceeding but the learned Counsel for the appellant relies on a statement contained in the evidence given by his client in this proceeding that all that is contained in the affidavit filed to prove the act of insolvency is true. We are afraid that is a dubious method of leading evidence and we cannot look into the contents of the affidavit to find out what all it contains. The petition as mentioned earlier did not contain any allegation which would go to show that the debtor was personally liable for the debt incurred by his mother during his minority. Nor does the order refer to any such facts. On the face of the petition it ought to have been dismissed 'in limine' and we have no hesitation therefore in stating that this is a case which easily falls within the spirit and the letter of Section 35.

(6) The learned Judge in the Court below thought it proper to refer to the so-called statement in the affidavit mentioned which according to the appellant goes to show that the debtor was personally liable for the pro-note debt. We are at one with the learned Judge in thinking that those allegations do not go to show that the debtor had undertaken any personal liability for the debt. They may at best mean that on coming of age he did not repudiate the debt. Nothing more can, in our opinion, be read into those passages.

(7) It is a common place of the insolvency law that an act of insolvency to serve as the basis of adjudication upon a creditor's petition must be an act committed by his debtor and unless there is a personal liability in respect of the debt there is no such relation of the debtor as will serve to support an adjudication order. See the decision in '32 Cochin L R 263', and the decisions referred to therein. An insolvency proceeding is essentially a proceeding 'in personam' and only the personal debts due by the insolvent can be proved therein. These propositions were not disputed by the learned Counsel for the respondent nor did he as stated earlier contend that originally the debtor was personally liable. It was the alleged undertaking that was sought to be made the basis for the liability and for that we could find no foundation on the facts of the case. When the debtor was not personally liable for the debt due to the petitioning creditor and when there is no evidence of any other debt being in existence when the sale deed in favour of the 1st respondent was executed, it can on no account be treated as an act of insolvency. There is therefore no merit in the appeal and we dismiss it with costs.

V.B.B. *Appeal dismissed.*

A. I. R. 1952 Travancore-Cochin 236

KUNHI RAMAN, C. J. AND VITHAYATHIL, J.

Janaki Amma Meenakshi Amma, Appellant v. Mathiri, Respondent.

Second Appeal No. 538 of 1951, D/- 21-11-1951.

Civil P. C. (1908), O. 34, R. 7 and O. 21, R. 1 (2) — Decree for redemption with mesne profits — Deposit of mortgage money in Court — Notice of deposit to mortgagee — Mesne profits —T. P. Act (1882), S. 83.

Under S. 83 of the Transfer of Property Act deposit of the mortgage amount in Court by the mortgagor will operate as a valid tender of the mortgage money only when notice of the deposit is given to the mortgagee. O. 21, R. 1 (2), C. P. C., also provides for the issue of such notice. Therefore, the mortgagor who has obtained a decree for redemption can claim mesne profits only from the date of service of the notice of deposit on the mortgagee till the date of actual delivery of possession to the mortgagor. As long as the mortgagor decree-holder is not able to get actual possession of the property on account of the obstruction of persons who were holding the property under the mortgagee the latter cannot be said to have surrendered possession of the property to the mortgagor by merely filing a petition in Court to the effect that he had surrendered.

(Paras 2, 3)

P. Narayana Pillai, for Appellant; V. Ramachandra Iyer, for Respondent.

JUDGMENT: The decree-holder is the appellant. The decree is for redemption of a mortgage. The 1st defendant-respondent is the mortgagee. The 2nd defendant was impleaded as a person having some interest in the mortgage right. Defendants 3 to 6 were persons who were residing in the mortgage property under the 1st defendant. The appeal relates to the claim of the decree-holder for mesne profits from the date of deposit of the mortgage amount till the date of delivery of the property. The decree awards mesne profit at the rate of Rs. 75 and 50 paras of paddy per year from the date of deposit of the mortgage amount. The decree-holder deposited the mortgage amount on 8-11-1124 and applied for delivery of property on 5-12-1124. Notice of deposit of the mortgage amount was served on the 1st defendant on 30-2-1125. The date fixed for return of notice was 12-3-1125. On that date the 1st defendant put in a petition to the effect that he surrendered possession of the property. As the decree-holder did not get actual possession of the property on account of the obstruction of defendants 2 to 6 she sought delivery of the property through Court. The Amin could give delivery of the property to the decree-holder only with the help of the police, and the property except the building thereon was delivered on 29-4-1125. The decree-holder claims mesne profits from 8-11-1124, the date of deposit of the mortgage amount till 29-4-1125, the date of delivery of the property. Both the lower Courts held that the 1st defendant was liable to surrender possession of the property only on receipt of notice of the deposit of the mortgage amount and that since he surrendered possession soon after getting the notice he is not liable for mesne profits.

(2) It is true that the 1st defendant was bound to surrender possession of the property only on receipt of notice of the deposit of the mortgage amount. Under S. 83 of the Transfer of Property Act deposit of the mortgage amount in Court by the mortgagor will operate as a valid tender of the mortgage money only when notice of the deposit is given to the mortgagee. Order 21, Rule 1 (2), C. P. C. also provides for the issue of such notice. Therefore the mortgagor can claim mesne profits only from the date of service of the notice of deposit on the mortgage.

(3) The further question for consideration is whether the obligation of the 1st defendant to surrender possession of the property was discharged by his putting in a petition in Court to the effect that he had surrendered possession of the property. As long as the mortgagor decree-holder was not able to get actual possession of the property on account of the obstruction of persons who were holding the property under the 1st defendant we do not think that the latter can be said to have surrendered possession of the property to the mortgagor by merely filing a petition in Court to the effect that he had surrendered. The obstruction of defendants 3 to 6 who were let into possession of the property by the 1st defendant made it impossible for the decree-holder to obtain possession of the property and she had to seek delivery of possession through Court, and the amin was able to give delivery only with the help of the police. In the circumstances we are of opinion that the 1st defendant is liable for mesne profits till the property was actually delivered to the decree-holder, i.e., 29-4-1125. The decree-holder is therefore entitled to get proportionate mesne profits from the 1st defendant from 30-2-25 to 29-4-1125 at the rate of Rs. 75 and 50 paras of paddy per year. The orders of the lower Courts are modified and the Second Appeal is allowed to the above extent. The parties will pay and receive proportionate costs.

K.S. Appeal allowed.

A. I. R 1952 Travancore-Cochin 237

SANKARAN AND VITHAYATHIL, JJ.

Ouseph Korathu, Appellant v. Gopalan Nair and another, Respondents.

Second Appeal No. 14 of 1950, D/- 20-9-51.

(a) Civil P. C. (1908), Ss. 145 and 151 and O. 41, R. 5(3)(c) — Decree for redemption — Appeal — Stay of execution — Security bond — Exercise of inherent power.

Where on an appeal against the decree for redemption the High Court ordered the judgment-debtor, on his applying for stay of execution, to furnish security for mesne profits from the date of deposit of the mortgage amount by the decree-holder for a period not exceeding one year from the date of the order and accordingly a security bond was executed:

Held (1) that the security that was demanded by the Court not being for the due performance of the decree that might be passed by that Court, was not one given under O. 41, R. 5(3)(c), (Para 2)

(2) that it was doubtful whether the case came under S. 145, (Para 3)

(3) that the bond must be deemed to have been taken by the Court in the exercise of its inherent power and could be summarily enforced by the Court without recourse to a fresh suit. Case law discussed. (Para 8)

Anno: C. P. C., S. 145 N. 3; S. 151 N. 2; O. 41, R. 5 N. 5.

(b) Civil P. C. (1908), Ss. 145 and 151 and O. 41, R. 5 — Security bond taken in exercise of inherent power — Surety liable to pay mesne profits — Liability not co-extensive with that of judgment-debtor — Surety's liability for amount covered by bond.

Where according to the terms of the security bond taken by the Court in the exercise of its inherent power the surety was liable to pay the amount of the mesne profits if the second appeal went against the defendant and the surety also agreed that the amount might be realised from him in execution in the same manner in which the decree could be executed against the defendant and the appeal was decided against the defendant:

Held, that nowhere was it stated in the bond that the surety would be liable only to the extent to which the judgment-debtor would be liable under the decree to be passed by the High Court. Therefore, though the High Court decree did not make the judgment-debtor liable, the surety was liable for the amount covered by the bond. (Paras 9, 10)

Anno: C. P. C., S. 145 N. 8; S. 151 N. 2; O. 41, R. 5 N. 12.

V. Rama Shenoy, for Appellant; S. Sivaraman, for Respondents.

Cases referred to:

('74-75) 2 Ind App 219: (15 Beng L R 383 PC) (Prs 4, 5)

('20) 42 All 158: (AIR 1919 PC 55) (Prs 4, 8)

('43) AIR 1943 P C 189: (ILR (1944) Kar P C 16) (Pr 4)

('26) 97 Ind Cas 787: (AIR 1926 Mad 1005) (Pr 7)

('36) AIR 1936 Mad 990: (166 Ind Cas 670) (Pr 5)

('49) AIR 1949 Mad 152: (1948-2 Mad L J 287) (Pr 6)

23 Cochin 408 (Pr 8)

3 Cochin L J 114 (Pr 8)

20 Trav L J 505 (Pr 8)

JUDGMENT: The decree-holder in O. S. No. 161 of 1118 of the Crangannore Munsiff's Court is the appellant in this case. The appeal relates to an order in execution refusing to enforce a security bond. The suit was one for redemption. It was decreed on 30-6-1119. The decree-holder deposited the mortgage amount on 9-11-1119 and applied for delivery of the property. The judgment-debtor appealed from the decree and the appellate Court stayed delivery of the property till the disposal of the appeal on security being furnished by the judgment-debtor for mesne profits. The appeal was dismissed and the judgment-debtor filed a Second Appeal in the High Court and again applied for stay of execution. The High Court passed an interim order on 1-5-1122 staying execution of the decree on security.

On 4-5-1122, a security bond was executed for answering the decree that might be passed in the second appeal. The decree-holder contended that the security should be for mesne profits from the property from the date of deposit of the mortgage amount as he was kept out of possession of the property. The High Court modified the original order and ordered the judgment-debtor to furnish security for mesne profits from the date of deposit of the mortgage amount, for a period not exceeding one year from the date of the order at the rate of Rs. 175 a year. Accordingly a security bond was executed for mesne profits.

The second appeal was subsequently dismissed. When the decree-holder filed an execution petition for the enforcement of the security bond the surety objected contending that he was not liable to pay any amount under the bond as the High Court decree did not make the judgment-debtor liable for mesne profits The substance of the contention is that the security bond was executed for answering the decree that might be passed by the High Court, that the liability of the surety is co-extensive with that of the judgment-debtor and that since the High Court did not make the judgment-debtor liable for mesne profits the surety also could not be made liable for the same. The Munsiff's Court accepted this contention and disallowed the prayer of the decree-holder to enforce the security bond. In appeal filed by him before the District Court the order of the trial Court was confirmed. Hence this Second Appeal.

(2) Both the lower Courts have taken the view that the security bond was executed under O. 41, R. 5 (3) (c), Civil P. C. According to that rule security has to be given by the applicant for the due performance of the decree or order that may ultimately be binding upon him. Under this rule the Court has jurisdiction to demand security only for the due performance of the decree or order that may ultimately be passed. In this case the plaintiff had made no claim in the suit for mesne profits from the date of deposit of the mortgage amount, and the decree of the trial Court did

not award him any mesne profits. Neither in the 1st appellate Court nor in the Second Appellate Court did the plaintiff make any claim for mesne profits. Although the High Court purported to act under O. 41, R. 5, in demanding security as a condition for staying execution the security that was demanded by the 2nd order was not one for the due performance of the decree that might be passed by that Court. It cannot therefore be said that the security in this case is one given under O. 41, R. 5 (3) (c), Civil P. C.

(3) The question, therefore, for consideration is whether the Court has got jurisdiction to demand security from a party apart from the provisions contained in O. 41, R. 5 (3) (c). It was argued for the appellant that under S. 145 of the Civil P. C., the Court has got jurisdiction to take security for the payment of any money or for the fulfilment of any condition imposed on any person under the order of the Court in any suit or in any proceeding. S. 145 reads thus:

"When any person has become liable as surety (a) for the performance of any decree or any part thereof or (b) for the restitution of any property taken in execution of a decree or (c) for the payment of any money or for the fulfilment of any condition imposed on any person under the order of the Court in any suit or in any proceeding consequent thereon, the decree or order may be executed against him to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decree, and such person shall, for the purposes of appeal, be deemed a party within the meaning of S. 47: Provided that such notice as the Court in each case thinks sufficient has been given to the surety."

According to the decree-holder this case will come under Cl. (c). But, for the applicability of that clause the surety must be liable for the payment of any money under an order of the Court. In this case there is no order of the Court directing payment of any money by the judgment-debtor and therefore the respondent cannot be said to be surety for such payment. It is, therefore, doubtful whether this case comes under S. 145, Civil P. C.

(4) Although there is no express provision in the Civil Procedure Code conferring jurisdiction on the Court to take security bonds of this nature it has been held in various cases that the Court has got inherent jurisdiction to take such bonds and to enforce the same summarily. Reference may be made to 'SADASIVA PILLAI v. RAMALINGA PILLAI', 2 Ind App 219. That was a suit for recovery of possession of property with mesne profits thereof up to the date of the suit. No claim was made in the suit for mesne profits from the date of suit and the decree also did not award mesne profits from the date of suit. During the pendency of the appeal filed by the defendant he applied for the stay of execution of the decree and executed security bonds undertaking to pay mesne profits from the date of suit till the disposal of the appeal. The appeal went against him. The Privy Council held that although there was no decree for mesne profits the bonds could be enforced in execution. Their Lordships held that the Court had general jurisdiction over the subject-matter and could therefore enforce the bond.

'RAJ RAGHUBAR SINGH v. JAI INDRA BAHADUR', 42 All 158, is another case in which the same question was considered by the Privy Council. In that case the plaintiff obtained a decree for possession of certain properties and when she applied for execution of the decree she was ordered to give security for the mesne profits from the properties. Security was accordingly given by the plaintiff. The decree of the trial Court was finally reversed by the Privy Council and the suit was dismissed except in the case of a few items. The question raised for consideration was whether the security bond could be enforced in execution and the Privy Council held that it could be so enforced.

This decision was followed by the Privy Council in another case reported in 'ROHANI RAMANDHWAJ v. HAR PRASAD', AIR 1943 P. C. 189. That also was a suit for recovery of possession of properties. The suit was decreed and pending appeal filed by the defendant the High Court ordered that the plaintiff should be put in possession of the properties on his executing a security bond for a particular amount towards mesne profits. The security bond was accordingly executed and the plaintiff was put in possession of the properties. Subsequently the High Court reversed the decree of the trial Court. The question arose for consideration as to whether the security bond could be enforced in execution. Their Lordships held that the Court could enforce the bond in execution in the exercise of its inherent power.

(5) In 'MUTHUSWAMI PILLAI v. MANIKKA MOOPAN', AIR 1936 Mad 990, the plaintiff sued for a permanent injunction restraining the defendant from entering into possession of the plaint property. The plaintiff also applied for a temporary injunction during the pendency of the suit. At the hearing of the application for temporary injunction the parties entered into an agreement by which the defendant was given possession of the property during the pendency of the suit. At the hearing of the application for temporary injunction the parties entered into an agreement by which the defendant was given possession of the property during the pendency of the suit on his executing a surety bond to the effect that he would pay the mesne profits in case the plaintiff succeeded in the suit. The suit was ultimately decreed and the plaintiff sought to enforce the bond in execution. Following the decision in 'SADASIVA PILLAI v. RAMALINGA PILLAI', 2 Ind App 219(P C), their Lordships held that the bond could be enforced in execution. Their Lordships observed thus:

"As stated by their Lordships of the Privy Council in '2 Ind App 219 (P C)', the security bonds under such circumstances must be considered as proceedings in Court importing a certain liability to be enforced in the suit against the defendant to that suit. Having undertaken this obligation it would not be open to defendant (1) or respondent (2) to resile from it and allege that proceedings were entirely irregular and that the Court had no jurisdiction to enforce the terms which they had undertaken to fulfil."

(6) In 'RAMAMURTHI v. SAGIRAJU', AIR 1949 Mad 152, the guardian of a minor with-

drew money from Court under O. 32, R. 6 Civil P. C., upon a security bond. The minor on coming of age sought to enforce the security. It was held that the bond could be enforced by the Court in execution in exercise of its inherent power.

(7) In 'SANKUNNI VARIER v. VASUDEVAN NAMBUDIRIPAD', 97 Ind Cas 787 (Mad), certain persons executed a surety bond to the Court undertaking to produce whenever required certain movable properties of the judgment-debtor which had been attached in execution of the decree. They defaulted to produce the movables when required by the Court. The decree-holder sought to enforce the bond in execution and to realise the value of the movables. It was held that although the case did not come within S. 145, Civil P. C., the Court had inherent power to enforce the bond in execution.

(8) In 'NARAYANAN PANDALAI v. VISHNU NAMBURI', 20 Trav L J 505, the plaintiff obtained an order of injunction on furnishing security for 6 years' mesne profits. The suit was subsequently dismissed and the defendant sought to enforce the bond in execution. Following the Privy Council decision in 'RAJ RAGHUBAR SINGH v. JAI INDRA BAHADUR', 42 All 158 (P C), it was held that the bond could be enforced in execution although the case would not come within the purview of S. 109 of the Travancore Civil P. C., corresponding to S. 145 of the Indian Civil P. C.

The same view was held by the Cochin High Court in 'CHEVUNNI v. LEXMIDAS MURANJI', 23 Cochin 408. In that case the plaintiff attached before judgment certain articles belonging to the defendant. A stranger preferred a claim to these articles and prayed for the return of the same. They were ordered to be returned on security. The appellant executed a security bond undertaking to satisfy the decree if the claim petition would be dismissed. The claim was subsequently dismissed. It was held that the bond must be deemed to have been taken in the exercise of the inherent power of the Court and that Court could in exercise of that power summarily enforce it in execution.

To the same effect is the ruling reported in 'MUHAMMATHU v. SANKU IYER', 3 Cochin L J 114. In that case, in order to avoid the appointment of a receiver for the plaint property the defendants offered to furnish security for the mesne profits of the property and the appellant executed the security bond. The suit went against the defendant. It was held that the bond was taken by the Court in the exercise of its inherent power and that it could be summarily enforced by the Court. In the light of the above rulings the surety bond in question must be deemed to have been taken by the Court in the exercise of its inherent power. These rulings also lay down that such bonds can be summarily enforced by the Court witnout recourse to a fresh suit.

(9) The next question for consideration is whether the surety has become liable under the bond. He has undertaken in the bond to pay mesne profits from the date of deposit of the mortgage amount for a period not exceeding one year from the date of the High Court order if the Second Appeal went against the defendant. The main contention of the defendant in the suit was that the property was not redeemable. That contention was repelled by the High Court also and the Second Appeal was dismissed although the order of the trial Court with regard to costs was modified by the High Court. In the circumstances it cannot be said that the Second Appeal was not decided against the defendant. What the surety had undertaken in the bond was this: *

> "If the Second Appeal No. 68 of 1122 goes against the defendant, Gopalan Nair I shall deposit the mesne profits of the properties at the rate of Rs. 175/- per year."*

According to the terms of the bond the surety would be liable to pay the amount if the Second Appeal went against the defendant irrespective of the question whether the defendant would be liable for mesne profits under the decree to be passed by the High Court. The surety has also agreed in the bond that the amount might be realised from him in execution in the same manner in which the decree could be executed against the defendant. The lower Courts have interpreted these words to mean that the liability of the surety would be co-extensive with that of the judgment-debtor. We do not find our way to agree with this view of the lower Courts. Nowhere is it stated in the bond that the surety would be liable only to the extent to which the judgment-debtor would be liable under the decree to be passed by the High Court.

(10) For the above reasons we hold that the surety is liable for the amount covered by the bond and that the decree-holder is entitled to have the bond enforced summarily in execution.

(11) We, therefore, set aside the orders of the lower Courts and allow this Second Appeal with costs in all the Courts.

V.R.B. Appeal allowed.

*The original in Malayalam has been omitted. —Ed.

A. I. R 1952 Travancore-Cochin 239

GOVINDA PILLAI, J.

Narayanan Nair, Petitioner v. State.

Criminal R. P. No. 244 of 1950, D/- 30-11-51.

(a) Travancore Prohibition Act (VII (7) of 1123), S. 9 — State of intoxication — Meaning.

The word 'intoxication" applies only to the excessive use of intoxicating liquors or drugs. And the state of intoxication may be taken to be practically equivalent to a state of drunkenness, so that the person intoxicated was incapable of knowing the consequences of his action. (Para 2)

Where the certificate of the Medical Officer stated that the accused was in a state of drunkenness for the following reasons, viz., smell of brandy from nose, redness of his eyes, very rapid pulse, and tremors of his hands:

Held that these findings were absolutely insufficient to hold that the accused was in a state of intoxication. (Para 3)

(b) Travancore Prohibition Act (VII (7) of 1123), S. 9 — Person found in state of intoxication in public road — Arrest — Refusal to give address.

Where a person is found in a state of intoxication in the public road, he cannot be arrested unless he refused to give his address to the police when demanded.

(Para 6)

N. K. Narayana Pillai, for Petitioner; Public Prosecutor, for the State.

ORDER: The accused was charged for an offence under S. 9 of the Travancore Prohibition Act, VII (7) of 1123, in that he was found in a state of intoxication in the public road, just in front of the State Transport Garrage at Meenakshipuram in Nagercoil. This was at about 1 a.m. on the night of 18-6-1124. At that period, the place in question was declared to be a prohibition area; and any one found in an intoxicating condition was liable to be tried and convicted for an offence under S. 9 of the Prohibition Act. The accused is the Superintendent of Fisheries. He was on his way to Muttam, to conduct an enquiry into the official irregularities of the Sub-Inspector of Fisheries there. That Sub-Inspector is P. W. 5.

The prosecution case was that the accused had taken brandy at Trivandrum, that he then travelled by bus to Nagercoil in the company of P. W. 5 and D. Ws. 1 and 3, that at the pertinent time in question he was seen standing at the gate of Raghuvilas Hotel in Meenakshipuram, smoking a cigarette, that P. W. 8, a Head Constable attached to the Kottar Police Station, came there with a constable, took the accused in custody at about 12-50 A.M. and took him to the Police Station. He was produced before P. W. 7, the Inspector of Police, with the report Ex. C. P. W. 7 drew up Ex. A Mahazar noting down the physical conditions and peculiarities he observed on the person of the accused and produced him for examination before the Medical Officer, P. W. 6. P. W. 6 examined him at 1-10 A.M. and issued Ex. B, medical certificate.

The case was then registered, investigated and charged before the First Class Magistrate of Kottar. The learned Magistrate, after trial, convicted the accused for the offence under S. 9, and sentenced him to pay a fine of Rs. 50. In default, he was to undergo simple imprisonment for one month. He appealed against this decision before the Sessions Court of Nagercoil. The appeal was heard by the Additional Sessions Judge, Nagercoil, and he, though with some hesitation, agreed with the conclusions arrived at by the Magistrate and confirmed the conviction and sentence. The accused has, therefore, come up in revision.

(2) If the decision of the case rested entirely on an appreciation of evidence, there would be no occasion for this Court to interfere in revision. But, after hearing the arguments of both sides and carefully going through the records in this case, it appeared that there was matter for serious consideration of this Court. The charge is, as mentioned already, for an offence under S. 9 of Act VII (7) of 1123. S. 9 says:

"Whoever is found in a state of intoxication in any public place and whoever not having been permitted to consume any intoxicating drug in pursuance of this Act, is found in a state of intoxication in any private place, shall be punished with imprisonment which may extend to six months, or with fine which may extend to one thousand rupees or with both."

In order, therefore, to arrest the accused, he must have been in a state of intoxication while he was in Nagercoil on the night of 16-6-1124. Intoxication or state of intoxication is not defined in the Act; and so, we have to look to its meaning through authorised English dictionaries. In the Encyclopedia Britanica, "Intoxication" is defined to be as poisoning, whether by drug or liquor or other toxic substances, and hence, the condition of the nervous system produced by excessive drinking of alcohol. In the absence of any specific definition of this word in the statute in which the term is used, the word "intoxication" applies only to the excessive use of intoxicating liquors or drugs.

What is mentioned in the section is that, if any one is seen 'in a state of intoxication' in a prohibition area, he is said to have committed an offence. The state of intoxication may be taken to be practically equivalent to a state of drunkenness, so that the person intoxicated was incapable of knowing the consequences of his action. By reason of intoxication, if a person is capable of knowing the nature of the act done, at the time he was under the influence of the alcohol, his act is not considered to be an offence under the Penal Code (vide S. 74 of the Travancore Penal Code).

So, what is necessary to be found out in this case is whether the accused was in the state of intoxication when he was said to have been taken to custody by P. W. 8. I shall refer later on to the extremely suspicious circumstances under which P. W. 8 himself, a head constable in mufty, came and took the accused into custody. P. W. 7, the Inspector of Police who investigated the case, had sworn in clear terms that his investigation revealed that the accused had taken brandy while he was in Trivandrum and before he got into the bus for Nagercoil. This bus started from Trivandrum at about 8 P.M. and it was an ordinary bus. It reached Meenakshipuram at 11-15 P.M. that day. It was at 12-50 the same night that P. W. 8 was said to have seen the accused standing at the gate of the Raghuvilas Hotel smoking a cigarette. So, not less than five hours must have elasped since he had taken the brandy.

There was absolutely no case or suggestion that the accused had brought any brandy and took it in Nagercoil, just before he was taken into custody. There was no necessity to speculate on that point, as the prosecution had no such case. The poisoning by alcohol is dealt with exhaustively in Taylor's Medical Jurisprudence, Volume 11, pages 535 and 536, 1948 edition. The relevant portion is quoted below:

"Ethyl alcohol is produced by the fermenting action of yeast on sugars, and is concentrated by distillation. The percentage of absolute alcohol in various beverages is approximately as under, taking round figures without regard for precise accuracy:

Spirits, such as whisky, brandy, gin and rum, contain about 40 per cent of alcohol.

Fortified wines, such as port and sherry, contain about 20 per cent of alcohol.

Natural wines, such as claret and burgundy, contain about 10 per cent alcohol.

Strong beer contains about 5 per cent of alcohol.

A "large whisky", which should be half a gill (2½ ounces), contains therefore 1 ounce, or 30 c.cm., of absolute alcohol, and the same amount will be present in a pint of strong ale, half a pint of claret, or a quarter of a pint of port.

The absorption of alcohol from the stomach and small intestine begins soon after ingestion. The rate of absorption is dependent upon a number of factors, the most important being the presence or absence of food in the stomach. Food delays absorption and the delay is most marked in the presence of fat and protein (Haggard and Greenberg, 1934; Mellanby, 1919). The concentration of alcohol is important, and generally the stronger the drink the more rapid is its effect. Absorption is usually complete within the first hour, so that after a single dose the maximum concentration in the blood is reached within the same period. After absorption, the alcohol is distributed more or less evenly throughout the tissues, with the exception of the bones and fat. Thus by estimating the amount of alcohol in the blood it is possible to calculate the approximate total quantity in the body at that time and the minimum quantity which must have been ingested.

About 90 per cent of the alcohol absorbed is oxidised and the remaining 10 per cent is excreted, mainly by the kidneys and the lungs. At no stage in its oxidation is alcohol stored in the tissues and its disappearance from the blood takes place at a fairly uniform rate, which for rough calculation may be placed at 10 c. cm. per hour (o. .185 c. cm. per kg. of body weight (Mellanby, 1919). It thus takes about three hours for the blood to be cleared of alcohol after the ingestion of a single large whisky. The excretion by the kidney is of importance in that at the time of secretion the urine has a similar concentration as that in the plasma at the same time, though higher than that in the blood as a whole, the ratio being approximately 1.3:1.

The concentration in the blood varies, however, increasing during absorption and then decreasing with oxidation. It follows, then that the concentration of alcohol in a given sample of urine will correspond with the average concentration in the blood during the time the urine has been collecting in the bladder (Smith and Stewart, 1932). If the concentrations in the urine and blood are estimated some time after ingestion, when the alcohol in the blood has fallen through oxidation, it may be found that the urine alcohol is at a higher level. Urine examination may, therefore, be used instead of blood examination and gives a reasonably accurate idea of the total alcohol in the body.

A considerable number of investigations have been made in an endeavour to correlate the alcoholic concentration in the blood with the behaviour of the individual.

It is generally agreed that with concentrations below 0.05 per cent, there is little change to be observed on clinical examination; at 0.10 per cent a number shows mild symptoms and quite possibly some more decided symptoms. Between this level and 0.2 per cent the number showing decided symptoms of intoxication increases, and at the latter figure it is to be expected that practically all will be diagnosed clinically. The critical concentration seems to lie at or about the 0.15 level and any person with this amount in his blood can be considered to have imbibed a dangerous amount of alcohol. With increasing concentrations the symptoms become more intense and at concentrations beyond 0.2 per cent up to 0. 5 per cent there is likely to be marked inco-ordination, coma and possibly death.

Knowing that the concentration in the blood is the same as that in the tissues, we may translate these percentages into amounts drunk as follows. When the amount in the blood is equal to 0.15 per cent, the person has ingested as a minimum within a few hours of the test 1.5 c. c. of absolute alcohol per kilogramme of body weight. In a man of ten stones this would amount to about 3½ ounces of absolute alcohol, or about 1½ gills of whisky at proof.

'Effects of Alcohol'. The only acute effect of alcohol which is of any interest is its effect on the central nervous system. Its first effect appears to be a depression of the highest evolutionary centres, the centres regulating the conduct, judgment, and self-criticism. It passes progressively downwards through the centres of earlier evolutionary origin until the motor centres are reached, and finally it depresses and paralyses the vital centres in the medulla.

There is first a feeling of well-being and a certain slight excitation. The actions, speech and emotions are less restrained, due to a lowering of the inhibition normally exercised by the higher centres of the brain. With this there is increased confidence and a certain carelessness of consequences. This implies a lack of self-control, which is one of the first things observed after alcohol, and which is a constant feature of alcoholic poisoning.

When the narcosis has penetrated more deeply the sense perceptions and skilled movements are effected. The increased loss of the inhibitory action of the higher centres causes an alternation in the conduct of the individual according to the dictates of his inherent desires and emotions.

This accounts for the fact that an individual may become morose, gay, irritable, excitable, pugnacious, sleepy, and so on, according to the dominant impulses which have been unleashed by the drug. The reaction times are somewhat lengthened, and there is a certain clumsiness and inco-ordination in the finer and more skilled movements shown by slight alteration in speech and in the finer finger movements.

This passes into a third stage, where the motor and sensory cells are deeply affected; speech becomes thick and slurring; co-ordination is markedly affected, causing the patient to stagger and possibly to fall. Finally a stage is reached where the narcosis affects the whole nervous system, and the patient passes into a state of coma with stertorous breathing, indicating a commencing paralysis of the respiratory centre.

The coma gradually lightens into a deep sleep, and the patient, if left alone, usually recovers in eight to ten hours, and wakes up with gastro-intestinal irritation, and usually nausea, vomiting and severe headache. If the coma continues for more than ten hours, the prognosis is bad."

(3) The accused was not in any condition of coma when P.W.8 saw him. According to the prosecution, it was also more than five hours since he had taken the liquor. He could not, therefore, have been in a state of intoxication at 12-50 a.m. P.W. 7 himself stated that the accused pleaded before him to let him free. That would not be the condition of a person who was in a state of intoxication. The tests, to find out whether a person is intoxicated or not, are given at pages 613 and 614 of Modi's Medical Jurisprudence and Toxicology. They are given below:

"In order to ascertain whether a particular individual is drunk or not a medical practitioner should bear the following points in mind:

1. The quantity taken is no guide.
2. An aggressive odour of alcohol in the breath, unsteady gait, vacant look, dry and sticky lips, congested eyes, sluggish and dilated pupils, unsteady and thick voice, talks at random and want of perception of the passage of time are the usual signs of drunkenness.
3. Drunkenness does not come within the cognizance of the police, unless the man is dangerous to himself or to his property or that he is annoying or dangerous to others.

A special committee of the British Medical Association was appointed to consider the question of the definition and diagnosis of drunkenness. This committee arrived at the following conclusions and recommendations in regard to persons accused of being "drunk":

I. That the word "drunk" should always be taken to mean that the person concerned was so much under the influence of alcohol as to have lost control of his faculties to such an extent as to render him unable to execute safely the occupation on which he was engaged at the material time.

II. That it is desirable that a medical practitioner should base his opinion on the following considerations:

(a) Whether the person concerned has recently consumed alcohol.

(b) Whether the person concerned is so much under the influence of alcohol as to have lost control of his faculties to such an extent as to render him unable to execute safely the occupation on which he was engaged at the material time.

(c) Whether his state is due, wholly or partially, to a pathological condition which causes symptoms similar to those of alcoholic intoxication, irrespective of the amount of alcohol consumed.

III. That in the absence of any pathological conditions a person is definitely under the influence of alcohol if there is a smell of alcoholic liquor in the breath and/or in the vomited matter (if any) provided there is a combination of all or most of the following groups of signs or symptoms:

(i) A dry and furred tongue, or conversely, excessive salivation.

(ii) Irregularities in behaviour, such as insolence, abusive language, loquacity, excitement or sullenness, and disorder of dress.

(iii) Suffusion of the conjunctivae & reaction of the pupils. The pupils may vary from a state of extreme dilatation to extreme contraction and may be equal or unequal.

In the opinion of many police surgeons when alcohol in toxic quantity has been consumed, the pupil reflex to 'ordinary light' is absent, whereas the pupil will contract in 'bright light' and remain contracted for an abnormally long time, indicating the delayed reaction of the pupil.

(iv) Loss or confusion of memory, particularly as regards recent events and appreciation of time.

(v) Hesitancy and thickness in speech and impared articulation.

(vi) Tremors and errors of co-ordination and orientation.

IV. That there is no single test by itself which would justify a medical practitioner in deciding that the amount of alcohol consumed had caused a person to lose control of his faculties to such an extent as to render him unable to execute safely the occupation on which he was engaged at the material time. A correct conclusion can only be arrived at by the result of the consideration of a combination of several tests or observations such as:

General demeanour;
State of the clothing;
Appearance of the conjunctivae;
State of the tongue;
Smell of the breath;
Character of the speech;
Manner of walking, turning sharply, sitting down and arising picking up a pencil or coin from the floor;
Memory of incidents within the previous few hours and estimation of their time intervals;
Reaction of the pupils;
Character of the breathing, especially in regard to hiccup.

V. That the following are the tests, upon which taken by themselves, little stress should be laid in deciding whether or not a person is under the influence of alcohol:
Presence of tachycardia (rapid pulse);
Repetition of set words or phrases;
Character of handwriting;
Walking along a straight line;
Failure of convergence of the eyes."

In this case P.W. 6 to whom the accused had been taken had, even if what he said was true, subjected the accused only to a very perfunctory examination. The certificate, Ex. B, given by P.W. 6, stated that the accused was in a state of drunkenness for the following reasons, viz., smell of brandy from nose, redness of his eyes, very rapid pulse, and tremors of his hands. These findings are absolutely insufficient to hold that the accused was in a state of

intoxication. Seeing the delicate position in which P.W. 7 (the Inspector of Police) and P. W. 6 (the Medical Officer) were put, they attempted to improve upon what they had stated in the earlier records. I do not think that it was proper on their part to resort to such methods, even though this was one of the earliest cases in the prohibition area.

In Ex. C, the report, P.W. 3 stated that the accused was standing unconscious after drinking brandy; (I saw him standing unconscious after drinking brandy)*. The same idea was repeated in Ex. A (Mahazar) prepared at 1 a.m. by P.W. 7 and the Medical Officer's certificate (Ex. B) was only a reproduction of what the Inspector and the Head-constable had mentioned in Exs. A and C. The examination by the Medical Officer was perfunctory and it would be extremely dangerous to act on the findings from such examination to see whether a person committed an offence or not.

(4) There appears to have been considerable development in the shaping of this case, as the trial advanced. The prosecution wanted, in any event, to get a conviction in the case. The defence was that, while the accused was sleeping in room No. 14 of Raghuvilas Hotel, run by P.W. 4, P.W. 8 and another constable woke him up and took him to the police station. That was exactly what D.W. 1, who was the Divisional Inspector of Fisheries and who had accompanied the accused to Nagercoil, stated in his evidence. The Courts below brushed aside his evidence as interested. I do not think that such comment is called for in the circumstances of this case.

It was true that D.W. 1 was a senior officer in the accused's department. That did not mean that he should perjure against his own conscience to support his superior. He is a graduate and he is the immediate man to be benefited, in case the accused loses his job. His evidence could, therefore, be safely acted upon, particularly when it was seen that it was corroborated by the testimony of P.W. 5, who was not expected to be on cordial terms with the accused who had gone there on that particular day to enquire into certain official irregularities alleged against him. It has also to be stated that though the version, that was given by P. W. 1 in the earlier portion of the chief examination, was that he saw the accused coming from the hotel with two or three persons and that he was then taken away by the police, the later development in the case was that P.W. 8 met the accused when he was seen near the gate of the hotel smoking a cigarette, which would not be the condition of a man who was in a state of intoxication.

(5) Again, it would be seen that there was an attempt on the part of the prosecution to disprove the statement of D.W. 1 and P.W. 5 by an allegation that the accused was not even given admission to room No. 14 of the Hotel. P.W. 2, an employee in the said hotel, at first mentioned that the hotel manager (P.W. 4) did not give him a room as he was found drunk and that he was, therefore, forced to sit on a bench in the verandah of the hotel. But there was the receipt, Ex. 1, issued for letting out room No. 14 in the upstairs to the accused and his parties. When P.W. 2 was shown this, he was forced to admit that it was in his handwriting, that the accused had gone to room No. 14 to lie down, that he had taken a cool drink from the hotel to the accused as desired by him, and that for some time the accused was lying in the room. P W. 4 was also induced to state that the accused was not given any room in the hotel. But he was forced to admit Ex. 1 and the fact that the room had been let out to the accused and his friends. Such a development was intended to disprove the defence that the police took the accused from the room and not from the road.

(6) It has also to be mentioned here that it was irregular for P.W. 8 to arrest the accused and take him to the police station. The charge against the accused was that he was found in a state of intoxication in the public road. If that be so, the accused could not be arrested unless he refused to give his address to the police when demanded. There was no such case that the arrest was because of the accused's refusal to give his address. The whole proceedings were, therefore, vitiated by illegality; and the prosecution was unable to answer or justify the acts of its officers on the night in question. All these put together would show that the prosecution had failed to prove that, when the accused was taken to custody by P.W. 8, he was in a state of intoxication. The conviction entered by the Courts below was, therefore, wrong; and it has to be set aside.

(7) The result is that the conviction and sentence against the accused by the trial Court and confirmed by the appellate Court are set aside and the accused acquitted of the charge framed against him and for which he was tried. If the fine has been realised from the accused, it will be refunded to him.

V.R.B. Conviction and sentence set aside.

* Original in Malayalam omitted—Ed.

A. I. R. 1952 Travancore-Cochin 243

KUNHI RAMAN, C. J. AND SUBRAMANIA IYER, J.

Mohammed Abdulla and others, Petitioners v. Gopala Pillai and others, Counter-Petitioners.

O. P. No. 147 of 1951, D/- 8-1-1952.

(a) Companies Act (1913), S. 153 (1) — Company being wound up — Right to make application.

The introduction of the words "in the case of a company being wound up, of the liquidator" is intended to provide an additional and not an exclusive person who could make the application. If a company, or a member, or a creditor may make the application under S. 153 (1) proposing a compromise or arrangement in the case of a company which is not under liquidation, there is no reason why any of them should not be competent to make the application in the case of a company which is being wound up. AIR 1939 Mad 318, Rel. on. (Para 2)

Anno: Companies Act, S. 153, N. 2.

(b) Companies Act (1913), S. 153 (1) — Tyranny of majority — Change in voting power.

If X persons hlod the large majority of shares, they can easily out-vote the mino-

rity whether the voting power be per share-holder or per share because, upon the hypothesis they are numerically the majority share-holders and are the owners of the majority of the shares as well. If the tyranny of the majority over a helpless minority was the ground of the liquidation the remedy that the voting power shall be, one vote not per share-holder but per share would be shadowy and not substantial in such a case. The arrangement proposed does not afford a remedy for the evil which occasioned the order for winding up. (Para 4)

Anno: Companies Act, S. 153, N. 2.

(c) Companies Act (1913), S. 153 (1) — First application — Order to be made.

On the first application, it cannot be said that the order asked for has to be made as a matter of course, though usually it is done. The reason is that usually an arrangement proposed would, 'prima facie', be such as to justify such an order. Where contrary is the case the order cannot be made. (Para 5)

Anno: Companies Act, S. 153, N. 2.

(d) Companies Act (1913), S. 153 (1) — Application under — Consent of legal representatives.

The fact that the legal representatives of the petitioner on whose application the order for winding up was passed, support the application under S. 153 (1) is of no moment at all. The consent of the legal representatives of the petitioner for winding up, to the arrangement proposed under S. 153, does not affect its consideration except as showing the consent of another member to the said arrangement, and it cannot be said that the order asked for in such a case must be made as a matter of course. (Para 5)

Anno: Companies Act, S. 153, N. 2.

(e) Companies (1913), S. 153-C (1) (b) — Applicability.

Section 153-C, applies to a stage before the order for winding up is passed by the Court and has no operation to a case where an order for winding up has been passed by the Court long before. (Para 10)

(f) Companies Act (1913), S. 162 (vi) — Just and equitable.

If the company or any of its members satisfies the Court that the Company could be continued without the conduct of its business being subject to the complaint of its being oppressive to some part of the members, the Court would not have found it just and equitable to order the winding up of the company. (Para 10)

Anno: Companies Act, S. 162 N. 7.

K. P. Abraham, for Petitioners; C. M. Kuruvilla, for 1st Counter-Petitioner; T. N. Subramania Iyer, Advocate-General, for other Counter-Petitioners.

Cases referred to:

('39) AIR 1939 Mad 318: (183 Ind Cas 353) (Pr 2)
('48) 1948 Trav L R 811 (Pr 4)
('48) 1948 Trav L R 1067 (Pr 4)

SUBRAMANIA IYER J.: This petition is by 17 persons, 1 to 14 as members and 15 to 17 as creditors of The Cape Comorin General Traffic Company Limited (in Liquidation), Ramavarmapuram, Nagercoil. This was presented in the District Court of Nagercoil and numbered there as O. P. 4 of 1124 which was withdrawn by this Court for trial and disposal and re-numbered here as O. P. 147/1951. The application is under S. 192 of the Travancore Companies Act (corresponding to S. 153 of the Indian Companies Act) and is the first application under Cl. (1) of that section, praying for liberty to hold a meeting of the members of the company under the orders of the Court for considering an arrangement proposed concerning the continuance of the company. This is opposed by some of the members (contributories) as also by the Official Liquidator.

(2) We must notice an argument urged by the learned Advocate-General as to the maintainability of the application. It is contended by him that under S. 153, Cl. (1) which provides that:

"Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or members of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs:"

The application can be made only by the liquidator because this is "the case of a company being wound up" by the Court.

The provisions of the English Companies Act, & S. 153 are similar. In commenting upon the English section, in Palmer's Company Precedents, Part II, Winding Up, (15th edition), page 906, it is stated that:

"A proposal for an arrangement or compromise is not confined to the company or its liquidator (if any). It is open to any creditor or member to take the initiative. The Act expressly provides that the Court may, on the application in a summary way of the company, or of any creditor or member of the company, or in the case of a company being wound up, of the liquidator, order a meeting etc."

We consider that this is the proper construction to put on the provision. The introduction of the words "in the case of a company being wound up, of the liquidator" is intended to provide an additional and not an exclusive person who could make the application. If a company, or a member, or a creditor may make the application under S. 153 (1), proposing a compromise or arrangement in the case of a company which is not under liquidation, there is no reason why any of them should not be competent to make the application in the case of a company which is being wound up.

The interest that entitled the company, member or creditor to make the application in the case of a going concern subsists even after an order for winding up is made to sustain a similar application even at that stage.

"The application for the holding of a meeting as contemplated in sub-section (1) may be made, either by the company or by any member or creditor of the company. Where the company is being wound up, the application may be made also by the Official Liquidator." (Sirkar, Indian Companies' Act p. 398. See also 'IN RE TRAVANCORE NATIONAL & QUILON BANK LTD.', AIR 1939 Mad 318 at p. 322).

We, therefore overrule the objection and hold that the present application is competent. We may, however, mention that the junction of petitioners 15 to 17 who claim to be creditors of the company is unnecessary, if not unjustified as the arrangement proposed does not in any manner affect or curtail the remedies or claims of any creditor.

(3) Th company was incorporated in the year 1906 (1081 M. E.) with a capital of 5 lakhs of rupees made up of 5,000 shares of the face value of Rs. 100 each. Rs. 30 was paid up leaving a reserve liability of Rs. 70 per share. The business that the company carried on was the manufacture of salt. The company obtained a licence in that behalf from the Government of Travancore for a period of 50 years, of which six or seven years have yet to run. The father of the 12th petitioner was the secretary and treasurer of the company from its inception for about 30 years and on his death, the 12th petitioner succeeded him to that position for life. Four out of the five thousand shares are either owned or absolutely controlled by the secretary & treasurer. Instead of calling up the unpaid share capital, the secretary & treasurer functioned as financier to the company imposing onerous terms by way of a high rate of interest besides stipulating for a share in the profits. The liability that the company incurred in this fashion was allowed to accumulate and the factory was put in the possession of the financier to enable him to recoup his dues. There was a sub-lease of the factory to another party latterly.

The result of all this was that notwithstanding the fact that the company was working and working profitably, no dividend was declared to the share-holders, all the profits being absorbed in the appropriation of the amounts due to the secretary and treasurer by way of liquidation of the company's liabilities. This state of things was brought about and sustained by the secretary and treasurer by using his voting power with a packed majority, tyrannising over the minority to its detriment. Petitions for winding up the company were filed in the District Court, Nagercoil, in the years 1110, 1111 and 1112, which ended in a compromise the main feature of which was "putting on the Board of Directors, 3 representatives from the minority share-holders, other than the relations of the 4th counter-petitioner." This was not given effect to.

It would appear that this provision in the compromise was not made honestly with a view to its being implemented but rather as a make shift arrangement to get rid of the petitions for winding up. No impediment to the implimentation of the compromise is pointed out and it is noteworthy that the arrangement proposed to be placed before a meeting of the members of the company does not contain a provision to this or similar effect which would tend to avoid opposition by the minority. Its absence is all the more significant in view of the fact that one of the grounds for ordering liquidation was the non-implementation of the aforesaid terms of the compromise.

(4) After the expiry of the time for giving effect to the aforesaid term of the compromise, O. P. 3 of 1116 was filed by a member of the company in the District Court, Nagercoil, for its being wound up compulsorily by the Court. This was withdrawn by the erstwhile Travancore High Court for disposal in exercise of its extraordinary original jurisdiction. The learned Single Judge who dealt with the petition dismissed it. Against his order, an appeal was preferred before a Bench of two Judges of the same Court which reversed it and directed the company to be wound up, being of the opinion that "it is just and equitable that the company should be wound up". The decision of the single Judge as also that of the Bench are both reported in 1948 Trav L R 811 and 1948 Trav L R 1067 respectively.

At page 1080, in Para. 9 of their judgment, the learned Judges remark thus:

"The fourth counter-petitioner has little regard for truth, scant respect for the statute and little regard for the authority of the Court. It seems to us that this company has been a fraud on the statute for 42 years. It is a one-man company. The majority of the shares are in the hands of one individual and we are satisfied that the minority is being oppressively harassed by what is called the majority. The minority shows equal obstinancy and upon all accounts, the company cannot be said to have a domestic forum so essential for its existence. We think that the affairs of the company ought to be wound up."

Feeling the force of this observation and the futility of any attempt to resuscitate the company without suggesting any means to cure the defect which proved fatal to its continuance the petitioners propose a remedy in Para. 30 of the petition. That remedy consists in the 12th petitioner's agreement to be excluded from holding any office in the company and by providing that the voting power shall be, one vote not per share-holder as it was, but per share. This is the only remedy proposed. The exclusion of the 12th petitioner from holding office cannot be considered to be an effective remedy because, the 12th petitioner can pull the strings equally effectively from behind the screen. The suggested change in the voting power would not lead to any change in the ultimate result. The remedy suggested is shadowy and not substantial.

If X persons hold the large majority of shares, they can easily out-vote the minority whether the voting power be per share-holder or per share because, upon the hypothesis they are numerically the majority share-holders and are the owners of the majority of the shares as well. It is thus obvious that the arrangement proposed does not afford a remedy for the evil which occasioned the order for winding up. If ever it is possible that there be an effective remedy, as the evil is chronic and inherent in the very situation there should be an honest and sincere change of mind of the majority with which the minority is satisfied, in which event there may be no opposition. It is not possible, in this case to find a means

to resusciate the company. The tyranny of the majority over a helpless minority was the ground of the liquidation. How can the same majority be trusted with the interests of the minority which they have been persistently disregarding without bona fides and for their own aggrandisement, in violation of the very foundation on which the rule of majority is based? We are not satisfied that the arrangement proposed deserves to be considered by a meeting of the members of the company.

(5) Learned counsel for the petitioners relies upon the observation of Sir N. N. Sirkar at page 398 of his book on the Indian Companies Act, to the effect that "on the first application the order asked for is usually made as a matter of course." Tnis observation is not an authority for the position that the order asked for has to be made as a matter of course. It only shows that usually it is done. The reason is that usually an arrangement proposed would, prima facie, be such as to justify such an order. From what we have said above, it is clear that the contrary is the case here. There is the further fact that an earlier application for the identical relief made by some of the petitioners was dismissed by the District Court, Nagercoil, which order has become final, not having appealed against. The present application is substantially, if not absolutely, the same. A circumstance that is relied upon by the petitioners is that the legal representatives of the petitioner on whose application the order for winding up was passed, support the application. This is of no moment at all. A proceeding to wind up a company can be started by the company, any member thereof, or any of its creditors. Any other person competent to maintain an application is entitled to appear at the hearing and, if the petition be not or not properly prosecuted, to prosecute it. An order for the winding up of a company operates in favour of all the creditors and of all the contributories, as if made on the joint petition of a creditor and a contributory. (Section 167). The consent of the legal representatives of the petitioner for winding up, to the arrangement proposed, does not affect its consideration except as showing the consent of another member to the said arrangement. In the facts of this case, even this consent would appear to be not one given freely but one procured for the occasion.

(6) The Register of share-holders of the company is not complete nor is it up to date. There appears to have been various transfers not recorded in the Register. Learned counsel for both sides agree that out of 192 share-holders, there are disputes as regards 102 and that those disputes have to be decided by the Court to ascertain who the share-holders are. The result is that as things stand, more than 50 per cent of the members of the company are unascertained. A meeting of the members of the company is not, therefore, feasible now.

(7) The period of the license for manufacture of salt which was for 50 years will expire within 6 or 7 years. The petitioners say that the manufacture of salt is profitable and will continue to be profitable. They say further, that the agreement entered into by the company with the Government provides for a renewal of the license upon the terms to be agreed upon with the Government. That provision may not mean much as any party can enter into an agreement with the Government. Even so the company. The company has no preferential right. No doubt the State will consider the fact that the company had been the prior licensee deciding upon a new licence. That apart, the real asset of the company now consists in the right to manufacture salt for the remaining period of the license, besides the salt pans and other asse.s. The remaining period of the license gets gradually diminished by lapse of time and would become extinct in six or seven years.

The business being admittedly now prosperous, a present sale of the assets would secure to the company a fair price. The Liquidator would value the right to manufacture salt in the future at 15 lakhs of rupees and the petitioners at much more. From the annual revenue now derived, income-tax at annas 2 in the rupee has to be paid and the net profit is only below one lakh. At that rate, for the remaining period, the profit that can be expected is only below six to seven lakhs of rupees, that is, the estimated net income for the remaining period of the licence. If the sale of the right to manufacture salt be for at least that amount, it would be to the advantage of the members as that sum can be availed of in presenti and being capital, will be free from any impost of income-tax.

(8) The salt pans had been leased under the orders of the Court by the Official Liquidator and the lease expired by the end of 1951. The sale has been fixed for the 16th of this month as ordered by this Court.

(9) There are various claims against the company, some of which are admitted and others disputed. Some suits have been filed to enforce some of the claims and other suits may follow. The aggregate of the claims would be to the tune of several lakhs of rupees. There is no method pointed out for liquidation of these liabilities except by sale of the assets. If the assets are not now sold by auction by the Official Liquidator as ordered, the result would be that they would be brought to sale by the creditors, some of whom are related to the 12th petitioner, with the almost sure prospect of such a sale turning out to be for an inadequate price. To postpone the sale until after determination of the 102 members of the company would be, in all likelihood, to render the sale impossible by the gradual diminution and ultimate determination of the remaining period of the license which is one of the main assets of the company.

(10) Learned counsel for the petitioners drew our attention to clause C of Section 153 (Section 153 C ?) of the Indian Companies Act introduced by Amending Act LII (52) of 1951, which provides for a remedy alternative to winding up even in cases where an order for winding up by Court is applied for on the ground "that the affairs of the company are being conducted (b) in a manner oppressive to some part of the members" and sought to bring his case within the ambit of that provision. Section 153 (Section 153 C ?) applies to a stage before the order for winding up is passed by the Court and has no operation to a case where an order for winding up has been passed by the Court long before, as is the case here. We may, however, mention that had there been

any bona fides in this application, the arrangement now proposed would have been placed before the Court that was considering the question of winding up of the company and it would have considered the matter even in the absence of a statutory provision as the one contained in S. 153 C, as the winding up was ordered under the last clause of S. 162 which provides:

"162 A company may be wound up by the Court:

* * *

(vi) if the Court is of opinion that it is just and equitable that the company should be wound up."

If the company or any of its members satisfies the Court that the Company could be continued without the conduct of its business being subject to the complaint of its being oppressive to some part of the members, the Court would not have found it just and equitable to order the winding up of the company. This was not done and the present belated application has only the unjustified opinion of its authors to support it.

(11) We are, therefore, of the opinion that the arrangement proposed does not deserve to be considered by a meeting of the members of the company under the circumstances of this case and that the application for ordering a meeting of the members in that behalf should be rejected with costs. We fix the advocate's fee at Rs. 200/- each for the respondent and for the liquidator's advocate. The amount shall be paid out of the assets in the hands of the liquidator.

(12) After this judgment was pronounced Mr. Ninan on behalf of the petitioners applies for a certificate under Art. 133 of the Constitution of India for leave to appeal to the Supreme Court. We are not satisfied that this is a fit case for granting such a certificate.

D.H. Order accordingly.

A. I. R. 1952 Travancore-Cochin 247

KUNHI RAMAN C. J. AND SUBRAMANIA IYER J.

Kochavu Kunjunni and another, Appellants v. Parur Bank Ltd., Respondent.

Second Appeal No. 616 of 1950, D/- 19-10-1951.

Limitation Act (1908), Art. 182(5) — "Final order" — Judicial or a ministerial order — Travancore Civil Courts Guide, R. 675.

On 19-10-1112 the decree-holder applied for execution on which the Court on 20-10-1112 directed him to produce a statement of account and also to deposit process fee and for this purpose posted the case to 29-10-1112. The decree-holder did not do either of the things that he was directed to do with the result that on 30-10-1112, i.e. the day next after that to which the case stood posted, the Court dismissed the execution petition directing the decree-holder to bear his own costs. Rule 675 of the Travancore Civil Courts Guide provided that orders upon execution petitions should be passed not later than the day next after that on which the petition was filed in Court.

'Held', that the decree-holder must be taken to have been aware of the rule 675 and that according to it orders upon his execution petition would be passed either on the day on which the execution petition was filed i.e. on 19-10-1112 or on the next day, i.e. 20-10-1112. The decree-holder must be taken to have been aware of the posting to 20-10-1112 & of the directions given to him to take steps. if so, he was a defaulter in not having taken the step and the order passed on 30-10-1112 for his default was again a judicial order and not a ministerial order, and the subsequent execution petition filed more than 11 years after the last order on 30-10-1112 was barred by limitation.

(Paras 1, 2)

Anon: Lim. Act, Art. 182 N. 129.

N. Varadaraja Iyengar, for Appellants; O. L. Abraham, for Respondent.

Cases referred to:

('50) 1950 Ker L T 5 (Pr 1)
('51) AIR 1951 Trav-C 179 (Pr 1)

JUDGMENT: The Second Appeal arises in execution and judgment-debtors 2 and 3 are the appellants before us. A decree for money was passed on 20-12-1107. On 19-10-1112 the decree-holder applied for execution on which the Court on 20-10-1112 directed him to produce a statement of accounts and also to deposit process fee and for this purpose posted the case to 29-10-1112. The decree-holder did not do either of the things that he was directed to do with the result that on 30-10-1112, i.e. the day next after that to which the case stood posted, the Court dismissed the execution petition directing the decree-holder to bear his own costs. The next application for execution was filed on 3-4-1124, that is more than 11 years after the previous petition and orders thereon. The only question that arises is one of limitation.

The learned Munsiff found that the execution petition was barred by limitation because the order passed on 30-10-1112 is a judicial order dismissing the execution petition on account of the default of the decree-holder. The lower appellate Court took a different view and held that the execution is not barred by limitation. The lower appellate Court thought that the order dated 30-10-1112 is a ministerial order because it was passed on a day to which the case did not stand posted. Rule 675 of the Travancore Civil Courts Guide which was in force at the time provides that orders upon execution petitions should be passed not later than the day next after that on which the petition is filed in Court. The decree-holder must be taken to have been aware of the rule and that according to it orders upon his execution petition will be passed either on the day on which the execution petition was filed i.e. on 19-10-1112 or on the next day, i.e. 20-10-1112. It was on the latter date that the Court directed the decree-holder to take the steps mentioned above and posted the case to 29-10-1112 for that purpose.

The decree-holder not having taken the steps as directed the petition was dismissed on the next day. The decree-holder must be taken to have been aware of the posting to 29-10-1112 and of the directions given to him to take steps. If so, he was a defaulter in not having taken the steps and the order passed on 30-10-1112 for his default is again a judicial order. The lower appellate Court refers to this

provision of the Civil Courts Guide but states that it is only a direction to the office and that it is not relevant in considering whether the decree-holder had notice of the orders passed upon his petition. A Division Bench of this Court 'MOHAMMATHU UMMAL v. MAHOMED UMMAL PATHUMAL', AIR 1951 Travancore-Cochin 179 took the view that if an order is passed upon the execution petition on the next day after the day on which the petition is filed, according to Rule 675 of the Tranvancore Civil Courts Guide it will be a judicial order of which the decree-holder must be deemed to be aware of, and that the consequences of default in not complying therewith will ensue.

The learned counsel for the respondent relies upon another Division Bench decision of this Court reported in 'VARGHESE CHACKO v. SIVASANKARA PILLAI', 1950 Ker L T 5. What happened in that case was that in execution of a decree, an order was passed for delivery of four items of properties. Pursuant to that order two items were delivered and the amin entrusted with the warrant for delivery submitted a report several months after the order stating that the remaining two items could not be delivered on account of certain obstructions. Two days after that report was submitted the Court directed the decree-holder to take further steps in the matter of removal of the obstruction for delivery of the remaining items and posted the case for that purpose to a particular date. The decree-holder not having taken the steps as directed the petition was dismissed the next day.

The question was whether the order passed by the Court directing the decree-holder to take steps for removal of the obstruction was an order which was judicially passed. The learned Judge found that that was not a judicial order. The facts stated in the judgment do not show that either on the day on which the order for taking steps was passed or on any day near thereto there was a posting of the case. It was true that the order was passed within two days after the amin submitted his report. But that is an accident or event about which the decree-holder may not have known. The learned Judges came to the conclusion that the decree-holder was not aware of the posting and that he was not in default in not having complied with the direction contained in such an order. That case is, therefore, distinguishable from the present, and is no authority for the position contended for by the learned counsel for the respondent.

(2) No decree-holder filing an application for execution can expect the Court to have orders passed thereon forthwith or on the very day on which the application is filed unless he makes a special motion in that behalf. Ordinarily the papers presented to the office of the Court will be be taken to the Presiding Officer for orders the next day and it cannot be said that the applicant is unaware of the orders passed on the next day. Whatever orders are passed are noted in the execution diary by the office which is accessible to the advocates and their clerks. It is clear, therefore, that the orders passed by the Court on 20-10-1112 directing the decree-holder to take steps and on 30-10-1112 for default in not taking those steps are judicial and proper and that the present execution petition filed more than 11 years after the last order on 30-10-1112 is barred by limitation. In the result the second appeal is allowed, the decision of the lower appellate Court reversed and that of the Munsiff restored with cost throughout.

D.H. Appeal allowed.

A. I. R. 1952 Travancore-Cochin 248

SUBRAMANIA IYER, J.

Kochu Kumari, Petitioner v. Krishnan Janardhanan, Counter-Petitioner.

C. R. P. No. 694 of 1951, D/-21-11-1951.

(a) Civil P. C. (1908), S. 115 and O. 40, Rr. 1 and 4, O. 43, R. 1 — Order refusing to remove receiver — Revision.

Whatever may be the position as regards orders actually removing Receivers, and order refusing to remove a receiver is certainly not appealable and therefore a revision lies. AIR 1947 Pat 418, Rel. on. (Para 1)

Anno: C. P. C., S. 115, N. 8. O. 40, R. 1, N. 51, R. 4, N. 5.

(b) Civil P. C. (1908), O. 20, R. 4 — Disposal without discussing grounds.

The Court cannot dispose of an application for removal of receiver in a summary fashion that "the facts alleged in the petition are insufficient to quash the order passed by this Court." The Court is bound to deal with the various grounds on which the relief by way of removal of the Receiver is sought and come to a conclusion. (Para 1)

Anno: C. P. C., O. 20, R. 4, N. 6.

N. Varadaraja Iyengar, for Petitioner; C. K. Sivasankara Panicker, for Counter-Petitioner.

Case referred to:

('46) 25 Pat 779: (AIR 1947 Pat 418) (Pr 1)

ORDER: The petitioner seeks revision of an order passed by the Court below refusing to remove the Receiver. On the question as to whether this revision is maintainable or not, learned counsel for the petitioner relies upon the decision of Fazal Ali, C. J. of the Patna High Court (as he then was) sitting with another learned Judge of the same Court to the effect that whatever may be the position as regards orders actually removing Receivers, an order refusing to remove a Receiver is certainly not appealable. (Vide 'SURENDRA v. NAGAR CHAND', 25 Pat 779). With great respect I follow that decision and hold that the order in this case is not appealable and therefore a revision lies.

On the merits of the application, the lower Court says that "the facts alleged in the petition are insufficient to quash the order passed by this Court." It appears to me that the matter cannot be disposed of in this summary fashion and the learned Munsiff is bound to deal with various grounds on which the relief by way of removal of the Receiver is sought and come to a conclusion. The order sought to be revised is, therefore, set aside, the revision is allowed and the case sent back to the Munsiff's Court for fresh disposal after bestowing attention upon the various grounds relied upon in support of the petition as also objection raised by the respondent in the matter of granting the relief. The records will be sent back

to the Court below forthwith. The Court below is directed to dispose of the matter expeditiously. The costs of this revision will abide the result and will be provided for by the lower Court in its revised record.

D.H. Order accordingly.

A. I. R. 1952 Travancore-Cochin 249
SUBRAMANIA IYER, J.

Standard Vacuum Oil Co., Ernakulam, Petitioner v. Industrial Tribunal, Ernakulam and others Counter-Petitioners.

O. P. No. 1 of 1951, D/- 27-2-1952.

Industrial Disputes Act (1947), Ss. 2 (k) and 10 (1) (c) — Industrial dispute, meaning of — Order of reference under S. 10 clearly showing nature of dispute to be individual — Order is ultra vires — Proceedings quashed — Appearance of employer before Tribunal —Effect — Constitution of India, Art. 226 — Civil P.C. (1908), S. 9.

Though the term 'industrial dispute' as defined in S. 2 (k), Industrial Disputes Act is wide enough to include a dispute between the employer and one or a few only of the workmen, the definition has to be understood and interpreted with reference to the context. Regard being had to the scheme of the Act in the light of the indications afforded by the provisions contained in S. 18, it is clear that such a wide interpretation cannot be justified and that the true meaning of an industrial dispute is that it should be a collective dispute. A dispute pertaining to an individual workman may, if taken up by all the others or a sufficient number of them or by a labour union, becomes collective and therefore an industrial dispute. But a dispute which at the inception is an individual one and continues to be such cannot be regarded as an industrial dispute within the meaning of the Act justifying a reference for adjudication to a Tribunal. (Para 7)

Hence, when the order of the Government under S. 10 of the Act referring a certain dispute to the adjudication of a tribunal, itself makes it clear that the dispute at the time of the order is one between an employer company and the three specified individuals who were discharged workmen, the dispute must be held to be an individual one and not a collective one so as to come within the definition of an industrial dispute. The mere allegation that the cause was taken up by the workers' Union at whose instance the labour department of the State intervened cannot affect its nature. In the face of the order of Government which is clear on the matter a contention that the dispute in question was one other than of the nature adumbrated therein cannot be raised or countenanced. AIR 1951 Mad. 141 and 55 Cal W N 256 Ref. (Para 7)

Consequently, in the absence of an industrial dispute the order of reference passed by the Government under S. 10 (1) (c) is ultra vires and the proceedings started on the foot of such reference will be quashed by a writ of certiorari as being without jurisdiction. (Para 8)

The want of jurisdiction of the Tribunal is inherent and in such a case, jurisdiction cannot be conferred by a consent. The appearance by the applicant before the Tribunal has not the effect of preventing them from challenging the proceedings which are 'ultra vires.' (Para 9)

Anno: C. P. C., S. 9, N. 5; Pt. 2.

S. Narayanan Potti and S. Govindaswamynathan, for Petitioner; T. N. Subramania Iyer, Advocate-General and M. N. Parameswaran Pillai, for Counter-Petitioner 1; C. V. Ammunni Menon and P. Balagangadhara Menon, for Counter-Petitioners Nos. 2, 3 and 4; Government Pleader, for Counter-Petitioner No. 5.

Cases referred to:

('51) 55 Cal W N 256 (Pr 7)
('49) 1949 2 Mad L J 789: (AIR 1951 Mad 616) (Pr 7)
('51) AIR 1951 Mad 141: (ILR (1952) Mad 43) (Pr 7)

ORDER: This is an application for a writ of certiorari to bring up and quash the proceedings in adjudication No. 11 of 1950 on the file of the first respondent, the Industrial Tribunal, Ernakulam, and for the incidental orders or directions under Art. 226(i) of the Constitution of India.

(2) The facts are these. The applicant Company are the stockists and distributors of petrol in Ernakulam. In July 1948 a quantity of petrol from their stock was taken out in a lorry belonging to, but without the knowledge of the company. A prosecution for theft at the instance of the police ensued. The third respondent was charged with having driven the lorry, and respondents 2 and 4 were charged with having taken the quantity of petrol from out of the company's stock. Respondents 2, 3 and 4 were employees under the company. There were some other accused in the case who were also the company's employees. All the accused were placed under suspension pending the trial. The prosecution ended in the acquittal of all the accused. The company took the other accused back into service, but having regard to the fact disclosed at the enquiry conducted by them as also to the confessions made by respondents 2 and 3, the company were satisfied about their participation in the matter and refused to take back respondents 2, 3 and 4 and discharged them.

(3) On a complaint made by these respondents that their discharge was unjustified the Government of the State of Travancore-Cochin (5th respondent) made the following order:

"L4-8057/50/DD.

Whereas an Industrial dispute has arisen between the Standard Vacuum Oil Company Ernakulam, represented by their Terminal Superintendent, Ernakulam, and their workmen viz., Sri C. P. Sukumara Menon, Povothil House, Thrikkanarvattom, Ernakulam. Sri Thakkeveettil Ouseph Xavier, Mariyattuparambu, Pachalam, Ernakulam, and Sri Mecheri Thommen Devassy, Choolakal Parambu, Thrikkanarvattum, Ernakulam, in respect of matters mentioned in the annexure to this order:

And whereas in the opinion of Government, it is necessary to refer the said Industrial dispute for adjudication;

Now, therefore, in exercise of the powers conferred by S. 10 (i) (c) of the Industrial Disputes Act 1947 (Central Act XIV (14) of 1947) Government hereby direct that the said industrial dispute be referred for adjudication to the Industrial Tribunal, Ernakulam, having its place of sitting at Ernakulam.

ANNEXURE.

Whether the discharge of Sri C. P. Sukumara Menon, Sri T. O. Xavier and Sri M. T. Devassy is justifiable? If not, to what relief are they entitled?"

The first respondent accordingly started the aforesaid proceedings No. 11/1950.

(4) The contentions urged on behalf of the applicant are (i) that there was no industrial dispute within the meaning of the Industrial Disputes Act XIV (14) of 1947 and that the dispute is purely individual; and (2) that even such dispute was not between the company and their workmen because by the time the dispute arose respondents 2, 3 and 4 had ceased to be workmen under the company. It is argued that in the absence of any one of these, the reference would be ultra vires the Government and that proceedings started by the Tribunal pursuant thereto would be unauthorised and illegal.

(5) The respondents replied by saying that though the dispute was individual at the inception it changed its character because the cause was taken up by the Mineral Oil Workers' Union at whose instance the Labour Department of the State intervened, secured re-instatement of the rest and the reference for adjudication was the result of the refusal of the company to reinstate these three. It is, therefore, contended that there is an industrial dispute, justifying the reference. Respondents 2, 3 and 4 are claimed to be workmen as their discharge was after the dispute arose. Respondents raise a further point that the applicant has submitted to the jurisdiction of the Tribunal by having appeared before it & that therefore this application cannot be maintained.

(6) The first question to be considered is whether there was an industrial dispute because in its absence the authority of the Government to refer for adjudication will not arise and cannot be exercised.

(7) Section 10 of the Industrial Disputes Act provides:

"10. Reference of disputes to Boards, Courts or Tribunals:

(i) If any industrial dispute exists or is apprehended, the appropriate Government may, by order in writing:

(a) .....

(b) .....

(c) refer the dispute to a Tribunal for adjudication.....and industrial dispute has been defined in the Act thus:

"2. (k) "Industrial Dispute" means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person;"

The contention urged on behalf of the respondents is that in view of the provisions of the General Clauses Act, the definition would comprise a dispute between the employer and one or a few only of the workmen. The language of the definition is certainly susceptible of the wide interpretation suggested. The definition has however to be understood and interpreted with reference to the context. Regard being had to the scheme of the Act in the light of the indications afforded by the provisions contained in S. 18, it is clear that the wide interpretation contended for cannot be justified and that the true meaning of an industrial dispute is that it should be a collective dispute. A dispute pertaining to an individual workman may if taken up by all the others or a sufficient number of them or by a labour union become collective and therefore an industrial dispute. But a dispute which at the inception is an individual one and continues to be such cannot be regarded as an industrial dispute within the meaning of the Act justifying a reference for adjudiciation to a Tribunal. In this case the contention urged on behalf of the respondents is that the dispute had so developed and become a collective dispute. Reliance is placed upon the interference of the Mineral Oil Factory Workers' Union. That such interference had not the effect of creating any change in the character of the dispute and did not operate to make it a collective one is clear from the order of Government read above. The order says:

"Whereas an Industrial dispute has arisen between the Standard Vacuum Oil Company Ernakulam, represented by their Terminal Superintendent, Ernakulam and their workmen viz., Sri C. P. Sukumara Menon, Poovathil House, Sri Thekkeveettil Ouseph Xavier .....and Sri Mecheril Thomman Devassy ....."

making it clear that the dispute at the time of the order was one between the employer company and the three specified individuals who were discharged workmen. Had the alleged interference of the Union any effect upon the nature of the dispute and had it operated to convert what was individual into a collective dispute then the order would have referred to the dispute in its changed aspect as a collective dispute and would not have mentioned it as even then being one individually appurtaining to the three named workmen and who alone were parties concerned therewith. In the face of the order of Government which is clear upon this matter a contention that the dispute in question was one other than of the nature adumbrated therein cannot be raised or countenanced. The question as to whether an individual dispute will come within the meaning of the definition of 'Industrial Dispute' in the Act has been considered by the Madras High Court in two cases, 'KANDAN TEXTILE LTD. v. THE INDUSTRIAL TRIBUNAL MADRAS', (1949) 2 Mad L J 789 and 'MANAGER UNITED COMMERCIAL BANK LTD., MATHURAI v. COMMISSIONER OF LABOUR, MADRAS', AIR 1951 Mad 141, wherein the learned Chief Justice & two Judges of the Madras High Court have discussed the matter in great detail and reached the conclusion that a proper interpretation of the definition would exclude an individual dispute from the ambit of an industrial dispute

in the Act. This view has been followed by the Calcutta High Court in 'J. CHOUDHARY v. M. C. BANERJEE', 55 Cal W N 256. In the face of the learned discussions of the question in the aforesaid cases it is unnecessary to embark upon any elaboration here and I consider it sufficient to record my respectful agreement with the view taken therein.

(8) It follows that the order passed by Government referring the dispute indicated in the annexture to the order read above is devoid of foundation there having been no industrial dispute whose existence is essential. I hold that the order of reference is 'ultra vires' the Government and the proceedings started by the first respondent Tribunal on the foot of that reference are also 'ultra vires'. A 'writ of certiorari' should therefore go and the order of reference as also the proceedings started by the first respondent on the foot of that reference should be quashed as having been passed and started without jurisdiction. The 1st respondent is directed to forbear from proceeding further upon that reference. As the application succeeds upon the first of the points taken it is unnecessary to consider the other point urged on that behalf.

(9) The want of jurisdiction of the first respondent Tribunal is inherent and in such a case, jurisdiction cannot be conferred by consent. The appearance by the applicant before the Tribunal has not the effect of preventing them from challenging the proceedings which are 'ultra vires'.

(10) The respondents will pay the costs of the applicant with Advocate's fee Rs. 100/-.

K. S. Order & proceedings quashed.

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SANKARAN, J.

Abdulkadir Lebba Abdul Rahiman and others, Petitioners v. State and two others, Counter-Petitioners.

Criminal R. P. Nos. 370/24; 31 and 32 of 1124, D/- 26-10-1951.

† Criminal P. C. (1898), S. 144 — Power of Magistrate to override private rights — Order prohibiting one section of fisher folk from using modern type of nets for fishing cannot be sustained.

It is the inherent right of every citizen to strive to achieve the greatest success in the pursuit of his lawful avocations by resorting to the most efficient and and up-to-date methods available. Courts of law are bound to protect all lawful activities in the exercise of such a legal right. Any threatened opposition by the members of the opposite party, to the exercise of such a right, cannot justify an action being taken by the Magistrate under Section 142 (corresponding to S. 144, Indian Criminal P.C.). If a breach of the peace is anticipated as a result of the clash between these two forces, the proper course to be adopted would be to take action against the potential law-breakers, and not against the peaceful citizens engaged in their lawful activities and whom the law-breakers threaten to molest. (Para 4)

Section 142 of Travancore-Criminal P.C. (corresponding to S. 144, Indian Criminal P.C.), is primarily intended to meet an emergent situation. Any order passed to meet an emergent situation cannot be allowed to be in force for any indefinitely long period. On the other hand it is the duty of the Magistrate to make a prompt enquiry into the legality or otherwise of the act prohibited and also into the causes which may lead to a breach of the peace as a result of that act. If as a result of such enquiry it is found that the act is a lawful one and is within the legal rights of one party and that a breach of the peace would occur only as the result of the interference by the other party with the lawful exercise of such rights, the Magistrate is bound to rescind the prohibitory order and to render every protection needed for the lawful exercise of the said legal rights by the party entitled to do so. The restraint, if any, can only be against the other party threatening a breach of the peace by illegally interfering with the exercise of such legal rights. AIR 1923 Mad 15; AIR 1922 Cal 483; AIR 1924 Pat 767 & AIR 1933 Cal 348, Ref. (Para 3)

Where the District Magistrate passes an order under S. 142, prohibiting one section of the fisher folk from using the modern type of nets for fishing in the Coastal waters, the order cannot be sustained. Even if the emergency of the situation had necessitated the passing of such an order in the first instance, the Magistrate should rescind that order when the petitioners against whom that order had been issued appear before him and draw his attention to the fact that they were only exercising their lawful right in a peaceful manner and that therefore action, if any, has to be taken against the others who threatened to commit a breach of the peace by resorting to force in opposing the exercise of such lawful right. (Para 5)

Anno: Criminal P. C., S. 144, N. 3.

N Kesavan Nair, for Petitioners in No. 370/24; N. Padmanabha Panicker, for the Counter-Petitioners; Public Prosecutor, for the State.

Cases referred to:

('22) AIR (9) 1922 Cal 483: (24 Cri L J 154) (Pr 5)

('33) AIR (20) 1933 Cal 348: (34 Cri L J 334) (Pr 5)

('23) AIR (10) 1923 Mad 15: (23 Cri L J 689) (Pr 5)

('24) AIR (11) 1924 Pat 767: (25 Cri L J 1178) (Pr 5)

ORDER: All these three petitions are directed against the order passed by the District Magistrate of Trivandrum on 4-6-1124 prohibiting the use of a particular type of net by these petitioners and others for the purpose of fishing in the coastal waters extending from Vettoor to Chilakkoor in the Chirayinkizh Taluk. The order was passed by the District Magistrate in the exercise of the powers conferred on him by S. 142 of the Code of Criminal Procedure of Travancore (corresponding to S. 144 of the Indian Code). On getting notice of the order, the petitioners through their counsel appeared before the District Magistrate and

moved for the cancellation of the order. They contended that they were not doing anything to occasion a breach of the peace and that there was no justification for issuing a prohibitory order against the normal pursuit of their activities in the matter of fishing in the coastal area referred to above with the aid of the more efficient types of nets. Respondents 2 and 3 as well as others, who took exception to the use of these modern types of nets by the petitioners, maintained that the use of these nets by the petitioners was harmful to their fishing interests and that therefore the use of such nets should be prohibited. By the proceedings passed on 1-8-1124, the District Magistrate confirmed the prohibitory order holding that there were no valid grounds for cancelling it. The duration of the prohibitory order was indefinitely extended by the Notification R. O. C. No. 793/49/ LAB dated 23-4-1949, issued by Government under Cl. 6 of S. 142 of the Code of Criminal Procedure. The petitioners who are aggrieved by the order have filed these revision petitions praying for the cancellation of the order by this Court in the exercise of its revisional jurisdiction.

(2) The main point urged on behalf of the petitioners is that the District Magistrate was clearly misusing his powers under S. 142 of the Code of Criminal Procedure in passing the prohibitory order in question. To appreciate the force of this contention it is necessary to have an idea as to the circumstances which induced the District Magistrate to take action under S. 142 against these petitioners. One section of the fisher folk residing in the coastal region from Vettoor to Chilakkoor in the Chirayinkizh Taluk filed a series of petitions before the District Magistrate complaining about the hardships caused to them as a result of the present petitioners and others belonging to another section of the fisherfolk in the same region resorting to the use of a new type of net. The complaint was that those who are using the new type of net are able to get a good catch of the fish while the others using the old type of net are able to get only a poor catch. It was also stated that the large majority of the fisher folk in the area are persons using the old type of net and that they are not in a position to compete with the others who are in a position to command the use of the more modern and efficient type of net. The majority complained that unless the use of these modern nets by the others is not prohibited, their means of livelihood would be seriously prejudiced and that as a consequence breach of peace was likely to occur. It may be mentioned here that the complainants have no case that the use of the modern type of net was in anyway unlawful or that those resorting to use of such net had no right of fishing in the coastal waters from Vettoor to Chilakkoor. In the reports submitted to the District Magistrate by the Police Officers who enquired into the allegations contained in the petition, it was not even suggested that the use of the modern type of net by the petitioners and others was unlawful or unauthorised. In fact those reports proceeded on the basis that the fisher folk in this particular locality had the right to use any type of net they liked for the purpose of fishing in the coastal waters of that region. All the same it was pointed out that the majority of the fisher folk who had only the old type of net at their command very strongly resented the use of the new type of net by the others and that such resentment and opposition on their part were likely to result in a clash between the two parties. It was to avoid such a clash and the consequent breach of peace that action under S. 142 of the Code of Criminal Procedure was recommended by the Police. The District Magistrate accepted such a recommendation and passed the order in question and in effect imposed a ban on the petitioners in the exercise of their lawful rights in a lawful manner.

(3) Section 142 of the Code of Criminal Procedure is certainly not intended to restrict the liberty of the citizen in exercising his lawful rights in a lawful manner. Occasions may arise where the District Magistrate who is responsible for maintaining peace and tranquillity in his District, may have to take immediate action for preventing an apprehended breach of the peace. There may not be time enough for the Magistrate to enquire and ascertain as to which of the opposing parties is in the wrong so that action may be taken against such wrong-doer. In such an emergent situation the Magistrate will have to prohibit the commission of the particular act which might result in a breach of the peace even though the act itself may be a lawful one. S. 142 is primarily intended to meet such emergent situations. Any order passed to meet an emergent situation cannot be allowed to be in force for any indefinitely long period. On the other hand it is the duty of the Magistrate to make a prompt enquiry into the legality or otherwise of the act prohibited and also into the causes which may lead to a breach of the peace as a result of that act. If as a result of such enquiry it is found that the act is a lawful one and is within the legal rights of one party and that a breach of the peace would occur only as the result of the interference by the other party with the lawful exercise of such rights, the Magistrate is bound to rescind the prohibitory order and to render every protection needed for the lawful exercise of the said legal rights by the party entitled to do so. The restraint, if any, can only be against the other party threatening a breach of the peace by illegally interfering with the exercise of such legal rights.

(4) In the present case the facts which had been brought to the notice of the District Magistrate were such as to leave no room for doubt as to which party was in the wrong. The complaint petitions and the police reports received by the Magistrate had made it abundantly clear that the revision petitioners in making use of the more modern and efficient type of net for the purpose of fishing in the coastal waters from Vettoor to Chilakkoor, were only exercising their legal rights in a lawful manner and that any breach of peace could occur only on account of the unlawful opposition threatened by the opposite party. Such oppositions cannot be justified by the fact that the members of this party find it difficult, with the old type of nets at their command, to compete with the others in the matter of fishing. The easy way out of such a difficulty would be for these persons also to resort to the use of the more modern and efficient type of nets. There is nothing to prevent them from resort-

ing to such a legitimate method of resolving their difficulties and getting their grievances redressed. If they prefer to adhere to the primitive method of fishing by resorting to the use of the old type of nets, they will have to put up with the inevitable handicap and inconveniences resulting from the adoption of such a course. But it is not within their rights to compel the others also to continue to use the old type of nets and to refrain from adopting any modern method of fishing. It is the inherent right of every citizen to strive to achieve the greatest success in the pursuit of his lawful avocations by resorting to the most efficient and up-to-date methods available. Courts of law are bound to protect all lawful activities in the exercise of such a legal right. Any threatened opposition by the members of the opposite party, to the exercise of such a right, cannot justify an action being taken by the Magistrate under S. 142 of the Code of Criminal Procedure. The power conferred by that section cannot be invoked at the instance of those who threaten to take the law into their own hands and for the purpose of stifling the lawful activities in the exercise of the legal rights of the others. If a breach of the peace is anticipated as a result of the clash between these two forces, the proper course to be adopted would be to take action against the potential law-breakers, and not against the peaceful citizens engaged in their lawful activities and whom the law-breakers threaten to molest.

(5) In discussing the scope of S. 144 of the Indian Code of Criminal Procedure it has been pointed out in 'MURARI NAICKEN v. AIYASAMI NAICKEN', AIR (10) 1923 Mad 15 that it is the duty of the Magistrate in taking steps to preserve peace

> "to take action only against those who are infringing the rights of others and protect those who wish to exercise their rights and not prohibit the latter's lawful enjoyment of rights."

The same view has been expressed in 'HAJI MD. ISMAIL v. BARKAT ALI', AIR (9) 1922 Cal 483 where it was ruled that:

> "the proper course that the Magistrate ought to follow is to find out which party is wrong and if he finds on the evidence that the second party is in the wrong and is interfering unnecessarily with the exercise of the legal powers of the first party, he ought to bind down the second party restraining them from committing any act which may lead to a breach of the peace."

In 'R. E. BLONG v. EMPEROR', AIR 1924 Pat 767, the scope of S. 144 has been explained in the following words:

> "Section 144, Criminal Procedure Code, is not intended to restrict the liberty of an individual if there is no apprehension of a breach of the peace on account of any act to be done by him. Its object is to enable a Magistrate in cases of emergency to make an immediate order for the purpose of preventing an immediate breach of the peace; but it is not intended to relieve him of the duty of making a proper enquiry into the circumstances which make it likely that such breach of the peace will occur if it is found that a man is doing that which he is legally entitled to do and that his neighbour chooses to take offence, threat and to create a disturbance in consequence; it is clear that the duty of the Magistrate is not to continue to deprive the first of the exercise of his legal right but to restrain the second from illegally interfering with that exercise of legal right."

To the same effect is the ruling in 'PORT COMMISSIONERS, CALCUTTA v. JOGENDRA', AIR 1933 Cal 348 where the cautious manner in which a Magistrate should proceed in taking action under S. 144 has been stressed in the following terms:

> "The legislature by S. 144 of the Code has conferred very large powers upon Magistrates who have to deal with urgent cases of nuisance or apprehended danger. The larger is the power, the greater is the necessity to be cautious about its exercise. And the exercise of the power should be guided by having the following principles in view viz; (1) Courts civil as well as criminal, exist for the protection of rights and therefore the authority of a Magistrate should ordinarily be exercised in defence of rights rather than in their suppression; (2) when an order in suppression of lawful rights has to be made, it ought not to be made unless the Magistrate considers that other action that he is competent to take is not likely to be effective; and (3) the order, if made, should never be disproportionate to but should always be, as far as possible, commensurate with the exigencies of any particular situation."

Examined in the light of these principles, it is clear that the prohibitory order impugned in this case was passed by the District Magistrate by misdirecting the jurisdiction conferred on him by S. 142 of the Travancore Code of Criminal Procedure. Even if the emergency of the situation had necessitated the passing of such an order in the first instance, the Magistrate should have rescinded that order when the revision petitioners against whom that order had been issued appeared before him and drew his attention to the fact that they were only exercising their lawful right in a peaceful manner and that therefore action, if any, had to be taken against the others who threatened to commit a breach of the peace by resorting to force in opposing the exercise of such lawful right. The order passed by the Magistrate on 1-8-1124 confirming the prohibitory order passed against the revision petitioners shows that the Magistrate was convinced of the legality of the right of these petitioners to use the modern type of nets for fishing in the coastal waters from Vettoor to Chilakkoor. All the same he seems to have been under the impression that in spite of the existence of such a right in their favour it is incumbent on him to issue an order against them under S. 142 restraining them from the exercise of such right so as to prevent any breach of the peace. The Magistrate has obviously lost sight of the fact that it was the opposite party who threatened to commit a breach of the peace in opposing by forceful means the activities of the revision petitioners in the exercise of their lawful right. The situation undoubtedly called for action being taken against those persons who openly threatened to commit a breach of the peace. Instead of taking such action against those who were in the wrong, the Magistrate has practically yielded to their threats by passing the order suppressing the

exercise by the revision petitioners of their lawful right. The Magistrate has undoubtedly misconceived his jurisdiction under S. 142.

(6) The District Magistrate is no doubt bound to maintain peace and tranquillity within his District. But that object is to be achieved not by suppressing the exercise of the lawful rights of the citizens. When it is seen that breach of the peace is threatened by the potential law-breakers, appropriate action has to be taken against them for restraining them from committing any breach of the peace. To take action by way of suppressing the lawful activities of the peaceful citizens on account of threatened opposition by such law-breakers, would in effect be yielding to such threats and encouraging lawlessness. This is what has happened in the present case. The District Magistrate has wrongly exercised his jurisdiction under S. 142 of the Code of Criminal Procedure in confirming the prohibitory order issued against these revision petitioners. The undesirable and illegal effect of that order has been perpetuated by the subsequent notification published by Government under clause 6 of S. 142 by which the duration of the prohibitory order was indefinitely extended. The order is unsustainable in law and is unwarranted by the facts and circumstances brought to light at the enquiry conducted by the Magistrate. The order is therefore liable to be quashed.

(7) In the result these three revision petitions are allowed and the prohibitory order issued by the District Magistrate against these petitioners and others on 4-6-1124 and which was confirmed on 1-8-1124 and subsequently extended by Government Notification No. R.O.C. 723/49LAB. dated 23-4-1949, is set aside.

V.B.B. Revisions allowed.

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KUNHI RAMAN C. J. AND SUBRAMANIA IYER J.

Lekshmi Pillai, Chempakakutty Pillai, Appellant v. Yacob Nadar Rajaian Nadar, Respondent.

Second Appeal No. 672 of 1950, D/- 16-10-51.

† (a) **Civil P. C. (1908), S. 146 and O. 21, R. 16 — Transferee of equity of redemption — Right of, to execute decree for redemption obtained by transferee.**

The only persons who can execute decree are those mentioned in O. 21, R. 16 and the transferee of an immovable property is not a transferee of a decree in respect of that property within the meaning of that rule, nor is he a person claiming under the decree-holder within the meaning of Section 146. Hence the transferee of the equity of redemption of an item of immovable property cannot execute a decree for redemption obtained by the transferor. AIR 1942 Mad 21, Disting.

Anno: C. P. C., S. 146 N. 8; O. 21, R. 16 N. 3 Pt. 6.

(b) Transfer of Property Act (1882), S. 8 — Rights under decree.

Section 8 does not take in rights under the decree in respect of immovable properties obtained by the transferor. (Para 2)

Anno: T. P. Act, S. 8 N. 8.

T. R. Subramonia Iyer, for Appellant; M. Madhavan Nair, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras.

('85) 7 All 107: (1884 All WN 224)	1
('08) 30 All 30: (4 All LJ 689)	1
('50) 5 Dom LR (All LB) 147	1
('24) AIR 1924 Bom 426: (80 Ind Cas 249)	1
('26) AIR 1926 Bom 406: (96 Ind Cas 833)	1
('27) AIR 1927 Mad 240: (98 Ind Cas 856)	1
('42) AIR 1942 Mad 21: (201 Ind Cas 148)	2
('48) 1948 Trav LR 755	1

JUDGMENT.: The only question that arises in this second appeal is whether the transferee of the equity of redemption of an item of immovable property can execute a decree for redemption obtained by the transferor. The learned Munsiff found against the transferee who sought to execute the decree. The learned District Judge took a different view relying on the decision in '1948 TLR 755' which held that the purchaser of certain immovable property would in law be the transferee of a decree in respect thereof. Mr. Madhavan Nair, the learned counsel for the respondent, did not rightly attempt to support the decree appealed against on the ground on which it is based. The only persons who can execute decree are those mentioned in O. 21, R. 16 of the Code of Civil Procedure and it has been held uniformly by Courts in India that the transferee of an immovable property is not a transferee of a decree in respect of that property within the meaning of that rule. Reference may be made to 'VITHAL LAXMAN v. MAHADEV RAGHUNATH', AIR 1924 Bom 426; 'GENARAM KAPURCHAND v. HANMANTRAM', AIR 1926 Bom 406; 'PERUMAL NAIDU v. MARU KRITHAMMAL', AIR 1927 Mad 240; 'RAM SAHAI v. GAYA', 7 All 107; 'KANIZ FATIMA v. WALI-ULLAH', 30 All 30 and 'HAMID ALI KHAN v. SMT. SHANTI DEVI', 5 DLR (All LB) 147.

(2) The learned counsel for the respondent however, sought to support the judgment of the District Judge by relying upon S. 146 of the Civil P. C. and contended that his client, namely, the transferee of the property is a person claiming under the decree-holder within the meaning of that section and that though that section starts by saying 'save as otherwise provided by this Code' the provision contained in O. 21, R. 16 is only an enabling provision and does not prohibit persons other than those contemplated in that rule from executing decrees.

He relies upon a decision of the Madras High Court reported in 'MAHANANDI REDDI v. PANIKALAPALI VENKATAPPA', AIR 1942 Mad 21, in support of his contention. That is a decision of a Bench of the Madras High Court where the question arose as to whether the transfer of the rights of a plaintiff in two suits filed on foot of promissory notes stating the transfer to be of all the rights under the suits would enable the transferee to execute the decree passed in those suits. The learned Judge came to the conclusion upon an interpretation of the documents concerned in that case that the transfer was not merely of the actionable claim on foot of which the suit was brought but also of the prospective decrees that were to be passed in those suits and in that view notwithstanding the provisions of O. 21, R. 16, S. 146 would enable the transferee to execute the decree. That case being distinguishable on the facts it is not necessary for us to consider the question as to whether the transferee of the rights of the plaintiff in a pending litigation can execute the decree or not. In this case, there is no transfer of any

right in respect of any litigation. The transfer is merely of the rights in a certain item of immovable property.

Section 8 of the T. P. Act on which also reliance was placed by the learned counsel for the respondent will not obviously take in rights under the decree in respect of immovable properties obtained by the transferor. A mere perusal of the section would make the position obvious and it is not necessary to enter into any discussion on the question. The second appeal should, therefore, be allowed, the decision of the lower appellate Court set aside and that of the District Munsiff restored with costs throughout

V.R.B. *Appeal allowed.*

A. I. R. 1952 Travancore-Cochin 255

SUBRAMANIA IYER J.

Kavukutty Amma, Petitioner v. Kaliani Amma and others, Counter-Petitioners.

Civil Revn. Petn. No. 350 of 1950, D/- 9-3-1951.

(a) Limitation Act (1908), Ss. 19 and 20 — Acknowledgment or part payment if not by person liable, must be by authorised agent of such person — Nair husband is not by implication from relationship agent of his wife.

To give validity either to an acknowledgment or to a part payment not made by the debtor, the person who makes the part payment or the acknowledgment must within the said relevant provisions of the Limitation Act, be proved to have been acting as an agent duly authorised in that behalf. According to the matrimonial law applicable to the Nair community no agency exists as between spouses. The fact of marital relationship, therefore, will not lend to any implication as to the existence of an agency or of an authority to either of the spouses to act on behalf of the other in any transaction. Hence an acknowledgment or part-payment made by the husband towards a chitty bond executed by wife will not save limitation for a suit on the bond, in the absence of proof that the husband acted as agent duly authorised to act on behalf of the wife.

Husband will not be made liable for the debt of his wife merely because he has written to the creditor that he will see that the money is paid. (Para 3)

(b) Contract Act (1872), S. 2 (d) — Debt of wife — Husband writing to creditor that he would see that debt is paid — Husband is not liable.

In respect of a liability of a wife already existing in order that her husband or any other person should be made liable under an enforceable contract, there must be some consideration to support that contract. There must be some forbearance or something of that kind which will in law, constitute consideration. Husband will not be made liable for the debt of his wife merely because he has written to the creditor that he will see that the money is paid. (Para 3)

Anno: Contract Act, S. 2 (d) N. 13.

P. Narayana Pillai, for Petitioner; P. Gopala Menon and Chandrasekhara Menon, for Counter-petitioners.

ORDER.: This revision petition is filed by the plaintiff in S. C. S. 15 of 1124 on the file of the District Munsiff, Parur. The suit was to recover moneys alleged to be due under a Chitty Security Bond Ex. A executed by Defendant 1 and others in favour of one Thoma Mathu. The plaintiff is the transferee of rights under Ex. A from the said Mathu. Relief was claimed against defendant 1 who is one of the executants of Ex. A as also against defendant 2 who is her husband.

(2) The Court below dismissed the suit as against Defendant 1 on the ground that the claim was barred by limitation. There are two endorsements on Ex. A, the later of which is dated 13-6-1113. The suit was filed on 11-12-1124. On behalf of the plaintiff reliance was placed upon two acknowledgments stated to be contained in Exs. D and C. Exhibit D is a coupon of a money order sent by Defendant 2 in connection with this chitty That is of the year 1120. Exhibit C is a letter dated 13-9-1120 sent by Defendant 2 to the plaintiff. Both the Exs. D and C purport to have been sent by Defendant 2 on behalf of his wife, Defendant 1. In Ex. D, however, there does not appear to be any acknowledgment of liability. Though a certain amount is sent towards the chitty, it is not stated that any more amounts were due. This is as regards the principal amount. As regards the interest there was no remittance made, but Ex. D contains a promise to pay interest at six per cent. The learned counsel for the petitioner wanted to rely upon Ex. D not merely as an acknowledgment under Section 19, Travancore Limitation Act 6 of 1100 but also as a part payment under the next section (Section 20). To give validity either to an acknowledgment or to a part payment not made by the debtor, the person who makes the part payment or the acknowledgment must within the said relevant provisions of the Limitation Act, be proved to have been acting as an agent duly authorised in that behalf.

Though Ex. D purports to be a coupon signed by Defendant 2 on behalf of the first, there is no evidence to prove that Defendant 2 had in fact been authorised to act for Defendant 1 in that behalf. The same remarks apply also to Ex. C. The learned counsel for the petitioner argues that the existence of an agency or an authority to make the part payment or the acknowledgment can be implied from the circumstances that Defendant 2 is the husband of Defendant 1 and that Defendant 2 purported to act on behalf of the first. The parties are Nairs. The learned counsel for the petitioners concedes that according to the matrimonial law applicable to the Nair community no agency exists as between spouses. The fact of marital relationship, therefore, will not lead to any implication as to the existence of an agency or of an authority to either of the spouses to act on behalf of the other in any transaction. Further, in this particular case, the two endorsements that have been made on Ex. A were made by Defendant 1 herself. If Defendant 2 had been constituted either as the general agent of Defendant 1 or as a particular agent in respect of this kuri transaction, one would expect the endorsements to be made by Defendant 2 rather than by the first.

Under the circumstances appearing in this case, therefore, it is not possible to make any implication as to the real existence of any authority on the part of Defendant 2 to act on behalf of Defendant 1. Defendant 2 as a loving husband, may have constituted himself as an agent of his wife and purported to act on her behalf. Indeed in Ex. C which is a letter written by Defendant 2 in 1123, he as an honest person says that the amount whatever it may be, if found due will be paid apart from

any question of limitation. Neither Ex. D nor Ex. C can therefore be availed of by the plaintiff to save the plaint from the bar of limitation, as the plaintiff has failed to prove that the part payment as per Ex. D and the acknowledgment contained in Ex. C were made by Defendant 2 as an agent duly authorised by Defendant 1. If Ex. D will not operate to extend the period of limitation, Ex. C would be absolutely inoperative because it is beyond three years from the second endorsements, dated 13-6-1118, as an acknowledgment to be operative must be made within the expiry of the period of limitation, for a suit to enforce the claim.

(3) The second point raised by the learned counsel for the petitioner is that Defendant 2 is personally liable on account of his having written Ex. C. As already mentioned Ex. C was written in respect of a liability incurred by Defendant 1. Defendant 2 only states that if any amount was found to be due it will be paid. He, in fact, does not undertake to make the payment. He only states that he will see that the payment is made. Assuming that Ex. C is capable of being construed as containing an undertaking to pay, that again, will not by itself enable the plaintiff to claim recovery of any amount from Defendant 2, because, in respect of a liability of Defendant 1 already existing in order that Defendant 2 or any other person should be made liable under an enforceable contract there must be some consideration to support that contract. There must be some forbearance or something of that kind which will in law, constitute consideration. It is not even contented that there was any such forbearance or in any other way a consideration for Defendant 2 making the undertaking under Ex. C. The second ground urged on behalf of the petitioner also must therefore be held against the petitioner. These are the two points raised in revision, both of which having been bound against the petitioner, the revision petition is dismissed with costs.

R.G.D. *Revision dismissed.*

A. I. R. 1952 Travancore-Cochin 256

GANGADHARA MENON AND VITHAYATHIL JJ.

M. S. Mohammed Gous Muhammadali & Co., Appellant v. Lakshmana Iyer, Respondent.

Second Appeal No. 146 of 1124, D/- 31-7-1951.

(a) Houses and Rents — Cochin Buildings (Lease and Rent Control) Proclamation (IV (4) of 1122), Ss. 6 (c) and 7 — Tenant — Meaning of — Claim for refund — Power of civil Court.

Even if the tenancy has terminated the Rent Controller can allow tenant to retain possession of the building except in certain specified cases. The tenant is entitled to get a refund of the sum paid by him in respect of the use of the buildings even after the termination of the tenancy to the extent it is in excess of the fair rent fixed by the Rent Controller. S. 6 (c) will apply even if the sum was paid as advance rent before the date of the Proclamation provided it is for the use of the building after the date of the Proclamation. It cannot be said that in awarding compensation for use and occupation the civil Court is not bound by the order of the Rent Controller fixing fair rent for the buildings. The tenant defendant should not be asked to file a fresh suit to get back the excess amount but should be granted relief in the suit for the recovery of the property.

(Paras 7, 10, 12)

(b) Houses and Rents — Cochin Buildings (Lease and Rent Control) Proclamation (IV (4) of 1932) — Building — Meaning of — Ground appurtenant to building.

The grounds appurtenant to buildings also form part of the buildings and come within the purview of the Proclamation.

(Para 12)

A. S. Krishna Iyer, for Appellant; C. S. Venkiteswara Iyer, for Respondent.

JOSEPH VITHAYATHIL, J.: Defendant 1 in O. S. No 344 of 1121 of the District Munsiff's Court of Cochin is the appellant in this second appeal. The suit is for recovery of property consisting of two buildings and the site thereof on the basis of a lease. The property originally belonged to one Alory Halegua. Defendant 1 Company took it on lease from the said Alory Halegua on 1st June 1945 on a monthly rent of Rs. 90. The plaintiff purchased the property from the original owner on 10-7-1121 for the purpose of trade. He issued a registered notice to Defendant 1 on 28th February 1946, demanding surrender of the property on 31st March 1946. As the property was not surrendered as per this notice the plaintiff filed this suit claiming Rs. 54 as arrears of rent till 1-4-1946 and compensation for use and occupation from that date at the rate of Rs. 175 per month. Defendant 2 is a sub-lessee of a portion of the property from Defendant 1.

(2) Both the defendants contested the suit. The main contentions of Defendant 1 were that the original owner had agreed to a term of three years. that Defendant 1 Company was not bound to surrender the property and that the plaintiff was not entitled to claim anything more than the agreed rent of Rs. 90 per month. Defendant 2 also contended that he was not bound to surrender possession of the property in his possession and claimed Rs. 200 as value of improvements effected by him. The trial Court gave the plaintiff a decree for recovery of the property and for the arrears of rent claimed in the plaint and also compensation for use and occupation after the termination of the tenancy i.e., 1st April 1946 at the rate of Rs. 140 per month.

(3) The plaintiff and Defendant 1 had also filed petitions before the Rent Controller under the Cochin Buildings (Lease and Rent Control) Proclamation. (IV of 1122) — the plaintiff for eviction of the defendants, and Defendant 1 for fixation of fair rent. The Rent Controller fixed fair rent at Rs. 66-11-0, and also passed an order for eviction. These orders were passed on 23-1-1123. The suit was decreed in the Munsiff's Court on 29-2-1123. The order of the Rent Controller fixing fair rent was not however produced in the Munsiff's Court. The plaintiff got delivery of the property on 8-7-1123.

(4) In appeal filed by Defendant 1 the District Court reduced the compensation for use and occupation from Rs. 140 to Rs. 90 a month. Defendant 1 contended in the lower appellate Court that he was liable to pay rent only at the rate of Rs. 66-11-0 and that he was not liable to pay any compensation for use and occupation. He produced in that Court the copy of the order of the Rent Controller fixing fair rent. That Court however did not accept it in evidence and no relief was granted to Defendant 1 on the basis of it. The learned Judge observed that it was open to Defendant 1 to seek his remedies in other appropriate proceedings.

(5) In this second appeal Defendant 1 contends that from 1st June 1945 to 20th February 1948, the date of delivery of the property to the plaintiff he is liable to pay only the rent fixed by the Rent Controller, and he also claims a sum of Rs. 304-0-4 as the value of electric fittings put up by him. The respondent's Advocate represents that Defendant 1 removed the fittings before the building was taken delivery of by the plaintiff. No contention was raised by Defendant 1 either in the written statement or in the appeal memorandum in the lower appellate Court relating to this matter. In the circumstances we cannot entertain this plea in this second appeal. If Defendant 1 is entitled to get the cost of electric fittings from the plaintiff he is free to claim it from him in other appropriate proceedings.

(6) With regard to the plea, for reducing the compensation awarded by the lower appellate Court for use and occupation and for fixing it on the basis of the order of the Rent Controller we think we must accept it. It was argued for the learned Advocate for the respondent that what was awarded by the lower appellate Court from the date of termination of the tenancy is not rent for the buildings but compensation for use and occupation and that in awarding such compensation the Civil Court is not bound by the order of the Rent Controller fixing fair rent for the buildings. We do not think that the provisions of the Cochin Buildings (Lease and Rent Control) Proclamation (IV of 1122) support this position.

(7) The word "tenant" as defined in the Proclamation includes a person continuing in possession of the building after the termination of the tenancy in his favour. Section 7 (1) of the Proclamation provides that a tenant in possession of a building is not to be evicted therefrom whether in execution of a decree or otherwise and whether before or after the termination of the tenancy except in accordance with the provisions of that section. It is therefore clear that even if the tenancy has terminated the Rent Controller can allow the tenant to retain possession of the building except in certain specified cases. Under Sub-section (2) (ii) of Section 7 one of the grounds on which a tenant can be evicted is that he is not ready and willing to pay the fair rent of the building for such period thereafter as he may continue in possession. That implies that subject to certain conditions the tenant will be entitled to continue to use the building even after the termination of the tenancy provided he is ready and willing to pay the fair rent fixed by the Rent Controller.

Under Section 6 (c) when the Rent Controller has determined the fair rent of the building any sum paid in excess of the fair rent, whether before or after the commencement of the Proclamation in respect of the use of the building after the commencement of the Proclamation, shall be refunded to the person by whom it was paid or at the option of such person otherwise adjusted. The words used are "any sum" and not "any rent." The Sub-section will apply if the sum paid is in respect of the use of the building after the commencement of the Proclamation and is in excess of the fair rent fixed by the Rent Controller. The sum paid in respect of the use of the building need not necessarily be rent. We have therefore no doubt that the appellant is entitled to get a refund of the sum paid by him in respect of the use of the plaint buildings even after the termination of the tenancy to the extent it is in excess of the fair rent fixed by the Rent Controller.

(8) We have admitted in evidence the order of the Rent Controller and have marked it as Ex. V. It shows that the fair rent fixed for the plaint building is Rs. 66-11-0. Any sum paid by Defendant 1 in excess of this rent in respect of the use of the building after the commencement of the Proclamation will be refunded to him. The Proclamation came into force on 1st October 1946 (15-2-1122).

(9) It was then argued for the appellant, that he is entitled to get a refund of the excess amount paid by him from the date of the tenancy, namely 1st June 1945 and not only the amount paid for the use of the buildings after the commencement of the Proclamation. We do not think that this position is warranted by the wording of Section 6, Sub-section (c). The Sub-section reads thus:

> "Any sum paid in excess of the fair rent, whether before or after the commencement of this Proclamation in respect of the use of the building after the commencement of this Proclamation, shall be refunded to the person by whom it was paid or at the option of such person otherwise adjusted."

(10) It is clear that under the Sub-section the tenant is entitled to get refund only of the excess sum paid by him, whether before or after the commencement of the Proclamation, in respect of the use of the building after the commencement of the Proclamation, i.e., after 15-2-1122. The Sub-section will apply even if the sum was paid as advance rent before the date of the Proclamation provided it is for the use of the building after the date of the Proclamation.

(11) In support of his position the learned Advocate for the appellant referred to Sub-section (b) of Section 6 which provides that any agreement for the payment of any sum in addition to rent or of rent in excess of the fair rent except in cases falling under Secion 5 or Sub-section (a) of Section 6 shall be null and void in respect of such addition or excess and shall be construed as if it were an agreement for payment of the fair rent. It is contended that the effect of this Sub-section is that the agreement relating to the tenancy should be construed as one for payment of the fair rent and that in the instant case it must be taken that the rent originally agreed upon was only Rs. 66-11-0 and not Rs. 90.

It is therefore argued that the tenant is entitled to get refund of the whole excess amount paid by him from the date of the tenancy and not only the amount paid in respect of the use of the buildings after the date of the Proclamation. But it is Sub-section (c) that provides for the refund of excess sum paid by the tenant and that sub-section expressly says that refund will be allowed only of the excess sum paid in respect of the use of the building after the commencement of the Proclamation. In view of this specific provision relating to refund we do not think that the argument based on the interpretation of Sub-section (b) has any force. For the above reasons we hold that Defendant 1 can claim refund only of the excess amount paid by him in respect of the use of the plaint buildings after 15-2-1122 till the date of delivery of the same to the plaintiff, i.e., 8-7-1133.

(12) It was argued by the learned Advocate for the respondent that the plaint properties consist not only of buildings but also premises and that the amount claimed as compensation for use and occupation is in respect of the premises also. Exhibit V order shows that it relates to two buildings, but according to the definition of the word "building" in the Proclamation it includes "the garden, grounds and out-houses, if any, appurtenant to such building, hut or part of such building or hut." Therefore the grounds appurtenant to the the two

buildings also form part of those buildings and come within the purview of the Proclamation. It is also to be noted that according to the plaintiff the rent originally fixed for the plaint buildings and premises was Rs. 90. It is for reducing this rent of Rs. 90 that Defendant 1 filed the Rent Control petition which resulted in Ex. V order.

It is therefore clear that Ex. V order relates to plaint Items 1 and 2 and that Defendant 1 is entitled to get a refund of the sum paid by him for the plaint items in excess of the fair rent fixed under Ex V. The lower appellate Court directed Defendant 1 to seek his remedy to get back the excess amount paid by him by means of other appropriate proceedings. We do not find any reason why Defendant 1 should be asked to file a fresh suit for this purpose. The decree of the lower appellate Court awarding compensation for use and occupation of the plaint items has therefore to be modified in the light of the order of the Rent Controller fixing fair rent.

We hold that the plaintiff is entitled to get compensation for use and occupation only at the rate of Rs. 66-11-0 from 15/2/1122 to 8/7/1123. The decree of the Court below is modified accordingly. It is represented that Defendant 1 has deposited the amount decreed by the lower appellate Court and that the plaintiff has drawn the same. If so, it will be open to Defendant 1 to claim restitution of the excess amount paid by him. Subject to this modification the decree of the lower appellate Court is confirmed. The second appeal is allowed to the extent mentioned above. The parties will get and pay costs in this second appeal in proportion to their success and failure.

D.H. Appeal partly allowed.

A. I. R. 1952 Travancore-Cochin 258

SANKARAN AND JOSEPH VITHAYATHIL JJ.

Kannu Pillai, Appellant v. Bhaskara Menon and others, Respondents.

Second Appeal No. 100 of 1124, D/- 20-9-51.

Civil P. C. (1908), O. 1, R. 10(2) — Suit by co-sharer on behalf of all co-sharers.

A co-sharer is entitled to sue a lessee for recovery of possession of the whole property on behalf of himself and the other co-sharers. The fact that there is a decree for partition under which he can work out his rights cannot be raised as a plea by the lessee for not surrendering possession of the property as per the lease deed executed by him though it was executed after the filing of the partition suit and was affected by 'lis pendens.' 35 All 331 (PC); AIR 1934 Cal 127; 1949 Trav-C LR 1 and 1951 Ker LT 210, Foll. (Para 6)

Further, the fact that the plaintiff or his predecessors-in-interest were not parties to the lease deed is immaterial if it was executed by the seniormost co-sharer for and on behalf of all the co-sharers. (Para 7)

Anno: C. P. C., O. 1, R. 10 N. 18.

T. R.. Balakrishna Iyer, for Appellant; C. S. Venketeswara Iyer, (for 1); S. Kutty Krishna Menon and V. Krishna Bhat, for Respondents.

REFERENCES: Courtwar/ Chronological / Paras

('08) 35 Cal 331: (35 Ind App 73 PC) 6
('34) AIR 1934 Cal 127: (149 Ind Cas 559) 6
25 Cochin 27 4
31 Trav-C LR 193 6
('49) 1949 Trav-C LR 1: (1949 Ker LT 5) 6
('51) 1951 Ker LT 210 6

JUDGMENT: The plaintiff in O. S. No. 73/1120 of the District Munsiff's Court of Cochin is the appellant in this case. The suit is for eviction and for arrears of rent on the basis of Ex. H lease deed dated 20-6-1111 executed by the 1st defendant in favour of one Valiaveetil Velayudhan Pillai and for damages for waste alleged to have been committed in the property. The plaint property belonged to Velayudhan Pillai, his brothers Sankara Pillai, Kunjan Pillai, Unni Pillai and Appu Pillai and his deceased brother's son Ramakrishna Pillai. The plaintiff acquired the rights of Ramakrishna Pillai and Unni Pillai under Ex. A dated 15-9-1109 and Ex. E dated 20-5-1119. The suit was filed on behalf of all the co-owners. The 2nd defendant is the father of the 1st defendant and he is alleged to be in possession of the property. Defendants 3, 4, 12 and 13 are alleged to be 'Kudikidappukars' in the property under the 1st defendant. The rights of Velayudhan Pillai. Sankara Pillai and Appu Pillai have devolved on defendants 5, 6 and 7. Defendants 8 to 11 have together acquired the rights of Kunjan Pillai.

(2) Defendants 1, 2, 4, 6, 8 to 11 and 12 contested the suit. The 1st defendant contended that the assignments in favour of the plaintiff were 'benami', that the suit is not maintainable, that the arrears claimed in the plaint are not due and that he has committed no waste in the property. The 2nd defendant contended that he was not a necessary party to the suit and that he should be given his costs. The 4th defendant contended that he had no right in the property and that he was unnecessarily impleaded in the suit. Defendants 6 and 8 to 11 contended that the suit was not maintainable and that they were opposed to the plaintiff recovering possession of the property on their behalf. The 12th defendant contended that the house in which he was living had been put up prior to the date of the lease-deed and that he was entitled to the value thereof. The trial Court dismissed the suit with costs on the ground that it is not maintainable. The appeal filed by the plaintiff was also dismissed. Hence this second appeal.

(3) The questions to be decided in this second appeal are:

1. Whether the suit is maintainable;
2. whether the plaintiff is entitled to get the arrears of rent claimed in the plaint;
3. whether the 1st defendant is liable to pay any amount as damages for waste; and
4. what should be the order as to costs.

(4) With regard to the first point, the plaint property admittedly belonged to Velayudhan Pillai, his four brothers and the son of a deceased brother. The property was originally outstanding on lease under Ex. G lease-deed dated 28-6-1099 executed by one Meethian Marakkaru in favour of Velayudhan Pillai. A suit for partition of the plaint property and other properties was filed by some of the co-owners in 1104 as O. S. 140/1104 of the Cochin Munsiff's Court. That suit was at first dismissed by the trial Court. But in appeal the decision was reversed by the then Cochin Chief Court and a decree was given for partition. The decision of the Chief Court is reported in '25 Cochin 27'. After the appellate decree in the partition suit the right under Ex. G was released in favour of Velayudhan Pillai by the assignee of the lease-hold right under Ex. F executed on 12-6-1111 and registered on 19-6-1111. On 29-6-1111 Velayudhan Pillai leased the property to the 1st defendant under Ex. H. There was a 'pidipathu' of Rs. 75. The annual rent fixed was Rs. 80-2-0. A sum of Rs. 12-2-4 was to be paid

to the Municipality as tax for a building in the property. Out of the balance amount a sum of Rs. 15-10-2 was to be paid to Velayudhan Pillai inclusive of 'puravaka' and Rs. 52-5-6 to be paid to the 5 other co-owners in equal proportions. It will thus be seen that Ex. H was executed in favour of Velayudhan Pillai for and on behalf of all the co-owners.

(5) The reasons given by the trial Court for non-suiting the plaintiff are that since there was already a decree for partition it was not necessary for the plaintiff to file a suit on the basis of the lease deed and that the plaintiff being only an assignee of 2/6th share in the property is not entitled to sue for recovery of possession of the whole property and to claim the rent payable to the other-co-owners. According to the lower appellate Court although a suit by one of the co-sharers for recovery of the property outstanding on lease is maintainable since there is already a decree for partition and since some of the co-owners object to the plaintiff recovering possession of the whole property the suit was misconceived and was therefore liable to be dismissed.

(6) In paragraph 11 of the plaint it is stated that the suit was instituted for and on behalf of all the co-owners & that the plaintiff is agreeable to have the other co-owners impleaded as co-plaintiffs. The question for consideration is whether a suit of this nature is maintainable. It has been held in various cases that one co-sharer alone can file a suit for eviction on behalf of himself and the other co-sharers provided all the co-sharers are made parties to the suit. Reference may be made to the decision reported in 'PRAMADA NATH v. RAMANI KANTA', 35 Cal 331 (PC). That was a case under the Bengal Tenancy Act. Their Lordships observed thus in that case:

> "It is a general rule — a rule not derived from the Bengal Tenancy Act but from the general principles of legal procedure — that a sharer whose co-sharers refuse to join him as plaintiffs can bring them into the suit as defendants and so far the whole rent of the tenure."

In 'JARMAN GOMEZ v. RAMAKUMAR', AIR 1934 Cal 127, the Calcutta High Court held that a co-sharer landlord who has made the other co-sharers defendants in a suit for ejectment is entitled to get a decree for recovery of possession of the property to the extent of his share jointly with the other co-sharers. In 'VARGHESE CHACKO v. SIVA SANKARA PILLAI', 1949 TCLR 1, it was held by this Court that one co-sharer can sue to recover possession of the share of another co-sharer also from persons who are in permissive possession of the property. Their Lordships have followed the decision reported in 'PHILIPOSE v. THOMA', 31 Trav LR 193, in which it has been held that one of several tenants-in-common, is entitled to recover exclusive possession of a property from a trespasser. In 'NARAYANA PILLAI v. RAMAKRISHNA PILLAI', 1951 Ker LT 210, it was held by this Court that a co-owner can maintain a suit for ejectment against trespassers in respect of the whole property. It is not disputed that the plaintiff in this case has acquired the rights of two of the co-owners. On the basis of the principle laid down in the above cases it cannot be disputed that the plaintiff is entitled to sue for recovery of possession of the whole property on behalf of himself and the other co-sharers. The fact that there is a decree for partition under which the plaintiff can work out his rights cannot be raised as a plea by the lessee for not surrendering possession of the property as per the lease deed executed by him. It is true that Ex. H lease deed executed after the filing of the partition suit is affected by lis pendens. But that is no reason why the lessor or his representative-in-interest should not be allowed to recover possession of the property from the lessee on the basis of the lease-deed.

(7) It was argued by the learned Advocate for the 1st respondent that since the plaintiff or his predecessors-in-interest are not parties to Ex. H a suit cannot be filed by the plaintiff on the basis of that document and he referred to various rulings for the position that a person who is not a party to a contract cannot enforce the same. But in this case Velayudhan Pillai leased the property as the seniormost member among the co-owners and the document was executed for and on behalf of all the co-owners. The lessee has undertaken to pay rent to the respective co-owners and it is admitted that rent was accordingly paid by him and accepted by the other co-owners. In the circumstances we see no reason why the ordinary rule that one co-sharer can institute a suit for ejectment on behalf of the other co-sharers should not apply to this case.

(8) It has also to be observed that although the plaintiff had only 2/6th share at the time of the institution of the suit he has subsequently acquired the rights of three other co-sharers including the right of the lessor Velayudhan Pillai and is therefore the owner of 5/6 share in the property at present. Although defendants 8 to 11 who are jointly entitled to 1/6 share filed a written statement in the case they seem to have taken no further interest in the suit. They did not appear in the lower appellate Court and they did not appear in this Court also to contest the appeal. The 6th defendant was a minor when the suit was filed and his guardian contested the suit on his behalf. He has now become a major. He has submitted in this Court through his advocate that he has no objection to a decree being given to the plaintiff. Defendants 5 and 7 also have made a similar statement through their advocate. It will thus be seen that none of the co-owners has now any objection to the plaintiff being given a decree for possession of the property and for the rent claimed in the suit. Since the rights of Velayudhan Pillai himself who has taken Ex. H lease-deed have been acquired by the plaintiff there is no force in the contention that the suit is not maintainable by reason of the fact that the plaintiff is not a party to Ex. H. For the above reasons we hold that the suit is maintainable.

(9) With regard to the second point namely arrears of rent the amount claimed in the plaint as arrears is Rs. 320-0-0. According to the first defendant he has paid Rs. 351-11-0 as rent after the date of Ex. H and it is stated that no receipts have been obtained for Rs. 44-8-0. Even if the discharge pleaded by the 1st defendant is true it will be seen that that more than the amount claimed in the plaint will be found due as arrears on the date of suit. The total rent from the date of the lease deed till the date of suit will be Rs. 661 and odd. Even after giving credit to Rs. 351-11-0 alleged to have been paid by the 1st defendant there will still be a balance of Rs. 329-6-0. In the circumstances it is unnecessary to go into the question whether some of the receipts produced by the 1st defendant which are not admitted by the plaintiff are genuine or not. We therefore hold that the plaintiff is entitled to get the amount claimed in the plaint as arrears of rent.

(10) It is not disputed that the Mattanchery Municipality filed a suit for arrears of tax due for the building in the plaint property from 1115 to 1117. Ex. J is the copy of the decree in the suit

filed by the Municipality. The costs awarded in this case would come to Rs. 39-5-0. Ex. K shows that the municipality realised the decree debt by attaching the amount deposited in O. S. 140/104. The plaintiff has claimed Rs. 30/- as damages on this account. The 1st defendant has undertaken in Ex. H to pay the tax due to the Municipality. He is therefore liable to pay the sum of Rs. 30/- claimed as damages in the plaint.

(11) With regard to the amount claimed as damages for waste alleged to have been committed by the 1st defendant both the lower Courts have concurrently found that no active waste has been committed by the lessee and that he is liable to pay only Rs. 10/- towards the value of an 'ayinee' tree cut and removed by him as per orders of the municipality. We do not find any reason to interfere with this concurrent finding of fact. The plaintiff will be given a decree for a sum of Rs. 10/- on this account.

(12) With regard to costs, we find no reason why the 1st defendant should not pay the costs of the plaintiff. It is contended on behalf of the 2nd defendant that he is not a necessary party to the suit and that he should be given his costs. It is alleged in the plaint that the 2nd defendant is in possession of the property on behalf of the 1st defendant. It is stated in paragraph 3 of the written statement of the 1st defendant that the plaint lease deed was executed at the instance of the 2nd defendant. The 2nd defendant gave evidence in the case on behalf of the 1st defendant. In the circumstances it cannot be said that the 2nd defendant was unnecessarily impleaded in the case. The plaintiff is therefore not liable to pay the costs of the 2nd defendant.

(13) In the result we set aside the decrees of the lower Courts and give the plaintiff a decree for recovery of possession of the plaint property with arrears of rent claimed in the plaint. The plaintiff will also be entitled to future rent at the rate of Rs. 80-2-0 per year from the date of suit till the date of recovery of possession of the property or for a period of three years whichever event happens earlier. The plaintiff is also given a decree for Rs. 30/- as damages on account of the failure of the 1st defendant to pay the municipal tax, and also Rs. 10/- as value of an 'ayinee' tree cut and removed by the 1st defendant. Future interest at 6 per cent is allowed on the amounts decreed and on future rent. The plainitiff will also get his costs in both the lower Courts and in this Court from the 1st defendant with 6 per cent. interest. The defendants will suffer their costs in all the Courts.

(14) The second appepal is allowed in the manner mentioned above.

Appeal allowed.

V.R.B.

A. I. R. 1952 Travancore-Cochin 260

GOVINDA PILLAI, J.

S. Sankarasubramony, Petitioner v. State & another, Counter-Petitioners.

O. P. No. 62 of 1950, D/- 28-2-1952.

Constitution of India, Art. 19(1)(g) — Scheme of distribution of yarn through licensed private yarn dealers and co-operative societies — Change in scheme envisaging distribution only through co-operative societies — No infringement of fundamental right of private yarn dealers — Travancore Cotton Yarn Dealers Licensing Order (1124), Cl. 6.

Till 1-10-1950, the distribution of yarn to the weavers had been effected both through the licensed Co-operative Societies. Since 1-10-1950 the policy of distribution entirely through the Co-operative Societies was adopted as a step towards the development of the handloom industry so that the new scheme would provide better opportunities for marketing finished products and the needed finance for indigent weavers. Due notice of this change in the policy was given by the Textile Commissioner to the former private yarn dealers, who were informed that with effect from 1-10-1950 no allotment of yarn would be given to them. The petitioner, who was a private yarn dealer, contended that the order discontinuing allotment was illegal and beyond the powers of the Government of the State of Travancore-Cochin and their Textile Commissioner for it offended Art. 19 (1) (g) of the Constitution of India:

Held that under Clause 6 of the Travancore Cotton Yarn Dealers Licensing Order, 1124, the Textile Commissioner was given absolute discretion to grant or refuse license to any applicant without assigning any reason. Such powers were necessary for if all persons apply for licenses to distribute yarn it would be impossible to oblige every one and to carry on the spirit with which the Control Order was made. Reasonable restrictions will have therefore be made in such matters. The petitioner got the freedom to deal in yarn which was a legally controlled commodity only by virtue of a license obtained from the officer appointed for the purpose. It was not a fundamental right but a right obtained by leave or permission from the Textile Commissioner who was only acting under the Control Order. He cannot therefore call in question a scheme of distribution adopted by the officer with the approval of the State Government. AIR 1950 SC 163: AIR 1951 SC 118 and AIR 1951 Cal 90, Disting. (Paras 4, 6)

N. K. Narayana Pillai, for Petitioner; Government Pleader, for the State.

Cases referred to:

('50) AIR 1950 SC 163: (1950 SCR 566) (Pr 7)
('50) AIR 1950 SC 222: (1950 SCR 621) (Pr 9)
('51) AIR 1951 SC 118: (ILR (1951) Hyd 221) (Pr 8)
('51) AIR 1951 Cal 90 (Pr 8)

ORDER: The petitioner is a retail dealer in yarn receiving & distributing yarn under a license issued by the Textile Commissioner by virtue of the powers conferred on him under the Travancore Cotton Yarn Dealers Licensing Order, 1124. The license was being renewed from time to time. He had on 14-9-1125 paid the necessary amount for renewing the license for 1126. But the license had not been returned renewed by the Textile Commissioner. The practice as regards the distribution of the yarn was that all the said commodities produced in the mills in India were taken under the control of the Textile Commissioner of India, who used to give release orders to the Mills to sell the yarn to the nominees of the States and Pro-

vinces. The persons thus nominated by the Travancore-Cochin State would buy yarn and import it into the State. The importers were allowed to sell the yarn in accordance with the Cotton Textile Control Order of 1125. The importers have to sell the yarn to those who hold license under the Travancore Cotton Yarn Dealers Licensing Order 1124, according to the allotment made by the Textile Commissioner. While matters were continuing in this way, the Textile Commissioner served him with a notice dated 9-9-50 in the following terms:

"The Government have decided that the distribution of the yarn to weavers from 1-10-1950 onwards shall be made entirely through licensed Co-operative Societies nominated for the purpose. All private dealers of yarn are therefore hereby informed that with effect from 1-10-1950 no allotment of yarn will be given to them."

(2) This order was illegal and beyond the powers of the Government of the State of Travancore-Cochin and their Textile Commissioner, for it offends Art. 19 (1) (g) of the Constitution of India. The State could not also refuse yarn to all licensees as a class. Neither the petitioner nor any of the other licensees have been found to have contravened any of the rights or acted in any way that would defeat the object of the control orders. The order does not purport to be made under any law. It is arbitrary discriminating and unreasonable. So the petitioner prayed that the Court may be pleased to issue any suitable writ restraining the counter-petitioners from enforcing, observing, & maintaining or requiring the enforcement, observation and maintenance by the concerned authorities in the State of the notification referred to and to pass such other orders to protect the rights of the petitioner. The notice of 9-9-1950 sent by the Textile Commissioner and served on the petitioner has been filed along with the petition.

(3) The Textile Inspector, Trivandrum, on behalf of the counter-petitioners(The State and the Textile Commissioner) has filed a counter affidavit. It was stated that till 1-10-1950, the distribution of yarn to the weavers had been effected both through the licensed private yarn dealers and through the licensed Co-operative Societies. The policy of distribution entirely through the Co-operative Societies was adopted as a step towards the development of the handloom industry, so that the new scheme would provide better opportunities for marketing finished produce and the needed finance for indigent weavers. Due notice of this change in the policy was given to the former private yarn dealers. The steps taken were perfectly valid and under clause 6 of the Travancore Cotton Yarn Dealers Licensing Order of 1124 the Textile Commissioner had absolute discretion to grant or refuse license to any applicant without assigning any reason. There was therefore no illegality or the breach of the provisions of the Constitution in issuing the notice The petitioner had no right to secure a license year after year. The Government and the Textile Commissioner have got the right to impose reasonable restrictions on the trade in public interest. They have only exercised this right with due regard to the course of trade and attendant circumstances. The application for the writ was therefore opposed on behalf of the counter-petitioner.

(4) The fundamental right which the petitioner claims now is the one provided for in Art. 19 (1) (g), i.e., the right to practise any profession and to carry on any occupation, trade or business. This is subject to the qualification in sub-clause (6) allowing the State to impose or to prevent from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred. The petitioner stated that he was carrying on his business in distributing yarn under a licence issued by the Textile Commissioner and that it was a family concern. So long as the yarn was a commodity available in the open market, it would have been an infringement of his right if he were restrained from carrying on the trade. But due to shortage in the production of the yarn, the Government, in the interests of the general public, had brought its production and distribution under control by passing the necessary directions or orders in the matter. The petitioner himself had admitted in the petition that all the yarn produced in the Mills in India are under the control of the Textile Commissioner of India, that the same was released only to persons nominated by the States, and that those persons sell the yarn to those nominated by the Textile Commissioners of the several States. These nominees take license from the Textile Commissioner and sell the yarn at the price fixed to recognised consumers. The petitioner has no case that the Yarn Control Orders passed by this State are 'ultra vires'. He does not anywhere in his petition question the validity or the binding nature of any of the provisions of the Travancore Cotton Yarn Dealers Licensing Order, 1124. On the other hand he accepted the validity of that Order and attempts to stand within it to agitate the enforcement of his alleged fundamental right. Under clause 6 of this Order, the Textile Commissioner was given absolute discretion to grant or refuse license to any applicant without assigning any reason. It is always expected that the Textile Commissioner would exercise this power with discretion and not arbitrarily. Such powers were also necessary for if all persons apply for licenses to distribute yarn it would be impossible to oblige every one and to carry on the spirit with which the Control Order was made. Reasonable restrictions will have, therefore, be made in such matters. The question, therefore, now is whether the system of distribution through co-operative societies envisaged in the order complained against is open to objection and can be made the subject-matter of an enquiry under the powers vested in the High Court.

(5) The Government were of the view that the policy of distribution of yarn through co-operative societies would be a first step towards an over all development of the handloom industry for it was the 'bona fide' belief of the authorities that this would provide better opportunities for marketing finished products and provide the needed finance for indigent weavers. The object is a laudable one. It will also improve the condition of the weavers who were to use the yarn for making cloth.

(6) The petitioner got the freedom to deal in yarn which was a legally controlled commodity only by virtue of a license obtained from the officer appointed for the purpose. It was not a fundamental right but a right obtained

by leave or permission from the Textile Commissioner who was only acting under the Control Order. He cannot therefore call in question a scheme of distribution adopted by the officer with the approval of the State Government.

(7) Reference in this connection was made to the decision in 'RASHID AHAMED v. MUNICIPAL BOARD KAIRANA', AIR 1950 S C 163 for the position that the action of the Textile Commissioner in changing the scheme of distribution was 'ultra vires'. In that case, a Municipal Corporation passed bye-laws prohibiting persons from carrying on wholesale vegetable trade within the Municipal area except with the permission of the Municipal Board. But there was no provision in the bye-law enabling the Board to issue a license to carry on the trade. There was also a provision granting a monopoly to the highest bidder to carry on the said trade. When the petitioner before the Supreme Court applied for a license to carry on the trade it was refused on the ground that the bye-laws did not provide for the same. On a consideration of the implications in the bye-laws, their Lordships of the Supreme Court held that the prohibition from establishing a market for wholesale transactions in vegetables except with the permission of the Board, in the absence of any provision for issuing license, became absolute, further restrictions in another bye-law sanctioning monopoly were more than reasonable restrictions as are contemplated by Art. 19 (6) and that therefore the bye-laws would be void under Art. 13 (1) of the Constitution. Vegetable was not a controlled commodity. There was no provision for license to sell the vegetables. That is not the case here and so the principles enunciated in that ruling have no application to the facts here.

(8) Another case cited was 'CHINTAMAN RAO v. STATE OF MADHYA PRADESH', AIR 1951 S C 118. The State of Madhya Pradesh passed a law imposing total prohibition of carrying on the business of the manufacture of bidies during the agricultural season. It was held that this law arbitrarily interfered with private business, and that it cannot be said to be reasonable restriction on fundamental rights guaranteed. The said law was therefore held to be wholly void. This too cannot apply to the facts of this case. The third case cited on behalf of the petitioner was the one decided by Bose J., in 'ANUMATHI SADHUKHAN v. M. K. CHATTERJEE', AIR 1951 Cal 90. There the owner of three rice mills had been given license to husk boiled paddy under the Rice Mills Control Order. He was served with an order that he was to husk only half of his previous permitted quantities up to a certain date, and then not to husk at all without obtaining further orders. This order resulted in the cancellation or refusal of a license already issued, and refusal to issue a new license without assigning any reasons. It was held that this overstepped the limits of reasonableness and that the said order was invalid in the face of the written Constitution of India. In that case the license already issued had been suspended without notice and without assigning reasons, and so the order can be held to be 'ultra vires'. His Lordship had then expressed himself in too generous terms regarding the rights of the mill owner and it is not necessary to go into that aspect now. That case also is not of much help here.

(9) As mentioned already, the Government were envisaging a scheme for the more efficient working of the distribution of yarn. It has been held in 'PROVINCE OF BOMBAY v. KHUSHALDAS S. ADVANI', AIR 1950 S C 222, that when the executive authority has to form an opinion about an objective matter as a preliminary step to the exercise of a certain power conferred on it, the determination of the objective fact and the exercise of the power based thereon are alike matters of an administrative character, and are not amenable to the writ of certiorari.

(10) For the above reasons, I hold that the petitioner is not entitled to any relief. His petition is, therefore, dismissed with costs including Advocate's Fee of Rs. 50/- (Fifty).

G.M.J. Petition dismissed.

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KOSHI AND GOVINDA PILLAI JJ.

Jallaludin Kunju, Petitioner v. State.

Criminal R. P. No. 383 of 1950, D/- 21-3-1951.

(a) Criminal P. C. (1898), S. 117 (3) — Travancore Criminal P. C., S. 113 (3) — Interim Security — Order for, when to be passed — Inquiry under S. 117 (1), when commences.

An order for interim security under S. 117 (3), Criminal P. C. (corresponding to S. 113 (3), Travancore Criminal P. C.) cannot be passed by a Magistrate unless and until the enquiry referred to in S. 117 (1) is commenced. An enquiry under S. 117 (1) can be said to commence when the persons sought to be proceeded against are brought or appear before the Court to answer the charge against them. The mere fact that due to the exigencies of the work of the Court the case has to be adjourned from time to time would not mean that the enquiry has not become yet one pending before the Court. 1950 Trav CLR 368, Foll.; Criminal Proceedings No. 448 of 1122 (Trav-C) and AIR 1943 Sind 123, Not foll.; AIR 1931 Bom 411, Ref. (Para 3)

Hence, an order for interim security cannot be said to be premature when it is passed after hearing the persons proceeded against who appear before the Court in pursuance of the preliminary order and file documents in support of the objection against furnishing interim security. (Para 4)

Anno: Cr. P. C., S. 117 N. 6.

(b) Criminal P. C. (1898), S. 117 (3) — Interim security — Form of order.

An order for interim security under S. 117 (3), Criminal P. C. merely stating that "for reasons stated in the police report the counter petitioners shall execute bonds etc." is unsatisfactory and is hardly likely to inspire confidence in the parties or the public. The order must clearly show that the emergent action under S. 117 (3) was called for and that the requirements of the section are fulfilled. (Para 5)

Anno: Criminal P. C., S. 117 N. 6.

T. S. Krishna Murthi Iyer, for Petitioner; Public Prosecutor, for the State.

Cases referred to:
('31) AIR 1931 Bom 411: (32 Cri LJ 1161) (Pr 3)
('43) AIR 1943 Sind 123: (44 Cri LJ 586) (Pr 3)
Cri. Proceedings No. 448 of 1122, D/-26-6-1122 (Trav-C) (Pr 1)
('51) 6 Dom LR (Trav-C) 18: (1950 TCLR 368) (Pr 3)

KOSHI J.: The first counter petitioner in M.C. 20/1950 on the file of the Division First Class Magistrate, Alleppey has preferred this revision against an order passed by the learned Magistrate directing the counter petitioners thereto to execute interim bonds for keeping the peace. Before the present petitioner filed this petition the 5th counter petitioner in the case had filed a similar application in Crl. Revision petition No. 238/1950 and that was dismissed by my learned brother Mr. Justice Govinda Pillai sitting alone. Afterwards when this petition came up before me it was argued that the order under revision was open to exception in more ways than one. An unreported Division Bench ruling of the Travancore High Court in 'Cri Proceedings No. 448 of 1122 D/-26-6-1122' as also a line of decisions of the Chief Court of Sind were cited in support of the revision. I then thought it proper to refer the petition to a Division Bench. That is how this revision happened to come up before a Division Bench.

(2) The grounds of attack directed against the order are two. They are (1) that the order was made prematurely or without jurisdiction in that it was passed before the order under S. 108 was read or explained to the persons sought to be proceeded against and (2) that in form or substance the order does not satisfy the requirements of the relevant sub-section of S. 113 namely sub-section (3).

(3) The argument on the first ground was that the Court that has seized of the case could not pass an order under sub-section (3) unless and until the enquiry referred to in sub-s. (1) is commenced and according to the learned counsel for the petitioner that enquiry does not commence before the preliminary order under S. 108 is read and explained to the persons proceeded against. This contention no doubt finds support in the unreported decision of the Travancore High Court referred to above and in the Sind cases cited at the Bar 'SAKINA KESSAR v. EMPEROR', AIR (30) 1943 Sind 123 at pp. 163 and 175. The question is when the enquiry contemplated under S. 113 (1) can be said to commence. The argument raised by the learned Public Prosecutor and the learned counsel for the petitioner in the Court below is that the enquiry should be considered to commence at least when the persons sought to be proceeded against are brought or appear before the Court to answer the charge against them. According to them when the counter petitioners to a proceeding under Chap. VIII are so before the Court the stage is set for the enquiry and the fact that due to the exigencies of the work of the Court the case has to be adjourned from time to time would not mean the enquiry has not become yet one pending before the Court. This appears to me to be a common sense interpretation of the provisions in S. 113 (1) and (3). A recent Division Bench ruling of this Court passed by the learned Chief Justice and Mr. Justice Sankaran 'ABRAHAM UPADESI v. MATHAI', 1951-6 Dom L R (Tra Coch.) 18 took the same view of this question. Apart from the fact that the construction sought to be put upon the two sub-sections by the petitioner's learned counsel would lead to several practical inconveniences and difficulties and hamper the proper working of the preventive sections of the Code. I am far from satisfied that the construction sought to be given on behalf of he State would offend any provision of the Code. Words similar to those occurring in S. 113 (1) occur in S. 249 (1) and interpreting the corresponding provision in the Indian Criminal Procedure Code (S. 252 (1) in 'PANDURANG v. EMPEROR', AIR (18) 1931 Bom 411 at p. 412 two learned Judges of the Bombay High Court said as follows:

> "As to whether the enquiry or trial had commenced on 31st July or not we are clearly of opinion that under the definition of "inquiry" under S. 4 (K), Criminal Procedure Code, combined with the provisions of S. 252 Ch. 21 of the same Code, the inquiry of the case was not deferred till such time as the Magistrate would begin to record evidence but commenced not indeed with the lodging of complaint or even with the issue of process but with their appearance on such processes before the Magistrate to answer the charges."

This accords with the view I take here and that taken in '(1951) 6 Dom LR (Trav-C) 18'.

(4) In this case the preliminary order was passed on 22-4-1950 and out of the seven counter petitioners in the case six of them appeared before the Court and furnished bail on 24-4-1950. The seventh counter petitioner entered appearance on 28-6-1950 and he was also allowed bail. Meanwhile the petitioner before the lower Court moved that Court by means of a petition supported by an affidavit sworn to by him that action be taken against the counter petitioners under sub-section (3) of S. 113. These papers were forwarded to the Police for enquiry and report. The police submitted their report on 14-5-1950 supporting the motion. The Court passed its order now sought to be revised only on 19-7-1950 and the records show that before that order was passed the first counter petitioner (the petitioner before us) had filed an objection and that afterwards the vakil for the counter petitioners had sought leave to file certain documents to support the objection. Those papers were actually filed and it is with all those materials before him and after hearing both sides that the learned Magistrate passed his order now impugned. Apart from what has been said above as to when an enquiry under S. 113 (1) commences I cannot on the facts of the present case find any substance in the complaint that the order was made prematurely or without jurisdiction.

(5) As for the second ground urged before us the facts set out in the preceding paragraph of this order clearly show that the Magistrate had applied his mind to the question whether any emergent action was called for. No doubt his order could have been better worded and he could have referred to the documents and the arguments advanced at the Bar rather than rely solely on the report of the Police. The form of the order is rather unsatisfactory but I do not think that sufficient grounds are made out for this Court's interference. Magistrates like other judicial officers have not only to see that justice is done but also that the

parties are made to feel that justice is being done to them. An order like the present one before us "that for reasons stated in the police report dated.....the counter-petitioners shall execute bonds etc." is hardly likely to instil or inspire the necessary confidence in the minds of the parties or the public and it is no wonder that it was sought to be challenged in revision.

(6) This observation however is only by the way. For reasons already explained the petition fails and it will stand dismissed.

(7) GOVINDA PILLAI: I agree.

K.S. Petition dismissed.

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SANKARAN J.

Kumaran, Petitioner v. State of Travancore-Cochin and others, Counter-Petitioners.

O. P. No. 68 of 1951, D/- 1-10-1951.

(a) Constitution of India, Arts. 309, 310 and 311 — "Civil post under the State" — Post of Secretary of Co-operative Society.

The post of the Secretary of a Co-operative Society does not in any sense come under the category of a 'civil post under the State' as contemplated by Arts. 309 to 311 of the Constitution. The removal from office of such an employee of the Society is not controlled by the procedure contemplated by Art. 311. (Para 3)

(b) Travancore Co-operative Societies Act (V (5) of 1122), S. 65 — Order passed by Government in exercise of revisional powers — Validity of order.

Where, on complaints received, the Government passed an order holding that the resolutions passed by the Managing Committee of a Co-operative Society were invalid because the Managing Committee itself had not been properly and legally constituted and directing that a meeting of the share-holders of the Society be held to elect the members of the Managing Committee,

Held, that the order was passed by the Government in the exercise of revisional jurisdiction vested in it by S. 65 and was not, therefore, invalid or 'ultra vires'. (Para 6)

(c) Co-operative Societies — Bye-Laws — Power expressly conferred by bye-laws on President of Managing Committee — General Body cannot withdraw and exercise such power.

So long as the bye-laws stand unaltered a power expressly conferred by such bye-laws on the President of the Managing Committee cannot be withdrawn and exercised by the General Body. No doubt the General Body is the ultimate authority competent to decide all matters relating to the affairs of the Society. But this does not mean that the General Body can ignore the provisions in the bye-laws and can act in derogation of such provisions. These bye-laws are binding on the General Body just as they are binding on the Managing Committee and other Officers of the Society. If the General Body of the share-holders disapprove of the actions of the Committee, it will be open to them to pass a vote of censure against the members of the Committee and to refuse to re-elect them to the Committee. But so long as the Committee is there, the General Body cannot override the powers of the Committee and usurp its functions. (1935) 2 KB 113, Rel. on. (Para 7)

T. K. Narayana Pillai, for Petitioner; P. Govinda Menon, for Counter-Petitioner No. 2; T. N. Subramania Iyer, Advocate-General, for the State.

Case referred to:

('1935) 2 KB 113: (104 LJKB 549) (Pr 7)

ORDER: The petitioner is a share-holder of the second respondent Co-operative Society, known as the Thrikkadavoor Coir Co-Operative Society, Ltd., No. 3084, Perinad, Quilon. This is a Society registered under the Travancore Co-operative Societies Act, Act V(5) of 1122. The petitioner claims to have been mainly responsible for organising and bringing the Society into existence. According to him the Managing Committee of the Society by a resolution passed on 14-1-1951 appointed him as the paid Secretary of this Society as contemplated by the bye-laws of the Society. His appointment as Secretary is stated to have been approved by the Coir Special Officer. All the same the resolution passed by the Managing Committee on 14-1-1951 was superseded by another resolution passed by the Committee on 11-4-1951, by which the Committee decided to appoint one Sri N. R. Paramu Pillai as the paid Secretary of the Society.

The petitioner complained to Government about such a course adopted by the Committee. As a result of such complaint, the Coir Special Officer arranged for holding a meeting of the share-holders of the Society on 24-5-1951 for considering the question of appointing a paid Secretary to the Society. The General Body meeting thus held passed a resolution cancelling the resolution passed by the Managing Committee on 11-4-1951 for appointing Sri N. R. Paramu Pillai as the paid Secretary. The President of the Society took the matter before the Government and contended that the resolution passed by the General Body was invalid and inoperative and that the General Body had no power to interfere with matters falling within the powers conferred on the Managing Committee as per the bye-laws of the Society.

After considering the complaint petitions filed by the President and by the present petitioner, the Government passed the order L. Dis. 5556/1951/DD dated 16-6-1951 holding that the resolutions passed by the Managing Committee on 14-1-1951 and on 11-4-1951 were both invalid because the Managing Committee itself had not been properly and legally constituted. It was also directed that a meeting of the share-holders of the Society should be held to elect the members of the Managing Committee. It was further pointed out that under the bye-laws of the Society the appointment of a paid secretary to the Society had to be made by the President of such a legally constituted Managing Committee. The present petition is directed against the said order passed by Government on 16-6-1951. The petitioner has impeached the order as being 'ultra vires' of the powers of

Government under the Co-operative Societies Act and the rules framed thereunder.

It is contended that the order is illegal and that it lacks the requisites of a quasi-judicial order. The order is stated to have been passed in violation of the principles of natural justice in so far as it was passed without hearing the petitioner and others interested in the matter. It is also alleged by the petitioner that by virtue of the order passed by the Coir Special Officer approving the petitioner's appointment as the paid Secretary of the Society, he was holding a civil post under the Government and that the Government order dated 16-6-1951 is void because it was not passed in accordance with the procedure laid down by clause 2 of Article 311 of the Constitution. It is contended that Government have misused their powers and have acted 'mala fide' in passing the order in question. On these allegations the petitioner has invoked the jurisdiction of this Court under Article 226 of the Constitution and has prayed that:

> "any appropriate writ, order or directive be issued directing the counter-petitioners to allow the petitioner to take charge as the Secretary of the Thrikkadavoor Co-operative Society, Ltd., No. 3084, after quashing the Government order L.Dis. 5556/51/DD dated 16-6-1951 and also for restraining the counter-petitioners from doing anything so as to prevent the petitioner from functining as the Secretary of the said Society."

Even though the reliefs prayed for by the petitioner are couched in general terms, it is clear that he wants this Court to issue writs in the nature of 'Certiorari', 'Mandamus' and 'Prohibition' against respondents 1 to 3 who are (1) the State, (2) the Thrikkadavoor Co-operative Society Ltd., No. 3084 and (3) the Coir Special Officer. The petition is opposed by all the respondents. They have questioned even the right of the petitioner to maintain a petition like this. They contend that the impugned order was passed by Government properly and validly and it is not open to attack on any of the grounds urged by the petitioner.

(2) The present petition has been filed on the basis that the petitioner has already been appointed as the paid and full-time Secretary of the 2nd respondent society and that in that capacity he is holding a civil post under the 1st respondent State. The records produced at the hearing of this petition show that both these assumptions are wrong. The bye-laws of the 2nd respondent Society are contained in Ex. D-1. Under clause 19 of Ex. D-1 the management of the Society is vested in a committee the members of which have to be elected at a general meeting of the share-holders. The provision for such election is made in clause 20 (1). Clause 20 (2) provides for the appointment of a paid and full-time Secretary for the Society. It is also stated therein that the Secretary will not be a member of the Managing Committee.

Thus it is clear that the position of the Secretary is only that of a paid employee of the Society. Under clause 23 (a) the power to appoint all such paid employees of the Society is vested in the President. The petitioner has no case that the President has appointed him as the paid Secretary of the Society. On the other hand, resolution No. 13 passed by the Managing Committee on 14-1-1951 and the order issued by the Coir Special Officer approving the recommendation contained in that resolution are relied on by the petitioner in support of his contention that he has become the Secretary of the Society. The said resolution is recorded at page 10 of the Society's Minutes book which has been marked as Ex. D-2. That resolution recorded the opinion of the Committee that the petitioner may be appointed as the Secretary of the Society and that the necessary approval of Government and the Coir Special Officer for such an appointment may be sought for.

Such an approval was deemed necessary in view of the directions contained in the Government order Cl-1721/50/DD dated 28-6-1950 by which certain proposals for the organisation of Coir Co-operative Societies had been sanctioned by Government. In that order it was stated that these Societies were to appoint their Secretaries in consultation with the Coir Special Officer. Exhibit D-3 is copy of that order. The Coir Special Officer to whom the resolution passed by the Managing Committee nominating the petitioner as the Secretary of the Society was communicated, approved such nomination and sent a communication to that effect to the President of the Society on 4-4-1951. Copy of that communication was sent to the petitioner also for information and necessary action. That copy has been produced by the petitioner and it has been marked as Ext P-1. In that communication it was stated by the Coir Special Officer that the Society's resolution to appoint the petitioner as the Secretary of the Society was approved and accordingly the President was directed to appoint the petitioner as the Secretary on a pay of Rs. 80/- per mensem on his furnishing security for Rs. 2000/-.

It is clear from this communnication also that the appointment had to be made by the President of the Society. The petitioner's complaint is that even though he was ready to furnish the required security, the President and the Managing Committee were unwilling to accept such security and to implement the direction to appoint him as the Secretary of the Society. Whether the refusal on the part of the President to make the appointment was justified or not, the fact remains that the petitioner was not appointed as the Secretary of the Society.

(3) At a meeting of the Managing Committee held on 11-4-1951 resolutions Nos. 28 and 29 relating to the appointment of a Secretary to the Society were passed. These resolutions are recorded at pages 16 and 17 of Ext D-2. By resolution No. 28 the Committee recorded its opinion that the petitioner by his dishonourable conduct had proved himself unfit to be appointed as the Secretary and that therefore resolution No. 13 passed at the meeting held on 14-1-1951 nominating him to that place must be deemed to have been cancelled. It was also resolved to intimate the Government and the Coir Special Officer that the Society was not in a position to implement that resolution. By the next resolution (resolution No. 29) it was resolved to appoint Sri N. R. Paramu Pillai as the Secretary of the Society in anticipation of the approval of Government. The President was authorised to take the necessary steps for getting such approval.

The petitioner appears to have filed several petitions to Government complaining about the steps taken by the Managing Committee on the basis of these two resolutions. As a result of such petitions the Coir Special Officer called together a meeting of the share-holders of the Society on 24-5-1951 to consider the question of appointing a paid secretary to the Society. He himself presided over that meeting. The proceedings of that meeting are recorded at pages 22 and 23 of Ext D-2. What was done at that meeting was to ascertain whether the share-holders were in favour of the appointment of the petitioner or of Sri N. R. Paramu Pillai, as the Secretary of the Society. It is seen that the members present at the meeting voted by a large majority in favour of the present petitioner. Accordingly the meeting passed a resolution rejecting the resolutions passed by the Managing Committee on 11-4-1951 cancelling the nomination of the petitioner for the secretaryship and appointing Sri N. R. Paramu Pillai to that place.

The petitioner maintains that by virtue of the resolutions passed by the Managing Committee of the Society on 24-5-1951 he must be deemed to have been appointed as the Secretary of the Society. Here again it has to be pointed out that even if the meeting held on 24-5-1951 is taken to have been a validly held meeting the resolution passed at that meeting has gone only to the extent of cancelling the Managing Committee's resolution to appoint Sri N. R. Paramu Pillai as the Secretary of the Society. But that does not mean that the petitioner has in effect been appointed as the Secretary of the Society. No such order of appointment has been served on him and as such he could not assume charge as the Secretary of the Society. The matter did not pass the stage of nominating an individual for appointment as the Secretary of the Society.

The best that can be said in favour of the petitioner is that the majority of the share-holders present at the meeting held on 24-5-1951 had expressed their view in favour of the petitioner's appointment as Secretary. Even then it could only mean that he could legitimately hope that his aspiration to become the Secretary of the Society was likely to be fulfilled, but it cannot be said that he had acquired any right as if he had actually been appointed as the Secretary of the Society. Since he had not acquired any such rights as the Secretary of the Society, it cannot be said that the impugned order (which has been marked as Ext P-2) has in any way interfered with such rights. By that order the petitioner cannot be said to have been removed or directed to be removed from the secretaryship of the society. In this view of the matter the question whether he was holding a civil post under the State does not arise for consideration.

It may also be pointed out in this connection that the post of the Secretary of a Co-operative Society like the second respondent, does not in any sense come under the category of a 'civil post under the State' as contemplated by Arts. 309 to 311 of the Constitution. The Secretary of the Society has nothing to do with the affairs of the State and is not appointed by the State or by any authority prescribed in that behalf. The remuneration for his services is also not paid out of the State Funds. The Secretary of the Society is essentially an employee of the Society. His appointment to that post is to be made by the authority prescribed by the bye-laws of the Society and he has to be paid by the Society itself. The removal from office of such an employee of the Society is not controlled by the procedure contemplated by Art. 311 of the Constitution. In the present instance the petitioner not having been appointed as the Secretary of the 2nd respondent Society, cannot be said to have been removed from that office and hence there was also no occasion or necessity to call upon him to show cause against such a removal.

(4) It has next to be considered whether Government had no jurisdiction to pass Ext P-2 order and whether the order is void for that reason. The circumstances under which the order was passed by Government have an important bearing on this question. By the communication Ext P-1 dated 4-4-1951 sent to the President of the 2nd respondent Society, the Coir Special Officer had intimated his approval of the Managing Committee's proposal recorded in the resolution passed on 14-4-1951 to appoint the petitioner as the Secretary of the Society. But this approval was subsequently revoked by the Coir Special Officer himself in the Official Memorandum No. C-2-237/51/CCD dated 30-4-1951 issued by him to the Inspector of Co-operative Societies at Quilon. Ext. D-4 is the official memorandum. Copy of it was sent to the president of the 2nd respondent Society also. By this official memorandum the Inspector of Co-operative Societies was directed to arrange for holding a meeting of the share-holders of the Society at 3 p.m. on 19-5-1951

> "to consider the question of appointment of a paid Secretary to the Society in the light of the several complaints received on the subject."

It was also directed that notice of the meeting should be given to all the members of the Society. Intimation was also given that the meeting will be presided over by the Coir Special Officer himself. Notices for the meeting to be held on 19-5-51 were accordingly issued by the President of the Society on 6-5-1951. Ext. D-5 is one such printed notice. In the meanwhile the Coir Special Officer sent another order C-2-237/51/ CCD dated 5-5-1951 to the President of the Society. intimating him that to suit the convenience of the Special Officer the meeting of the share-holders of the Society should be arranged to be held on 24-5-1951 instead of on 19-5-1951. Ext. D-6 is this order. Fresh notices were accordingly issued by the President intimating the share-holders that a General Body meeting will be held at 3 p.m. on 24-5-1951. Ext. D-7 is one such printed notice.

In Ext. D-6 order the Coir Special Officer has directed the President that the members of the Society enlisted after 11-4-1951 need not be invited for the General Body meeting proposed to be held on 24-5-1951. At the meeting held on 24-5-1951 at which the Coir Special Officer presided, he directed that all those who had become members of the Society subsequent to 11-4-1951 should go out of the hall where the meeting was held. Accordingly a large number of members present at the meeting walked out of the meeting and the meeting was conducted with the remaining 82 members. It was at such a meeting that a resolution was passed rejecting the Managing Committee's resolution dated 11-4-1951 to appoint Sri N. R. Paramu

Pillai as the Secretary of the Society. 76 of the share-holders present at the meeting recorded their votes in favour of the present petitioner's appointment as Secretary. These facts are evident from the proceedings recorded at pages 22 and 23 of Ext. D-2.

(5) Prior to the aforesaid meeting the petitioner had sent up a petition to the Chief Minister on 2-5-1951 praying that the Coir Special Officer may be ordered to direct the President of the Society to put him in charge as the Secretary of the Society after accepting the security of Rs. 2000/- as contemplated in the direction contained in Ext. P-1 order of the Coir Special Officer. Ext.D-8 is this petition. It was rejected as per Ext. P-3 order dated 22-5-1951. By this order the petitioner was informed that his petition Ex. D-8 had been rejected and the Coir Special Officer's action in arranging for holding a General Body meeting of the Society on 24-5-1951 for considering the question of appointing a paid Secretary to the Society was ratified by Government. Subsequent to the General Body meeting held on 24-5-1951 the petitioner sent another representation dated 31-5-1951 to the Chief Minister contending that the General Body meeting held on 24-5-1951 was proper and valid and praying that the resolutions passed at that meeting may be implemented by permitting him to take charge as the Secretary of the Society.

In the meanwhile the President of the Society had sent Ex. D-10 petition to the Chief Minister questioning the validity of the General Body meeting held on 24-5-1951 and also of the resolutions passed at that meeting and seeking a revision and cancellation of these resolutions. The Government directed the Registrar of Co-operative Societies to enquire into the allegatoins contained in these two petitions and to submit his report. It was after a due consideration of the petitions in the light of the Registrar's report that Ext. P-2 order was passed by Government. By this order it was held that the present Committee of the Society is not a legally constituted Committee and that therefore the steps taken by the Committee in respect of the appointment of the Secretary were invalid. It was also directed that a General Body Meeting of the Society should be held to elect a proper Managing Committee so that the President of such a legally constituted Committee may appoint a paid Secretary to the Society.

(6) It is argued on behalf of the petitioner that the General Body meeting held on 24-5-1951 was a valid meeting and that the validity of the proceedings of that meeting cannot be questioned by Government. As already pointed out, the General Body meeting was held as per the order of the Coir Special Special Officer. In Ext. D-6 order issued by him he had expressly directed that the members of the Society enlisted after 11-4-1951 need not be invited to that meeting. It is also clear from the proceedings of the meeting that such members were not allowed to participate in that meeting and that they were asked to go out of the meeting. The petitioner himself has admitted in paragraph 2 of the affidavit filed by him on 24-7-1951 in answer to the affidavit filed on behalf of the respondents 1 and 3, that the allegation that more than 50 per cent. of the members who had assembled at the meeting held on 24-5-1951 walked out of the meeting and did not take part in it is correct. This fact by itself is sufficient to show that the General Body meeting held on 24-5-1951 was not a proper and valid meeting.

It was certainly wrong on the part of the Coir Special Officer to refuse the members enlisted after 11-4-1951 to participate in that meeting. There was no valid reason to make any discrimination as between members enlisted prior to 11-4-1951 and those enlisted subsequent to that date. All those who were members of the Society on 24-5-1951 were entitled to take part in the General Body meeting held on that day and only those who were disqualified on account of any of the grounds specified in the bye-laws of the Society could be denied the right to participate in that meeting. It was not on any such grounds that the members enlisted after 11-4-1951 were denied the right to participate in the meeting. Hence it cannot be said that the meeting held on 24-5-51 was a proper and legally constituted meeting of the share-holders of the Society. The Coir Special Officer was responsible for holding such an invalid meeting.

The President of the Society had drawn the attention of Government to the invalidity of the proceedings passed at such a meeting held at the instance of the Coir Special Officer and presided over by himself. Under S. 65 of the Co-operative Societies Act, Government have been given the power to examine the legality and propriety of such proceedings and to annul such proceedings, in the exercise of the revisional jurisdiction vested in Government. Ex. P-2 order was passed by Government in the exercise of such revisional jurisdiction and hence it cannot be said that the order is invalid or 'ultra vires' of the powers of Government.

(7) The position taken up by the petitioner that he is entitled to be appointed as the paid Secretary of the Society on the strength of the resolutions passed by the General Body meeting held on 24-5-1951 is also untenable. In the first place, there was no resolution to appoint him as the paid Secretary of the Society. All that was done at that meeting was to record the views of the majority of the members present at that meeting in favour of the petitioner's nomination to the Secretaryship. But it has to be remembered that the Secretary is not to be so elected by the share-holders. He is only a paid employee of Society and as per the provisions contained in Cl. 23 of the bye-laws of the Society, all such employees of the Society are to be appointed by the President of the Managing Committee.

So long as the bye-laws stand unaltered a power expressly conferred by such bye-laws on the President of the Managing Committee cannot be withdrawn and exercised by the General Body. No doubt the General Body is the ultimate authority competent to decide all matters relating to the affairs of the Society. But this does not mean that the General Body can ignore the provisions in the bye-laws and can act in derogation of such provisions. These bye-laws are binding on the General Body just as they are binding on the Managing Committee and other Officers of the Society. Since these bye-laws are intended to regulate the conduct of the business of the Society, the Managing Committee and the General Body must have

freedom of action within their own respective spheres as circumscribed by the bye-laws and one cannot encroach upon or usurp the functions of the other. Since the Managing Committee is elected by the General Body, the Committee will be answerable to the General Body for all its actions. If the General Body of the share-holders disapprove of the actions of the Committee, it will be open to them to pass a vote of censure against the members of the Committee and to refuse to re-elect them to the Committee. But so long as the Committee is there, the General Body cannot override the powers of the Committee and usurp its functions.

This is the position in respect of every incorporated body whose activities are regulated by the procedure prescribed by its own bye-laws. So far as this matter is concerned the general principles governing a Co-operative Society registered under the Co-operative Societies Act and a Company registered under the Companies Act are the same. The bye-laws of a Co-operative Society correspond to the Articles of Association of a Company and the Managing Committee of a Co-operative Society corresponds to the Board of Directors of a Company. In the case of both the share-holders constitute the General Body. In 'SHAW & SONS (SALFORD) LTD. v. SHAW AND SHAW, (1935) 2 K B 113 at p. 134, the law governing the respective powers of the Directors and share-holders of a Company is explained by Greer L. J., in the following words:

"A company is an entity distinct alike from its share-holders and its Directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the share-holders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the General Body of the share-holders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of the share-holders."

These principles are to govern the working of Co-operative Societies also. Tested in the light of these principles, it is clear that the General Body of the 2nd respondent Co-operative Society is not entitled to interfere in the appointment of the Secretary of the Society in view of the express power conferred on the President of the Managing Committee to make that appointment. The petitioner cannot therefore take his stand on the resolutions passed by the General Body at the meeting held on 24-5-1951 and contend that he has been validly nominated to the secretaryship of the Society and is accordingly entitled to be appointed to that post. Since he has acquired no such rights it cannot also be said that any such rights have been taken away by the Government Order Ex. P-2. That order as it stands does not contain any direction as to who should be appointed as the Secretary of the Society. In that order Govt. have only pointed out that the President of a legally constituted Managing Committee has the power of appointing a paid Secretary to the Society as per the provisions contained in the bye-laws and that this power has to be exercised after the Managing Committee has been properly elected by the General Body meeting convened for that purpose.

(8) It has already been found that Ex. P-2 order was passed by Government in the proper exercise of the revisional jurisdiction conferred on Government by S. 65 of the Co-operative Societies Act. All the grounds urged by the petitioner against the validity and legality of this order have also been found to be unsustainable. It follows therefore that the order is not liable to be quashed. The petition can have no legitimate grievance about this order which has not in any way taken away or interfered with any of his rights. His grievance is only imaginary and it is based on the baseless assumption that he had already acquired a right to be appointed as the Secretary of the 2nd respondent Society. The Court cannot grant him any relief to protect a right which is non-existent. He cannot impose himself on the Society against the will of the authority competent to entertain him as an employee of the Society.

In view of the reasons already stated, this Court cannot and will not issue a writ against the respondents directing them to permit the petitioner to take charge as the Secretary of the 2nd respondent Co-operative Society and to continue to function in that capacity. This petition is undoubtedly the result of a thorough misconception by the petitioner of the rights and remedies available to him in the matter of the fulfilment of his aspiration to become the Secretary of the 2nd respondent Society. The petition is clearly unsustainable and it is accordingly dismissed with costs—one set to the 2nd respondent Society and another set to respondents 1 and 3. Advocate's fee is fixed at Rs. 100/-.

V.R.B. Petition dismissed.

A. I. R. 1952 Travancore-Cochin 268

KOSHI J.

Lekshmi Amma Kochukutty Amma and another, Petitioners v. Raman Pillai Kumara Pillai and others, Counter-Petitioners.

Criminal R. P. No. 284 of 1950, D/- 28-9-51.

Criminal P. C. (1898), Ss. 107, 119, 245 — Initiation of proceedings under S. 103, Travancore Criminal P. C. on complaints — Complainants and others witnesses not appearing on several hearings — Magistrate should proceed under S. 115, Tr. Cr. P. C. and terminate proceedings and discharge the persons proceeded against — He cannot acquit them under Section 244, Tr. Cr. P. C. — (Travancore Criminal P. C., Ss. 103, 115, 244), AIR 1927 Cal 343, Rel. on. (Para 2)

T. K. Narayana Pillai, for Petitioners; T. S. Krishnamoorthy Iyer, for Counter-Petitioners.

Case referred to:

('27) AIR 1927 Cal 343: (28 Cri LJ 479) (Pr 2)

ORDER: The revision petition is by the complainants who moved the authorities for initiating proceedings under S. 103 of the Travancore Criminal Procedure Code against as many as twelve persons. A case was registered against the counter-petitioners as M. C. 13 of

1950 on the file of the Taluk First Class Magistrate, Sherthali, and the present revision is against an order terminating the proceeding. Technically the Magistrate's order, the operative portion of which is quoted below, is not correct. The learned Magistrate said:

"This is a summons case and as such I order the counter-petitioners being acquitted under S. 244, Criminal P. C. and proceedings against them are discharged."

The ground on which the above order happened to be passed is that the complainants or the other witnesses for the State were not appearing in Court for the several hearings to which the case stood posted. Section 115 of the Travancore Criminal Procedure Code is the section to which the learned Magistrate ought to have resorted to under the circumstances and not S. 244. Except for pointing out this error I do not think any interference is called for in the case.

(2) The decision in 'ASRAFALI SAIGAL v. NASU SARKAR', AIR 1927 Cal 343, is sufficient authority for the view that in circumstances similar to those narrated in the order the Court can under S. 115, (S. 119 of the Indian Code), terminate the proceeding and discharge the persons proceeded against. The State to whom notice was issued of this revision is of the view that there is no scope for any apprehension that a breach of peace is imminent on account of the conduct of the counter-petitioners. That would seem to have been the attitude the State took in the Court below as well. The revision is hence dismissed but the disposal of the case by the Court below will be taken to be one under S. 115, Travancore Criminal P. C. The mention of S. 244, evidently due to carelessness or ignorance, has not caused any failure of justice.

(3) Order accordingly.

R.G.D. Order accordingly

A. I. R. 1952 Travancore-Cochin 269

KOSHI AND GOVINDA PILLAI JJ.

Govindan, Appellant v. Damodaran and others, Respondents.

A. S. No. 414 of 1950, D/- 19-6-1951.

(a) Limitation Act (1908), Art. 182, Cls. (2) and (3) — Decree one but in several distinct parts against judgment-debtors — Appeal by some of the judgment-debtors only in respect of their distinct parts of the decree — Execution against non-appealing judgment-debtors in respect of their part of decree — Starting point of limitation — (Civil P. C. (1908), S. 48) — (Travancore Limitation Act, Art. 166) — (Travancore Civil P. C., S. 41).

There is no warrant for reading into the words "where there has been an appeal" in Cl. (2) of Col. 3 of Art. 182 any qualification either as to the character of the appeal or as to the parties to it. The words mean just what they say. Where the decree was one but severally and distinctly against the judgment-debtors and the appeal was preferred only by some in respect of their part of the decree, still the time for execution of those parts of the decree which was not the subject-matter of the appeal would run from the date of the appellate order, even though the judgment-debtors affected by the execution were not parties to the appeal nor was the appeal one in which the whole decree was imperilled. AIR 1932 PC 165, Foll.; AIR 1941 Nag 19, Relied on. (Paras 3, 10)

Under S. 48, Civil P. C. the date of the appellate decree is the starting point. To hold otherwise would be to hold that the starting point for limitation under S. 48 will not be the same as under Cl. 2 or Cl. 3 of Art. 182, Limitation Act. A worse anomalous position cannot perhaps be thought of. (Para 16)

Anno: Limitation Act, Art. 182 N. 35 and 36; Civil P. C., S. 48 N. 10.

(b) Civil P. C. (1908), S. 48 — No previous application — Section does not apply — (Travancore Civil P. C., S. 41).

The application of S. 48 is not attracted to a case where there has been no previous application. Chitaley's Civil P. C., 5th Edn., p. 620, cited. (Para 3)

Anno: C. P. C., S. 48 N. 2.

T. K. Narayana Pillai, for Appellant.

Cases referred to:

REFERENCES: Courtwar / Chronological / Paras

('32) AIR 1932 PC 165: (60 Cal 1) (PC) 3, 4, 7, 8, 16
('90) 13 All 1: (1890 All WN 207 FB) 6, 7, 16
('04) 1904-1 All LJ 409 16
('23) AIR 1923 Bom 400: (73 Ind Csa 310) 16
('98) 25 Cal 594: (2 Cal WN 556 FB) 6, 7, 9
('14) AIR 1914 Cal 583: (22 Ind Cas 685) 6
('15) 19 Cal WN 287: (AIR 1914 Cal 583) 7
('18) 22 Cal WN 192: (AIR 1918 Cal 929) 12
('20) 47 Cal 813: (AIR 1920 Cal 840 (2)) 6
('26) AIR 1926 Cal 664: (95 Ind Cas 257) 16
('27) AIR 1927 Cal 89: (53 Cal 901) 6, 7
('35) AIR 1935 Lah 949: (162 Ind Cas 208) 12
('03) 26 Mad 91 (FB) 15
('41) AIR 1941 Nag 19: ILR (1941) Nag 199) 7
('43) 1943 Trav LR 1004 12

KOSHI, J.: This appeal arises out of proceedings in execution of the decree in O. S. No. 54 of 1102, on the file of the Quilon District Court. The appellant before this Court is the assignee-decree-holder. The question for decision in the appeal is one of limitation. The trial Court's decree which was passed on 5-7-1107 set aside as many as six different alienations made at different times by two successive karnavans of a marumakkathayam tarwad and it allowed the plaintiffs, three junior members, to recover possession of the concerned properties on behalf of the tarwad. Each alienee was in separate possession of the item or items alienated to him and the decree passed was one severally as against all the defendants individually and in no sense against them jointly, and it specifically stated the properties of which each of them was severally and separately in possession as also the mesne profits each of them was to pay to the plaintiff. Defendant 10, whose was the main opposition to the execution application giving rise to this appeal, was the purchaser of Items 3 to 5 in the plaint schedule and the decree allowed the plaintiffs to recover a one-half share of those items together with the mesne profits due in respect of that share. The only person to prefer an appeal against the decree passed in the suit was defendant 5, an alienee of some other items. His appeal which was filed as A. S. No. 222 of 1108 before the Travancore High Court was confined to the properties he was interested in and the plaintiffs alone were made respondents to it. The appeal was successful and

the High Court passed its decision on 26-10-1116 upholding the validity of the alienation in favour of Defendant 5. The present appellant had in the meanwhile obtained an assignment of the plaintiff's rights in the decree and on 10-1-1122, well within six years of the High Court's decision in A. S. 222 of 1108, but more than 14 years after the trial Court's decree, filed execution petition out of which this appeal has arisen. This was the first and so far, the only application filed in the case to execute the decree passed in favour of the plaintiffs. Defendant 10 opposed it as time-barred and the learned District Judge upheld the objection. Hence this appeal.

(2) The period of limitation within which an execution application has to be filed is prescribed by Article 166 of Schedule 1 of the Travancore Limitation Act (corresponding to Article 182, Indian Limitation Act) and Section 41 of the Code of Civil Procedure, Travancore (Section 48 of the Indian Code) fixes an outside period after which execution of a decree, though not barred by the Limitation Act, may not be granted. Article 166 provides a period of six years or three years according as the decree is registered or not from the different starting points mentioned in Clauses 1 to 7 of Column 3 thereof. The present decree comes under the category of registered decrees and hence an application filed within six years of the starting point will be well within time. A reference to the various clauses in column 3 would show that Cls. 3 to 7 have no application or relevance to the present case. So far we are on agreed grounds and the controversy in the case is whether Cl. (1) or Cl. (2) applies. The words used in Cl. (1), so far material, are 'date of the decree.....' and the relevant words in Cl. (2) are '(whether there has been an appeal) the date of the final decree.....'. The six years had expired or had not expired according as computation fell to be made, as the appellant urged, from the date of the decree of the High Court, or, as the respondent urged, from the date of the original decree.

(3) It admits of no doubt that the decree under execution is one passed severally against the various alienees. It was not contended to be otherwise either here or in the Court below. It is equally clear that the scope of the appeal in A. S. No. 222 of 1108 was limited to the validity of the alienation made in favour of defendant 5. Defendant 10 or any other defendant sought to be affected by the present execution was not a party to the appeal either as appellant or respondent. On these grounds it was contended on behalf of the 10th defendant-respondent (hereinafter referred to as the respondent) that the applicatory clause is Cl. 1 and not Cl. 2. The argument was Cl. 2 applies only to a case where the whole decree is imperilled in the appeal or where the party sought to be affected by the execution was also a party to the appeal. A further refinement to the argument was, though not in form in substance the decree passed by the trial Court consisted of as many as six independent decrees and that the appeal in A. S. 222 of 1108 was only from one of such decrees viz., that passed against defendant 5. Though the words in Cl. 2 appear to be sufficiently clear, the question as to its interpretation is one which has given rise to a considerable conflict of authorities. One school of thought is that the words should be understood or interpreted in their plain grammatical meaning without any exceptions or qualifications added to them. The other school is the scope of the appeal or how far it could have affected the rights of the parties to the suit and its constitution should be taken into account in deciding whether Cl. 2 applies to a given case or Cl. 1 should govern it. Among the older High Courts in India controversy started soon after the Article itself was enacted. For our present purpose it is unnecessary to go into the sharp conflict of judicial opinion on the point as now the conflict has been set at rest by a pronouncement of the Privy Council in 'NAGENDRA NATH v. SURESH CHANDRA', AIR 1932 P C 165 to the effect that there is no warrant for reading into the words "where there has been an appeal" any qualification either as to the character of the appeal or as to the parties to it. Their Lordships said the words mean just what they say. Even before the Judicial Committee gave the above decision the preponderance of judicial opinion among the Indian High Courts was in favour of giving these words their plain grammatical meaning.

(4) The case in 'NAGENDRA NATH v. SURESH CHANDRA', AIR 1932 P C 165 arose under the following circumstances: A, receiver appointed in a suit for partition among the members of a Hindu family in Bengal raised a loan from some of the co-sharers themselves and executed a mortgage with respect to it. After the allotment of the shares to the several co-sharers was effected and the receiver discharged, two co-sharers, Madan Mohan and his son instituted a suit to enforce the mortgage and in it Madan Mohan claimed that the shares of two other co-sharers (appellants before the Board) has been assigned to him. His claim was upheld by the Subordinate Judge who tried the suit and the preliminary mortgage decree passed was on that basis. An appeal was preferred against the preliminary decree and the parties effected a compromise whereby the alleged assignment of the shares of the two co-sharers was disregarded and the preliminary decree the High Court passed in the appeal in supersession of the one passed by the Subordinate Judge recognised the appellants before the Board as mortgagee-creditors. In that preliminary decree the co-sharers were ranged into two groups, one of decree-holders consisting of six sets of co-sharers and the other of judgment-debtors consisting of eight sets of co-sharers. The decree would seem also to have defined the rights and liabilities of each of these sets as to the amounts each set was entitled to receive or liable to pay.

(5) Madan Mohan again tried to re-assert his former claim more than once and finally repeated it in the proceeding to pass the final decree. While passing the final decree the Subordinate Judge again negatived his claim and he preferred what he called an appeal to the High Court against the decision upholding the rights of the appellants before the Board. There was no appeal against the final decree as such or any portion thereof. As such the appeal was considered irregular nor was proper court-fee paid on it. The appeal only raised the question of the correctness of the decision regarding the assignment and the only respondents to the appeal were the other decree-holders and not the judgment-debtors. The appeal was ultimately dismissed both on the ground of irregularity and upon the merits and the dismissal was embodied in a decree.

(6) The execution petition giving rise to the appeal before the Board was filed by the appellants before the Board within three years of the appellate decision but beyond three years of the final decree passed by the Subordinate Judge. The question arose whether the execution was within time. The Subordinate Judge decided in favour of the decree-holders but that decision was reversed by the High Court. On appeal to the Judicial Committee their Lordships restored the decision of the Subordinate Judge. Of the three grounds upon

which the High Court's decision was sought to be supported grounds Nos. 2 and 3 are relevant here and those grounds as set out in their Lordships' judgment read:

"(2) that an appeal in order to save limitation under Cl. 2 of the Art. (182) must be one to which the persons affected, i.e., in the present case the judgment-debtors were parties; and

(3) that it must also be one in which the whole decree was imperilled."

In giving their decision on the above contentions their Lordships said as follows:

"The second and third contentions have been the subject of much difference of opinion in India. In 'MASHIATUNNISSA v. RANI', 13 All 1, three of the Judges in the Full Court took one view, and two the other. In 'GOPAL CHUNDER v. GOSAIN DAS', 25 Cal 594 a Calcutta Full Bench followed the Allahabad minority, though drawing a distinction between cases of joint and of several decrees. Subsequently further differences of opinion manifested themselves even in the Calcutta Court; See 'CHRISTIANA BENSHOWN v. BENARASI PROSAD', AIR 1914 Cal 583 (upon which the judgment of the High Court in the present case was based); and 'SATISH CHANDRA v. GIRISH CHANDRA', 47 Cal 813 and 'ABDUL ALIM v. ABDUL HAFEZ', AIR 1927 Cal 89 in both of which cases the opposite view seems to have prevailed. In the Courts of Madras, Bombay and Patna the view which was taken by the minority in the Allahabad case, and which favours the present appellants, has ultimately prevailed.

Their Lordships think that nothing would be gained by discussing these varying authorities in detail. They think that the question must be decided upon the plain words of the article: 'where there has been an appeal', time is to run from the date of the decree of the appellate Court. There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide. It is at least an intelligible rule that so long as there is any question sub judice between any of the parties those affected shall not be compelled to pursue the so often thorny path of execution which, if the final result is against them, may lead to no advantage. Nor in such a case as this is the judgment-debtor prejudiced. He may indeed obtain the boon of delay, which is so dear to debtors, and if he is virtuously inclined there is nothing to prevent his paying what he owes into Court. But whether there be or be not a theoretical justification for the provision in question, their Lordships think that the words of the article are plain, and that there having been in the present case an appeal from the mortgage decree of 24th June 1920, time only ran against the appellants from 24-8-1922 the date of the appellate Court's decree. They are therefore in agreement upon this point with the Subordinate Judge, and they think that the order passed by him on 4th August 1924 was right."

We thought it proper to state in detail the facts of the case and to quote their Lordships' words in extenso as an attempt was made before us by the learned Counsel for the respondent to distinguish the case from the present one. The facts as stated on page 166 and summarised above show that though the suit was upon a single mortgage the decree had assigned different portions of the mortgage money to different sets of decree-holders and that it had also made clear what the liability of each set of judgment-debtors was. None of the judgment-debtors was a party to the appeal preferred by Madan Mohan; in fact the appeal was only between the rival claimants for a specific portion of the decree debt. Nor was any portion of the final decree sought to be imperilled in the appeal. Still their Lordships decided the question of limitation in favour of the decree-holders and said that the relevant words in the clause must be interpreted in their plain and true grammatical sense without seeking to add any words or epithets to them or to qualify them in any other manner. The decision most relied upon for the respondent 'MASHIAT-UN-NISSA v. RANI', 13 All 1 was disapproved by their Lordships. It is the minority view of Brodhurst and Mahmood JJ. in that case that found favour with their Lordships and it was not disputed that that minority view was against the respondent.

(7) That the case cannot be distinguished in the manner the respondent's learned Counsel attempted to do will also be clear from a decision of the Nagpur High Court reported in 'PANDURANG KESHO v. KUNWARLAL', AIR 1941 Nag 19. There the suit was for rendition of accounts by two lambardars regarding village profits for a certain year. The suit resulted in a decree against one defendant for a specific amount and against the other for another amount. The period of the liability of each of them was different. One of the defendants appealed against the decree passed against him impleading the plaintiff alone as respondent. The appeal was partly successful and it subsequently arose whether the execution application filed within three years of the appellate decree was within time as against the non-appealing defendant. The present argument that the decree really consisted of two decrees though in form it was only one decree was raised there but the contention was repelled. The arguments raised before us on behalf of the respondent were raised in that case and the decisions cited were also more or less the same. It is therefore interesting to notice how the learned Judge (Niyogi J.) dealt with them. On page 20 of the report the learned Judge after stating the facts said:

"The main argument submitted on behalf of the appellant is that the decree under consideration passed in Civil Suit No. 135/31 consisted of two decrees though in form it was only one decree and that Md. Hanif's appeal was not directed against that part of the decree which had been passed against Pandurang & that consequently the period of limitation for execution of the decree as against Pandurang could not be computed from the date of the Appellate Court's decree but from the date of the first Court's decree. Reliance is placed on 'MASHIATUNNISSA v. RANI', 13 All 1 and 'CHRISTIANA BENSHOWN v. BANWARI PROSAD', 19 Cal WN 287 at p. 289 in support of the argument. In the first mentioned case the majority opinion was certainly in favour of the contention that is put forward here but the minority dissented from it. In '19 Cal WN 287', a Bench of the Calcutta High Court followed the majority view in the Allahabad Full Bench case & enunciated the principle that in dealing with question of limitation in such cases it should be seen whether the original decree was really one decree or an incorporation of several decrees and whether the appeal against it imperilled the whole decree or not. But the majority view in '13 All 1' did

not commend itself to the Judges of the Calcutta High Court in a Full Bench case reported in 'GOPAL CHANDER v. GOSAIN', 25 Cal 594. In 'ABDUL ALIM v. ABDUL HAFEZ', 53 Cal 901, '13 All 1' was again dissented from and '25 Cal 594' was approved. In the High Courts of Madras, Bombay and Patna also the majority opinion in 13 All 1 was not approved. The authority of the Allahabad Full Bench case which was already weakened by the repeated dissents expressed by the other High Courts in India has now been altogether extinguished by the view taken by their Lordships of the Privy Council in 'NAGENDRA NATH v. SURESH', 60 Cal 1: AIR 1932 PC 165. In that case it was specifically argued that an appeal, in order to save limitation under Cl. (2) of Art. 182, must be one to which the persons affected were parties and that it must also be one in which the whole decree was imperilled. Their Lordships after observing that these contentions were the subject of much difference of opinion in India propounded their view as follows."

The learned Judge here quotes the second paragraph extracted above from the Privy Council decision and then concluded the discussion as follows:

"It is clear from the passage quoted above that their Lordships of the Privy Council have expressly disapproved of the majority opinion in '13 All 1' which was followed in '19 Cal WN 287' at p. 289. An attempt is made on behalf of the appellant to show that the interpretation put upon Art. 182 by their Lordships of the Privy Council could not have been intended to apply to the case such as the present where there are really two decrees incorporated into one. It was in this form that the contention was put forth before their Lordships and that form had appealed to the learned Judges who decided the case reported in '19 Cal WN 287, at p. 289, but that was explicitly and unequivocally overruled by their Lordships of the Privy Council. On the construction put upon the Article under consideration by the Privy Council it is clear that whatever the nature of a decree, whether a decree proceeds upon a ground common to the defendants or not, and whether one defendant appeals from such decree in so far as it affects his own interests or whether all the defendants appeal from only a part of a decree, and whether the parties against whom execution is sought were parties to the appeal or not, the period of limitation under Art. 182 commences to run only from the date of the appellate decree. The appellant's contention must therefore fail....."

(8) It is in our opinion unnecessary to add anything further to show that the Privy Council decisions in 'NAGENDRA NATH v. SURESH', AIR 1932 P C 165 must govern this case.

(9) Before leaving this part of the case, it will be instructive to refer to a Full Bench decision of the Madras High Court where the same clause of the Limitation Act came up for consideration. There the appeal related only to a portion of the decree and one of the questions referred to the Full Bench was whether, under Art. 179, Sch. II of the Limitation Act (now Art. 182 of Sch. I), when a portion of the decree has been appealed against, & a portion has not, the period of limitation for an application to execute the portion not appealed against runs from the date of the original decree or the date of the decree on appeal? The Full Bench unanimously held that the period started only from the latter date. What Sir Arnold White, C. J. said on that occasion may with advantage be quoted here:

"As regards the first question which has been submitted to us, I think the words of Cl. 2 in the third column of Art. 179 of the Limitation Act should be read as meaning what they say. We are asked to read into the plain words "where there has been an appeal" some such words as "and all the parties to the suit are parties to the appeal and the subject matter of the appeal includes the whole subject-matter of the suit.' I can see no good reason for doing so. It seems to me that the proper inference to be drawn from the fact that the Legislature has expressly limited the operation of Explanation I to Cl. 4 of the article, is that the Legislature did not intend that the plain words of Cl. 1 should be read as subject to the qualification or modification which, it has been argued, should be imposed upon them.

A rule of law that in any case in which there has been an appeal from a decree, limitation shall begin to run from the date of the decree on appeal, irrespective of whether the decree was appealed from in whole or in part, may not be altogether scientific; but it is simple, certain and intelligible and I think it is the rule which the Legislature intended to lay down. The Calcutta cases on which the learned Judges who decided the case of 'MUTHU v. CHELLAPPA', ILR 12 Mad 479 relied as laying down the sounder principle have not been followed in the recent Full Bench decision of the Calcutta High Court in 'GOPAL CHUNDER MANNA v. GOSAIN DAS', 25 Cal 594."

No doubt the decree does not appear to have been passed severally against the defendants nor does it appear that all the defendants were not parties to the appeal.

(10) To sum up, in the face of the Privy Council decision cited above and the meaning and import put upon it by the Nagpur High Court we cannot persuade ourselves to hold that the execution petition in this case was barred under Art. 166 of Sch. I of the Travancore Limitation Act.

(11) Of the remaining cases relied upon by the learned Counsel for the respondent the decision in 'JACINTO v. FERNANDEZ', AIR 1939 Bom 454 relates to a case where there were two distinct decrees in the same suit passed on two different dates against different sets of properties of which one decree alone was appealed from. Sir John Beaumont C. J. who gave the judgment in the case himself remarked that no question of limitation really arose in the case but only a question of practice in execution. The learned Chief Justice however further said the words "where there has been an appeal" in the last column of the article mean an appeal from the decree sought to be executed, and not an appeal from another decree, though made in the suit.

(12) The three remaining cases cited by the respondent's Counsel viz., in 'DHIRENDRA NATH v. NISCHINTAPORE CO.', 22 Cal WN 192, 'UMRAO SINGH v HAFIZ MUHAMMAD', AIR 1935 Lah 949 and 'PARAMESWARAN PILLAI v. JOSEPH', 1943 Trav LR 1004 deal with the question as to how far a prior execution application would keep a decree alive regard being had to the provisions of Explanation I to Article 182 (Art. 166 Travancore). This being the first execution petition filed in the case Explanation 1 has no relevance at all here. The Explanation relates to the application contemplated by Cl. 5 of column 3 of the article. The learned Judge in the Court below has however referred to the Explanation and relied upon it to base his conclusion that the execution was barred. We were unable to follow the line of reasoning.

A passage in the judgment of Sir Arnold White, C. J. quoted earlier shows that the learned Chief Justice used the limited scope the Legislature gave to the Explanation by making it applicable to one clause alone as a pointer to show that the plain words of Cl. 2 should be read without any qualification.

(13) Yet another matter to be mentioned before concluding is the learned Judge's reference in his order to S. 41 of the Civil P. C. That section as mentioned earlier only fixes an outside period after which execution of a decree, though not barred by the Limitation Act, may not be granted. It does not prescribe the period within which the application for execution is to be made. The application of that section is not attracted to the present case where there has been no previous application. In Travancore, the Civil P. C., Act VIII of 1100 retained in the section the words "and granted" which occurred in the Code of 1882 (S. 230) but deleted in the Code of 1908. The first part of the section reads:

> "Where an application to execute a decree, not being a decree granting an injunction has been made and granted, no subsequent application to execute the same decree shall be granted upon any fresh application presented after the expiration of 12 years from".

The section then proceeds to mention the starting points thereunder. We are unable therefore to appreciate how the learned Judge could have invoked the aid of S. 41 to decide the present case. In Sir D. F. Mulla's commentaries to the Civil P. C. (11th Edition-1941) the following passage occurs in the commentary to section 48:

> "Under S. 230 of the Code of 1882, the twelve years' limitation imposed by that section applied only if one at least of the previous applications was 'granted' by the Court but not otherwise. Under the present section it matters not whether the previous applications have been granted or refused or withdrawn. All that the section now provides is that where an application to execute a decree 'has been made', no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from the date specified in the section."

In the 5th (1950) Edition of Chitaley at page 620 it is seen observed: "This section does not come into play until there has been a prior application for the execution of a decree."

(14) The following extract from Rustomji's Law of Limitation (Fifth Edition 1938) Vol. II page 1665 would seem to be apposite here:

> "Section 48, C. P. C. deals with the maximum limit of time provided for execution and does not prescribe the period within which each application for execution is to be made. An application for execution of a decree will not necessarily be in time because filed within 12 years. It will be out of time unless it is made within 3 years from any of the dates mentioned in the third column of Art. 182, Limitation Act. To an application for execution of a decree Art. 182 has first to be applied, and if it is found not wanting when tested by Art. 182, then S. 48, Civil P. C. will operate as a further test."

The learned Judge therefore approached the question the wrong way round when he proceeded first to decide whether the application is in time according to S. 41. Article 166 is not at all referred to except when referring to Explanation 1.

(15) With reference to S. 48 also question has been raised in decided cases as to what the starting point for limitation thereunder is where an appeal is preferred only with respect to a part of the decree or where one of the defendants severally made liable for a distinct portion of the subject-matter of the suit alone prefers an appeal. The first starting point prescribed by S. 48 is the date of the decree sought to be executed. Though in view of what we have stated in the preceding paragraph the question does not strictly arise in this case we think it worthwhile to advert to it as well. The only reported decision we were able to come across where both S. 48 (then S. 230) and Cl. 2 of Col. 3 of Art. 182 (then Art. 179) had to be applied to a case or the interpretation of both provisions came up for consideration together is the Full Bench decision of the Madras High Court in 'KRISTINAMACHANDAR v. MANGAMMAL', 26 Mad 91, referred to earlier. In that case the second question referred to the Full Bench ran thus:

> "In the case of a decree for the payment of money or the delivery of property, whether under S. 230 (a) of the Code the period of limitation for an application to execute a portion of the decree which has not been appealed against runs from the date of the original decree or the date of the decree on appeal."

The answer given by the Full Bench was the same as that given to question 1 viz., that the date of the appellate decree was the starting point.

(16) On his second question Sir Arnold White, C. J., said:

> "The question of construction which is raised by the second question which has been referred to us seems to me to be more open to doubt. In my opinion, however, when a portion of a decree is appealed from, and a portion is not appealed from, the Appellate Court in adjudicating on the appeal affirms that portion of the decree to which no exception has been taken, and though the decree does not in terms affirm that portion, it must be read and construed as so doing."

This view was concurred in by the other two learned Judges constituting the Full Bench, Benson and Bhashyam Ayyangar, JJ. No doubt as mentioned earlier it might be said that that was not a case of the present type, that is, where a decree has been passed severally against various defendants. Decisions there are which hold that in the present type of cases the first Court's decree furnishes the starting point for the execution of the portion of the decree which has not been appealed against. Those cases are found collected under foot-note (j) on p. 204 of Mulla's Civil P. C. (1941 Edn.), under foot-note (18) on p. 629 of Chitaley (1950 Edn.) Vol. I and under foot-note (24) on p. 1165 in Vol. II of U. N. Mitra's Law of Limitation and Prescription (1950 Edn.). The two last mentioned commentaries say that the cases mentioned under these foot-notes can no longer be considered to be good law after the Privy Council decision in 'NAGENDRA NATH v. SURESH', AIR 1932 P C 165. We venture to observe that that view is correct. To hold otherwise would be to hold that in cases similar to the present the starting point for limitation under S. 48 will not be the same as under Cl. 2 or Cl. 3 of Art. 182, Limitation Act. A worse anomalous position cannot perhaps be thought of. No question of the twelve years' rule of limitation however arose in two of the cases mentioned in the foot-notes viz., 'MASHIATUNNISSA v. RANI', 13 All 1 and 'GANGA KUAR v. KESAR KUAR', 1 All LJ 409, but it arose in the two other cases noted 'KALYANCHAND v. BHOGILAL JOYCHAND', AIR 1923 Bom 400 and 'AMIR ALI v. HARISH CHANDRA', AIR 1926 Cal 664.

(17) We would, in the result, allow this appeal with costs, set aside the decision of the lower Court and send the execution case back to that Court for disposal of the other points raised before it. Costs in that Court should abide the result. Order accordingly.

R.G.D. Order accordingly.

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GOVINDA PILLAI J.

C. Philiph, Petitioner v. Travancore-Cochin State and others, Counter-Petitioners.

O. P. No. 6/1951, D/- 3-3-52.

Municipalities — Trivendrum City Municipal Act (IV (4) of 1116), S. 207 — Validity — Closing of public road — Constitution of India, Art. 19(1)(d).

It cannot be contended that S. 207(1)(c) is 'ultra vires', for at the time this Act was passed, His Highness the Maharaja of Travancore had sovereign powers to lay down restrictions regarding the use of public ways. The provisions in S. 207 are also not 'ultra vires' of the Constitution. The fundamental rights that had been guaranteed by Art. 19(1)(d) of the Constitution was one to move freely throughout the territory of India. That does not mean the use of any particular road for that purpose. The right contemplated there has for its object the removal of all internal barriers in the country & to make India as a whole the abode of the citizens of India. This provision is thus complimentary to Art. 5 which provides a single citizenship under Art. 19(5). The restrictions can be imposed, provided they are reasonable. Any act providing for such reasonable restrictions could not therefore be 'ultra vires' of the Constitution. The use of a public way can be regulated by the State and for that purpose reasonable restrictions can be imposed. Reasonable restrictions may in some cases amount to complete prohibition or stoppage of the use. The Court has only to see whether that was in the interests of the general public.

The Women's College is a public institution opened in the interests of the general public. To accommodate the students there, a college hostel had to be opened and for the efficient and safe use of the hostel the authorities found it necessary to close the pathway between the hostel and the college. That is the discretion exercised by the State and it is not a matter that can be called in question by the petitioner under Art. 226. The petitioner also cannot file a petition on behalf of the general public. He can only agitate his right when it is infringed.

Further when the final orders to close the road had been passed by the Government on 22-12-1949. so that the proceedings had been terminated even long before the Constitution of India came into force, the provisions of the Constitution could not be relied upon to attack an act which was done before it came into force. The provision of the Constitution has no retrospective effect. Even if the sign boards containing the words 'no thoroughfare' had been put up only after 26-1-1950, it was not very material for it was only in furtherence of a decision taken legitimately and within powers before the date of the commencement of the Constitution. AIR 1951 All 257 (FB), Rel. on. (Paras 6, 7, 8, 10)

P. J. Simon, for Petitioner; Government Pleader, for the State; K. Ayyappan Pillai and R. Kesava Pillai, for Counter-Petitioners Nos. 2 and 3 respectively.

REFERENCES: Courtwar/Chronological/ Paras.
('51) AIR 1951 All 257: (ILR (1951) 1 All 269 FB) 8
(1949) 2 All ER 755 9

ORDER.: The petitioner is the owner of S. No. 282, in Chengazhasseri Pakuthy in Trivandrum, and is residing in a building constructed in the said plot. This plot of ground lies to the north of the premises of the Women's College in Trivandrum. There was a road running between the petitioner's compound and the Women's College premises, connecting the public roads on the south and east of the college premises. According to him, this road was in existence for very nearly a hundred years and was carved out of S. Nos. 282, 279, 280,281, 268 and 271 to 276 by their owners for the purpose of the better and more convenient enjoyment of their properties, and affording them the right of way to public roads lying on the south and east. The Government of Travancore, represented by the first counter-petitioner, had acquired the plots comprised in S. Nos. 270 & 276 excluding the portions occupied by the road on the south of the premises of the Women's College. The acquisition was for the University of Travancore, represented by the third counter-petitioner, for locating and conducting a hostel for the students of the Women's College.

On the requisition of the third counter-petitioner the State and City Municipal Corporation, Trivandrum the 2nd counter-petitioner were taking steps to close the road between the plots of land which have been acquired and the premises of the Women's College, and as a first step had put up boards containing the words "No thoroughfare" at either end of the whole road extending from the southern to the eastern end. The portion of the road which was carved out of S. 271 to 276 had not been acquired by Government and could not be acquired as the property in it vested in the public as it was constituted into a street or high way over which the public had the right of passing and repassing. This road in question which was being used freely by the public for passing and repassing and for plying vehicles such as bullock carts and motor cars had now been completely blocked. The property in the land belonged to the respective owners of the neighbouring land and so nobody had a right to close it. Even assuming that the high way vested in the Government or in the Municipal Corporation, either of them was only a trustee for the public who had a unlimited right of use over the high way. They could therefore have only control over this road on behalf of the public as might be necessary to manage the same and keep it in proper condition.

(2) The contention of the counter-petitioners appeared to be that they were acting under the powers conferred by the statute, that is, the city Municipal Act. The petitioner contended that even if there were such provisions, they were repugnant to the Constitution of India and were void. The right

to the public to use the high way or street was a fundamental right which was guaranteed by the Constitution of India, and it was not competent for the Legislature of the State to interfere with such right except for such regulatory requirements as might be necessary in the exercise of the police power of the State for security, safety, convenience or health of the public. There could not be any discrimination by the State or the Municipal Corporation in favour of the third counter-petitioner as against the right of the public over the high way.

Even if the provision in the City Municipal Act was not repugnant to the Constitution of India. steps were not properly taken to close the road. If the corporation had decided to close the high way in question, they had acted in excess of their authority and had violated the trust reposed in them by the public. The corporation did not hear the objection of the public before they reached the decision. The decision was therefore 'ultra vires' of the Municipal Council, and void, and of no effect. It was therefore prayed that action might be taken under Section 18 (2) of the High Court Act and that the proceedings taken by the counter-petitioners for closing the road be quashed, that further steps for closing the road be prohibited, and that such further orders in the form of writs be passed securing the right of the petitioner and the public over the road in question in order to prevent any further infringement of the rights of the petitioner and the public.

(3) Along with the petition, a plan showing the lie of the road was also produced. Notice of this petition was given to the counter-petitioners who had all entered appearance. On behalf of the counter-petitioners, the Section Officer of the University Maintenance Section, Trivandrum, had filed a counter-affidavit.

He stated that the way in question was a road poromboke covering an area of one acre and 77 cents in S. No. 277 of the Chengazhacherry Pakuthy, that it lies between the Women's College compound on the east and the Women's College Hostel on the west, that the allegation that the road in question was carved out of survey numbers mentioned in the petition was not correct, that in exercise of the powers conferred on the Commissioner of the Trivandrum Corporation by Section 207 (1) (c) of Act IV of 1116. he with the special sanction of the Council and of Government had permanently closed down the way in the eastern side of the Women's Hostel and west of the Women's College premises at the point where the premises of the hostel on the north touched the road behind the Women's College premises, that the boards containing the words 'no thoroughfare' had been put up at the two ends of the road to prevent the passage, that it was necessary to do so to prevent trespass, especially into the premises of the Women's College, Hostel, by people passing along the said road, that the closing of the road did not in any way cause inconvenience to the petitioner or to the public, that there was a road leading to the locality from the Althara Mukku Junction which could be used by the petitioner and the public, that the property in the said road did not vest in the public, that the petitioner and the public had only a right to use the road for legitimate purposes so long as it remained a public way, that it ceased to be a public way the moment it became inaccessible at both ends, that after it had ceased to be a public way, neither the public nor any members of the public could have any legal access to any part of it without committing trespass, that a public way could be legally destroyed by the Commissioner by resorting to proper statutory means, that in respect of public ways neither the Government nor the Municipal Council was a trustee for the public, that provisions of Section 207 of the Trivandrum City Municipal Act IV of 1116 had been enacted in public interest and are not repugnant to the Constitution of India, that no question of fundamental rights arose in this case, that steps taken by the Commissioner of Corporation were proper and legal, that his act could not be called in question as he was not a party to these proceedings, that the provisions of Section 207 had been complied with before the road was closed, that this petition was incompetent and that the petitioner was not entitled to any writ as prayed for.

(4) The petitioner has filed a rejoinder in which it was contended that the pathway in question was a public way and not a poromboke, that it was carved out of the adjoining survey numbers in the ownership and possession of the adjoining owners who had dedicated the respective portions for use as public high way, that no records had been produced to prove that any action was taken under Section 207 (c) of the City Municipal Act, that there had been no special sanction by the council or by the Government, that it was 'ultra vires' of the corporation, and of Government to sanction the closing of the high way even if there were records to show that sanction had been given, that a public right could not be destroyed by any action taken by the Commissioner of Corporation, that the corporation or the Government had only the position of a trustee on behalf of the public in respect of the land used as a high way, that the same could not be assigned away for the purpose of an institution or an individual, that the provision of Section 207 of the City Municipal Act were 'ultra vires' of the Legislature in so far as the same infringed the fundamental rights guaranteed by the Constitution of India, and that this was a fit case where the High Court was to interfere and issue the necessary writ.

(5) The allegation that the road in question had been carved out of lands from registered holdings belonging to the owners of the adjoining survey numbers had not been made out by the petitioner. It was stated by the counter-petitioners that the road had been a portion of S. No. 277 of the Chengazhacherry Pakuthy. The Settlement Register of that pakuthy shows that S. No. 277 has an area of 1 acre and 77 cents, and that its tenure is road poromboke. If the portion of the road belonged to the adjoining owners, and if the same had been dedicated for the use of the public, then certainly such owners would have claimed compensation for portions of this road also when the Government or the Corporation had acted in derogation of such grants. There is nothing to show that any such claim had been advanced by any of those owners. If there was a dedication, it must have been supported by records, and no paper had been filed to prove this case. It, has, therefore to be taken that the portion of the road closed is a road poromboke and that it did not form portion of any adjoining registry holdings.

(6) Under Section 207 (1), (c) of Act IV of 1116, the Commissioner of the Corporation may, subject always to sanction as may be required under Chapter 4, turn, divert, or with the special sanction of the council and the Government permanently close any public street or part thereof. It cannot be contended that this provision is 'ultra vires', for at the time this Act was passed, His Highness the Maharaja of Travancore had sovereign powers to lay down restrictions regarding the use of public

ways. It could be void after the constitution was passed only if this provision was inconsistent with any of the provisions in the constitution. The petitioner was contending that there was no record to show that the special sanction of the council and of the Government of Travancore had been obtained to indicate that the Commissioner acted within his powers.

(7) Sri M. N. Parameshwaran Pillai, the learned Government Pleader who appeared for the State had placed before me the papers relating to the closing of the road. The Commissioner of the Municipal Corporation had by letter R. O. C. 189/1/4/148 C. I., dated 4-8-1949 communicated to the Government the views of the council that the latter had no objection to close the portion of the road in question provided the Government sanctioned such closing. The Government, by their proceedings I Dis. 2693/49/E H L., dated 22-12-1949, had sanctioned the permanent closing of the road. I take it therefore, that the Commissioner before closing this public street had observed the formalities required of him, as provided for in the section. Under Section 3 (30) of Act IV of 1116, a public street means any street, road, etc., over which the public have a right of way and it includes the road way and the foot way used by the public.

The final orders to close the road had been passed by the Government on 22-12-1949, so that the proceedings had been terminated even long before the Constitution of India came into force. The provisions of the Constitution could not therefore be relied upon to attack an act which was done before it came into force. It is unnecessary here to cite authorities for the position that the provision of the Constitution has no retrospective effect. Whatever might be the interpretation put on the nature of the fundamental rights claimed by the petitioner, he could not attack the present proceedings which terminated before 26-1-1950 the date of the commencement of the Constitution. It was argued by the petitioner's learned Advocate that the actual closing of the road was after 26-1-1950, that he had knowledge of the action that the Commissioner proposed to take only after the date of the commencement of the Constitution and that he had a right to agitate the matter relying on the provisions of the Constitution. Even if the sign boards containing the words "no thoroughfare' had been put up only after 26-1-1950, it is not very material for it was only in furtherance of a decision taken legitimately and within powers before the date of the commencement of the Constitution.

(8) The provision in Section 207 of Act IV of 1116 are also not 'ultra vires' of the Constitution. The chief executive authority of the corporation is authorised to close any portion of a road way. Clause 2 there provides for the payment of reasonable compensation to the owners and occupiers of any land or buildings which are acquired for or affected by any such purposes mentioned in Clause (1). The fundamental right that had been guaranteed by Art. 19 (1) (d) of the Constitution was one to move freely throughout the territory of India. That does not mean the use of any particular road for that purpose. The right contemplated there has for its object the removal of all internal barriers in the country and to make India as a whole the abode of the citizens of India. This provision is thus complimentary to Article 5 which provides a single citizenship. Sub-clause (5) of Art. 19 of the Constitution provides that nothing in the Sub-clause (1) (d) shall affect the operation of any existing law in so far as it imposes, or prevent the state from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said Sub-clauses, either in the interests of the general public or for the protection of the interests of any scheduled Tribes. The restrictions could therefore be imposed, provided they are reasonable. Any act providing for such reasonable restrictions could not therefore be 'ultra vires' of the Constitution. The ruling in 'MOTI LAL v. GOVT. OF THE STATE OF UTTAR PRADESH', AIR 1951 All 257, was relied on by both sides in respect of the position taken by them. At page 267 of the report, Malik, C.J., observes thus:

> "It is well-known that the right of the public in a highway is merely to pass and repass. Such right can be restricted at the time of the dedication and whether the right is restricted or not is generally established by the nature of the user. The presumption generally is that the dedication is for the ordinary and reasonable user of the road as a highway."

At page 268 of the report it is stated thus:

> "In India we have highways or roads that are maintained by the State. There are roads which vest in Municipal Boards or District Boards, but it can be assumed that the law relating to highways, is more or less, the same as in England."

There can be no doubt, that so long as the road exists as a highway, the general public will have the right to use it for all legitimate purposes without causing inconvenience or annoyance to others who are using it. His Lordship also points out (vide page 268 of the above report) that the right to use a highway is a right which a person possesses as a member of the public along with other members of the public, and whatever personal rights he has of using it are merely as such a member. That being so, the right has always been held to be exercisable subject to such reasonable restrictions or regulations, which, at times, might even amount to prohibition, as might be necessary to be imposed in public interest. In all civilized countries this right has been subject to regulations from very early times.

(9) At page 269 of the same report, wherein the learned Chief Justice disposes of the argument that "reasonable restriction" cannot mean a total stoppage, it is stated:

> "the words in Art. 19 are not 'regulation' but are 'reasonable restriction', and I do not see why if by reason of the nature of the trade carried on, which might be against public morality or if, for any other reason, it is deemed necessary in the general interest, to stop totally any trade or business, it cannot be included in the word 'restriction.'

An extract from an English Report 'COMMONWEALTH OF AUSTRALIA v. BANK OF NEW SOUTH WALES', (1949) 2 All E R 755 at p. 772, quoted by His Lordship, is as follows:

> "..... their Lordships do not intend to lay down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency, or in some other body, be justified. Every case must be judged on its own facts and in its own setting of time and circumstances, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to state monopoly was the only particular and reasonable manner of regulation and that interState 'trade, commerce and intercourse' thus prohibited and thus monopolized remained absolutely free. Nor can one further aspect of prohibition be

ignored. It was argued by the appellants that prohibitory measures must be permissible, for otherwise lunatics, infants and bankrupts could without restraint embark on inter-State trade and diseased cattle or noxious drugs could freely be taken across State frontiers. Their Lordships must, therefore add what, but for this argument so strenuously urged, they would have thought it unnecessary to add, that regulation of trade may clearly take the form of denying certain activities to persons by age or circumstances unfit to perform them or excluding from passage across the frontier of a State creatures or things calculated to injure its citizens. Here, again a question of fact and degree is involved...
....."

(10) Thus, it is obvious that the use of a public way can be regulated by the State and for that purpose reasonable restrictions can be imposed. Reasonable restrictions may in some cases amount to complete prohibition or stoppage of the use. The Court has only to see whether that was in the interests of the general public. In this case, the State acquired certain lands adjoining the Women's College at Trivandrum for the purpose of opening a hostel for the students there. The Women's College is a public institution opened in the interests of the general public. To accommodate the students there, a college hostel had to be opened and for the efficient and safe use of the hostel the authorities found it necessary to close this pathway between the hostel and the college. That is the discretion exercised by the State and it is not a matter that can be called in question by the petitioner.

The petitioner also cannot file a petition on behalf of the general public. He can only agitate his right when it is infringed. It would be seen that the act done by the authorities in this case was not 'ultra vires' in any way. It was done in the interests of the general public after going through the several formalities required by law, which have provided the necessary safeguards to the general public in the use of the public roads. There is, therefore, no case made out for the petitioner. I, therefore, think that the case for interference by this Court has not been made out. The petition is dismissed with costs, including Advocate's fee Rs. 100/- one set.

D.H.

Petition dismissed.

A. I. R. 1952 Travancore-Cochin 277

KOSHI J.

on difference of opinion between

SANKARAN AND GOVINDA PILLAI JJ.

Krishnan Damodharan and others, Appellants v. Narayanan Kumaran and others, Respondents.

A. S. No. 574 of 1122, D/- 17-10-1949.

Family Settlement — Construction — Deed of "Anubhava udampadi" — Whether maintenance deed or outright partition — Tests for construction — Deed held out and out partition deed — (Marumakkathayam Law — Ezhawa Tarwad — Partition).

Where the question is whether the document named an "Anubhava Udampadi" is an out and out partition or a mere maintenance arrangement, the following rules of constructions are to be borne in mind.

The true juristic nature of a transaction evidenced by a document is to be determined not by the name given in the document, but by the intention of the parties as gathered from its various provisions.

There are three features as indicative of an intention to divide. They are: (1) the absence of a provision for a common Karnavan. (2) a per capita distribution of the assets and liabilities among the several disintegrating units, and (3) the permanency of the arrangement.

Where the terms are conflicting they have to be construed with reference to their comparative merits in order to ascertain the principal intention of the parties. Where the terms of a karar transfer in favour of the various thavazhies into which the family is divided substantive rights arising out of ownership in property, viz., rights of possession, management and enjoyment, nothing substantial remains to be preserved in common and the arrangement evidences an intention to effect an out and out division. Terms providing for retention of common ownership partake of the character of restraints against alienation and do not extend, curtail or qualify the otherwise unrestricted rights and powers transferred to the various small independent groups.

When the terms of a document are capable of two constructions, it is relevant to look into how the parties understood those terms.

If the provisions in the document clearly or by necessary implication indicate that the allotment of properties is made for all time to come without any liability to readjustment to suit the altered circumstances of the family in future, the document has to be accepted as a partition deed. The permanency of the arrangement is a decisive test in favour of the construction of the document as a partition deed.

The value of the stamp paper used for the deed is no indication of the nature of the deed.

Any restraint on the right of free disposal would be void for repugnancy if, but for it, there was a complete separation. Case Law Ref.

(Paras 5, 10, 20, 21, 25 & 27)

In the deed in question which was termed "anubava udampadi" the bulk of the properties dealt with did not form sub-tarward properties. The branches as such were to start to enjoy the properties allotted to each of them only after the life-time of the surviving acquirers. The immediate occasions to bring such an arrangement into being was the apprehended danger that the family might lose the entire property on account of the debts then existing. There was also a provision that the arrangement made under the deed was in no wise and on no account to be disturbed. The division or distribution that was made was per stripes and not per capita. There was no provision for a common Karnavan. All available sub-tarward properties and debts were dealt with under the

deed. Every valuable property had been transferred to respective branches:

Held per Koshi and Sankaran JJ., Pillai J. Contra— that the deed evidenced an outright partition and was not an arrangement for maintenance.

(Paras 6, 15, 22, 27)

T. R. Subramania Iyer, for Appellants; K. Parameswaran Pillai and M. Madhavan Nair, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras.

6 Coch LR 460	20
16 Coch LR 202	20
18 Coch LR 459	20
19 Coch LR 54	20
20 Coch LR 221	20
25 Coch LR 674	20
13 Trav LJ 432	5
16 Trav LJ 139	5
21 Trav LJ 652	5, 10
22 Trav LJ 652	10
22 Trav LJ 40	5, 10
23 Trav LJ 1031 (FB)	5, 10
26 Trav LJ 235	5, 10
27 Trav LJ 404	5, 10
28 Trav LJ 72	5, 10
30 Trav LJ 433	10
32 Trav LJ 709	5
32 Trav LJ 739	10
3 Trav LT 160	5, 10
14 Trav LR 212	10
19 Trav LR 198	10
19 Trav LR 178	5
Second Appeal No. 607 of 1121 (Trav)	24
(1900) AC 260: (69 LJ Ch 516)	27
(1946) 1 Ch 8: (1945-2 All ER 520)	26

GOVINDA PILLAI, J.: The plaintiffs 1, 2, 4 to 8, 10 to 22, 24 and 25 are the appellants. The plaintiffs and defendants 1 to 10 were members of an Ezhava Tarawad consisting of two main branches. Plaintiffs and defendants 6 to 10 belong to one branch and defendants 1 to 5 to the other. The plaint properties were said to be sub-tarwad properties common to both the branches and the suit is for partition of these properties under the Ezhava Act on the per capita basis. The plaintiffs stated that in 1096, the properties of this sub-tarwad were allotted for maintenance under an Anubhava Udampady Ext. A, that the branch of defendants 1 to 5 was allotted one-half of the properties, that the other half went to the branch of the plaintiffs, that defendants 15 and 16 had obtained some of the plaint properties on mortgage from the branch of defendants 1 to 5, that since these mortgages were executed to discharge the debts mentioned in Exhibit A the plaintiffs admitted the same, that the plaintiffs' branch had also executed a mortgage for Rs. 4,300/- to discharge a prior debt of the sub-tarwad, that the plaintiffs admitted these debts, and that they were entitled to get their share from the plaint properties. Defendants 3, 6 to 13 and 16 filed written statements. The 3rd defendant while admitting the relationship between the parties contended that Ext. A was an outright partition, that the subsequent conduct of the branches also would show that Ext. A was considered an outright partition, that the plaintiffs were not entitled to claim any share from the one-half of the properties allotted to the branch of defendants 1 to 5, and that the plaintiffs were not entitled to any relief so far as the properties that came to his branch. The 6th defendant a member of the plaintiffs' branch adopted the contentions of the 3rd defendant and resisted the suit. Defendants 7 to 13 also supported defendants 3 and 6. The 16th defendant stated that he got a mortgage from the 3rd defendant over some of the plaint properties, and that the same was valid as it was executed by the 3rd defendant who had got himself divided from the plaintiffs under Ext. A. The plaintiffs filed a replication stating that Ext. A was only a maintenance allotment, that subsequently the properties obtained by the plaintiffs' branch were again allotted among the members of that branch for maintenance under Ext. VII, and that the plaintiffs were entitled to the reliefs claimed in the plaint.

(2) At first, one of the plaintiffs alone had filed the suit and on the objection of the defendants that such a suit for partition was not maintainable the remaining plaintiffs were also added, and the suit amended by paying court-fees on the market value of the share which all the plaintiffs claimed. The lower court held that the suit as amended was maintainable, that proper court-fee had been paid, that Ext. A was only an allotment for maintenance and not an outright partition deed, that after the execution of Ext. A the two branches became divided by course of conduct and that, therefore, the plaintiffs were not entitled to any reliefs. The suit was, dismissed with costs.

(3) The defendants 3 and 6 who contested the suit in the lower court had not entered appearance here. The 5th defendant (2nd respondent) and defendants 8 and 10 (respondents 5 and 7) alone appeared and opposed the appeal. Respondents 5 and 7 filed objection to the findings regarding the nature of Ext. A and the maintainability of the suit.

(4) The main question argued in this case related to Ext. A. The plaintiffs stated that it was only an allotment for maintenance whereas the respondents contended that it evidenced an outright partition. Ext. A was executed on 4-5-1096. There were 19 adult members then in both the branches of whom 17 took part in Ext. A. Two of the adult members Sankaran Raghavan (7th defendant) and Madhavan Ponnan (21st plaintiff) were then employed in foreign countries, and so they did not join in Ext. A.

Clause 1 of Ex. A dealt with the relationship between the parties and the reason why two of the adult members did not join in Ext. A.

Clause 2 stated how the plaint properties were acquired. The existence of some mortgages over portions of the plaint properties was mentioned there and provision had been made for redeeming the same.

In Clause 3, some decrees charged on the plaint properties on account of Devaswom dues are mentioned. It was stated that in execution of one of the decrees two items of properties had been sold and that the sale amount was to be deposited within 30 days from the date of sale. These 30 days had not expired when Ext. A was registered. It was apprehended that if the properties are enjoyed as was done before, the taxes and dues would accumulate resulting in loss of the properties to the Tarwad. To avoid the same the properties were intended to be allotted into two shares for purposes of enjoyment according to their right:

अवकाशक्रममनुसरिच्चु वस्तुक्कळे अनुभवत्तिन ओन्नु पकुति
वीतं रण्डायि वींतिच्चुं मेलाल कैक्कार्यं चेय्यणमेन्नु ... ...
सम्मतिच्चतिक्कवण्णम् इ अनुभव उटम्बाट एजुतियिट्टुल्लताकुन्नु।

In the 4th and 5th Clauses the properties allotted to each branch were stated to have been mentioned in the A and B schedules attached. Provision was also made for the payment of tax and the Devaswom dues charged on the properties thereby allotted.

The sixth Clause dealt with the modes to be adopted to discharge the debts charged on the properties.

The 7th Clause provided for the redemption of the mortgages already mentioned.

The 8th Clause allowed any one of the branches to discharge the admitted debts mentioned already and for realising the excess paid by that branch.

In the 9th Clause the renewal of Kanom deeds to be taken as regards Madam Vaga properties was provided for. It was stated that any one branch could advance the necessary funds for the same and realise the excess amount from the defaulting branch. After realisation of the same the right obtained under the renewals would be kept in common."

पिन्नीट आधारवाध्यत पोतुविल इरिक्कुमेन्नु ळ्ळंतु पेरुकार्कुं प्रत्येक अवकाशं उण्डेन्नुं विचारिक्कुवान् पाटिल्लात्ततुं आकुन्नु,

Clause 10 mentioned that there were no debts charged on the properties other than those mentioned in Ext. A, that the plaint properties would not be liable for anything more than that specifically admitted, that no further debts were to be incurred, that this arrangement for enjoyment was made with the intention of improving the properties, and that no provision had been made as regards the properties of the original tarwad. The executants 1 and 2 were allowed to be in possession of the A schedule properties till their death. Similarly executants 7 and 8 were to enjoy the B schedule properties.

After the death of these people, the others in each branch were to enjoy the same without alienating any of the properties. " यातोरु अन्याधानङ्कुं चेय्यात " These were the provisions in Clause 11.

In Clause 12 powers were given to any one member of the tarwad to question the acts of any other who did anything contrary to the provisions in Ext. A. It was then stated that on no account Ext. A or the provisions in it were to be changed.

(5) The provisions, read together, would indicate that Ext. A was intended to be a maintenance allotment and not a partition deed. Because of the mention in Cl. 12 that no change in Ext. A or its provisions was to be made, it was argued for the respondents that the same indicated a permanent arrangement, and so Ext. A was a partition deed. In construing documents of this kind all the provisions are to be read together so as to know what the intentions of the parties were. As observed in 'VELAYUDHAN v. LEKSHMI PILLAI', 3 Trav LT 160 and 'ATCHUTHAN v. MATHEVAN', 23 Trav LJ 1031 (FB), it may not be profitable to rely upon other documents which, themselves ambiguous in their nature had become the subject matter of judicial decisions, though the legal principles enunciated in such pronouncements may be of utility for the purpose of guidance. It was also pointed out there that the intention of the parties to a document must be gathered from the words and when such words are definite and unambiguous, the Courts should not travel outside the words.

The document which was the subject matter of interpretation in the Full Bench ruling in '23 Trav LJ 1031' was also practically like Ext. A. Under that document which was styled as a Nischayapatrom, properties were allotted to the different branches of an undivided tarawad separately, such allotments being more or less of an enduring nature. Limited powers of alienations were conferred on some of the members; but at the same time care was taken to see that the properties were not frittered away by independent dealings and the hold of each branch over the properties given to the other branches was maintained intact in order to prevent them from being lost to the tarawad. Provision was also made for averting revenue sales of the properties from negligence of the branches in possession. All alienations not expressely authorised by the documents were declared invalid. Rules were also laid down for the maintenance of a common Kalary and the performance of the ceremonies connected therewith by all the branches and also for conducting Thalikettu in the Tarawad. Their Lordships unanimously came to the conclusion that the document read as a whole constituted only a maintenance allotment and not a deed of partition.

In 'KARTHIYANI PILLAI v. GOVINDAN', 19 Trav LR 178, one of the earliest decisions of this Court in interpreting documents, it was stated that in documents allotting properties for maintenance it was usual to find a prohibition against alienation of tarawad properties. The absence of such a prohibition in the document dealt with there as well as the omission to use the word चिलविनायि were considered to be two indications to treat the document as a partition deed. Some of the general principles that were to guide a Court to interpret a document to know whether it evidenced an outright partition or an allotment for maintenance are laid down in '13 Trav LJ 432; 21 Trav LJ 652; 22 Trav LJ 40; 26 Trav LJ 235; 27 Trav LJ 404; 28 Trav LJ 72; 32 Trav LJ 709 and 16 Trav LT 139.

In '21 Trav LJ 652', though the learned Judges agreed to the decree to be passed in that case, they came to diametrically opposite conclusions as to the nature of the document interpreted there. Mr. Justice P. K. Narayana Pillai held that the provisions in the document evidenced only an allotment for maintenance, whereas Mr. Justice K. Parameswaran Pillai came to the conclusion that it evidenced a partition deed. If it was possible to conclude definitely that the parties to the document intended the arrangement to last for ever, it has to be held that it evidenced a partition deed. If the intention is short of this, it has to be held that it is only an allotment for maintenance, though some of the provisions in the document are not against those we find in an outright partition deed. With these observations, I shall examine the provisions in Ext. A.

(6) In the case of a partition deed, the parties are to give the market value of the property and to execute the document on the necessary stamp paper prescribed for such market value. Exhibit A, certainly is for some valuable properties in this City. It is written using a stamp paper of half a rupee. From this, it is evident that the parties never intended Ext. A to be an outright partition deed. The document itself is called an Anubhava Udampady and not a partition deed. The allotment is made for अनुभवत्तिनार्यां. This expression is used throughout the document. The renewal deed for the Madomvaga properties is to be taken duly in the names of both the branches. If any one branch defaulted in the same, the other branch is to spend the necessary amount and take the renewal deed in the name of that branch. The excess amount paid by that branch was allowed to be realised from the defaulting branch. After realising the same, it was stated that the right obtained under the renewal deed would remain in common. (Vide the expressions in Cl. 9):

पिन्नीटं आधारवाध्यत पोतुविल् इरिक्कुमेन्नुळ्ळतुं पेरकार्कुं प्रत्येक अवकाशमुण्डेन्नुळ्ळतु विचारिक्कुवान् पाटिल्लात्ततुताकुन्नु।

The parties are allowed to encumber the properties only for discharging the admitted common debts which were specifically mentioned in Ext. A. Any

further alienation or encumbrance was definitely prohibited.

In Clause 12, it was provided that if any one of the parties acted against the provisions mentioned in Ext. A, any one of the members of the tarawad was competent to question the same and to set right the mischief done. This provision gives any one member of the tarwad the right to protect all the properties of his branch as well as of the collateral branch. The provision that on no account Ext. A or the provisions in it were to be altered has to be considered with reference to the law governing the parties then. No compulsory partition was allowed in 1096. Thus, as long as Ext. A remained as an allotment for enjoyment, the parties were strictly to obey the terms mentioned therein. This does not, in my opinion, indicate that the allotment was intended to last for all time to come. The several provisions, read as a whole, would, in my opinion indicate that Ext. A was only an allotment for maintenance and not an outright partition deed. I would therefore confirm the finding of the learned Munsiff that Ext. A is only an allotment for maintenance.

(7) The learned Munsiff then entered a finding that by the subsequent conduct the parties became divided. In this, his view was incorrect. Ext. A was on 4-5-1096. The present suit was filed on 13-2-1108, i.e., within 12 years of Ext. A. It is open to the plaintiffs to ignore any document that came into existence subsequent to Ext. A, and to ask for the necessary relief provided the persons who took the document had also been made parties to the suit.

The learned Munsiff thinks that within 12 months of Ext. A the plaintiffs' branch itself divided properties under Ext. VII. Ext. VII is clearly an allotment for maintenance. In it are included the properties obtained by the plaintiffs' branch under Ext. A as well as separate properties belonging to that branch. It is called an Anubhava Udampady, and all the provisions therein are only in accordance with a maintenance allotment. By no stretch of imagination could Ext. VII be called a partition deed. It was stated that one of the members of the plaintiffs' branch had executed a hypothecation bond Ext. IV on 23-7-1104. In the first place it is within 12 years of the suit. What was hypothecated was the executant's interest in the hypotheca. It is stated thus in Ext. V:

वस्तुविल एतिक्कुळ्ळ अवकाशत्त इंटायि स्थापिच्चु।

He had only a right to enjoy the property, and coming to the worst, it was only against that right that the hypothecatee could proceed.

There is no other document in the plaintiffs' branch. The branch of defendants 1 to 5 had treated Ext. A as an outright partition deed and executed, on 9-12-1102, Ext. XI partition deed. This was shortly after the Ezhava Act, sanctioning partition, was passed. This suit was within 12 years of Ext. XI, and the plaintiffs could very well ignore Ext. XI and claim their share in Ext. A properties. There is, however, one document Ext. V dated 19-6-1107, a Kettotti executed by the 3rd defendant to the 15th defendant. The 3rd defendant, there, stated that he got the property absolutely under Ext. XI, that he was mortgaging 13 cocoanut trees for Rs. 120/- for the purpose of the trade he was conducting then. The plaintiffs, in paragraph 9 of the plaint, admitted this mortgage. They stated that the mortgage to the 15th defendant had been executed by the 3rd defendant to discharge the debt admitted in Ext. A, and that, therefore, they had no objection to admit the consideration for the mortgage. This was only a qualified admission made by the plaintiffs, and this would not, in any way, show that they admitted the partition deed of 1102 in the branch of defendants 1 to 5. Apart from this, there is no other document to show that by the subsequent conduct after Ext. A, the parties had attained a status of division. The finding of the learned Munsiff on this point is wrong and hence set aside.

(8) Even if the finding of the lower Court that the two branches had attained a status of division is upheld it was wrong to dismiss the plaintiffs' suit, for the plaintiffs could be allowed their share in the sub-tarwad properties belonging to that branch. The decree passed, could not, however, be supported. But as I have already found that the parties had not attained a status of division, the decree of the lower Court has to be reversed and the case sent back for further enquiry and disposal. In the result, the decree of the lower Court is set aside. The case is sent back with the direction to restore the suit to file and to pass preliminary decree for partition, and to proceed with the case. The costs of this appeal will be paid by the respondents 2, 8 and 10.

(9) SANKARAN, J.: Plaintiffs and Defendants 1 to 10 are members of two branches in a common Tarawad. These parties are Ezhavas and are governed by the provisions of the Ezhava Act. Plaintiffs and defendants 6 to 10 are members of one branch and defendants 1 to 5 belong to the other branch. The plaint properties are stated to be properties belonging to the sub-tarwad of these two branches and it is on that basis that the plaintiffs have sued for partition and recovery of their share in these properties. The contesting defendants maintain that the two branches have attained a status of division by virtue of Exhibit A anubhuva udampady (अनुभवउटम्बटि) of the year 1096 and also by the subsequent conduct of the parties. Plaintiffs on the other hand would contend that Exhibit A evidences only a maintenance allotment as between the two branches.

The real question for decision in this case is whether under Ex. A there has been only a maintenance allotment or there has been a complete severance of interest between the two branches in respect of the plaint properties. On a consideration of all the provisions contained in Ex. A, my learned brother Mr. Justice Govinda Pillai has come to the conclusion that Ex. A evidences only an allotment for maintenance. I regret that I am unable to agree to this conclusion. I shall state my reasons for differing from him in this respect while discussing the relevant provisions of Ext. A.

Since the facts necessary for the purpose of this case have already been stated in the judgment of my learned brother, I do not propose to reiterate them. I shall content myself by referring to the important provisions of Ext. A and also to the other evidence adduced in the case in proof of the conduct of the parties.

(10) Before proceeding to construe Exhibit A, I shall briefly refer to certain reported decisions of this Court which have laid down the general principles to be kept in view while construing documents like Ext. A. Cases where similar documents executed by members of Marumakkathayam Tarawads came up for construction are numerous and those reported in '14 Trav LR 212'; '19 Trav LR 198'; '3 Trav LT 160'; '21 Trav LJ 652'; '22 Trav LJ 40'; '23 Trav LJ 1031 (FB)'; '26 Trav LJ 235'; '27 Trav LJ 404'; '28 Trav LJ 72'; '30 Trav LJ 433' and '32 Trav LJ 739' are only some of them.

Since the documents construed in these cases were of varying types containing different sets of provisions, a reference in detail to those cases will not be of much help for determining the true purport of Exhibit A in the present case. But cer-

tain fundamental rules of guidance as laid down in the above mentioned rulings have to be kept in mind in construing a document like Exhibit A. These principles are: (1) the nomenclature of the document may not by itself afford a safe or decisive indication as to whether the arrangement under it is an outright partition or is only a maintenance allotment; (2) for a proper construction of the document all the provisions in it must be read as a whole and the intention of the parties to the document has to be gathered primarily from the document itself; (3) where the expressions used in the document are definite and unambiguous and are such as would clearly indicate the intention of the parties, the Court should not travel outside such expressions in construing the document; (4) due weight has to be given to the evidence as to how the parties to the document understood it and acted upon it; and (5) if the provisions in the document clearly or by necessary implication indicate that the allotment of properties is made for all time to come without any liability to readjustment to suit the altered circumstances of the family in future, the document has to be accepted as a partition deed. This Court has been consistently upholding the position that the permanency of the arrangement is a decisive test in favour of the construction of the document as a partition deed. Vide '22 Trav LJ 652'; '22 Trav LJ 40'; '26 Trav LJ 235'; 27 Trav LJ 404' and '32 Trav LJ 739'

(11) The nature of the arrangement made under Exhibit A may now be examined. Plaintiffs' claim for partition of Exhibit A properties can be sustained only if it is found that the properties are their Tarawad properties and that a maintenance allotment alone was made under Exhibit A. Exhibit A shows that two items of properties have been dealt with under it. A half share of each of these items has been included in the A schedule in Ext. A and has been set apart to the branch of defendants 1 to 5. The other half share of each of the two items has been included in the B schedule of Exhibit A and has been set apart to the branch of the plaintiffs. The total extent of item 1 is seen to be 2 acres and the extent of item 2 is seen to be only 40 cents. It is further clear from the nature of the acquisitions of these items as described in Cl. (2) of Ex. A that the second item alone could be treated as the Tarawad property belonging to the two branches in common. That item is stated to have been an acquisition in the name of deceased Narayanan Mathevan who was a common Karanavan of the two branches. Naturally on his death this property devolved on the tarawad as a whole.

Regarding item 1 it is stated that it was acquired in the joint names of four female members who were only junior members in the Tarawad. It is also stated that the acquisition was made with their separate funds. The acquirers were parties 1, 7 and 8 of Exhibit A and deceased Adicha who was the sister of the first party to Exhibit A. From the genealogy given in Exhibit A it is clear that Adicha and the first party to Ext. A (same as the first defendant in the case) belonged to the branch of defendants 1 to 5 while parties 7 and 8 of Exhibit A belonged to the branch of the plaintiffs. The sixth party to Exhibit A who was the eldest male member and who was 57 years of age on the date of Exhibit A was the common karnavan in the Tarawad. All the same it is admitted in Exhibit A itself that patta for item 1 was issued in the names of the four ladies who had acquired it in their names and that it had not become a common tarawad property on the date of Exhibit A.

In clause (10) of Exhibit A it is expressly stated that the surviving three acquirers were making certain provisions regarding this property in the interests of themselves and also of their descendants. Thus there cannot be any basis for the contention that item 1 was a Tarawad property and that a maintenance allotment in respect of this item was made under Exhibit A. In fact the acquirers of this item were making a settlement in respect of that property in favour of the members of their respective branches. It is not open to the members of these branches, who have acquired a right to this item by virtue of such a settlement to impeach the validity of the same. Even if the settlement is to be set aside, the property has to revert to the acquirers or in their absence to their legal representatives. The result of such reversion will be that each of the two branches claiming under two of the acquirers of the property would be getting one half share out of it. This will make no alteration in the allotment already made under Exhibit A.

It is also significant to note that plaintiffs have not questioned the validity of the allotment made under Exhibit A. On the other hand they have accepted Exhibit A as it stands and have only claimed a partition of the properties as being Tarawad properties dealt with under Ext. A by way of maintenance arrangement. Since the basic claim in respect of item 1 as a Tarwad property fails, the question of any maintenance allotment in respect of that item does not strictly arise for consideration. If no maintenance allotment could have been made in respect of item 1, it is not likely that there has been any such arrangement in respect of item 2 which has only a comparatively smaller extent of 40 cents and which was also taken into account in making the settlement in respect of item 1.

(12) Assuming that the acquirers of item 1 allowed that property also to be dealt with as a common tarawad property under Ex. A it has to be seen whether the parties to the document intended the arrangement to be permanent or only provisional. The closing portion of Cl. (12) of Exhibit A is as follows:

यातोरु कारणवशालु इ उटम्बटियो, इतिल एतेम्किलुं भागञ्ळयो भेदघेडत्तन्नातिन्नुं पोटिल्लात्ततुभाकुंन्नु ।

In view of such a clear and unambiguous expression that Exhibit A Udampady or any of the provisions of it should not be altered on any account whatever, there can be no doubt that the parties intended the arrangement under Ext. A to last for ever. Thus the decisive test of permanency is unmistakably satisfied by Ext. A. All the same it may be seen whether the other provisions in the document would support the case of maintenance allotment as put forward by the plaintiffs.

It is seen from Exhibit A itself that on the date of the document there were 19 adult members in the two branches together. Fourteen of these members belonged to the plaintiffs' branch and the other five members belonged to the first defendant's branch. Besides these persons there were minor members also in the two branches. Calculated on the basis of the age of the parties as given in the plaint it is seen that there were 14 minor members in the plaintiffs' branch and one minor member in the first defendant's branch at the time of Exhibit A. The common Karnavan also belonged to the plaintiffs' branch. If the arrangement under Exhibit A was really intended to provide for the maintenance of the members in the respective branches, one would naturally expect the allotment of properties to bear a reasonable proportion to the number of members in each of the branches. Since the number of members in the plaintiffs' branch was more than four times the number of members in

the first defendant's branch, the properties allotted to the plaintiffs' branch should normally have been considerably larger in extent than the properties allotted to the first defendant's branch. But as a matter of fact it is seen that the properties were equally shared by the two branches.

It is also significant to note that the continuance of a common Karnavan was never contemplated by Ext. A. The equity of redemption of the properties outstanding on mortgage could not yield any income available for the maintenance of the members of the Tarwad until those properties were redeemed by the Tarwad. Hence it is not usual to allot specific shares out of such equity of redemption also to the different branches in an ordinary arrangement for maintenance. But Ext. A shows that even the equity of redemption of the properties outstanding on mortgage was set apart to the two branches in equal shares. Exhibit A states that two of the adult members of the plaintiffs' branch could not join in the execution of the Udampady because they were employed in a foreign country. No such explanation was necessary if only a maintenance allotment was being made under the document. The fact that the parties to Exhibit A thought it necessary to explain the non-participation of two of the adult members of the Tarwad in the execution of Exhibit A indicates that the executants were conscious that they were making a permanent division of the properties.

The circumstances that prompted them to effect such division are explained in clause (3) of Exhibit A. After enumerating certain court decrees and sales affecting Exhibit A properties it is stated that it was deemed necessary to divide the properties into two equal shares and to allot a share to each of the branches so that each branch may enjoy and deal with the properties included in that share without incurring any further debts or liabilities. In the several clauses in Exhibit A repeated reference is made to a division of the properties as between the two branches. In clause (4) it is expressly stated that the properties have been divided by metes and bounds and items 1 and 2 in the A schedule have been allotted to the share of parties 1 to 5 and that items 1 and 2 of B schedule have been allotted to the share of parties 7 and 8 of Exhibit A. Even though it is not specifically stated that the different sharers should obtain separate pattas in respect of the properties allotted to them, it is expressly provided in clause (5) that each sharer should pay the tax due in respect of his property separately. It is also stipulated that the properties outstanding on mortgage should be redeemed separately by the two branches on payment of the proportionate mortgage amount due in respect of the respective shares.

It is seen from Clauses (6), (7), (10) and (11) that the special rights of parties 1, 2, 7 and 8 over the properties included in Exhibit A have been recognised by the other parties also. In the latter part of clause (10) it is stated that the persons other than the acquirers of the properties have also been allowed to join in the execution of Exhibit A so that it may be in the future interests of themselves and of the acquirers. Clause (11) shows that the descendants of the acquirers did not derive any present or immediate right over the properties included in Ext. A. That clause states that the properties included in the A schedule were to be enjoyed by parties 1 and 2 of Exhibit A during their lifetime and only after their death the other members of their branch were entitled to enjoy those properties. Similarly the properties included in the B schedule were to be enjoyed by parties 7 and 8 during their lifetime and only thereafter the members of their branch could obtain possession of these properties. This provision is totally inconsistent with plaintiffs' case that the arrangement under Exhibit A was for the maintenance of the members of the two branches. Clause (10) makes a reservation to the effect that no provision is made under Exhibit A in respect of the ancestral properties belonging to the executants of the document. No such reservation was called for if Exhibit A was only intended to be a maintenance allotment. The anxiety to expressly reserve the right over the ancestral properties suggests that the parties were making a permanent division in respect of the properties dealt with under Exhibit A.

The provision in clause (8) of Exhibit A lends considerable support to this inference. That clause provides that, in case any branch fails to discharge the debts set apart to the share of that branch, it will be open to the other branch to discharge such portion of the debts also and then to realise the amount of such debts from the members of the defaulting branch and also from the properties set apart to the share of that branch. If there was only a maintenance allotment under Exhibit A, the properties would have continued to be common Tarwad properties and the items set apart to one branch could not be proceeded against and sold for realisation of any debt which that branch was obliged to pay. The right given to one branch to proceed against the properties set apart to the share of the other branch is a conclusive indication that the arrangement under Exhibit A was an outright partition with no further common interest surviving in favour of both the branches in respect of the properties dealt with under the document.

(13) As against all the above mentioned outstanding features of Exhibit A, which are decidedly in favour of the conclusion that a permanent partition arrangement was made under the document, only circumstances that could be urged in support of the case that only a maintenance allotment was made under Exhibit A are the statement in the document itself that the division is effected for the separate enjoyment of the properties by the two branches, the provision that even if one branch is to redeem the entire property outstanding on mortgage the share of the other branch is liable to be surrendered to that branch on payment of the proportionate mortgage amount due from that branch, the provision that even if renewals are taken in respect of the Devaswom properties by one branch alone the right will enure to the benefit of both the branches subject to the liability of the other branch to pay their share out of the amount paid to the Devaswom for obtaining the renewal, and the absolute prohibition regarding the alienation of the properties except for the payment of the debts specified in the Udampady, and the right conferred on the members of both the branches to question all such unauthorised alienations.

I think that these provisions are not inconsistent with the dominant idea of the permanent settlement underlying Exhibit A. On the other hand, the stipulation that the branch taking a renewal of the Devaswom properties or redeeming the entire property outstanding on mortgage is bound to surrender one-half share out of such properties to the other branch on receipt of the proportionate amount due from that branch is in conformity with the position that each branch has acquired a separate and permanent right over the properties set apart to the share of the branch.

Coming to the provision regarding restraint against alienation, it is seen from clause (11) of Exhibit A that an absolute restraint is imposed on all kinds of alienation. Clause (10) prohibits the incurring of any debt other than those expressly

provided for in the document. Such an absolute restraint against alienation in general is opposed to public policy and is void. These provisions were inserted in the document evidently as a result of the anxious wish and vain hope of the executants of the document to prevent the dissipation of the assets set apart to the respective branches and to conserve such assets for the sole benefit of the members of these branches for ever. In spite of such provisions there is nothing to indicate that the parties to the document intended to disturb the allotments already made and make any readjustment on any future occasion.

The idea of the parties that the properties allotted to the two branches should never be alienated by the members of the branches appear to have prompted them to describe the arrangement as an allotment for enjoyment (अनुभवम्) and to call the document an Anubhave Udampady (अनुभव-उटम्बटि). No greater significance can be attached to the nomenclature of the document. It is also significant to note that there is no mention at all anywhere in the document that the allotment is for the maintenance of the members of the two branches. It cannot be the significant word (चिलविनायि) was unknown to these parties. This word appears to have been deliberately and scrupulously avoided from Exhibit A, evidently because the arrangement was not meant to be a mere allotment for maintenance.

(14) The next aspect to be considered is how the parties themselves understood the arrangement under Exhibit A. Since the plaintiffs have brought the present suit within twelve years from the date of Ext. A Udampady, it cannot be said that, if the allotment under the document was only a maintenance allotment to start with, the two branches have attained a status of division by long course of conduct. The time for impeaching the documents executed by the members of the respective branches, which would indicate that they had attained a status of division, had not elapsed on the date of the suit. All the same the conduct of the parties would be strictly relevant and helpful for ascertaining how the parties to Ext. A understood the arrangement made under it.

Exhibit VII dated 15-4-1097 is the earliest document that was brought into existence after Ext. A. Ext. VII is an udampady executed exclusively by the members of the plaintiffs' branch within one year from the date of Ext. A. This udampady was executed in respect of all the properties which belonged to that branch exclusively. Items 2, 3 and 4 of Ext. VII are the properties which this branch got under Ext. A udampady. Clause (2) of Ext. VII refers to these properties as the properties set apart to the share of the plaintiffs' branch under Ext. A. It is also significant to note that under Ext. VII these properties were put on a par with the other properties over which the plaintiffs' branch had absolute and exclusive rights and were treated alike in making the allotment under Ext. VII. On 23-10-1104 one of the members of the plaintiffs' branch hypothecated the properties which he got to his share under Ext. VII udampady. Ext. IV is the copy of that hypothecation bond and it shows that the executant dealt with the property as belonging to him absolutely as per Ext. VII udampady. It is also seen that some of the members of the plaintiffs' branch had leased out the properties which they got under Ext. VII.

Exhibit II is the copy of the plaint in O. S. No. 803 of 1111 instituted for recovery of the properties on the strength of such a lease deed. The plaintiffs in that case have stated in Ext. II that the properties belonged to them absolutely. The conduct of the members of the plaintiffs' branch as evidenced by Exts. VII, IV and II clearly indicates that they understood and accepted the arrangement under Ext. A as an outright partition. Exts. XI and V show that the members of the branch of defendants 1 to 5 also understood Ext. A in the same light.

Exhibit XI dated 9-12-1102 is a partition deed executed by the members of this branch in respect of the properties which were allotted under Ext. A. Ext. XI is styled as a partition deed and in view of the clear provisions in it, there is no scope for any doubt that it is an out and out partition deed. One of the sharers under Ext. XI executed Ext. V otti deed in respect of 13 cocoanut trees standing in the property which he got to his share under Ext. XI. He has described the property as belonging to him absolutely and exclusively and the consideration under the document is stated to have been received for the purpose of his own trade. Plaintiffs have not impeached this document. On the other hand, the validity of this document is admitted by them in paragraph (9) in the plaint. No doubt, they have stated that Ext. V was executed for discharging a common debt recognised in Ext. A and that therefore they are willing to contribute their share of Ext. V debt. There is no basis for these statements. Ext. V itself makes it clear that it was not executed for the discharge of any common Tarwad debt, but that the debt under the document was incurred for the sole benefit of the executant himself.

Plaintiffs' admission that Ext. V is valid virtually amounts to an admission of the validity of Ext. XI partition deed executed by the members of the branch of defendants 1 to 5. The wife and children of deceased Narayanan Govindan who was a member of that branch have been impleaded in this case as defendants 11 to 14. Plaintiffs have not stated that these defendants have been impleaded as persons in possession of any portion of the plaint properties. It appears that these defendants have been impleaded as the heirs of deceased Narayanan Govindan in respect of the properties which fell to his share under Ext. XI. If the properties continued to be common Tarwad properties, deceased Narayanan Govindan could not be said to have had any definite share in them and defendants 11 to 14 could not have been impleaded to represent any such separate share. It may also be mentioned in this connection that plaintiffs have not impeached Exts. VII, IV, XI and V and have not sought to get these documents set aside.

(15) On a consideration of Ext. A Udampady in all the above mentioned aspects, I am clearly and definitely of the opinion that the arrangement under it was not intended to be a maintenance allotment but was meant to be a permanent partition under which each of the two branches obtained absolute rights in respect of the properties set apart to that branch. The lower court's finding that Ext. A is only an allotment for maintenance is therefore set aside and to that extent the objection memorandum filed by respondents 5 and 7 is allowed. The other points raised in the objection memorandum were not pressed at the time of hearing. These points relate to the findings on issues 1, 7 and 9 dealing with the maintainability of the suit and the jurisdiction of the lower court to entertain the suit. The findings on these questions in favour of the plaintiffs do not call for any interference.

(16) The only other point that remains for consideration is whether the present suit could be treated as a suit for partition, of the properties which fell to the share of plaintiffs' branch under Ext. A. The suit was framed on the basis that

the plaint properties belonged to the common Tarwad of the plaintiffs and defendants 1 to 10. Such a suit cannot be treated as a suit for partition of some of the items as belonging exclusively to the branch of the plaintiffs. As already pointed out, Ext. A was followed by another Udampady Ext. VII by the members of the plaintiff's branch. The question whether under Ext. VII the members of the plaintiffs' branch have attained a status of division can be agitated only in a proper suit as between the members of that branch. Even defendants 6, 8 and 10 who are members of the plaintiffs' branch and who have resisted the present suit, had no occasion in this case to join issue with the present plaintiffs on the question whether the members of the plaintiffs' branch have attained a status of division or not. All the properties exclusively belonging to that branch have not also been included in the present suit. Under these circumstances the present suit cannot be treated as a suit for partition of the properties of the plaintiffs' branch. For any such relief plaintiffs have necessarily to institute a fresh suit in respect of all the properties belonging to that branch and with necessary parties on record.

(17) In the result I reverse the finding of the lower court that Ext. A is only an allotment for maintenance and hold that under Ex. A the two branches attained a status of division with no further community of interest as between them in respect of the plaint properties. It follows therefore that plaintiffs' suit for partition and recovery of their share out of the properties set apart to the branch of defendants 1 to 5 under Ext. A is not maintainable. The lower court's finding that the two branches have attained a status of division is confirmed. Accordingly the lower court's decree is upheld and this appeal is dismissed with costs. The objection memorandum is allowed only to the extent already indicated and is dismissed in other respects.

(18) KOSHI, J: This appeal has been referred to me for decision by the learned Chief Justice, as the two learned Judges who heard it in the first instance differed in their conclusions as to its disposal. The appeal arose from a suit for partition instituted by certain members of an Ezhava family before the District Munsiff's Court at Trivandrum. That court dismissed the suit on the ground that the family was already divided and the suit not maintainable. The plaintiffs' appeal against that decision was heard by a Bench consisting of Mr. Justice Sankaran and Mr. Justice Govinda Pillai and they delivered separate and differing judgments. The case was therefore referred for decision originally to Mr. Justice Habeeb Mohamad. All these took place while the case was on the file of the Travancore High Court. Since the integration, as Mr. Justice Habeeb Mohamed is on leave, the learned Chief Justice directed the case to be placed before me. The case was very elaborately argued by Mr. T. R. Subramania Iyer for the appellants and Mr. Kayalam Parameshwaran Pillay and Mr. M. Madhavan Nair for the respondents. However, in view of the elaborate and, if I may say so, the exhaustive judgments delivered by Mr. Justice Sankaran and Mr. Justice Govinda Pillai I shall content myself with a short judgment setting out my conclusion and the reasons therefor.

(19) The question in this appeal turns on the construction of Ext. A, the point for decision being whether it is family arrangement for maintenance or an out and out partition. Ext. A was executed on 4-5-1096 by all the then members of the sub-tarwad of the plaintiffs and defendants except two who had gone abroad and have since returned. The plaintiffs who regarded the document as merely an arrangement for maintenance, instituted this suit to obtain partition and separation of their shares. The contesting defendants contended that Ext. A was an out and out partition and had been acted upon as such. While holding that Ext. A amounted only to an arrangement for maintenance the Court below dismissed the suit on the ground that the parties had, by their subsequent conduct and dealings with the properties, established a status of division. In the appeal both Mr. Justice Sankaran and Mr. Justice Govinda Pillai agreed that as the suit was instituted on 3-6-1111, well within 12 years of Ext. A, no subsequent conduct or dealing with the properties could bring about an effective or enduring divided status between the parties and that the decision of the case must depend upon the true construction of the document. Mr. Justice Sankaran took the view that Ext. A is, to all intents and purposes, a partition arrangement and not a mere arrangement for maintenance. His learned colleague took the opposite view. The argument before me was naturally confined to this aspect of the case and I need only decide whether Ext. A evidences a mere arrangement for maintenance or it amounts to an out and out partition.

(20) The circumstances which brought Ext. A into existence as also other relevant facts necessary for the decision of the case and the various clauses of the document are clearly set out in the judgments delivered by the learned Judges of the Division Bench and I shall not attempt to repeat them here. The learned Judges have also, with reference to the Travancore case law bearing on the subject, stated what the general rules to guide a court in the decision of the question involved are. It is unnecessary for me to refer to those cases again. I shall however add that decided cases in Cochin lay down more or less the same rules as guides, to decide whether a particular document is a mere allotment for maintenance or an outright partition.

See 'PADMANABHA MENON v. SIVARAMA MENON', 6 Coch L R 460, 'CHENU AMMA v. RAMANKUTTY MENON', 16 Coch L R 202, 'KUNJUMENON v. MEENAKSHI AMMA', 18 Coch L R 459, 'KUNCHI AMMA v. ACHYUTHAN NAYAR', 19 Coch L R 54, 'MADHAVI AMMA v. KUNJI AMMA', 20 Coch L R 221 and 'THEVUNNI MENON v. KOMU MENON', 23 Coch L R 674. In the earliest of these cases 'PADMANABHA MENON v. SIVARAMA MENON', 6 Coch L R 460, it was held that the true juristic nature of a transaction evidenced by a document was to be determined not by the name given in the document, but by the intention of the parties as gathered from its various provisions. To use the language of the decision itself the true nature of a document was to be determined not by the name given to it but by the operative and substantial portions thereof. That decision emphasises three features as indicative of an intention to divide. They are: (1) the absence of a provision for a common Karnavan, (2) a per capita distribution of the assets and liabilities among the several disintegrating units, and (3) the permanency of the arrangement.

In 'KUNCHI AMMA v. ACHUTHAN NAYAR', 19 Coch L R 54, it was held:

> "The question whether a family karar amounts to an outright partition or a mere family arrangement has to be decided with reference to the intention of the parties and that intention has to be gathered primarily from the express terms of the karar itself. Where the terms are conflicting they have to be construed with reference to their comparative merits in order to ascertain the principal intention of the parties.

> Where the terms of a karar transfer in favour of the various thavazhies into which the family is divided substantive rights arising out of ownership in property, viz., rights of possession, management and enjoyment, nothing substantial remains to be preserved in common and the arrangement evidences an intention to effect an out and out division. Terms providing for retention of common ownership partake of the character of restraints against alienation and do not extend, curtail or qualify the otherwise unrestricted rights and powers transferred to the various small independent groups.

More or less the same principles are enunciated in the other cases as well and on analysis it would be found that in substance, they are practically the same rules, as laid down by the decisions of the Travancore High Court, referred to in the judgments of my learned colleagues.

(21) I have carefully examined the provisions in Ext. A, in the light of both sets of decisions, and though a conclusion is by no means easy, keeping in view the wholesome rule that where the terms are conflicting they have to be construed with reference to their comparative merits in order to ascertain the true intention of the parties. I am inclined to agree with the view taken by Mr. Justice Sankaran that Ext. A is in all intents and purpose an outright partition and that the present suit must fail on that ground. Mr. Justice Sankaran has dealt with all possible aspects of the case and it would be presumptuous on my part to attempt to add to or to improve upon the grounds tending to the conclusion which he arrived at. Nevertheless, I must state my reasons.

(22) The fact that the bulk of the properties dealt with under Ext. A did not form sub-tarwad property and the further fact that the branches as such are to start to enjoy the properties allotted to each of them only after the life-time of the surviving acquirers, influence me greatly to take the view that the parties did not intend the arrangement evidenced by Ext. A to be a mere arrangement for maintenance. That the immediate occasion to bring such an arrangement into being, was the apprehended danger that the family might lose the entire property on account of the debts then existing, almost tends to the same conclusion. When the members of a family make an arrangement for maintenance, it is not natural or reasonable to expect they would postpone its operation until after the life-time of three or four living persons. It is the immediate needs that the parties will have in mind for a maintenance arrangement.

(23) Another important factor which influences me in the decision of the case is the provision in the document that the arrangement made thereunder shall in no wise and on no account be disturbed. At a time when there was no right of compulsory partition among the members of the Ezhava community if the members of this subtarwad thought that they should make an arrangement which should endure for all time, to me the conclusion appears to be irresistible that the parties meant or intended a partition arrangement and nothing short of it. The Ezhava Act which allows the parties the privilege of partition is not intended, in my opinion, to disturb and unsettle such permanent arrangement, which, in the absence of the Act, the parties will admittedly not be entitled to do. The liability to a revision is, if I may say so, the hall-mark of a maintenance arrangement and when the possibility of a revision is in express terms taken away, it is difficult for me to persuade myself to hold that Ext. A is a maintenance arrangement, when no revision or redistribution can be made in the event of changes in the circumstances of the family such as fluctuations in the numerical strength of the two dividing branches, it is difficult to hold a mere maintenance arrangement alone was intended.

(24) One branch consisted of as many as 14 adults and 14 minors while the other had only 5 adults and one minor. It is a per stirpes division or distribution that is made and not a per capita one. That again is an indication that a partition was intended. If it were a maintenance arrangement properties would have been distributed according to the numerical strength of the two branches and not an equal division into 2. In a recent unreported decision of the Travancore High Court, 'PADMANABHAN GOPALAN v. RAMAN NARAYANAN', S. A. 607/1121, Krishnaswami Iyer, C. J., remarked that prior to the Ezhava Act, Sakha or branch division was very much more prevalent according to the usage than per capita division. That was also a suit for partition and like the case on hand, its decision depended on the true construction of a document which like Ext. A in this case the parties had named as an 'anubava udampadi.' Analysing the various clauses of that document the learned Chief Justice, with whom Simon, J. concurred, held the document to evidence an outright partition and not a mere maintenance arrangement. The following extract from that decision would be helpful in this context:

> "The division or distribution has to be according to the Sakhas. The parties being Ezhavas, Sakha division was very much more prevalent according to the usage than per capita division. The Ezhava Act was passed in 1100 and this division was effected in 1095, five years before. The other terms of the document are definitely in favour of a partition rather than a temporary arrangement for distributive enjoyment. There is a provision for the making of improvements which is unusual in the case of an undivided tarwad. Karnavan..... The other branches are allotted different schedules of properties. They are asked to pay taxes separately....Liability to pay the debts has been settled under Ext. A (the document concerned in that case). There is a provision that each branch may of its own accord by alienation or otherwise raise a sum of money not exceeding 2140 fanams. This is consistent with the divided status. Any borrowings beyond the amount is restrained by the requirement of consent from the other members. Such restraints in respect of alienations of an extravagant kind are conceived more in the interests of branches than an indication of an undivided tarwad."
>
> "There is a provision for the contribution by all the four branches for the common ceremonies and for the recovery in case of default in respect of such contributions by resort to legal proceedings against the properties allotted to the defaulting branches. Taking all the surrounding circumstances regarding Ext. A it seems impossible to us to resist the conclusion that the Ezhava tarwad was divided according to the branches or Sakhas under Ext. A."

It need hardly be observed that most of the features that induced the learned Judges in that case to interpret the document before them as evidencing a partition arrangement are present in Ext. A in this case as well and the view Mr. Justice Sankaran took in this case gains considerable support from that unreported decision. Earlier in that judgment the learned Chief Justice had said:

> "The operative portion of the document explains why Ext. A came to be executed. The document states that it was found by the members of the

tarwad that it was better for the members of the tarwad and also for the preservation of the properties that they should divide the properties and enjoy the same ശാരവക്രമമനുസരിച്ചേ വീതിച്ചു അനുഭവിക്കുന്നത നല്ലതാണെന്നു കരുതു. The implication of these words is strong that the enjoyment was to follow on a partition....."

Clause 3 of Ext. A the relevant words of which are extracted in the judgment of Mr. Justice Govinda Pillai, contains almost similar ideas and words. The use of the words അവകാശ ക്രമമനുസരിച്ചേ വസ്തുക്കളിൽ അനുഭവതിലേക്ക് ഉന്ന പകുതി വീതം രണ്ടായി വീതിച്ചു മേലാല കൈകാര്യ ചെയ്യണ മെന്നു..... is significant. A partition necessarily implies an arrangement as to enjoyment also. The implication of the words അവകാശ ക്രമമനുസരിച്ച രണ്ടായി വീതിച്ചു and മേലാല കൈകാര്യ ചെയ്യണമെന്നു is to my mind that the enjoyment was to follow on a partition.

(25) The foregoing considerations together with such circumstances as the absence of a provision for a common Karnavan and that all available sub-tarwad properties and debts are dealt with under Ext. A compel me to take the view that the combined effect of all the relevant provisions of the document is to infer that the parties sought to effect thereunder an outright division. Everything which makes property valuable has been transferred to the respective branches. Any restraint on the right of free disposal would be void for repugnancy if, but for it, there was a complete separation and the view I take in agreement with Mr. Justice Sankaran is that such a separation was brought about by the document. A provision such as that unauthorised alienations can be questioned by any member of the sub-tarwad is rather illusory and if anything has only a sentimental and not a marketable value.

(26) No great reliance can be placed on the value of the stamp paper used for Ext. A. The point raised by the learned Advocates for the respondents that the stamp paper used is of insufficient value even for a maintenance arrangement to be engrossed upon it was not sought to be controverted by the appellant's learned Advocate. The repeated use of the word അനുഭവിച്ചിന്നായി only shows that the members were anxious that the properties should not go out of the family. As stated earlier a partition necessarily implies an arrangement as to enjoyment also. It has repeatedly been held that the name the parties give to a document may at best help its interpretation and not determinate it. To quote Uthwatt, J., (as he then was):

"No label can create a fact; a label may accurately describe a fact or it may misdescribe it, or may help to the solution of a doubtful question of interpretation. What the parties have done — not their description of it — is the determining consideration." 'SAMUEL v. SALMON & GLUCKSTEIN LTD.', (1946) 1 Ch 8 at p. 13.

(27) When the terms of a document are capable of two constructions, it is relevant to look into how the parties understood those terms. In 'NORTH EASTERN RLY. v. HASTINGS (LORD)', (1900) AC 260 at p. 270, Lord Brampton said:

"I grant that if the clause were capable of two constructions, one of which would support, the other of which would defeat the claim, the omission would afford irresistible proof that the latter was the interpretation intended by the parties."

Judged by that test, the conclusion I have arrived at receives added strength from the subsequent conduct and dealings of the parties. This aspect is fully discussed by Mr. Justice Sankaran in his judgment and I do not wish to travel over the same ground here.

To conclude, I agree with the conclusion which Mr. Justice Sankaran reached in this case and the reasons therefor given in his judgment, I also agree to the decree proposed by that learned Judge to confirm the lower Court's judgment and decree and to dismiss the appeal with costs.

R.G.D. Appeal dismissed.

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KOSHI AND GOVINDA PILLAI JJ.

Bhageerathi Pilla Omanakutty Amma and another, Appellants v. Kochan Nadar Podian Nadar and others, Respondents.

A. S. No. 414 of 1123, D/- 23-8-51.

T. P. Act (1882), S. 60 — Mortgage styled as Otti and Kuzhikanom — Provision to pay compensation for trees planted, on redemption — Mortgagee to surrender property on demand on redemption — Mortgagee does not get right to be in possession for twelve years — Redemption suit can be filed any time after execution of deed.

A provision in a mortgage deed styled as Otti and Kuzhikanom, that if the mortgagee planted trees that would be compensated for at the time of redemption on demand does not confer on the mortgagee a right to hold property for twelve years when there is a provision for surrender on demand which allows the mortgagor to ask for redemption at any time after the execution of the document. 1950 Trav CLR 137, Foll.; 13 Trav LJ 37, Disting. (Para 2)

Anno: T. P. Act, S. 60 N. 5.

A. Sankara Pillai and K. Ayyappan Pillai, for Appellants; Mathew Muricken and O. L. Abraham, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('50) 1950 Trav CLR 137: (1950 Ker LT 303) 1
13 Trav LJ 37 1

PILLAI J.: The plaintiffs are the appellants. The suit was for redemption of Ex. A, mortgage. It had been executed by the first plaintiff, on her behalf and on behalf of her minor children, in renewal of a prior lease of 1071. It was styled as 'Otti' and 'Kuzhikanom' and there was also a provision that, if the mortgagee planted trees, that would be paid for when redeemed on demand. The plaintiffs' position was that no term of twelve years had been conferred by this and that the mortgagee was to surrender possession of the property when demanded. It was also stated that the defendants had committed waste in the property to the extent of Rs. 1875. This suit was, therefore, filed for redemption of the mortgage. Defendants 1 to 3 contended that, as Ex. A, mortgage, was in 1119, with a kuzhikanom term the suit for redemption filed in 1121 was premature, that there was no provision in Ex. A for surrender on demand and that no waste had been committed by them. The lower court, on the preliminary issue relating to the maintainability of the suit in 1121, that is within two years of the document, held that the suit was premature. The suit was dismissed without entering its findings on the other issues raised in the case. The appeal is against this decree.

(2) It is true that Ex. A is styled as 'Otti' and 'Kuzhikanom'. But the provision there is, *"Besides the consideration amount I shall also pay at

*Original is in Malayalam.—Ed.

the time of redemption on demand the customary value of the trees duly planted from 1071 and trees that you plant from to-day."

This would only indicate that if the mortgagee planted trees that would be compensated for, at the time of redemption on demand. This would not confer on the mortgagee a right to hold the property for twelve years. A similar document came up for consideration in 'CHELLANPAN v. RAMAKRISHNA PILLAI', 1950 Trav C L R 137 and it was held that the provision, for surrender on demand, allowed the mortgagor to ask for redemption at any time after the execution of the document. The lower court had relied on the Full Bench decision in 'GNANA PRAKASOM v. SAMUAL', 13 Trav L J 37. That is not against the interpretation put on documents like Ex. A in the case referred to above and in the present case. It had been held there that where an otti contained a direction empowering the mortgagee to plant trees and make other improvements on the property mortgaged, coupled with or implying a promise by the mortgagor to compensate the mortgagee for such improvements, the combined effect of the direction and the promise was to confer on the mortgagee the right to remain in possession for a period of twelve years; in the absence of any other clause in the instrument indicating an inconsistent or contrary intention. The provision for surrender on demand would indicate the intention of the parties that Ext. A was not to be for a period of twelve years, though the mortgagee had been allowed the right to improve the property, in which case he was to get compensation thereof. We follow the ruling in 1950 Trav C L R 137 and hold that Ex. A does not provide for a term of twelve years.

The suit is, therefore, not premature. Since the lower court has disposed of the suit on this sole question, the case has to be sent back for disposal after recording findings on the remaining issues raised in the case. The appellant will get costs of this appeal. But they would be allowed advocate's fee only on 2800 fanams, which is the mortgage amount. There was no necessity for them to pay any court-fee on the waste claimed. The respondents will suffer their costs of this appeal. The costs of the trial court shall abide the final result. The appellants will get refund of the court-fees paid on the reliefs for waste and injunction claimed in appeal.

R.G.D.

Appeal allowed.

A. I. R. 1952 Travancore-Cochin 287

KUNHI RAMAN C. J.
AND SUBRAMANIA IYER J.

P. K. Krishnan Kutty, Appellant v. State of Travancore-Cochin.

Appeal Suit No. 86 of 1951, D/- 12-2-1951.

Constitution of India, Art. 226 — Quasi-judicial tribunal — Opportunity to be heard by — Right whether exists — Special Tribunal.

All that quasi judicial tribunals like the Board of Revenue have to do, is to give sufficient opportunity to persons who approach them for the exercise of their jurisdiction to state their case. In the case of an executive authority like the Member of the Board of Revenue, there is no rule which requires that he should listen to oral contentions of parties or their advocates. It is enough if the contentions are put in writing and the order is passed on perusal of these objections. That is sufficient hearing for the purpose of disposing of the matter. AIR 1951 Mad 276, Foll.; AIR 1951 TC 197, Affirmed. (Para 7)

(b) Constitution of India, Art. 19 — Obligations arising out of contract entered into by party — Party whether can contend that restrictions imposed by contract offend fundamental right.

Where a person's legal status and responsibility as also his obligations arise out of a contract entered into between him and the Government, it is futile for such person to try to avoid the restrictions imposed upon him under the clauses and rules of his contract by saying that they offend the Constitution of India which recognised "fundamental rights" in favour of the citizens of the country. Such restrictions, far from being infringement of a fundamental right, are of a fundamental obligation arising out of a formal contract entered into by the person with the Government. It is not the object of the Constitution of India to enable the citizens of India to break obligations arising under formal contracts entered into by them under the guise of that obligation being something that is repugnant to the recognition of a fundamental right. Such an idea is foreign to the Constitution of India. (Para 8)

S. Narayanan Potti, for Appellant; T. N. Subramania Iyer, Advocate General, for the State.

REFERENCES: Courtwar/Chronological/ Paras.

('50) 1950-2 Mad L Jour 399: (AIR 1951 Mad 276) 7

('50) O. P. No. 51 of 1950: (AIR 1951 Trav-C 197) 1

('50) A. S. No. 815 of 1950: (AIR 1951 Trav-C 241) 7

(1915) AC 120: (84 LJKB 72) 7

KUNHI RAMAN, C. J.: This appeal is brought from the decision of Mr. Justice Koshi in 'KRISHNAN KUTTY v. STATE OF TRAVANCORE, COCHIN', O. P. No. 51 of 1950 in which the prayer was for the issue of a writ of certiorari to quash the order of the Government refusing to interfere in the petitioner's case. The order was passed on 4-10-1950. The petitioner also asked for a direction to the Board of Revenue to desist from enforcing its decision that the petitioner should transfer his place of business in vending toddy from what is described as shop No. 7. The learned Judge refused to issue the writ and from that decision the present appeal is brought by the petitioner. The learned Advocate General appeared before this court on notice and supported the order made by the learned Judge.

(2) There was an auction held under the directions of the Government of the right of vending toddy in shop No. 7 for the period 17-8-1950 to 31-3-1952. The petitioner was the highest bidder at that auction and consequently he acquired the right of carrying on the business in shop No. 7 during the relevant period. There was no fixed place of business mentioned in the notice of auction. It may here be stated that the auction was conducted in accordance with the rules framed by the Government under the Cochin Abkari Act (I of 1077) and published in the Travancore-Cochin Gazette dated 2nd May 1950 at page 435 and subsequent pages. One of the conditions subject to which the auction was held was that the place selected by the highest bidder for carrying on the

business which was knocked down at the auction in his favour will have to be approved by the Government. For this purpose a description of the site at which the business is proposed to be carried on will have to be submitted within the prescribed period and the Board of Revenue will decide whether the site is suitable for the purpose. If the Board decides that it is not satisfied, then the business cannot be carried on in that place.

(3) Naturally to enable the Board of Revenue to consider the various aspects of the question, it will have to devote time and attention to the application and to the objections, if any, preferred by people in the neighbourhood and subordinate officers of Government. There are certain rules for the guidance of people like the appellant which are to be found in the rules framed by the Government. For example, within a municipal area the distance between two toddy shops should not be less than ½ a mile. In a rural area the distance should not be less than one mile. The shop should not be located near a public school or a place of public resort or a place of worship or a public market. To enable a person like the appellant to begin his business as early as possible and not to be kept in suspense, there is an emergency provision according to which a temporary license can be obtained by him which can be granted by the Assistant Commissioner of Excise and which will remain in force for one month. During the period of that month, he can carry on his business temporarily in a place that is chosen by him and approved by the Assistant Commissioner. After the expiry of the month, a permanent license will be issued to him. In that permanent license, the place where the business will be carried on will be specified. That need not necessarily be the place to which the temporary license applied. The place of business under the temporary license is, as already stated, only subject to the approval of the Assistant Commissioner, but the place of business under the permanent license has to be approved by the Board of Revenue which is in no way bound by the selection made by the Assistant Commissioner as an emergency measure. Even after the permanent license is granted to a vendor, if there are objections to the place where the business is being carried on by him the Board of Revenue can review the situation and give a direction to the vendor to move to a more suitable place of business. In the present case, the petitioner appellant has not yet been given a permanent license. He has been carrying on business in a place which is said to be within three furlongs of another toddy shop owned by a person who is described as the appellant's rival in business. He had competed with the appellant in bidding at the auction. He was the person who was the successful bidder at the auction held during the previous two years. The appellant's complaint is that this rival shop keeper has resorted to dishonest tactics and manoeuvred to influence the Board of Revenue to prevent him from carrying on his business in the place which he had selected while he was functioning under the authority of the temporary license. He alleges that he has incurred expenditure in making the place suitable for carrying on his business and that it will result in loss if he is asked to move to another place.

(4) It was while the appellant was carrying on his business in the site chosen by him temporarily under the temporary license that he was called upon by the Board of Revenue to move to a more suitable place for the reason that in the opinion of the Board the place where the temporary business was carried on was objectionable. Soon after appellant heard about this order he appealed to the Government, but the Government declined to interfere. There was a review petition which was also dismissed. It must here be stated that the Government when dealing with the matter heard the petitioner and his advocate; but his complaint is that the first member of the Board of Revenue who made the original order did not hear his advocate. He even doubts whether any order at all was passed by the First Member.

(5) The learned Judge who heard the Original Petition, after listening to the elaborate arguments addressed on both sides arrived at the conclusion that no case was made out for the issue of a writ of 'certiorari' and dismissed the petition.

(6) The first contention urged in appeal by the learned counsel for the appellant is that the Revenue Board had not passed any order whatsoever. The learned Advocate General appearing for the State has produced a copy of the order passed by the Board of Revenue and also brought to the Court the original of the order so that we may be satisfied that such an order was passed. There is no doubt that an order was passed by the Board of Revenue. Otherwise there was no ground for the petitioner to approach the Government as he has done in the present case.

(7) The next contention urged on behalf of the appellant is that the first Member of the Board of Revenue who decided that the appellant's place of business should be shifted, did not permit the appellant or his advocate to make any representation to him, although he was interviewed by both of them when he was here in Ernakulam on an official visit. It is argued that when the Revenue Board Member saw the petitioner and his advocate, he merely told them that he had made up his mind and that there was no point in urging any contention before him. This, it is contended, amounts to a denial of natural justice and consequently the conclusion reached by the Revenue Board Member and the order made by the Government confirming that conclusion must be quashed. It must here be pointed out that the appellant's contention is that no order was passed by the Revenue Board Member. The proceedings in this Court were started for issuing a writ of 'certiorari' for quashing the order passed by the Government and not the order of the Board of Revenue. There is no substance in the contention that the appellant was not given a hearing, because it is conceded that the Minister for Excise when he was dealing with the petitioner's case, did hear his advocate. So far as the Revenue Board Member is concerned, he, no doubt, did not listen to the oral arguments of the petitioner's Advocate who accompanied him when he came to see him at Ernakulam, but on the appellant's own admission in his affidavit he had sent up a representation in writing to the Board in which was set forth all the grounds that he wanted to urge in support of his contention that the place of business must not be directed to be moved from its present site. In the case of an executive authority like the Member of the Board of Revenue, there is no rule which requires that he should listen to oral contentions of parties or their advocates. It is enough if the contentions are put in writing as appears to have been done in the present case, and the order was passed presumably on perusal of these objections. That is sufficient hearing for the purpose of disposing of the matter. We have taken a similar view in the case decided by us, 'STATE OF TRAVANCORE COCHIN v. JOSEPH CHACKO', A. S. No. 815 of 1950, so has the Madras High Court in the case reported in 'SHANMUGA MUDALIAR, In re: 1950-2 Mad L J 399, where the

learned Judges relying upon the decision in 'LOCAL GOVERNMENT BOARD v. ALRIDGE', 1915 A C 120, took the view that all that quasi judicial tribunals like the Board of Revenue have to do, is to give sufficient opportunity to persons who approach them for the exercise of their jurisdiction to state their case. In the decision of the House of Lords, the view expressed was that an appellant to the local Government is not entitled as of right as a condition precedent of a dismissal of his appeal either to be heard orally before the deciding officer, or to see the report made by the Board's inspector upon the public local inquiry.

(8) It has now become conventional for persons who come with applications for writs to talk about fundamental rights. The present appellant's case is no exception to the rule. His learned counsel tried to dwell upon the infringement of his "fundamental right " to carry on his business in the place selected by him originally. But in the present case it will be seen that the petitioner's legal status and responsibility as also his obligations arose out of a contract entered into between him and the Government. In response to a notice that the right to vend toddy in the locality was about to be auctioned, he attended the auction and was one of the bidders who was ultimately declared to be the successful bidder and it is as a result of his bid which was declared to be the highest bid at the auction, that he become entitled to carry on the business of vending toddy in the area which was allotted to him. The details of the auction were all set forth in the notice published prior to the auction. The locality in respect of which the auction was held was also specified. Obviously therefore, it would be futile for the petitioner to contend that because he happened to be the highest bidder at the auction, he must be permitted to carry on his business of vending toddy in some area or locality other than that for which the auction was held. No doubt he does not urge such an extreme contention in the present case, but the argument that he is not bound by the rules and restrictions subject to which the contract was entered into between him and the Government, if it is extended to its logical consequence must result in such an absurd position. In the rules and regulation there are two restrictions that are relevant to the present case. The first is that for a period of one month from the date of the auction, pending decision by the Board of Revenue as to the suitability of the place selected by the appellant for carrying on his business permanently under a permanent license, and pending the issue of a permanent license to him, he is permitted to carry on business by virtue of a temporary license at a place which need only be approved by the Assistant Commissioner. The temporary license granted to him has been produced in court. It does not specify the place of business. But the permanent license which would be granted to him in due course will mention the place specifically. One of the rules subject to which the auction was held is that the place which is chosen by the successful bidder for carrying on his business under a temporary license, will have to be approved by the Board of Revenue if he wants to use it for carrying on his business under the permanent license. If it is not approved, the Revenue Board may tell him that he should not carry on his business of vending toddy in that place. The next rule which is relevant for the present purpose is the rule which says that even a place that is approved by the Board of Revenue when it grants a permanent license, may for valid reasons subsequently be also disapproved by the Board which may then call upon the appellant to move to a fresh site. There are thus two distinct stages at which the approval of the Board of Revenue will have to be obtained to enable the petitioner to carry on his business. The first is when he has been doing business under a temporary license and the Board does not approve of that place for carrying on business under the permanent license on the expiry of a month from the date on which the temporary license was granted. At that stage, the Board can either approve the site where the business under the temporary license was carried on or disapprove and call upon the appellant to choose a different site for doing business under the permanent license. That is what has happened in the present case. When such a right has been reserved in favour of the Government in the rules and regulations subject to which the auction was conducted, it is futile for the appellant to try to avoid the restrictions imposed upon him under the clauses and rules of his contract by saying that they offend the Constitution of India which recognised "fundamental rights" in favour of the citizens of the country. It seems to us that far from there being infringement of a fundamental right, this is a case of a fundamental obligation arising out of a formal contract entered into by the appellant with the Government which he is trying to break. It is not the object of the Constitution of India to enable the citizens of our country to break obligations arising under formal contracts entered into by them under the guise of that obligation being something that is repugnant to the recognition of a fundamental right. Such an idea is foreign to the Constitution of India.

(8a) If such an idea is permitted to prevail, it will only lead to demoralisation of public morals which it is never the intention of our Constitution to encourage. When the appellant has entered into a contract with the Government he is bound to conform to the conditions of that contract and in the present case all that the State has done is to enforce its right to insist upon the appellant moving from the place where he had started his business during the first month of his contract. The State was within its rights in enforcing this condition. The condition has been enforced after giving every opportunity to the appellant to set forth his objections. According to the appellant's own admission, he had presented a petition in detail to the First Member of the Board of Revenue in which he had set forth all his objections. It was subsequently that the Revenue Board Member passed the order directing him to move. So far as the Government is concerned, every opportunity was given by the Honourable Minister for Excise to the petitioner to urge his contentions orally and it was after hearing the arguments of his counsel that the order was finally passed. Therefore, there is nothing that is sinister or opposed to natural justice in the proceedings either of the Board of Revenue or of the Government to warrant this Court inferfering by issuing a writ of 'certiorari' and quashing these proceedings.

(9) One more contention urged on behalf of the appellant refers to the wording of the Government order which indicates that he may carry on business "at or about the site where it was conducted in 1124 or 1125." The appellant's learned Advocate argues that it is not open to the Government to specify the place where the petitioner should conduct his business. We cannot see in this order any clause directing the appellant to carry on his business at any particular spot. There is only an indication as to the site where the business may be carried on without objection by the Revenue Board or the Government. Instead of driving the appellant from pillar to post and making him file a series of applications suggesting different places

which in the opinion of the Government or the Revenue Board may be objectionable for carrying on his business, he is given an opportunity of selecting a place which will not normally be objected to by the authorities concerned. There is nothing improper in giving such an indication in the order and this does not render it liable to attack in an application for the issue of a writ of 'certiorari.'

(10) In these circumstances, we see no ground to interfere in appeal and we dismiss this appeal with costs and advocate's fee which we fix at Rs. 250.

V.S.B. Appeal dismissed.

A. I. R. 1952 Travancore-Cochin 290

SANKARAN J.

Kesavan, Petitioner v. State and another, Respondents.

O. P. No. 22 of 1951, D/- 4-10-1951.

(a) Houses and Rents — Travancore-Cochin Buildings (Lease and Rent Control) Order (1950), S. 9 (2) — Building taken on rent for specific non-residential purpose — Use of building for any other non-residential purpose — (Houses and Rents — Cochin Buildings (Lease and Rent Control) Act (XXIV (24) of 1124), Ss. 2 and 4).

Though it is clear from Ss. 2 and 4 of the Act that they indicate only two general categories of buildings, namely, residential and non-residential buildings and though the commission of such acts by the tenant as may amount to nuisance to the occupiers of the buildings in the neighbourhood and the user by him of the building for a purpose other than that for which the building was leased may be consistent with the use of the building for non-residential purposes, yet the tenant will become liable to surrender the building by virtue of the special provisions contained in section 9 of the Act. In the face of such special provisions it is not open to the tenant to contend that since he has taken the building on rent for a non-residential purpose, he is entitled to put the building to any kind of non-residential use. (Para 5)

(b) Houses and Rents — Travancore-Cochin Buildings (Lease and Rent Control) Order (1950), S. 9 (2) (ii) — "After the commencement of" — Meaning of.

The plain meaning of the clause is that the tenant becomes liable for eviction if he is found to have used the building after the commencement of the Act for a purpose other than that for which the building had been leased out to him. What is stressed in the clause is such user for a different purpose and not the commencement of such user. (Para 6)

(c) Interpretation of statutes — Court must confine itself to words in statute.

In construing and interpreting a particular provision in a statute, the Court has necessarily to confine itself to the particular words used by the Legislature in enacting that provision. The Court cannot attempt to improve upon that provision by reading more into it. In doing so the Court would be usurping the function of the Legislature. (Para 6)

Anno: C. P. C., Preamble N. 7 Pt. 2.

T. K. Narayana Pillai, for Petitioner; Government Pleader, N. Kumaran Achan, for the State; M. S. Menon, G. B. Pai, and K. V. Raja Gopala Shenoi, for Respondent No. 2.

ORDER.: The petitioner is the tenant in occupation of building No. 253/A/XVII within the Ernakulam Municipal Town. This building belongs to the 2nd respondent and it was rented out to the petitioner for the purpose of being used as a furniture mart. She applied to the Rent Controller at Ernakulam for evicting the petitioner from the building on the grounds that the petitioner by using the building as a tea-shop has unauthorisedly used it for a purpose different from that for which the building has been rented out to him and that he has committed acts of waste resulting in damage to the building. In R.C.P. No. 179 of 1125 these allegations were enquired into by the Rent Controller and on finding them to be true, he passed an order directing the eviction of the petitioner from the building and putting the landlady in possession.

Against that order the petitioner filed an appeal as R. C. A. No. 56 of 1950 before the District Magistrate at Trichur, who is the appellate authority under the Rent Control Order. The findings recorded by the Rent Controller were confirmed by the appellate authority and the appeal was dismissed. The petitioner then moved Government for a revision of that order. By the order L. Dis. 13425/50 PWC dated 17-2-51 the revision petition was dismissed by Government. It is for quashing the eviction proceedings which terminated with the Government order dated 17-2-1951 that the present petition has been filed by the tenant in occupation of the building. He has invoked the jurisdiction of this Court under Article 226 of the Constitution or, in the alternative, under Article 227. He has prayed for the issue of a writ or order under Article 226 quashing all the proceedings in R.C.P. No. 179 of 1125 which terminated in the Government order dated 17-2-1951.

The alternative relief prayed for by the petitioner is that these proceedings may be set aside by this court in the exercise of the supervisory jurisdiction under Article 227 of the Constitution. The petition is opposed by both the respondents i.e., the State as well as the owner of the building. In the counter affidavit filed on behalf of the 2nd respondent it is stated that the present Municipal number of the building is 228/XVII and not 253/A/XVII as stated in paragraph 1 of the petitioner's affidavit.

(2) The eviction proceedings in R.C.P. No. 179 of 1125 on the file of the Rent Controller at Ernakulam were started under the Cochin Buildings (Lease and Rent Control) Act, Act XXIV (24) of 1124, which was in force at the relevant period. This Act has subsequently been replaced by the Travancore-Cochin Buildings (Lease and Rent Control) Order, 1950 issued by Government in the exercise of the powers conferred on them by Section 13 of the Travancore-Cochin Public Safety Measures Act, Act V (5) of 1950. The petitioner has attacked the order of eviction passed against him in R.C.P. No. 179 of 1125 as illegal and as being 'ultra vires' of the powers of the Rent Controller. The Rent Controller is stated to have acted without jurisdiction in passing such an order. The petitioner has also alleged that he has not used the building for any purpose different from that for which he had taken it on rent and that even if there has been any contrary user, such user would entail a forfeiture of his right of tenancy only if the user was commenced subsequent to the passing of the Buildings (Lease and Rent Control) Order, 1950.

(3) Subsequent to the filing of the present petition the petitioner filed a supplementary affidavit on 12-3-1951 questioning the validity of the Travancore-Cochin Public Safety Measures Act and also of the Buildings (Lease and Rent Control) Order, 1950 passed under section 13 of that Act. But these contentions were not pressed at the time of hearing. The grounds raised in the affidavit filed along with the petition and also in the supplementary affidavit filed on 11-7-1951 were alone pressed at the hearing.

(4) The petition before the Rent Controller was filed under section 9 (2) of the Cochin Buildings (Lease and Rent Control) Act, Act XXIV (24) of 1124. That Act came into force on 7-6-1949/25-10-1124. It was provided in clause (4) of section 1 of the Act that the Act was to remain in force till the last day of 'Karkatagam' 1125 i.e., till 16-8-1950. The Rent Controller passed his order in R.C.P. No. 179 of 1125 on 5-6-1950. This fact is mentioned in paragraph 5 of the counter-affidavit filed on behalf of the 2nd respondent and it is not challenged by the petitioner. The Travancore-Cochin Buildings (Lease and Rent Control) Order, 1950 which superseded Act XXIV (24) of 1124 of Cochin, came into force on 17-8-1950. From these facts it is clear that the eviction proceedings before the Rent Controller in R.C.P. No. 179 of 1126 were commenced and concluded at a time when Act XXIV (24) of 1124 of Cochin was in force.

As per the provisions of that Act the Rent Controller had been invested with jurisdiction to determine whether the grounds for eviction urged against the tenant are true and valid. In the exercise of such jurisdiction the Rent Controller after due enquiry came to the conclusion that the building had been originally rented out to be used as a furniture mart and that the tenant without obtaining the consent of the landlady has been using the building as a tea-shop. These are findings on questions of fact and these findings were confirmed by the appellate authority also. The correctness of these findings cannot be gone into in the present proceedings. In fact the arguments addressed on behalf of the petitioner proceeded on the basis that the findings on the questions of fact recorded by the Rent Controller may be taken to be correct.

(5) It is contended on behalf of the petitioner that even on the facts proved against him it cannot be said that he has entailed a forfeiture of the tenancy in question and that the Rent Controller has acted without jurisdiction in ordering his eviction from the building. The two points urged in support of this contention are: (1) that the building had been rented out to him for a non-residential purpose and as such he is entitled to use it either as a furniture mart or as a tea-shop (2) that he had started using the building as a tea-shop even prior to the commencement of Act XXIV (24) of 1124 and that such user will not entail a forfeiture of the tenancy as per section 9 of the Control Order of 1950. The provision governing this matter is contained in sub-clause (ii) (b) of clause (2) of section 9 of the Control Order. It empowers the Controller to order eviction if he is satisfied:

> "that the tenant has after the commencement of .....the Cochin Buildings (Lease and Rent Control) Act, XXIV (24) of 1124..... without the written consent of the landlord, used the building for a purpose other than that for which it was leased."

According to the petitioner the use contemplated by this provision must fall under the category of residential use or of non-residential use. It is argued that Act XXIV (24) of 1124 of Cochin and the subsequent Rent Control Order of 1950 of Travancore-Cochin both contemplate only two such general uses of the building given on rent. This argument is attempted to be supported by the definition of the word "Building" as given in section 2 of Act XXIV (24) of 1124 which is as follows:

> "'building' means any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes, and includes the garden, grounds and out-houses....."

In section 4 also the same two classes of buildings are recognised, viz., residential buildings and non-residential buildings. It is clear from these provisions that they indicate only the two general categories of buildings which are to come within the scope of the Act and not to specify any details as to the particulars regarding the manner in which a residential building or non-residential building may be used by the tenant. Such details in respect of non-residential buildings are given in section 9 of the Act which deals with the grounds under which the tenant would become liable to surrender the building. One such ground is the user of the building for a purpose other than that for which it was leased. Another ground is the commission of such acts by the tenant which may amount to a nuisance to the occupiers of the buildings in the neighbourhood.

Even though the commission of such acts by the tenant and the user by him of the building for a purpose other than that for which the building was leased may be consistent with the use of the building for non-residential purposes, the tenant will become liable to surrender the building by virtue of the special provisions contained in section 9 of the Act (Order?). In the face of such special provisions it is not open to the tenant to contend that since he has taken the building on rent for a non-residential purpose, he is entitled to put the building to any kind of non-residential use. When the building has been given on rent for a specified purpose the tenancy will be protected only so long as the building is used for the identical purpose. If the tenant wants to use the building for any other purpose, he has to obtain the written consent of the landlord for the same. If he uses the building for a purpose different from that for which the building was rented, without obtaining such consent from the landlord, he would be entailing a forfeiture of the tenancy. Thus the first ground urged on behalf of the petitioner fails.

(6) The second ground urged on behalf of the petitioner is also untenable. There is nothing in clause (2) of section 9 of the Control Order, 1950 to support the petitioner's contention that he becomes liable for eviction only if the user by him of the building for a purpose other than that for which it was originally leased commenced subsequent to the date on which Act XXIV (24) of 1124 came into force. The plain meaning of the clause is that the tenant becomes liable for eviction if he is found to have used the building after the commencement of the Act for a purpose other than that for which the building had been leased out to him. What is stressed in the clause is such user for a different purpose and not the commencement of such user. To construe the clause to mean as the commencement of the use of the building for a different purpose would be doing violence to the words used in the clause and also qualifying the clauses by adding new words to it. In construing and interpreting a particular provision in a statute, the Court has necessarily to confine itself to the particular words used by the Legislature in enacting that provision. The Court cannot attempt to improve upon that provision by reading

more into it. In doing so the Court would be usurping the function of the Legislature.

The result of construing sub-clause (ii) of clause (2) of section 9 of the Control Order as applying only to cases where the unauthorised use of the building for purpose other than that for which it was leased has commenced subsequent to the coming into force of Act XXIV (24) of 1124, would be to condone such unauthorised user which commenced earlier and which may be continuing even after the commencement of the Act. The several clauses of the control Order, 1950 do not indicate that the Legislature intended to ratify the earlier unauthorised user of the building by the tenant and to confer on him a right to continue such unauthorised user. On the other hand it is clear from the several provisions of the Control Order that such unauthorised user is definitely discouraged. It is also seen that the provisions of Act XXIV (24) of 1124 relating to the forfeiture of the tenancy have been bodily incorporated in the Control Order, 1950.

(7) This means that those provisions have been kept alive even under the Control Order. In sub-clause (ii) of clause (2) of section 9 of Act XXIV (24) of 1124 there was an express provision that if the tenant had after 11-2-1122 without the written consent of the landlord used the building for a purpose other than that for which it was leased, he was liable to be evicted from the building. In the present case the unauthorised use of the building as a tea-shop admittedly commenced in 'Thulam' 1124 and as such the tenant became liable to be evicted under the aforesaid clause. The Rent Controller passed the order of eviction in this case on 5-6-1950 when this clause was in force. In the appeal and the revision which followed, the only question that had to be considered was whether the Rent Controller had properly exercised his jurisdiction in acting under the clause. The correctness of that order cannot be tested in the light of the corresponding provision contained in the Control Order, 1950 which came into force only subsequently.

Thus in any view of the matter, it is clear that the present objections raised against that order are unsustainable. That order was passed by the Rent Controller in the proper exercise of the jurisdiction conferred on him by Act XXIV (24) of 1124. There is no reason for interfering with that order by the issue of any writ or direction under Art. 226 of the Constitution. The power conferred on this Court under Article 227 of the Constitution cannot also be invoked for giving any relief to the petitioner against the order of eviction passed against him by the Rent Controller.

(8) In the result this petition is dismissed with costs to respondents 1 to 2, Advocate's fee Rs. 50'-.

V.R.B. Petition dismissed.

A. I. R. 1952 Travancore-Cochin 292

KOSHI AND SUBRAMANIA IYER JJ.

Kumara Pillai Kunjan Pillai, Appellant v. Kurien Ouseph and another, Respondents.

Second Appeal No. 120 of 1124, D/- 30-7-51.

Debtor and Creditor—Extinguishment of liability by merger — Extent of — (T. P. Act (1882), S. 101).

It is a principle of jurisprudence that a person cannot, at one and the same time, unite in himself two opposite characters. For instance, a person cannot be his own creditor, or the mortgagee of his own rights. The doctrine of merger proceeds on this principle. The rule no doubt owes its origin to the 'confusio' of the Roman Law. The coincidence of the two opposite characters of debtor and creditor in the same person operates as an annihilation or extinguishment, whereafter there is no more creditor or debtor. If the quantum of the interests that coincide is co-extensive, the extinguishment is complete; otherwise there would be an extinguishment 'pro tanto.' The principle applies to all obligations whatever be their origin and nature; it applies to obligations arising out of or merged in and evidenced by decrees as well. The principle would equally apply whatever be the manner in which the two characters happen to become vested in the same individual whether by act of parties or by operation of law. Case law Ref. (Para 4)

A obtained a money decree against B for Rs. 450. A then borrowed Rs. 250 from C hypothecating the said decree as security. C transferred his interest under the hypothecation bond in favour of B. B as transferee then instituted a suit against A for recovery of the amount due under the hypothecation bond personally from A as also by sale of the hypotheca:

Held that on account of the operation of the rule of extinction occasioned by the plaintiff becoming debtor and creditor the plaintiff's claim for money due on the hypothecation bond must be taken to have been satisfied out of the decretal amount due from him which was in excess of his claim. The plaintiff therefore had nothing to recover by action and hence his suit was not maintainable. 32 Cochin L R 290, Rel. on; 35 Cochin L R 414, Ref. (Para 6)

Anno: T. P. Act, S. 101, N. 1.

Mathew Muricken and O. L. Abraham, for Appellant; T. S. Krishnamoorthi Iyer, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('82) 5 All 27: (1882 All WN 140)	4
('88) 10 All 570: (1888 All WN 231)	4
('33) 54 All 448: (AIR 1932 All 704)	4
('45) ILR (1945) 1 Cal 233	4
('26) 51 Mad LJ 443: (AIR 1926 Mad 1141)	4
32 Cochin LR 290	5
35 Cochin LR 414	5
(1827) 4 Bing 149: (130 ER 725)	4

SUBRAMANIA IYER J.: The first defendant in O. S. 272 of 1120 on the file of the Munsiff's Court, Vaikom, is the appellant in this Second Appeal. He had obtained a decree for money against the plaintiff in O. S. 56/1104 of the same court under which he had to get Rs. 450/-. He borrowed Rs. 250/- and executed a bond for repayment thereof in favour of the 2nd defendant, hypothecating the said decree as security. Ext. A dated 5-6-1111 is the bond. On 28-4-1117 the 2nd defendant assigned his interests under Ext. A in favour of the plaintiff by executing a deed of transfer, Ext. B. The plaintiff brought the suit as such transferee seeking recovery of the amount due under Ext. A personally from the 1st defendant as also by sale of the hypotheca. The total amount claimed in the suit inclusive of principal and interest is Rs. 375/-.

(2) Various contentions were raised by the 1st defendant which were all repelled by both the courts below. The only point that is raised in the Second Appeal is as regards the maintainability of the suit.

(3) Mr. Mathew Muricken, learned counsel for the appellant, contends that the legal consequence of the transfer of the deed of hypothecation, Ext. A, in favour of the plaintiff who is the judgment-debtor in the decree which is the hypotheca under which an amount in excess of that which is claimed in the plaint is payable by him is to extinguish the plaintiff's obligation under the decree to the extent of the amount due under the hypothecation bond and that it will not operate to create any right in him which he can enforce by a suit.

(4) Ext. A operates to transfer the decree in O. S. 56/1104 in favour of the 2nd defendant though the transfer is only by way of security. The rights of the 2nd defendant under Ext. A have been transferred in favour of the plaintiff. The result is that the plaintiff has become the transferee of the rights of the decree-holder (1st defendant) in O. S. 56/1104 under which he is the judgment-debtor, that is to say, the two opposite characters or qualities of debtor and creditor became united in the same person, viz., the plaintiff.

It is a principle of jurisprudence that a person cannot, at one and the same time, unite in himself two opposite characters. For instance, a person cannot be his own creditor, or the mortgagee of his own rights. The doctrine of merger proceeds on this principle. The rule no doubt owes its origin to the 'confusio' of the Roman Law. The coincidence of the two opposite characters of debtor and creditor in the same person operate as an annihilation or extinguishment, whereafter there is no more creditor or debtor. If the quantum of the interests that coincide is co-extensive, the extinguishment is complete; otherwise there would be an extinguishment 'pro tanto'. The principle applies to all obligations whatever be their origin and nature; it applies to obligations arising out of or merged in and evidenced by decrees as well. The principle would equally apply whatever be the manner in which the two characters happen to become vested in the same individual whether by act of parties or by operation of law. This principle which is well established, is covered by authorities from very early times, and has been recognised everywhere. The dictum of Best C. J., in 'NEAL v. TURTON', (1827) 4 Bing 149 at p. 151, "There is no principle by which a man can be at the same time plaintiff and defendant" which applies equally to proceedings in execution, is a corollary. Domat has stated the rule in these terms:

> "If the creditor succeeds, as heir to him who was surety for debtor, or the surety succeeds to the creditor, the obligation of the surety is annulled; but the debtor, nevertheless, remains still obliged. For the surety's obligation which is extinguished by this change was only accessory to the principal obligation and if there were more debtors, or more creditors, for one and the same sum, and if one of the debtors should succeed to one of the creditors, or one of the creditors to one of the debtors, the confusion which would be made in the person of the said heir, being limited to one portion of the debt, would make no manner of change with respect to the others."—(Civ. Law, s. 2263).

Sherman in his "Roman Law in the Modern World", Vol II, page 309, paragraph 742, says:

> "'Extinction of obligation: (10) confusion:' In Roman Law an obligation was dissolved by confusion or merger when the debtor and creditor became one and the same person, for instance when a creditor became by succession heir to his debtor and vice versa. Whenever the principal obligation was extinguished by confusion, any accessory obligation for instance suretyship—was also extinguished: but the opposite case was not true—extinction of the accessory did not extinguish the principal obligation. Confusion as a mode of extinguishing obligations is found in modern law, such as the French, Italian, Spanish, Japanese, Louisiana, and Anglo-American. For example, the Japanese Civil Code provides that if the obligation, right, and duty become vested in the same person, the obligation is extinguished."

It is not necessary to discuss the decisions; it would be sufficient to make reference to the leading and more important ones: 'BANARSI DAS v. MAHARANI KUAR', 5 All 27; 'KUDHAI v. SHEO DAYAL', 10 All 570; 'MT. ASIA BIBI v. AZIR AHMAD', 54 All 448; 'ABDUL KADIR SAHIB v. ABDUL KADIR MARAKKAYAR', 51 Mad L J 443; 'KHELAT CHANDRA v. PEARY LAL', ILR (1945) 1 Cal 233.

(5) Mr. Krishnamoorthi Iyer, learned counsel for the plaintiff-respondent relied upon two decisions: 'RAPPAI v. RAMAN NAIR', 32 Cochin L R 290 and 'SUBRAMANIA PATTAR v. VISWANATHA PATTAR', 35 Cochin 414. The one in 35 Cochin does not appear to have any application to the present case. 32 Cochin L R 290 was a decision under the second proviso to the 14th Rule of the 21st Order of the Cochin Code of Civil Procedure, XXIX/1111, which provides as follows:

> "'Order 21, Rule 14:' Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder.
>
> Provided that, where the decree, or such interest as aforesaid has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the court has heard their objections (if any) to its execution.
>
> Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others,"

and the question that arose there was whether the legal representative of a deceased judgment-debtor would be a "judgment-debtor" within the meaning of the said 2nd proviso.

Order 21, Rule 14, Proviso 2 is also bottomed on the principle of extinction occasioned by the co-existence of opposite qualities of debtor and creditor in the same person. The principle of extinction is accepted in 32 Cochin L R 290 and in the various cases of the Courts in India which are referred to therein. The two learned Judges who heard the case first could not agree. The learned Chief Justice was of the opinion that the proviso prohibited execution only in case of a total extinction occasioned by a complete transfer of the entire rights under the decree which was not the case there. The other learned Judge took the view that the prohibition applies to partial extinctions as well occasioned by the coincidence of the two characters even to a fractional extent. There was agreement between the two learned Judges upon the point that there would be an extinction whether partial or total according to the quantum of the coincidence. Their difference was merely upon the extent of the application of the prohibition contained in the proviso to Rule 14, Order 21 of the Cochin C. P. C. The

third learned Judge before whom the matter was placed on account of such a difference of opinion also accepted the principle of extinction as aforesaid after a discussion of the various authorities cited before him, but was of the opinion that that principle had no application to the facts of that case, as in his view, though the person who sought execution of the decree was a legal representative of the judgment-debtor, he was not himself a judgment-debtor within the meaning of the prohibition which did not, therefore, stand in the way of his executing the decree. The decision in 32 Cochin L R 290 thus is in support of the view that we have taken in this case.

(6) The plaintiff was a judgment-debtor in O. S. 56/1104 to the tune of over Rs. 450/-. The amount of the hypothecation bond, as the transferee of which the plaintiff has brought the suit is only Rs. 250/- which, with interest as claimed in the plaint, as already stated, comes to Rs. 375/- only, which is far less than the amount that the plaintiff is liable to pay under the decree. The result is that on account of the operation of the rule of extinction occasioned by the plaintiff becoming debtor and creditor, the decree is satisfied to the extent of the consideration for Ext. A that is, to the extent of the amount that is sought to be recovered in the suit. The plaintiff, having thus got satisfaction of the amount due to him under the hypothecation deed by the discharge of his liability under the decree to that extent, has nothing to recover by an action. The suit filed by the plaintiff cannot, therefore, be maintained and the second appeal should be allowed with costs in this Court. As regards costs in the courts below, we direct the parties to bear their own costs as the question does not appear to have been presented to either of the courts below in the manner in which it was done before us.

K.S. Appeal allowed.

A. I. R. 1952 Travancore-Cochin 294

SANKARAN AND GANGADHARA MENON JJ.

Padmanabhan Krishnan, Appellant v. Mathevan Pillai Kesava Pillai, Respondent.

Second Appeal No. 376 of 1950, D/- 5-12-51.

Evidence Act (1872), S. 40 — Two conflicting decrees inter partes — Later prevails — Executing Court can refuse to execute the earlier decree — (Civil P. C. (1908), Ss. 11 and 47).

In order to render the earlier decree inoperative, it is not necessary that it should be reversed or superseded by proceedings arising out of the same case. On the other hand, it may be collaterally superseded and rendered ineffective even by some ulterior and independent proceedings. What is material is that the parties to the first decree must also be parties to the subsequent proceedings so that the decision in such subsequent proceedings may be binding on them. The rights and liabilities covered by the decree must also have been considered and adjudicated upon in the subsequent proceedings. When there have been two adjudications binding on the same parties in respect of the same right, the later adjudication has to prevail over the earlier one. It cannot be said that so long as the earlier decree has not been reversed or superseded in express terms, the executing Court is bound to enforce that decree. When the existence of the later decree having the effect of superseding the earlier decree is brought to the notice of the execution court, it is bound to realise that the earlier decree has become inoperative and unenforceable and thus to refuse to execute it.

A decree based upon a partition deed directed A, a party to pay a certain amount to B to equalise the shares. Later on in another suit the partition deed was set aside. Parties to the first suit were also the parties to the second suit:

Held that the decree in the first suit was superseded by a decree in the later suit and the executing Court could refuse to execute it: Case law Ref. (Paras 4, 5)

Anno: Evidence Act, S. 40 N. 1; Civil P. C., S. 11 N. 100; S. 38 N. 9a.

T. S. Krishnamoorthi Iyer, for Appellant; T. R. Subramania Iyer, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('63-66) 10 Moo Ind App 203: (3 WR 25 (PC)	4
('23) AIR 1923 PC 167: (46 Mad 895)	4
('16) 31 Mad LJ 219: (AIR 1917 Mad 950)	4
('21) 1921 Mad WN 487: (AIR 1921 Mad 612)	4
('49) 1949 Ker LT 140	4
('50) 1950 Ker LT 32	4

SANKARAN, J.: The additional 2nd plaintiff-decree-holder in O. S. No. 772 of 1105 on the file of the District Munsiff's Court at Kazhithura is the appellant. The question for determination in this appeal is whether the rights under the decree in this case subsist and whether the decree-holder is entitled to enforce such rights against the judgment-debtor.

(2) As per a partition arrangement embodied in a deed of partition executed by the plaintiff and the defendants in this case, along with the other members of their tarwad, the judgment-debtor in this case was to pay a certain sum of money to the plaintiff towards the adjustment and equalisation of the respective shares. The plaintiff has obtained the decree in this case for recovery of the said amount. But by the subsequent decree passed in O. S. No. 50 of 1106, the partition deed on the basis of which the plaintiff has obtained the decree in O. S. 772 of 1105, was itself set aside. The plaintiff and the defendants in this case are all parties to O. S. 50 of 1106 also and as such the decree in that case is binding on all of them. All the same the additional 2nd plaintiff in O. S. 772 of 1105 applied for the execution of the decree in that case. The 2nd defendant objected to the execution and contended that the decree has become unexecutable because it has been superseded by the decree in O. S. 50 of 1106 under which the right for recovery of the money covered by the decree in O. S. 772 of 1105 has been extinguished. This objection was upheld by both the lower courts, and hence this second appeal by the decree-holder.

(3) On behalf of the appellant it is argued that the decree in O. S. 50 of 1106 has not in express terms set aside the decree in O. S. 772 of 1105 which must therefore be deemed to be in force even after the passing of the decree in O. S. 50 of 1106. We see no force in this contention. The validity and sustainability of the partition deed which formed the basis of the decree in O. S. 772 of 1105 had been challenged in the subsequent suit O. S. 50 of 1106. This means that all the arrangements embodied in that partition deed inclusive of the provision enabling the plaintiff in O. S. 772 of 1105 to recover a specific sum of money from the defendants in that case, had been called in question in O. S. 50 of 1106. The decree in O. S. 50 of 1106 did not

reserve in favour of the plaintiff in O. S. 772 of 1105, who is a party defendant to O. S. 50 of 1106, the right to recover any amount on the strength of the partition deed. On the other hand, the partition deed in its entirety was set aside by the decree in O. S. 50 of 1106 resulting in a negation of the plaintiff's claim in O. S. 772 of 1105 to recover any amount on the strength of that partition deed. Thus so far as his right in respect of the amount is concerned, there have been two decrees, the earlier decree upholding his right and the later decree negativing that right. In such a situation the earlier decree cannot be deemed to be subsisting as a valid and enforceable decree. It has been superseded by the later decree.

(4) In order to render the earlier decree inoperative it is not necessary that it should be reversed or superseded by proceedings arising out of the same case. On the other hand, it may be collaterally superseded and rendered ineffective even by some ulterior and independent proceedings. This position has been upheld by the Judicial Committee of the Privy Council in 'SHAMA PURSHAD v. HURRO PURSHAD', 10 Moo Ind App 203 (PC). The same principle was affirmed in 'NAGANNA v. R. VENKATAPAYYA', AIR 1923 P C 167. What is material is that the parties to the first decree must also be parties to the subsequent proceedings so that the decision in such subsequent proceedings may be binding on them. The rights and liabilities covered by the decree must also have been considered and adjudicated upon in the subsequent proceedings. When there have been two adjudications binding on the same parties in respect of the same right, the later adjudication has to prevail over the earlier one.

Judicial precedents governing this matter are almost uniform. In 'MOTURI SESHAYYA v. VENKATADRI APPA ROW', 31 Mad L J 219 it was held that in

"cases of judgments 'inter partes' the later adjudication should be taken as superseding the earlier, whether or not the earlier adjudication was made."

Similarly it was ruled in 'RUKMANI AMMAL v. NARASIMMA IYER', 1921 Mad W N 487 that where the rights obtained under two decrees, both binding on both sides, are in conflict with each other, the rights under the later decree must prevail. The ruling of this Court in 'ARUMUKHOM NADAR v. SAIDUKANNU PAKEER PILLAI' 1950 Ker L T 32 is also to the same effect. There it was held that when there are two inconsistent and contradictory decrees 'inter partes', the prior decree becomes unenforceable after the later decree, which alone can prevail. The ruling in 'MOHAMMED KUNJU v. KURUVILLA', 1949 Ker L T 140 relied on by the appellant has in no sense departed from the principles enunciated in the cases mentioned above. The rights adjudicated upon in the two decrees which came up for consideration in that case, were distinct and separate and it was for that reason that it was held that the later decree could not be deemed to have superseded the earlier one.

(5) So far as the present case is concerned, the question of the enforceability of the provision contained in the partition deed, to which the plaintiff and the defendants were all parties, had come up for consideration and was decided in O. S. 772 of 1105 as also in O. S. 50 of 1106. The parties to the earlier suit being parties to the later suit also, they are bound by the decree in the later suit, which has in effect superseded, though not in express terms, the decree in the earlier suit. It cannot be said that so long as the earlier decree has not been reversed or superseded in express terms the executing Court is bound to enforce that decree. When the existence of the later decree having the effect of superseding the earlier decree is brought to the notice of the execution court, it is bound to realise that the earlier decree has become inoperative and unenforceable and thus to refuse to execute it. It follows, therefore, that the lower court was right in rejecting the execution petition filed by the present appellant on the strength of the decree in O. S. 772 of 1105.

(6) In the result the order of the lower court is confirmed and this appeal is dismissed with costs.

R.G.D.

Appeal dismissed.

A. I. R. 1952 Travancore-Cochin 295

KOSHI AND GOVINDA PILLAI JJ.

Pakavathi Neelakantan, Appellant v. Ummini Pillai Lekshmi Pillai, Respondent.

Appeal Suit Nos. 330 and 598 of 1123, D/- 12-11-1951.

(a) T. P. Act (1882), S. 61 (before amendment) — Principle of section applied in Travancore-Cochin, even before introduction of T. P. Act there — Several mortgages on same property in favour of same person — Remedy of mortgagee in respect of one mortgage barred — He can still insist on their redemption, when redeeming others.

Notwithstanding the fact that the Transfer of Property Act was not law in Travancore and Cochin before its introduction there, the principle which s. 61 (before its amendment in 1929) impliedly recognised was applicable to Travancore and Cochin and all the mortgages over the same property in favour of one and the same person must be simultaneously redeemed, and the mortgagor is not entitled to redeem one without redeeming the other or others, AIR 1927 PC 32; AIR 1940 PC 38; 1946 Trav LR 546; AIR 1947 Mad 18; 3 Select Decisions 34; AIR 1951 Trav-C 17, Relied on.

The fact that an unsuccessful attempt was made to realise the puramkadam amount is no bar at all to permit the tacking. A second suit within the statutory period is not under the circumstances prohibited. (Paras 8, 10)

The fact that the mortgagee had by the time the suit for redemption of one of the mortgages is brought lost his right to enforce payment of the puramkadam amount in respect of other mortgages by a separate suit, will not stand in his way to claim it when these other transactions are sought to be redeemed. All that is needed for a mortgagee to avail of the right of tacking is that on the date when several mortgagegs become united in him they must all have been live mortgages and that if a mortgagee has a right to insist upon redemption of all the mortgages which have become united in him, he can hold on to the property and claim that the mortgagor, when redeeming the one, must redeem all. There is no reason or principle which necessitates all mortgages being alive on the date of the suit. Even if they are barred by limitation on the date of the suit by

the mortgagor, they are still available to the mortgagee as a shield to defend his possession. Limitation does not extinguish the liability but only bars the remedy. AIR 1947 Mad 18; AIR 1932 All 558; 1946 Trav L R 546; 3 Select Dec. 34; AIR 1922 Mad 249; AIR 1943 Mad 370, Relied on. (Para 11)

Anno: T. P. Act, S. 61 N. 2.

(b) T. P. Act (1882), S. 63A — Stipulation for improvements to be effected by mortgagee — Only some of improvements effected—Mortgagee is not entitled to more than ratable proportion of amount provided for in deed.

The law of landlord and tenant and mortgagor and mortgagee as administered in Travancore does not impose any restrictions on the freedom of the parties to make contracts regarding value of improvements. That law recognises no distinction whether the value is fixed before the improvements are made or after it. The mortgagee and those holding under him are bound by stipulations in the mortgage deed and for the items of works specified in that document they cannot get a higher value than that fixed by it. Where all the stipulated improvements have not been effected, the mortgagee is not entitled to claim more than the ratable proportion of the amount provided for in the mortgage deed. 23 Trav L J 369, Foll. (Paras 14, 15)

Anno: T. P. Act, S. 63A N. 5.

(c) T. P. Act (1882), S. 63A — Mortgagee given possession with directions to make specific improvements — He cannot make other improvements and claim compensation for them—But he is entitled to remove materials.

It is for an owner to decide what use he should make with his land and if a mortgagee or lessee is given possession of a land with specific directions as to what he should do with it or what improvements he should make thereon, he cannot disobey those directions or make such use as he in his wisdom deems fit or claim compensation for improvements effected according to his whims and fancies. If the mortgagor does not wish to pay for such improvements, the mortgagee is entitled to remove the materials. 18 Trav L J 95, Relied on. (Para 16)

Anno: T. P. Act, S. 63A, N. 3.

(d) Civil P. C. (1908), O. 34 R. 10—Redemption suit — Normally mortgagee is entitled to his costs unless he is guilty of misconduct — Putting excessive value on improvements is not misconduct — Mortgagee however claiming more than what was bargained for in mortgage deed, and also putting plaintiff to prove his title to redeem, when there was no doubt about his title — Mortgagee allowed only one fourth of costs incurred by him in lower Court — High Court refused to interfere. (T. P. Act (1882), S. 60). (Para 20)

Anno: C. P. C., O. 34 R. 10 N. 3; T. P. Act, S. 60 N. 49.

T. K. Narayana Pillai, for Appellant; N. K. Narayana Pillai and P. Sivarama Iyer, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras
('27) AIR 1927 PC 32: (50 Mad 180) 8
('40) AIR 1940 PC 38: (ILR (1940) Kar PC 76) 8
('32) AIR 1932 All 558: (138 Ind Cas 492) 11
3 Select Decisions 34 9, 11
('22) AIR 1922 Mad 249: (70 Ind Cas 212) 11
('43) AIR 1943 Mad 370: (209 Ind Cas 330) 11
('47) AIR 1947 Mad 18: (230 Ind Cas 387) 8, 11
('28) 18 Trav LJ 95 16
('31) 21 Trav LJ 266: (5 Trav LT 668) 14
('33) 23 Trav LJ 369 14
30 Trav LR 47 16
('46) 1946 Trav LR 546 8, 11
('49) 1949 Kar LT 92 14
('50) 1950 Ker LT 462: (AIR 1951 Trav-C 17) 9
('51) A. S. No. 68 of 1123 (Cochin): (AIR 1952 Trav-C 150) 9
1 UD 517 14

KOSHI, J.: These two appeals arise from one and the same decree in O. S. No. 853 of 1119 on the file of the Kottarakara District Munsiff's Court. The suit was brought to redeem an otti and while the court granted redemption, the terms on which it has been allowed has not met with satisfaction from the side of the plaintiff or that of the contesting defendants. Defendant 3, one of the legal heirs of the deceased mortgagee, has brought A. S. No. 330 while A. S. No. 598 has been preferred by the plaintiff. For the most part the two appeals cover common grounds but before we proceed to state them we have to state the facts of the case.

(2) The plaint comprises three items of which item 3 is a building on item 1 put up by the mortgagee. Items 1 and 2 belonged to one 'Pazhavila' Tarwad and in a family partition effected in 1101 these items were allotted to the share of the plaintiff's father, deceased Mathevan Krishnan. On the latter's death in 1115 the plaintiff became the sole owner of the properties. Long before the partition of 1101, on 26-8-1071, the Pazhavila Tarwad had created an otti (Ext. B) in respect of these items in favour of the mother of defendants 1 to 3, Kurumba Echamma for a consideration of Fs. 10000 of which Fs. 5000 were left in the hands of the mortgagee to effect certain specified improvements on the properties. Item 1 is a puthuval which had got silted up and the mortgagee was directed to remove the sand and silt and make the property fit for paddy cultivation. Item 2 is a chira adjoining item 1 planted with cocoanut trees and the mortgagee was directed to widen a canal running alongside of it and to construct a culvert at the junction of the canal with an adjoining river. While the properties were thus outstanding in the possession of the mother of defendants 1 to 3, on 4-4-1078 the 'Pazhavila' Tarwad granted a 'melotti' in favour of defendant 1 authorising him to redeem the otti and received a sum of Fs. 2000 as additional ottiartham. The document is Ext. C in the case and it is really a 'melotti cum puramkadam' deed, for besides the Fs. 2000 mentioned a further sum of Fs. 3000 was also received by the tarwad from defendant 1. In respect of the latter amount the equity of redemption was charged and the tarwad had made itself personally liable for its repayment. In fact the provision was that Fs. 1000 will be repaid before 30th Medom 1078 and the balance before 30th Medom 1080. Provision was also made in that document for payment of the value of improvements due to the mortgagee as per the terms of Ext. B, the otti deed. Defendant 1 however found himself unable to redeem the otti and on 29-3-1090 he conveyed his rights under Ext. C to his mother, the ottidar as per Ext. P. On the death of the mother defendants 1 to 3 succeeded to her estate and they are now the persons entitled to the

rights under Exts. B and C. Defendants 4 to 20 were impleaded in the suit on the ground that they had obtained some interest over the properties under defendants 1 to 3 or their mother.

(3) In her plaint the plaintiff offered to pay Fs. 7000 towards the mortgage money due under the two documents (Exts. B and C) and Fs. 2850 towards value of improvements. The plaint averred that out of five acres and fifty-seven cents comprised in item 1, one acre and eighty cents alone had been converted into wet land and that the mortgagee had not widened the canal as per the stipulation made in the otti deed. It was admitted that the culvert had been constructed. According to the plaintiff as all the improvements specified in Ext. B were not effected, towards value of improvements the defendants were not entitled to anything more than the rateable proportion of the Fs. 5000 earmarked for that purpose in that document and such proportionate value was estimated in the plaint at Fs. 2850. The plaint also stated that the mortgagee and defendants 1 to 3 had committed waste on the properties and claimed damages in lieu thereof. Along with the plaint an amount of Fs. 12000 was paid into the Court, but the plaint contained no offer to pay the said amount or any portion thereof to the defendants before the suit was decided. The plaintiff wanted defendants 1 to 3 to remove the building shown as item 3 in the plaint schedule and claimed mesne profits of items 1 and 2 from the date of the institution of the suit as also costs of the action.

(4) Defendants 1 and 3 contested the suit and they filed a joint written statement. They joined issues with the plaintiff on almost all matters referred to in the preceding paragraph. According to them the puramkadam amount of Fs. 3000 had also to be paid as part of the price of redemption. They claimed reasonable compensation for all improvements effeced by them regardless of the stipulation in Ext. B and claimed to have planted cocoanut and other trees on the portion of item 1 which had not been converted into wet land. They disputed the plaint allegations regarding waste and the plaintiff's right to claim damages. They agreed to remove the building and claimed that they were entitled to their costs in the suit. It was also contended that the claim for mesne profits was unsustainable.

(5) The lower court fixed the mortgage money at Fs. 7000 and held that notwithstanding the stipulations in Ext. B the defendants were entitled to reasonable compensation for all the improvements effected by them. The lower court's award in that behalf came to Fs 1652-13 chs.-1 cash and the plaintiff's claim for damages in lieu of alleged waste was negatived. The court also disallowed any mesne profits to the plaintiff but has held that the mortgage money paid into the court should bear 6 per cent interest per annum from the date notice of deposit was given to the defendants. The defendants are directed to remove the building (item 3) within two months from the date of the service of the execution notice and in case that is not done provision is made for its removal through court. As for costs the direction is that the plaintiff should bear her costs and pay the defendants one-fourth of the costs incurred by them.

(6) As against the decree passed in the above terms both sides have appealed. In A. S. No. 330 which is the appeal by defendant 3 the points taken are: (1) that the puramkadom amount of Fs. 3000 should also have been made part of the price of redemption; (ii) that a further amount of Fs. 1297 ch. 0 and Cash 6 should have been allowed towards value of improvements; (iii) that the provision for interest on the mortgage money is wrong and (iv) that the contesting defendants should have been allowed all their costs in the suit.

(7) The points taken in the plaintiff's appeal A. S. 598 are: (i) that the Court's award towards value of improvements is excessive and that regard being had to the provision in Ext. B the defendants are not entitled to anything more than Fs. 2850, the rateable proportion for the improvements carried out; (ii) that the Court went wrong in refusing to award mesne profits and (iii) that the plaintiff should have been allowed her costs and not made liable for any portion of the costs incurred by the defendants. Of these, the first point alone was seriously pressed while on the two other points it was more or less conceded that the decision on them will depend upon the lines the decision of the main question in the two appeals take.

(8) It is convenient to deal with point (i) in A. S. No. 330 first. When defendant 1 transferred his rights under Ext. C to his mother as per Ext. P she could have enforced payment of the puramkadom of Fs. 3000 by means of a suit. In other words it was a live claim on 29-3-1090, the date of Ext. P. In fact an infructuous attempt was made in O. S. 390 of 1090 of the Quilon Munsiff's Court to recover it. Though a decree was obtained execution was disallowed on the ground that the plaintiff tarwad was not properly represented in the suit. Vide Exts. K and J, the respective orders of the execution court and the appellate court made on the matter. A second suit to realise it, with all the necessary parties on the record, was not prohibited by law provided such suit was brought within the statutory period. It is not very clear from the lower court's judgment as to the ground on which it refused to tack on the puramkadom amount to the 'Ottiartham' due as per Exts. B and C. From what has been stated above it is clear that Exts. J and K created no bar to it.

The plaintiff's learned Counsel strenuously contended that the law as administered in Travancore did not permit such tacking to be made and that in any view it should not be allowed in this case as when it was claimed the right to recover the puramkadam amount had become barred by limitation. So far as we can see there is no substance in either contention. The Travancore Law on the subject always remained untrammelled by any provision of the Transfer of Property Act and in jurisdictions where the said Act was introduced before section 61 thereof was amended by Act XX of 1920 in cases where there were two incumbrances on the same property the mortgagor was not entitled to redeem the one without redeeming the other. Speaking of section 61 as it stood before the said amending Act Lord Sinha said as follows in pronouncing the judgment of the Judicial Committee in 'RAMARAYANINGAR v. GOVINDA KRISHNA', AIR 1927 P C 32 at page 36:

> "The section which the appellant's counsel urges as being applicable to the facts of this case is S. 61 of the Transfer of Property Act, which enacts by implication that a mortgagor seeking to redeem shall not be entitled to do so without paying any money that may be due under a separate mortgage or charge, if the latter relates to the same property."

In this context it will be instructive also to quote a passage from the judgment Lord Romer gave in 'JANKI NATH v. PRAMATHA NATH', AIR 1940 P C 38. At page 43 of the report the learned Lord is seen to have observed:

> "In the case however of a mortgagee holding a first mortgage on property A and also a second mortgage on the same property, the mortgagor cannot on payment of the first mortgage redeem

the property, that is to say claim a reconveyance and delivery of the title deeds, and so forth, unless he repays what is due on the second mortgage."

These two decisions were referred to and followed by a Division Bench of the Travancore High Court composed of Krishnaswamy Iyer, C. J. and Krishna Pillai, J. in 'BHASKARAN MOOTHATHU v. AGNISARMARU NAMBOORI', 1946 Trav L R 546. In that case Krishnaswamy Iyer, C. J. who pronounced the judgment of the Court examined at length the question whether in circumstances similar to the present the mortgagor can be permitted to redeem one of the two mortgages alone subsisting on an item of immovable property and categorically stated that notwithstanding the fact that the Transfer of Property Act was not law in Travancore the principle which S. 61 (before its amendment in 1929) impliedly recognised was applicable to Travancore and that all the mortgages over the same property in favour of one and the same person must be simultaneously redeemed. We were not told anything at the Bar to induce us to take a different view here. It is worthy of notice that in a recent case before the Madras High Court it was suggested that the common law of India bearing on the point even during the pre-Transfer of Property Act days, that is, before 1882 was the same as that enacted by S. 61 as it originally stood. See 'NACHAPPA GOUNDAN v. SAMIAPPA GOUNDAN', AIR 1947 Mad 18 at p. 24. In that case Somayya and Yahya Ali, JJ. have discussed the whole question very elaborately and the judgment, if we may say so with respect, will well repay perusal.

(9) Here it may usefully be added that in Cochin the same rule was recognised to be the law even long before the Transfer of Property Act was made law there in 1112. See 'ULUTHRA WARRIER v. SUBRAMONIA PATTAR', 3 Select Decisions 34. Recently a Division Bench of this Court consisting of the learned Chief Justice and Mr Justice Sankaran, was called upon to examine what the law on the subject was in Cochin before the enactment of the Cochin Transfer of Property Act, XVII of 1111. The learned Judges applied the decision in 3 Select Decisions 34 to the decision of the cases before them and held that what was laid down in that decision should be taken to be the common law of Cochin on the point. See 'AZHEEKKAL SREE VARAHA DEVASWOM v. UMMER SAIT ABDULLA SAIT', 1950 Ker L T 462 and NARAYANA MENON v. RAMAN NAMBOODIRIPAD', A. S. No. 68 of 1123 (Cochin) decided on 31-8-1951.

(10) On the question whether a mortgagor can be allowed to redeem the first mortgage over a property leaving out the second one that was created in favour of one and the same person in cases where there is no statute law applicable we do not think it necessary to add anything to what the learned Judges in the Travancore and Cochin cases referred to have said on the subject or to what is contained in the two decisions of this Court mentioned above. The fact that an unsuccessful attempt was made to realise the puramkadam amount in this case is in our opinion no bar at all to permit the tacking asked for. It was not disputed that a second suit within the statutory period was not under the circumstances prohibited.

(11) The further question is whether the fact that the defendants had by the time the present suit was brought lost their right to enforce payment of the puramkadam amount by a separate suit will stand in their way to claim it when the two otti transactions are sought to be redeemed. The two decisions of this court mentioned above and the Travancore and Cochin cases referred to, as also the decision in 'NACHAPPA GOUNDAN v. SAMIAPPA GOUNDAN', AIR 1947 Mad 18, answer the question in favour of the defendants. The general rule is that a ground of defence never becomes barred by statutes of limitation. See 'PARAS RAM v. SHEO DHAN', AIR 1932 All 558. The Limitation Act prescribes only the periods within which actions have to be brought. In AIR 1947 Mad 18 at page 33 it is pointed out that all that is needed for a mortgagee to avail of the right of tacking is that on the date when several mortgages become united in him they must all have been live mortgages and that if a mortgagee has a right to insist upon redemption of all the mortgages which have become united to him, he can hold on to the property and claim that the mortgagor, when redeeming the one, must redeem all. Somayya, J. who gave the judgment also said that there does not seem to be any reason or principle which necessitates all mortgages being alive on the date of the suit. Though in 'BHASKARAN v. AGNISARMARU NAMBOORI', 1946 Trav L R 546, the question did not directly arise the point is discussed at page 557 and answer given in the following terms:

> "The mortgagee's suit may be barred for the recovery of the debt; still the debt subsists and is not extinguished and so long as the debt subsists the charge also subsists. The mortgagor is given the right to redeem over a period of 50 or 60 years as the case may be under the Limitation Act and his redemption would necessarily involve the discharge of the barred, but none the less existing, debt payable to the creditor."

In 'ULUTHRA WARRIAR v. SUBRAMONIA PATTAR', 3 Select Decisions 34 it was observed that though the remedy to enforce payment of the puramkadom by a regular suit was time-barred as the puramkadam created an unmistakable charge on the mortgaged properties, the mortgagee had an undoubted lien on the same which was not capable of being extinguished so long as the debt remained unpaid. The same rule was enunciated in the decisions in 'VENKATARAMANA v. RANGIAH CHETTI', AIR 1922 Mad 249 and 'ANANTHANARAYANA IYER v. SIVARAMAKRISHNA', AIR 1943 Mad 370, Krishnaswami Ayyangar J. with whom Leach, C. J. concurred, observed in the latter case that the prevailing view in the Madras High Court was that even if a mortgage was barred by limitation it was still available to the mortgagee as a shield to defend his possession. The learned Judge added that limitation does not extinguish the liability but only bars the remedy.

(12) In the light of these authorities and the principles behind them the lower court's decision refusing to make the puramkadam amount part of the redemption price is clearly wrong and we modify that decision by holding that the mortgage money repayable is Fs. 10,000. Point (i) in A. S. 330 therefore succeeds.

(13) The next point to be discussed is that relating to value of improvements, while the plaintiff complains that the lower court's award in that respect is excessive, in A. S. 330 defendant 3 has claimed further amounts. A commission was deputed by the lower court to assess the value of all the improvements the mortgagee and her successors in interest had effected on the properties and the further amount defendant 3 claims in the appeal represents the difference between the commissioner's valuation and the amount the lower court has awarded. The contention raised before us on behalf of the plaintiff is that the parties are bound by the terms of Ext. B and that as the mortgagee or her successors in interest had not effected even all the improvements specified in

Ext. B they cannot get anything more than the rateable proportion for the works or improvements effected. The plaintiff also raised a further contention that the conduct of the mortgagee and that of defendants 1 to 3 in planting trees on that part of item 1 which remains unconverted was unauthorised and that they cannot be paid any value for the trees or other improvements effected thereon. We shall first discuss the question of the value relating to the improvements specified in Ext. B, the otti deed.

(14) What the lower court has done is to award reasonable compensation for the three items of improvements or works specifically mentioned in Ext. B. It has awarded Rs. 604-2-8 cash for converting one acre and eighty cents out of item 1 into wet land, Rs. 581-7-8 for widening the canal and for making a by-canal and Rs. 117 for the culvert. The question for our decision is whether the defendants are entitled to these amounts or whether they are entitled only to receive the rateable proportion of Fs. 5000 for the works done. Admittedly the whole of item 1 has not been converted as paddy land. Though in the lower court it was contended that two acres had been so converted the finding that the extent of the converted area is only one acre and eighty cents was not challenged before us. The law of landlord and tenant as administered in Travancore did not impose any restrictions on the freedom of the parties to make contracts regarding value of improvements. That law recognises no distinction whether the value is fixed before the improvements are made or after it. An exhaustive review of the case law bearing on the subject is to be found in 'MADHAVAN PILLAI v. THRASIA', 23 Trav L J 369. The headnote to that case which correctly sets out the facts and the principle laid runs thus:

> "Where a mortgage deed of certain paddy fields provided for the conversion thereof into a garden and besides fixed the cost of conversion but the mortgagee having converted only a portion of the fields claimed, on redemption, the actual amount he had spent for the conversion, in excess of the amount fixed.
>
> 'Held', that the terms of the mortgage deed must be strictly enforced as between the mortgagor and the mortgagee and the mortgagee cannot claim anything more than a rateable proportion of the amount provided for in the mortgage deed in respect of the cost of conversion."

We have not been persuaded by any argument raised on behalf of defendant 3 to depart from the rule laid down as above. We think it unnecessary to cite the earlier cases referred to in that decision. It would suffice for our present purpose to say that that case reviews all the decisions on the point commencing from the earliest decision in 'KOLAPPAN PILLAI', I.U.D 517 and that it also refers to the decision in 'JANARDANAN v. SUBRAMANIA IYEN', 21 Trav L J 265 : 5 Trav L T 668 which was brought to our notice by the learned counsel for defendant 3. That case was cited as striking a discordant note to the uniform course of decisions laying down the rule enunciated in 23 Trav L J 369, but on closer examination it will be found that that decision does not conflict with any of the earlier or later pronouncements on the subject. There the learned Judges found that the terms of the deed were ambiguous and on that basis applied a well-known rule of construction that if a doubt arises upon the construction of a grant and that doubt can be removed by construing the deed adversely to the grantor that will be done. The learned Judges were unable to read into that document a contract contrary to the usual rule that a mortgagee or tenant was entitled to reasonable compensation for the improvements effected by him. As observed in 23 Trav L J 369 that case does not purport to lay down any general proposition of law, on the other hand it assumes that if there is a contract between the parties fixing the value of improvements the parties will be bound by that contract. What the decision in 23 Trav L J 369 and the cases referred to there lay down is not a different rule. In the earliest case in 'KOLAPPAN PILLAY', I.U.D. 517 the learned Judges concluded their discussion as follows:

> "The defendant knew at the time he executed, the amount sanctioned in Exhibit A for improvement, that he did so at his own risk, where the amount of improvement is fixed by deed, the term of the deed must be strictly enforced."

The principle of these decisions has recently been followed by a Division Bench of this Court of which one of us was a member. See 'CHEMPAKAKUTTY v. RAMALEKSHMI AMMAL', 1949 Ker L T 92. There the case in 21 Trav L J 265 : 5 Trav L T 668 was distinguished.

(15) From the foregoing discussion it is clear that defendants 1 to 3 and all those holding under them are bound by the stipulations in Ext. B and that for the items of works specified in that document they cannot get a higher value than that fixed by it. The plaintiff has offered Fs. 2850 as the rateable proportion for the works done and in the absence of any case or evidence that the said amount does not represent the true proportion we have to accept it. That amount and that amount alone can be awarded for the works referred to and we therefore modify the lower court's decision accordingly. In place of Rs. 1652-13-1 cash awarded by the lower court for these works the defendants will receive only Fs. 2850 as stated above.

(16) There is one more aspect to be considered under the head of value of improvements. The lower court has awarded Fs. 350-3 chs. 1 cash as the value of the various kinds of trees planted on the portion of item 1 that remains not converted as paddy land. The plaintiff's case regarding it is that those improvements are inconsistent with the purpose for which the plaint properties were handed over to the possession of the predecessor in interest of defendants 1 to 3. Ext. B makes it clear that 'Pazhavila' Tarwad wanted to have item 1 made fit for paddy cultivation and the works the mortgagee was directed to do were all works calculated to that end. The plaintiff has further case that the sand and silt removed from the one acre and eighty cents converted into paddy land were all dumped on the remaining portion of item 1 and that it is how that portion was made fit for planting trees. It is for an owner to decide what use he should make with his land and if a mortgagee or lessee is given possession of a land with specific directions as to what he should do with it or what improvements he should make thereon, he cannot disobey those directions or make such use as he in his wisdom deems fit or claim compensation for improvements effected according to his whims and fancies. This position would seem to be so well-established in the Travancore Courts and we need only cite one case to illustrate it. In 'KUNJAN v. NETHRAN BHATTATHIRIPAD', 18 Trav L J 95 it was held as follows:

> "A lessee has no right, without the consent of the lessor, to convert, wholly or in part, the nature or character of the holding from its original purpose. If a lessee or mortgagee chooses to speculate and spends money in the hope of improving the property by altering its character, without the express or implied assent of the owner he must do so at his own risk. If it were not so, a weapon would be put in the hands of

the lessee or mortgagee which might be abused for increasing the difficulties in the way of the right of redemption."

The learned Judges in that case quoted a passage in their judgment from 'PADMANATHAN BHOOTHANATHAN v. KALI NEELAKANDAN', 30 Trav L R 47 and it would be instructive to extract that passage here. In that earlier case Hunt and Ananda Row, JJ. observed:

"A mortgagee may, no doubt, effect improvements consistent with the character of the land, which he is given as security over and into which he is placed in possession; but he has to return the land in the character in which he got it. It would be a very dangerous thing to permit a mortgagee interfering with the character of the land when objected to on the pretext of the conversion being what he considered an improvement. At that rate there would be nothing to prevent him from converting a house into a stable on the pretext that stabling would yield better a monitary return."

The law on the subject being what is set out above we cannot uphold the lower court's award of Fs. 350-Chs. 3 cash 1 for the improvements referred to and we set aside that award. However, when the plaintiff is not prepared to pay for these improvements the defendants must have the liberty to remove them and we accord permission to the defendants to do so. If the defendants choose to remove these improvements they must do it within two months of the receipt of the notice of the filing of the execution application. That is the period allowed by the lower court to remove the building and if the trees coming under this head are not removed within that time the properties together with these improvements will be delivered over to plaintiff, in which case the defendants will have no further right or claim regarding them. The plaintiff has of course the option to seek to retain these improvements on payment of the value fixed by the lower court or such other value as the parties may hereafter choose to fix. The court's decision on the point however is as indicated above.

(17) The main point in the plaintiff's appeal therefore fully succeeds. The defendants are not entitled to claim anything more than that Fs. 2850 towards the value of their improvements and point (ii) in A. S. 330 and point (i) in A. S. 598 are decided accordingly.

(18) Point (iii) in A. S. 330 and point (ii) in A. S. 598 relate to allied matters. As a result of our decision on point (i) in A. S. 330 the defendants are entitled to get Fs. 10000 as mortgage money. We have also found that the plaintiff is bound to pay Fs. 2850 towards the value of improvements. Though an amount of Fs. 12000 was deposited in Court when the plaint was filed that amount is now found to be insufficient to cover the mortgage money and value of improvements. We have already said that the plaintiff did not want the defendants to draw the money before the suit was decided. In these circumstances the plaintiff's claim for mesne profits for any period anterior to all the amounts due to the defendants coming into court is unsustainable and we repel that claim. Point (ii) in A. S. 598 is hence decided against the plaintiff.

(19) Point (iii) in A. S. 330 relates to the award made by the lower court regarding interest on the mortgage money. Both sides have construed the last sentence in the lower court's judgment reading "Interest on mortgage money at 6 per cent. from the date of service of notice of deposit" as meaning that the mortgage money should bear interest from 29-2-1120 well nigh two years before the date of the decree appealed from. Presumably 29-2-1120 was the date when the defendants were given notice of the deposit of Fs. 12000. We have however our own doubts whether the lower court meant that. However that is beside the point now. As until this date there is no payment or tender by the plaintiff of the full price of redemption no interest on the mortgage money can be allowed until all amounts due to the defendants are brought into the court and notice of it given to the defendants. If from the date of such notice delivery is delayed beyond the two months period fixed by the lower court and referred to in our judgment the net price of redemption shall thereafter bear interest till the date of delivery at 6 per cent per annum. This is our decision on point (iii) in A. S. 330 and that goes entirely in favour of the defendants.

(20) There remains the question regarding costs before the lower court. Both sides are dissatisfied with the lower court's direction about it. It was strenuously argued on behalf of defendant 3 that there were no circumstances in the case which warranted a departure from the normal rule that the mortgagee should get the costs of a suit for redemption. The lower court has awarded the contesting defendants only one-fourth of the costs incurred by them. We are not satisfied that there are sufficient grounds to interfere with the discretion exercised by the lower court on this matter. Decisions have held that a claim for excessive value for improvements will not amount to misconduct to disentitle a mortgagee to his costs in an action for redemption. That however is not the position here; the dispute is not about the quantum of the value alone. A principle is also involved, that is whether the mortgagee or her heirs at law could claim anything more than what was bargained for in the otti deed. Further the contesting defendants also put the plaintiff to prove her title to redeem. That is a matter about which no doubt at all could have been entertained by them In these circumstances we decline to interfere with the lower court's decision awarding the contesting defendants only one-fourth of the costs they incurred in the lower court. This necessarily implies that we are not awarding the plaintiff her costs before the lower court. The normal rule apart, in the circumstances of the case the plaintiff's demand for costs is clearly unsustainable. Point (iv) in A. S. 330 and point (iii) in A. S. 598 are hence decided against the respective appellant.

(21) All the points covered by the two appeals have been dealt with and the decree the lower court passed for redemption will stand modified as indicated in the preceding paragraphs of this judgment.

(22) The two appeals are disposed of accordingly and the plaintiff and defendant 3 shall receive and pay costs in either appeal in proportion to her or his success and failure.

R.G.D. Orders accordingly

A. I. R. 1952 Travancore-Cochin 300

KOSHI C. J.

AND GANGADHARA MENON J.

Kuruvila Joseph, Appellant v. State.

Criminal Appeal No. 203 of 1951, D/- 20-3-52.

(a) Evidence Act (1872), S. 27 — Information leading to discovery — Tests — That part of statement in which accused admits his guilt is inadmissible.

The condition necessary to bring S. 27

into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police Officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. It is fallacious to treat the "fact discovered" within the section as equivalent to the object produced. The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered.

That part of the statement wherein the accused admits his guilt is inadmissible since it does not relate to the discovery of the thing. AIR 1947 PC 67, Relied on.

(Paras 4, 7)

Anno: Evidence Act, S. 27 N. 9.

(b) Criminal P. C. (1898), Ss. 162 and 174 — Statements made to police at inquest cannot be used as substantive evidence — Statement by person at time when there was no suspicion against him, also cannot be used as substantive evidence. AIR 1939 PC 47, Relied on.

(Para 10)

Anno: Criminal P. C., S. 162 N. 10, 11; S. 174 N. 7.

(c) Criminal P. C. (1898), Ss. 162, 174 — Practice of getting inquest report embodying the statements of witnesses and accused, signed by them deplored as unwholesome and unwarranted — Practice of police of getting signatures of witnesses on statements made by them during investigation whether they be in the form of matiazars, Yadasths or recovery list equally deplored. (Paras 11, 12)

Anno: Cr. P. C., S. 162 N. 9; S. 174 N. 1, 5.

P. I. Simon, for Appellant; Public Prosecutor M. N. Parameswaran Pillai, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('39) AIR 1939 PC 47: (40 Cri LJ 364) 10
('47) AIR 1947 PC 75: 74 Ind App 80: (48 Cri LJ 679) 12
('47) AIR 1947 PC 67: (48 Cri LJ 533) 4
('32) 56 Bom 172: (AIR 1932 Bom 286): 33 Cri LJ 396 4
('29) 10 Lah 283: (AIR 1929 Lah 344): 30 Cri LJ 414 (FB) 4
('37) ILR (1937) Mad 695: (AIR 1937 Mad 618): 38 Cri LJ 1027 (FB) 4, 5, 8
25 Cochin LR 571 12
27 Cochin LR 103 (FB) 11

KOSHI, C. J.: The appellant has been convicted by the learned Sessions Judge of Parur of two offences of murder and four offences of attempt to murder. For each offence of murder he has been sentenced to undergo rigorous imprisonment for life. With respect to the attempts to commit murder, as regards the attempts made on the lives of Pws. 1 and 7 he has been sentenced to undergo rigorous imprisonment for five years in each case. As for the remaining two attempts, namely those on the lives of P.W. 3 and Ulahannan, a brother of the appellant, the sentence awarded is two months' rigorous imprisonment for each offence. The appellant has hence been awarded two sentences of life imprisonment (rigorous) and fourteen years' rigorous imprisonment in addition. These sentences are directed to run concurrently. The appeal is against the above convictions and sentences.

(2) In the view we take that the interests of justice demand the convictions and sentences passed upon the appellant by the lower court should be set aside and a retrial ordered we do not propose to set out the facts of the case in any detail or submit the evidence to any great scrutiny. We shall content ourselves by setting out the reasons which induce us to quash the convictions and sentences and direct a retrial. It may however be stated that the prosecution case is that the accused poisoned the toddy which he knew his father (one of the deceased persons) would be consuming. He is said to have adulterated it with a decoction made out of the tubers of Gloriosa Superba. The toddy so adulterated was consumed by Kuruvilla, the father of the accused, Pylee, a confidant of Kuruvilla, who also died and the four prosecution witnesses referred to in the preceding paragraph of this judgment whom the accused is alleged to have attempted to murder.

There is no direct evidence in the case that the accused poisoned the toddy which the six victims mentioned above consumed. To bring home the guilt to the accused the prosecution relied upon (i) an alleged confession of the accused to the Police which is said to have led to the discovery of incriminating materials such as the remnants of the poisonous decoction said to have been used to adulterate the toddy and a hammer used to crush the roots of Gloriosa Superba, (ii) certain circumstances which the learned Judge refers to as 'attendant circumstances', (iii) subsequent conduct of the accused and (iv) motive. Of these items of evidence the learned Judge brushed aside the attendant circumstances, some as inconclusive and others as unworthy of credit. The item of evidence of which most use has been made is the alleged confession and it is the illegal and improper use of that confession which mainly induces us to quash the convictions and sentences the learned Judge passed in the case.

(3) We regret to notice the learned Judge has ignored the limitations imposed by rules of evidence as to the extent of information received from a person accused of any offence in the custody of a Police Officer which leads to the discovery of incriminating materials can be admitted in evidence or made use of at the trial. The prosecution case is that pursuant to a confessional statement the accused made to P.W. 23, the investigating Police Officer M.Os. 3 to 5 were recovered. M.O. 3 is an old cigarette tin with remnants of the poisonous decoction in it, M.O. 4 a hammer said to have been used to crush the poisonous tubers and M.O. 5 a wooden toy gun. If so much of the statement which lead to the discovery of these articles alone was made use of no exception could have been raised. That however is not what the learned trial Judge did. The following extracts from his judgment would show how far he has transgressed the provisions of Sections 25 to 27, Evidence Act and Section 162, Criminal Procedure Code. In paragraph 2 of the judgment it is seen stated:

"Immediately they (the police) contacted and questioned him. He made a clean breast of the whole affair and admitted that he poisoned the toddy by adding a decoction of Gloriosa Superba. He also pointed out the hammer with which he crushed the tubers and the cigarette tin in which the decoction was prepared."

In paragraph 15 the learned Judge makes the following comments about the confession:

"The accused must have been questioned before his statement was recorded in Ext. C. Even when

he stated that Gloriosa Superba was used the Inspector could not straightaway accept it, without some corroboration. So the post-mortem examination was conducted in the house itself by getting down the Doctor there, with a view to get his opinion about the theory admitted by the accused. The dead bodies were entrusted at 2.30 p.m., for post-mortem examination, as can be seen from Exts. H and K. There does not appear to have been any necessity to get the Doctor in that place. The only object I repeat, was to get the opinion of the Doctor whether the accused's admission about Gloriosa Superba was probable. The post-mortem appearances noted by the Doctor must have convinced the Inspector that the accused's admission was probably acceptable. Otherwise a statement from the accused expressly mentioning the use of Gloriosa Superba would not have been embodied in Ext. C. The Inspector believed firmly that Gloriosa Superba was used. It is seen from the accused's statement in Ext. C that he mentioned that the cigarette tin was hidden at the foot of a Maruthu tree in Kuzhikattu Puraidom. The Inspector wanted to ascertain the truth of this statement. Ext. C. could not be completed before the return of P.W. 7 and Ulahannan. There was time after the post-mortem examination of Kuruvilla to visit Kuzhikattu Puraidom to ascertain whether the tin was secreted as stated by the accused and the Inspector wanted it to be done before a record of the admission of the accused was made."

The next paragraph (paragraph 16) also contains references to the confession and the relevant portion reads:

"There was no possibility for the Inspector to know beforehand that the poison was of Gloriosa Superba, unless the accused told him so. Exts. H and K show that the Doctor was not positive about it and that he deferred his opinion pending the report of the chemical examiner. So without an assurance the Police Inspector would not have dared to foist M. O. 3 with remnants of Gloriosa Superba."

This is followed by the summing up in paragraph 17 and there we see the culmination of the misuse of the alleged confessional statement of the accused to the Police. We shall extract here the whole paragraph:

"So much of the information supplied by the accused, as leading to the recovery of the incriminating material is admissible in evidence. His admission is that the tin which contained the remnants of the poison poured into the toddy, was secreted by him in his holding. That admission led to the discovery. The statement which is corroborated by the recovery establishes that it was the accused who poisoned the toddy and that the poison used was the root of Gloriosa Superba."

The second and the fourth sentences in that paragraph are in clear violation of the rules of evidence relating to the admissibility of confessional statements to the Police even when they lead to the discovery of incriminating materials. It is not only the information as related distinctly to the fact thereby discovered that has been made use of in the case but also the statement that he committed the crime. Ext. R, the Mahazar relating to the recovery of M. Os. 3 to 5 and the accused's statement embodied in Ext. C (inquest report) have not only been admitted in evidence but have been made free use of by the court in fastening criminal responsibility for the acts complained of on the accused. We are not sure whether but for this improper use of the accused's statement to the Police the learned Judge would have come to the conclusion he arrived at.

(4) It is not infrequently that in Criminal appeals coming from certain parts of the State we find such gross disregard of the provisions of sections 23 to 27 of the Evidence Act and section 162 of the Criminal Procedure Code. We take the liberty to tell sessions Judges and Public Prosecutors that the decision of the Privy Council in 'PULUKURI KOTTAYA v. EMPEROR', AIR 1947 P C 67 will well repay perusal. In that case at page 70 of the report Their Lordships after setting out sections 25 to 27 of the Evidence Act said as follows:

"The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police Officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in Police custody produces from some places of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Magow, for the Crown, has argued that in such a case the "fact discovered" is the Physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the Police, or by persons in police custody. That ban was presumably inspired by the fear of the Legislature that a person under Police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the "inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the Police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to S. 26, added by S. 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced, the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife, knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is

proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

"High Courts in India have generally taken the view as to the meaning of Section 27 which appeals to their Lordships, and reference may be made particularly to 'SUBHAN v. EMPEROR', 10 Lah 283 and 'GANUCHANDRA v. EMPEROR', 56 Bom 172 on which the appellants rely, and with which their Lordships are in agreement. A contrary view has, however, been taken by the Madras High Court, and the question was discussed at length in a Full Bench decision of that Court, in 'ATHAPPA GOUNDAN v. EMPEROR', ILR (1937) Mad 695 (FB) where the cases were referred to. The Court, whilst admitting that the weight of Indian authority was against them, nevertheless took the view that any information which served to connect the object discovered with the offence charged was admissible under S. 27. In that case the Court had to deal with a confession of murder made by a person in police custody, and the Court admitted the confession because in the last sentence (readily separable from the rest) there was an offer to produce two bottles, a rope, and a cloth gag, which, according to the confession had been used in, or were connected with, the commission of the murder, and the objects were in fact produced. The Court was impressed with the consideration that as the objects produced were not in themselves of a incriminating nature their production would be irrelevant unless they were shown to be connected with the murder, and there was no evidence so to connect them apart from the confession. Their Lordships are unable to accept this reasoning. The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into S. 27 something which is not there, and admitting in evidence a confession barred by S. 26. Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by the law."

(5) In their Lordships' opinion 'ATHAPPA GOUNDAN v. EMPEROR', ILR (1937) Mad 695 was wrongly decided, and it no doubt influenced the decision now under appeal.

(6) The statements to which exception is taken in this case are first a statement by accused No. 6 which he made to the police sub-Inspector and which was reduced into writing, and is Ext. P. It is in these terms:

"The mediatornama written at 9 A.M. on 12-1-1945, in front of Maddinani Verrayya's choultry and in the presence of the undersigned mediators.

Statement made by the accused Inala Sydayya on being arrested. About 14 days ago, I, Kotayya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We, all beat Beddupati China Sivayya and Subayyam to death. The remaining persons, Pullayya, Kotayya and Narayana ran away. Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of Pulikuri Kotayya".

Signed/- Potla China Mattayya,
Kotta Krishnayya.
G. Bapaiah, Sub-Inspector of Police.
12th January 1945.

(7) The whole of the statement except the passage "I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come" is inadmissible. In the evidence of the witness Potla China Mattayya proving the document the statement that accused 6 said "I Mattayya and others went to the corner of the tank-land. We killed Sivayya and Subayya" must be omitted.

(8) A confession of accused 3 was deposed to by the Police Sub-Inspector, who said that accused 3 said to him.

"I stabbed Sivayya with a spear, I hid the spear in a yard in my village. I will show you the place."

The first sentence must be omitted. This was followed by a Mediatornama, Ext. Q. 1, which is unobjectionable except for a sentence in the middle, "he said that it was with that spear that he had stabbed Booddapati Sivayya" which must be omitted.

Here it is interesting to mention that after this pronouncement of the Privy Council an expert Committee was appointed in Madras to examine the correctness of the convictions made in that jurisdiction following 'ATHAPPA GOUNDAN v. EMPEROR', ILR (1937) Mad 695 (FB) and that on the recommendations made by that Committee the unexpired portion of the sentences passed on several prisoners were remitted by Government and the prisoners concerned released.

(9) Sufficient mention has been made earlier that both Ext. B and the accused's statement in Ext. C, contain what the learned Judge has characterised in one of the quotations we have 'a clean breast of the whole affair' that is to say, they embody statements that he prepared the decoction out of tubers of Gloriosa Superba, that he climbed up the Palamyra tree and poured the decoction into the toddy which he knew would be consumed by his father. After the quotations we have made in extenso from Kottaya's case further words from us would be superfluous to show that inadmissible evidence has been allowed to go in. It is unfortunate that it should be so. We regret the learned Judge should have used it for the decision of the case.

(10) Yet another criticism to be made of the trial held by the lower court and the judgment which it gave in the case is regarding the free use made of the statements made by the witnesses and the accused at the inquest. Paragraph 15 wherefrom we took one extract contains also the following:

"Her (referring to Pw. 6, wife of the deceased Kuruvilla) statement (at the inquest) shows that the accused was not present when she was making the statement."

Further on comes the following sentence:

"The statements of P. Ws. 5, 6 and 8 make it abundantly clear that the accused was suspected. The Inspector makes no secret of it and he admits that he questioned the accused. The statement of the accused embodied in Ext. C. is a clean cut confession."

Section 174, Criminal Procedure Code deals with inquests. It states 'inter alia' that on receipt of information that a person has committed suicide or that a person has been killed by another or that somebody died under suspicious circumstances the officer in charge of a Police station shall pro-

ceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation and draw up a report of the apparent cause of death etc. This section comes under Chapter XIV of the Code commencing with section 154. Section 162 states:

"No statement made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced to writing, be signed by the person making it, nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

"Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination."

The rest of the section is not material for our present purpose. Apart from the provisions of the Evidence Act as to how far previous statements of witnesses can be used at a trial those two sections of the Criminal Procedure Code make it abundantly clear there is no warrant for making use of the statements made at the inquest as substantive evidence in the case. Unfortunately that is what has happened in this trial. That a statement made by a person when there is no suspicion against him that he has participated in the commission of the crime under investigation also comes under this ban is clear from the decision of the Privy Council in 'NARAYANA SWAMI v. EMPEROR', AIR 1939 P C 47. It is idle to speculate what decision the learned Judge would have come to in the case without putting the statements referred to above to the use he actually made of them.

(11) We would also avail of this occasion to point out that the prevailing practice of getting eye-witnesses or accused persons to sign inquest reports is not only unwholesome but also unwarranted. Section 174 when read with section 162 makes it plain that inquest reports are not to be signed by witnesses. The provision in sub-section (2) of section 174 that besides the Police Officer, other persons, or so many of them as concur therein, shall sign the report, when it refers to other persons etc., refers to 'two or more respectable inhabitants of the neighbourhood' mentioned in clause (c) of sub-section (1) of the section. Reference may in this connection be made to a decision of a Full Bench of the Cochin Chief Court reported in 'COCHIN SIRKAR v. KADIR KUNHI', 27 Coch LR 103, where this point is dealt with.

(12) Apart from the legal bar now pointed out the pernicious result of the practice would be that witnesses will not feel as free agents when they afterwards give evidence at the enquiry or the trial, subsequently held. The decision now referred to, as also an earlier decision of the Cochin Chief Court reported as 'OUSEPH ELYIKUTTY v. COCHIN SIRKAR', 25 Coch L R 571, deals with this aspect of the matter. Recently in 'ZAHIRUDDIN v. EMPEROR', AIR 1947 P C 75, the Judicial Committee pointed out that the value of evidence of a witness who had given a signed statement previously to the Police may be seriously impaired as a consequence of the contravention of the statutory safeguard (Section 162 Cri. P. C.) against improper practices. The arguments in that case as reported in '74 Ind App 80 (PC)' contain exhaustive references to the case law bearing on the subject and show that the tendency of the Courts is on the side of caution, if not of over-caution, to place reliance on the testimony of witnesses who happen to give signed statements to the Police during the course of the investigation. The principle and purpose behind the statutory bar against the Police obtaining signed statements during investigation are thoroughly thrashed out in the arguments as reported in 74 Ind App. 80 (P C). We have purposely adverted to this irregular practice of witnesses who give their statements at the inquest being made to sign the report with a view to see that that practice is ended. Equally improper it is for the police to get signed statements from witnesses interviewed during the course of the investigation whether they be in the form of statements as such or in the guise of mahazars, yadastha, recovery lists etc.

(13) This irregularity on the part of the Police apart, to repeat what we have said already we are not sure what the learned Judge's view of the accused's guilt would have been had he not made use of the items of inadmissible evidence pointed out earlier to make his decision of the case. Notwithstanding the provision in section 167, Evidence Act and that in Section 537, Criminal Procedure Code, we think that regard being had to the grave charges levelled against the accused we shall not ourselves embark upon an investigation as to whether independently of the inadmissible evidence admitted there is sufficient evidence to justify the conviction. Though under the present order of things our decision may not be the last word on the case we do not feel justified to seek here to exercise the jurisdiction vested in us under the two sections now referred to and virtually function as a trial court. If eventually we were to uphold the conviction that would be really depriving the accused the benefit of one appeal. The accused stands charged with two murders and four attempts to murder. We would therefore set aside the convictions and sentences passed upon the accused and direct the case to be retried. Sense of justice and fair play demand that another Judge should conduct the retrial. The case will hence on remand go before the Additional Sessions Judge, Parur.

(14) A word more may be added. The learned Judge conducting the retrial will try to obtain more definite evidence as to whether the poison detected under Exts. J and L on the one hand was or was not identical with that detected under Ext. W on the other. If so advised the Chemical Examiner himself may be examined either at the Parur Court itself or on commission through the Trivandrum Sessions Court. Section 510, Criminal Procedure Code which enables the Court to use a Chemical Examiner's report as evidence without examining him is but an enabling provision.

(15) The appeal is therefore allowed and the convictions and sentences passed by the trial Court are set aside. The appellant is directed to be retried for the offences with which he was charged.

(16) It would appear that since his arrest the day following the occurrence he has been in custody. If and when an application for bail is made on his behalf the Sessions Judge is at liberty to release him on such bail as he thinks reasonable.

R.G.D. Appeal allowed and Retrial ordered.

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SANKARAN AND SUBRAMANIA IYER JJ.

Mathai Mathew, Appellant v. State.

Criminal Appeal No. 146 of 1951, D/- 12-3-52.

(a) Penal Code (1860) Ss. 299 and 300 — Circumstantial evidence — Evidence Act (1872), S. 3.

It will not be wrong or opposed to any rule of law to find the accused guilty of the offence charged against him merely on the strength of the circumstantial evidence provided that such evidence is so conclusive as to lead only to one conclusion, viz. that it establishes beyond doubt the guilt of the accused: when the circumstantial evidence is so thorough and convincing, it can be accepted and acted upon as good as direct evidence.

The accused and the deceased were together in a toddy shop at Ezhumattam on the evening of 2-5-1124 till about 9 p.m. They left the shop together and both of them proceeded towards the south along the Arappamattam lane. They were fully drunk and while they were proceeding along the lane they were engaged in a wordy quarrel by using foul and abusive language against each other. They were seen in that condition at about 9.30 p.m. by P.W. 5. A little later the accused alone was seen going towards his house, by P. W. 13. On the next morning the dead body of deceased was found in the Arappamatam lane and at a point to the south of the spot where the accused and deceased were together seen by P.W. 5 and some distance to the north of the place where the accused alone was seen by P. W. 13. The clothes worn by the accused on the night were washed by him and spread for drying. Inspite of such washing human blood was detected on these clothes when they were subjected to chemical examination after they had been recovered from the accused's house. A knife which belonged to the accused and which was in his possession on the night of 2-5-1124 and which was recovered from him at the time of his arrest, was also subjected to chemical examination and human blood was detected on that knife also. The accused was seen to have sustained certain minor injuries as described in the wound certificate on the night of 2-5-1124. These injuries were admitted by him to have been sustained at 10 p.m. on the crucial night and in the course of a struggle.

Held that the cumulative effect of all these circumstances was to lead to the irresistible conclusion that the accused sustained the minor injuries already mentioned, in the course of a tussle between himself and the deceased and that the fatal wound on the deceased was inflicted by the accused himself at that time. The several links in the chain of the circumstantial evidence were complete in themselves and it was impossible to explain them away in favour of the innocence of the accused. Thus the circumstantial evidence already adverted to conclusively proved and established the fact that it was the accused who caused the death of the deceased. (Para 4)

Anno: Penal Code, S. 299 N. 1 S. 300 N. 45. Evidence Act S. 3 N. 6.

(b) Criminal P. C. (1898) Ss. 164 (2) and (3) and 364 — Warning to the accused — Requirements of — (Travancore Criminal P. C. Ss. 162 and 361) — Evidence Act (1872) S. 90.

Direction in S. 364 applies only to the statement proper given by the accused. If the warning given to the accused by the Magistrate before proceeding to record the confessional statement is also given by putting the necessary questions to him and eliciting the answers to such questions, then such questions and answers also should be recorded in the statement because it would then form part of the statement given by the accused. But the warning could also be given by simply explaining to the accused that he is not bound to make a confession and that if he does so it may be used as evidence against him. In such a case the warning will not form part of the statement of the accused and as such it cannot be said that it should form part of the confessional statement itself. It is also significant to note that there is no express direction in S. 164 as to the form in which the warning is to be given or that it should form part of the confessional statement itself. On the other hand from the form of the certificate to be added at the foot of the confession, it is clear that it will be sufficient compliance with the provisions of the section that if the confession has been recorded after the warning has been given to the accused in the first instance and after the Magistrate is satisfied that the accused is giving confession voluntarily in spite of the warning given to him. When the confession contains a certificate of a memorandum at its foot as required by S. 164 a presumption arises under S. 90 of the Evidence Act that all the necessary formalities have been duly complied with and that the statements contained in the memorandum are true and correct. AIR 1933 Bom 145 (FB), Rel. on. (Para 5)

Anno: Cri. P. C. S. 164 N. 13 S. 364 N. 1. Evidence Act S. 90 N. 1.

(c) Evidence Act (1872) S. 24 — Retracted confession — Corroboration.

When the confession has been retracted, it is only prudent and proper to see if all the material facts stated in the confession are corroborated by other independent evidence. (Para 6)

Anno: Evidence Act S. 24 N. 9.

K. T. Thomas and K. M. Joseph, for Appellant; M. N. Parameswaran Pillai Public Prosecutor, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('33) AIR 1933 Bom 145: (34 Cri LJ 555) (FB) 5

SANKARAN, J.: The appellant is the accused in Sessions Case No. 18 of 1951 on the file of the Sessions Court at Parur. He stood charged for the offence of murder punishable under section 302, Indian Penal Code. After considering the evidence

in the case, the learned Sessions Judge found that the act proved against the accused did not amount to the offence of murder, but only to culpable homicide not amounting to murder. Accordingly the accused was convicted under Part I of section 304, I.P.C. and sentenced to undergo rigorous imprisonment for 7 years. It is against such conviction and sentence that the accused has preferred this appeal.

(2) The case against the accused is that at about 10 O'clock on the night of 2.5.1124 the accused attacked deceased Ulahannan Ouseph alias Kunju, inflicted a deep cut on the right side of his neck with a knife and thus caused his death. The occurrence is stated to have taken place at the point marked A in the Arappamattom lane in Thondikuzha Kara, Karikode Pakuthy, Thodupuzha Taluk. The situation of this lane as well as the point at which the occurrence is stated to have taken place are shown in the sketch Ext. I prepared and produced by the Investigating Officer. On the question that Ulahannan Ouseph alias Kunju met with his death on the night of 2.5.1124 as the result of a cut sustained by him on the right side of his neck, there is no dispute in this case.

This fact is also conclusively proved by the evidence recorded at the trial. P.W. 1 is the brother and P.W. 2 is the widow of Ulahannan Ouseph. P.Ws. 5, 7 and 8 are independent witnesses who are well acquainted with him. All these witnesses identified the dead body found in the Arappamattom lane on 3.5.1124 and which is described in Ext. B report prepared after holding an inquest on the dead body, as that of Ulahannan Ouseph. After the inquest the body was subjected to post-mortem examination by the Medical Officer P.W. 10 and Ext. G is the post-mortem certificate issued by him. Of the 8 injuries found on the body of Ulahannan Ouseph and which are described in Ext. G, the first injury was a gaping wound 4" x 1½" bone-deep across the right side of the neck beginning from the thyroid cartilage and cutting the cartilage and all the soft tissues up to the cervical bone. This was a fatal injury according to P.W. 10. These items of evidence establish beyond doubt that Ulahannan Ouseph, the husband of P.W. 2, had sustained the wound on the right side of his neck and that he died as the result of that injury, on the night of 2.5.1124.

(3) The plea of the accused is that he had nothing to do with the injury which resulted in the death of Ulahannan Ouseph. It is urged on behalf of the accused-appellant that the evidence adduced by the prosecution is extremely unreliable and that such evidence does not establish the case alleged by the prosecution. At the outset it may be mentioned that there is no direct evidence to prove the act attributed to the accused. That act is sought to be proved by the several items of circumstantial evidence adduced by the prosecution witnesses and also by a confessional statement given by the accused. According to the prosecution, the accused made the fatal attack on deceased Ulahannan Ouseph on the night of 2-5-1124 while they were returning home from the toddy shop at Ezhumuttam, after getting themselves fully drunk. The several connecting links in proof of this version are furnished by the evidence given mainly by P. Ws. 1, 2, 5, 7, 8, 9, 12 and 13 and also by Exts. A to C, J, H and N.

The learned Sessions Judge has believed such oral and documentary evidence.

(Then after discussing the oral and other circumstantial evidence His Lordship proceeded as follows:)

(4) The question for consideration is whether the several items of circumstantial evidence already referred to are sufficient to warrant a conclusion that it was the accused who inflicted the fatal injury on Ulahannan Ouseph on the night of 2-5-1124 and thereby caused his death. It will not be wrong or opposed to any rule of law to find the accused guilty of the offence charged against him merely on the strength of the circumstantial evidence provided that such evidence is so conclusive as to lead only to one conclusion, viz., that it establishes beyond doubt the guilt of the accused; when the circumstantial evidence is so thorough and convincing it can be accepted and acted upon as good as direct evidence.

In the present case there is clear and conclusive evidence definitely proving the following facts; the accused and the deceased were together in the toddy shop at Ezhumattam on the evening of 2-5-1124 till about 9 P.M. They left the shop together and both of them proceeded towards the south along the Arappamattam lane. They were fully drunk and while they were proceeding along the lane they were engaged in a wordy quarrel by using foul and abusive language against each other. They were seen in that condition at about 9.30 P.M. by P.W. 5. A little later, the accused alone was seen going towards his house, by P.W. 13. On the next morning the dead body of Ulahannan Ouseph was found in the Arappamattam lane and at a point to the south of the spot where the accused and deceased were together seen by P.W. 5 and some distance to the north of the place where the accused alone was seen by P.W. 13. The clothes worn by the accused on the night were washed by him and spread for drying. Inspite of such washing human blood was detected on these clothes when they were subjected to chemical examination after they had been recorded from the accused's house. M. O. II knife which belonged to the accused and which was in his possession on the night of 2-5-1124 and which was recovered from him at the time of his arrest, was also subjected to chemical examination and human blood was detected on that knife also. The accused was seen to have sustained certain minor injuries as described in Ext. H wound certificate on the night of 2-5-1124. These injuries were admitted by him to have been sustained at 10 P.M. on the crucial night and in the course of a struggle.

The cumulative effect of all these circumstances is to lead to the irresistible conclusion that the accused sustained the minor injuries already mentioned, in the course of a tussle between himself and the deceased and that the fatal wound on the deceased was inflicted by the accused himself at that time. The several links in the chain of the circumstantial evidence are complete in themselves and it is impossible to explain them away in favour of the innocence of the accused. Thus we hold that the lower court was fully justified in holding that the circumstantial evidence already adverted to has conclusively proved and established the fact that it was the accused who inflicted the cut on the neck of the deceased Ulahannan Ouseph and caused his death.

(5) There is also a confessional statement given by the accused. Ext. O is that statement. It was duly recorded by a competent Magistrate who has been examined as P.W. 23. As already stated, the accused was arrested at 8.30 A.M. on 5-5-1124. He was produced before the Magistrate within a few hours of the arrest and the confessional statement Ext. O was recorded at 12 noon on the same day. Even though the accused has pleaded that he had been arrested even on 3-5-1124 and that it was on account of the police torture that he happened to give the confessional statement as embodied in Ext. O there is nothing in the evidence in the case to show that there is any basis for this allegation. The internal evidence furnished by Ext. O is suffi-

cient in itself to expose the hollowness of the plea that the version given in Ext. O was put to the accused by the police and that he was compelled to repeat the same. The prosecution case against the accused was that he was guilty of the offence of murder. The confessional statement in Ext. O is couched in such a manner as to make out a case of private defence for the accused. It is too much to believe that the police would have induced the accused to put forward such a version as to undermine the very charge against the accused.

Exhibit O shows that the Magistrate proceeded to record the confession after interrogating the accused on all the relevant aspects, and after satisfying himself that the accused was making the confession of his own free will. The questions directed towards that end are recorded in Ext. O together with the answers given by the accused. On a perusal of Ext. O in the light of all the attendant circumstances, we see no reason to differ from the lower court's conclusion that the accused was making a voluntary confession. At the foot of the confession the Magistrate has certified that the confession has been recorded by him after he was fully satisfied that it was a voluntary confession. There is no inherent defect in Ext. O as it stands. However the lower court has rejected Ext. O for the simple reason that the fact that the necessary warning was given to the accused is not recorded in the body of the confession. The view taken by the learned Sessions Judge is that the failure to record that fact in the body of the confession is a fatal defect rendering the confession as illegal and inadmissible. This view of the learned Sessions Judge is not correct and it is not supported by the relevant provisions of the Code of Criminal Procedure.

The directions to be followed in recording a confession are contained in section 162 of the Travancore Criminal Procedure Code (corresponding to section 164 of the Indian Code). Clause 3 of the section directs that the Magistrate shall before recording the confession explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and that no Magistrate shall record any such confession unless upon questioning the person making it, he has reason to believe that it was made voluntarily. It is significant to note that this clause only insists that the Magistrate should explain to the person making the confession that he is not bound to make a confession and that if he does so it may be used as evidence against him. This explanation of warning is not part of the confession.

Clause 2 of the section lays down that the confessional statement shall be recorded and signed in the manner provided for in section 301 of the Travancore Criminal Procedure Code corresponding to section 364 of the Indian Code. Section 301 insists that the statement given by the accused shall be recorded in full, including every question put to him and every answer given by him, in the language in which he is examined and that it shall be got signed by him after the same has been read or heard read and understood by him and admitted to be correct. It is clear that this direction applies only to the statement proper given by the accused. If the warning given to the accused by the Magistrate before proceeding to record the confessional statement is also given by putting the necessary questions to him and eliciting the answers to such questions, then such questions and answers also should be recorded in the statement because it would then form part of the statement given by the accused. But the warning could also be given by simply explaining to the accused that he is not bound to make a confession and that if he does so it may be used as evidence against him.

In such a case the warning will not form part of the statement of the accused and as such it cannot be said that it should form part of the confessional statement itself. It is also significant to note that there is no express direction in the section as to the form in which the warning is to be given or that it should form part of the confessional statement itself. On the other hand from the form of the certificate to be added at the foot of the confession, it is clear that it will be sufficient compliance with the provisions of the section that if the confession has been recorded after the warning has been given to the accused in the first instance and after the Magistrate is satisfied that the accused is giving confession voluntarily in spite of the warning given to him. Such a certificate is made at the foot of the confessional statement Ext. O. There is no warrant for supposing that the statement contained in Ext. O that the Magistrate has given the necessary warning to the accused is not true and the certificate is a mere reproduction of the form given in the section itself.

When the confession contains a certificate of a memorandum at its foot as required by section 162 (Section 164, Indian Code) a presumption arises under section 90 of the Evidence Act that all the necessary formalities have been duly complied with and that the statements contained in the memorandum are true and correct. Such a presumption arising in the case of Ext. O has not been rebutted. On the other hand, the direct evidence given by the Magistrate as P.W. 23 has only gone to confirm the presumption. In the course of his examination he has stated that before proceeding to record the confession, he made the accused understand that he was a Magistrate, that the accused was not bound to make a confession and that if he does so it may be used as evidence against him. The Magistrate has further stated that only after giving such a warning and after satisfying himself that the confession was being made voluntarily that he proceeded to record the same.

Thus it is clear that so far as Ext. O is concerned it is not defective in any manner and as such it could be relied on and accepted. A similar question arose for consideration in 'THUKARAM v. EMPEROR', AIR 1933 Bom 145 and there it was ruled by a Full Bench of the Bombay High Court that all that is required by section 164 (3) is that before recording the confession, the Magistrate should explain it to the accused that he is not bound to make a confession and that it is not necessary that such warning should appear in the body of the confession or should appear in writing at the commencement of the recording of the confession. It is sufficient if the warning was given as a matter of fact and that fact is mentioned in the memorandum added at the foot of the confession. Since all the formalities required by section 164 have been complied with so far as Ext. O is concerned, it can be accepted and acted upon and we hold accordingly.

(6) On the basis of the confession exhibit O the accused can be found to have caused the death of Ulahannan Ouseph. But the fact remains that the accused had retracted the confession. When the confession has thus been retracted, it is only prudent and proper to see if all the material facts stated in the confession are corroborated by other independent evidence. The several items of evidence already referred to and discussed afford such corroboration. The only point on which corroboration is lacking is about the exact nature of the fight that took place between the accused and the deceased. Corroboration on that point could not naturally be expected in a case where there is

no direct evidence at all. All the same the accused is entitled to get the benefit of all the circumstances which are in his favour. The lower court has construed all those circumstances in favour of the accused. From the version put forward by the accused himself in Ext. O confession it is clear that in the tussle between the accused and the deceased he was able to easily overpower the deceased. It is also seen from the inquest report Ext. B that the small pen-knife which the deceased had with him was safely enclosed in a packet along with a few currency notes and that the packet was found enclosed in the folds of the cloth worn by the deceased.

The witnesses who met the deceased on the evening of 2-5-1124 did not also find any weapon in the hand of the deceased. Under such circumstances it is clear that the accused could not reasonably apprehend death or even grievous hurt, at the hands of the deceased, so as to justify his using the knife for inflicting a deep-cut wound on the neck of the deceased. Both of them were drunk and the wordy quarrel that commenced between them in that drunken mood appears to have developed into a hand to hand fight and to a tussle. It was on a consideration of all these circumstances that the lower court found the accused not guilty of the offence of murder but only to culpable homicide not amounting to murder and punishable under section 304 Part 1, I.P.C. The conviction is right and it is accordingly upheld. On the question of sentence also we are not prepared to say that the 7 years rigorous imprisonment awarded by the lower court is excessive, in the circumstances of the case.

(7) The result is that the conviction entered against the appellant accused and the sentence awarded to him by the lower court are confirmed and this appeal is dismissed.

(8) The bail bonds of the accused are cancelled and he is committed to custody.

D.H. Appeal dismissed.

A. I. R. 1952 Travancore-Cochin 308

SANKARAN AND SUBRAMANIA IYER JJ.

Moran Mar Masselious Gheevarghese II Catholicos of the East, Appellant v. Most. Rev. Paulose Mar Athanasius and another, Respondents.

Misc. Appeal No. 38 of 1952, D/- 26-2-52.

(a) Civil P. C. (1908), O. 40, R. 1 — Execution proceedings — Pending consideration of objection to execution pursuant to notice under O. 21. R. 22, Court can appoint receiver.

The power of a court to appoint a receiver is very wide. The restrictions that there were as regards the property over and the stage of proceedings at which the power could be exercised, no longer exist and it is now competent for a court to appoint a receiver if it appears to be just and convenient so to do; such appointment can be made over any property and at any time whether before or after decree. Such an appointment is justified merely by the justice and convenience of the matter as it appears to the court and does not depend upon the eligibility or otherwise of the reliefs claimed and contested in the proceedings before it.

Court has jurisdiction to appoint a receiver in respect of properties decreed to be surrendered by the defendants to the plaintiffs pending consideration of the objections to execution filed pursuant to notices issued under Order XXI rule 22. The powers conferred on the court under the provisions of O. 40 are paramount and can be exercised even overriding the limitations imposed by O. 21, R. 22, clause (1). (Paras 4, 6)

Anno: Civil P. C., O. 40 R. 1, N. 14, 20.

(b) Civil P. C. (1908), O. 40 R. 1 — Decree directing delivery of property with mesne profits — Non-compliance by defendant for more than three years — Process in execution for recovery of mesne profits not feasible — Assumption of possession of properties by court by appointment of receiver, to be dealt with according to the final decision of the Court on objections to execution by defendant is justified — When property belongs to trust and tie is between two contesting parties, claiming to be proper representative of trust, no question of hardship arises. (Para 5)

Anno: Civil P. C., O. 40 R. 1 N. 14, 19.

N. Varadaraja Iyengar; M. Abraham and E. V. Mathew, for Appellant; K. P. Abraham; T. N. Subramonia Iyer; K. T. Ninan and T. K. Joseph, for Respondents.

JUDGMENT: The sole question raised in this case relates to the jurisdiction of the Court to appoint a receiver in respect of properties decreed to be surrendered by the defendants to the plaintiffs pending consideration of the objections to execution filed pursuant to notices issued under Order XXI rule 22 of the Code of Civil Procedure. The Court below held that it had jurisdiction and appointed a receiver for collection of the rents and profits of certain items of properties which are paddy flats situate within its territorial jurisdiction and outstanding with tenants under the defendants.

(2) The contention urged on behalf of the appellant first defendant is that under section 51(d) of the Code the appointment of a receiver is a substantive relief, that such an appointment was prayed for in the execution petition, and that the order passed by the court below amounts to the granting of that relief. It is contended that though under clause (2) of Order XXI rule 22 it is competent for a court to issue any processes in execution without service of the notice enjoined by clause (1) the appointment of a receiver as a substantive relief in execution will not be the issue of such a process and that therefore the appointment made by the court below is 'ultra vires' its powers. It is also urged on behalf of the appellant that the decree sought to be executed being of the year 1121 and three years having elapsed therefrom before the petition for execution was filed, the defendants are immune from liability from the enforcement of a claim for mesne profits in execution and that the appointment of a receiver prayed for with the object or purpose of securing the profits is beyond the scope of the proceedings in execution.

(3) Though the learned counsel for the respondent-decree-holders stated that there having been an application for execution filed within one year of the decree by all the decree-holders against all the judgment-debtors no question of notice under Order XXI rule 22 arises, in view of the fact that in the petition for execution which is now pending before the court below notices under the said Order and rule were applied for and issued, this

case may be dealt with on the assumption of such notice being necessary though the necessity is not conceded.

(4) The order appointing a receiver passed by the court below is not pursuant to the prayer contained in the execution petition for that relief. It was on a special petition filed in that behalf by the decree-holders which is C.M.P. 440 of 1952 that the appointment of a receiver was made. The appellant has also taken the order as such and in that view has sought redress in this court by means of this civil miscellaneous appeal. An order appointing a receiver made under Order XI of the Code of Civil Procedure is appealable as an order under Order XLIII. If the order be considered as granting a substantive relief in execution, it would be appealable as a decree and not as an appealable order. Even in cases where orders are passed under Order XL in execution, an appeal as against a decree might be the proper remedy. But when a party takes the order complained of only as an appealable order and not as an order passed in execution and appealable as a decree, a contention urged on his behalf that the order is beyond the competence of the court as it is or amounts to the grant of a relief in execution cannot be accepted. The power of a court to appoint a receiver is very wide. The restrictions that there were as regards the property over and the stage of proceedings at which the power could be exercised no longer exist and it is now competent for a court to appoint a receiver if it appears to be just and convenient so to do; such appointment can be made over any property and at any time whether before or after decree. Such an appointment is justified merely by the justice and convenience of the matter as it appears to the court and does not depend upon the eligibility or otherwise of the reliefs claimed and contested in the proceedings before it.

(5) The second objection raised on behalf of the appellant would rather be a ground in favour than against the appointment of a receiver. The decree directed delivery of properties with mesne profits. It was up to the defendants to have respected that mandate by complying with it without being forced to do so by a further order passed or process issued by the court. If on account of non-compliances by the defendants for more than three years a process in execution for recovery of mesne profits has become not feasible, that would be a good reason why the court should step in and assume possession of those properties to be dealt with according to the final decision of the court on the objections to execution raised by the defendants. Otherwise, it might be aiding the defendants to obtain an advantage on account of their default. If ultimately the objections are repelled the court will hand over possession to the decree-holders with the income collected during the period of the court's management. If on the other hand the objections are upheld the properties will be restored to the defendants from whom they were taken with the income collected by the officer of the court. It is but elementary justice that a party who has become entitled to delivery of property under a decree be enabled to realise the fruits thereof completely in the very proceedings in which the decree was made.

(6) The appellant not being in actual possession of the properties no hardship can be caused to him. The case might perhaps be different if the defendants had been in actual possession and enjoyment. Here, it is only a question of money. The property belongs to a trust. Each of the contending parties claims to be the proper representative of the trust and they are or ought to be in agreement that the properties of the trust should be conserved for its benefit. An apprehension is expressed on behalf of the respondents that as the wealth of the appellant who is a religious head of his party is spiritual and not worldly, any collection of rents made by him hereafter would become irrecoverable and be lost to the trust. The reasonableness of this apprehension did not appear to us to have been seriously challenged. In our judgment the powers conferred on the court under the provisions of Order XL are paramount and can be exercised even overriding the limitations imposed by Order XXI rule 22 clause (1). The order passed by the court below is therefore right and the civil miscellaneous appeal for its 'reversal' should be dismissed with costs.

R.G.D. Appeal dismissed.

A. I. R. 1952 Travancore-Cochin 309

SUBRAMANIA IYER AND VITHAYATHIL JJ.

Venkiteswara Pai Vamana Pai, Appellant v. Kunju Vava Mahomad Ali and others, Respondents.

Second Appeal No. 280 of 1951, D/- 21-2-52.

Transfer of Property Act (1882), S. 52 — Compromise between parties to suit — Intention to defraud stranger transferee — Applicability of principle of 'lis pendens' — (Civil P. C. (1908), O. 23, R. 3.)

When a compromise is entered into by a party to the suit with the opposite party subsequent to the transfer of his interests in favour of a stranger with a view to defraud that stranger transferee that compromise will not affect the interests of the transferee and the decree passed on such a compromise will not affect that transferee, that is to say, the principle of 'lis pendens' will not apply to such a case. AIR 1920 Mad 391 (SB), Ref. (Para 1)

Anno: T. P. Act, S. 52 N. 38 Pt. 1.

K. P. Abraham, for Appellant; P. Vasu, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('20) 43 Mad 37: (AIR 1920 Mad 391 SB) 1

SUBRAMANIA IYER, J.: The 22nd defendant is the appellant in this second appeal. The suit out of which the second appeal arises was for redemption of a mortgage and was filed by the transferee of the equity of redemption. The first defendant was the mortgagee. After his death defendants 2 to 9 were brought on record as his legal representatives. They assigned their interests in favour of the 21st defendant who was impleaded as transferee. He filed a written statement claiming the mortgage money as also value of improvements theretofor made and thereafter to be made. The 21st defendant in his turn gave a sub-mortgage of this property with possession to the 22nd defendant with a hypothecation over another item of property belonging to him to secure future subscriptions in a 'chitty' run by the 22nd defendant wherefrom the prize money had been drawn.

After the last transaction aforesaid the plaintiff compromised the suit with the 21st defendant the result of which was that the plaintiff had nothing more to pay but had to get a part of the costs of the suit from the 21st defendant. Scenting this compromise the 22nd defendant applied to the court to get himself impleaded. It transpired that the petition of compromise and the application of the 22nd defendant impeaching it as a fraud upon him and to get himself impleaded in the suit came to the court on the same day. On that day the court did not record the compromise or pass any decree thereon. Thereafter, the 22nd de-

fendant's application to get himself impleaded was allowed.

Nevertheless the trial court did not permit the 22nd defendant to put forward his complaints against the compromise nor did it consider his case but was of the opinion that the 22nd defendant was concluded by an agreement made by his advocate to the effect that should he be brought on record in the case he need only be heard. That agreement is seen endorsed on the application filed by the 22nd defendant. It is below that endorsement that the court has written the order allowing the 22nd defendant's application to get himself impleaded as a party to the suit. The terms of the order will indicate that the purpose for which he had sought and was allowed to come in was to challenge the compromise that was presented in the case without his concurrence and to his detriment. Under the circumstances, the order of the trial court shutting the mouth of the 22nd defendant after having brought him in would appear to be not sustainable.

Aggrieved by this order as also by the decree based on the compromise the 22nd defendant filed an appeal to the District Judge who reached the same conclusion but for a different reason. The reason stated by the learned Judge is that the transfer by way of mortgage of the mortgage right in favour of the 22nd defendant was pending suit and was, therefore, affected by the principle of 'lis pendens' with the result that the compromise entered into between the parties on record i.e. the plaintiff and the owner of the mortgage right whose transferee the 22nd defendant was, bound the transferee. The learned Judge did not consider the question as to whether when a party to the suit after having transferred his interests pending suit enters into a compromise with the opposite party with the object or effect of defeating and defrauding the interests of such transferee, whether such compromise would bind the transferee and as to whether the principles of section 52 of the Transfer of Property Act would apply to such a compromise and the decree passed thereon.

The law is clear on the point and it is to the effect that when a compromise is entered into by a party to the suit with the opposite party subsequent to the transfer of his interests in favour of a stranger with a view to defraud that stranger transferee that compromise will not affect the interest of the transferee & the decree passed on such a compromise will not affect that transferee, that is to say, the principle of 'lis pendens' will not apply to such a case. Reference may be made to pages 239 and 240 of Mulla's Transfer of Property Act (3rd edn.) It may here be mentioned that Mr. Vasu learned counsel for the respondent did not very seriously canvass the correctness of this position of law because he himself cited before us 'VEERARAGHAVA REDDI v. SUBBA REDDI', 43 Mad 37 (S. B.) which is another authority for the above said position.

Under the circumstances the second appeal should be allowed. The orders and decree in the case passed by the courts below are set aside. The case is remitted to the Munsiff's Court for enabling the 22nd defendant to put forward his case in respect of the compromise in order that that case may be considered by the trial court and the matter disposed of according to law. Costs will abide the result and will be provided for in the decree to be passed by the trial court.

(2) We may here mention that Mr. Vasu represented before us that pending these proceedings the rights of the respondent-decree-holder have been transferred to one Venkiteswara Kamath who is alleged now to be in possession of the properties which were taken possession of from the appellant, that that Venkiteswara Kamath is prepared to pay off the appellant and that for that purpose that Venkiteswara Kamath may be brought on record as a party. This procedure it is said will enable Kamath to claim the money that he pays to the appellant as additional charge upon the property. If the payment be made the appellant can have no more claim nor can the appellant refuse to receive payment. These matters are beyond the scope of the second appeal before us but we make mention of these in view of the earnest submissions made before us by Mr. Vasu. The trial court will consider these matters if presented before it and deal with them in the appropriate manner.

V.R.B. Appeal allowed.

A. I. R. 1952 Travancore-Cochin 310

KOSHI AND GOVINDA PILLAI JJ.

Rama Varma Thampuran, Appellant v. Parvathi Kunju Pennamma and others, Respondents.

Second Appeal No. 259 of 1124, D/- 3-8-1951.

(a) Limitation Act (1908), S. 21 — Joint decree — Acknowledgment by one of several judgment-debtors.

When a joint decree is passed against several persons an acknowledgment of liability by one of them will not save limitation as against the others and such acknowledgment will save limitation as against the judgment-debtor who makes the acknowledgment. Case law referred. (Para 5)

Anno: Lim. Act S. 21 N. 17, Pt. 1.

(b) Limitation Act (1908), Art. 182, Explanation I — Decree alive against one judgment-debtor — Decree if alive against all.

The view that where a decree is alive against one of several judgment-debtors it is alive against all the joint judgment-debtors cannot be accepted. No such general principle can be extracted from Art. 182 Explanation (1) and be engrafted into one or the other of the sections relating to the computation of the periods of limitation in the Act. Case law discussed. (Para 11)

Anno: Lim. Act Art. 182 N. 138, Pts. 1 to 3.

(c) Limitation Act (1908), Art. 182 (5) — Previous application.

Art. 182 (5) relates to a case where there has been a previous application. Then and then alone the question whether a decree is kept alive by a previous application can arise. (Para 15)

Anno: Lim. Act Art. 182, N. 51a.

(d) Limitation Act (1908), Art. 182 (5) — In accordance with law — Joint decree for redemption — Application against one of co-mortgagees.

When a decree for redemption is passed jointly against several co-mortgagees it is difficult to say that an application against one or some alone of the co-mortgagees will be an application for execution in accordance with law. (Para 17)

Anno: Lim. Act, Art. 182 N. 52.

(e) Limitation Act (1908), Art. 182 — Explanation I — Petition against one joint judgment-debtor — When extends limitation against rest.

In order that a petition against one joint judgment-debtor may extend the period for execution against the rest by a further period allowed by law the decree should have been alive against them when the application against the joint-debtor was filed. It is only an execution petition filed when the decree is alive that would extend the life of the decree and not one filed after it is dead. When the subsequent application is brought against all the debtors it would be open to such of them as were not made parties in the previous application to show that even on the date of that application the decree was barred. (Para 18)

Anno: Lim. Act Art. 182 N. 138.

(f) Limitation Act (1908), S. 21 — Redemption decree — Acknowledgment by co-mortgagee — Application for redemption of his share, if sustainable.

Where a decree is one in redemption of a mortgage, acknowledgment of liability by one co-mortgagee-defendant will not be effective to sustain an application for redemption of such co-mortgagee's share in the decree. Case law discussed. (Paras 12 and 21)

Anno: Lim. Act S. 21 N. 16.

P. Govindan Nair, for Appellant; S. Narayanan Potti, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('13) 37 Bom 326: (18 Ind Cas 909 PC)	20
('32) AIR 1932 PC 165: (60 Cal 1 PC)	15
('96) 18 All 458: (1896 All WN 147)	20
('05) 27 All 575: (2 All LJ 287)	8
('12) 34 All 371: (14 Ind Cas 132)	20
('36) AIR 1936 All 820: (ILR (1937) All 272 FB)	5
('93) 17 Bom 173	20
('09) 11 Bom LR 318: (2 Ind Cas 469)	20
('27) 29 Bom LR 1563: (AIR 1928 Bom 28)	20
('30) 54 Bom 625: (AIR 1930 Bom 466 FB)	20
('74) 13 Beng LR 177: (20 WR 375 PC)	14
('12) 14 Ind Cas 1 (Cal)	5
('12) 13 Ind Cas 702: (15 Cal LJ 251)	5
('14) 22 Ind Cas 709 (1): (AIR 1914 Cal 764)	5
('17) 37 Ind Cas 738: (AIR 1917 Cal 422)	5
('32) 59 Cal 760: (AIR 1931 Cal 719 FB)	16
('77) 61 Pun Re 1877	20
('20) AIR 1920 Lah 516: (67 Ind Cas 463)	20
('34) AIR 1934 Lah 293 (1): (151 Ind Cas 385)	20
('12) 35 Mad 670: (12 Ind Cas 679)	11
('15) 38 Mad 419: (AIR 1916 Mad 1 FB)	11, 16
('28) 51 Mad 583: (AIR 1928 Mad 627)	9
('41) 1941-1 Mad LJ 270: (AIR 1941 Mad 440)	10, 18
('47) 1947-1 Mad LJ 85: (AIR 1947 Mad 271)	10
('47) 1947-2 Mad LJ 583: (AIR 1949 Mad 346)	10
('41) AIR 1941 Pat 147: (19 Pat 938)	20
('43) 1943 Trav LR 257	4

KOSHI J.: The question raised in this second appeal arising from proceedings in execution of a decree for redemption of an 'otti' is whether the execution is barred by time. The two lower courts have answered the question concurrently against the decree-holder and he has therefore brought this second appeal.

(2) The final decree for redemption which was passed by the appellate court entitles the decree-holder to recover possession of the mortgaged property on payment of the mortgage money and value of improvements. With reference to certain buildings shown as item (2) in the schedule annexed to the decree, the decree provides that the defendants should remove the same within two months from the date of the decree and that in the event of their not carrying out the direction the decree-holder can recover possession of them on payment of the value fixed for them by the decree. Defendant 2 was to receive from the decree-holder the commission 'batta' he paid into the trial Court to take out a commission to value the improvements and the decree-holder was also to pay defendant 2 the latter's costs before the appellate court. The date of the appellate decree is 30-3-1110. E. P. No. 137 of 1121 wherefrom this second appeal arises was filed on 24-2-1121 and it is the one and only application the decree-holder filed in the case to execute the decree. 'Prima facie', the execution petition was filed out of time, but for the decree-holder reliance is placed on two acknowledgments in writing made by defendant 2.

(3) The first one bears the date 12-10-1114 and it is contained in an application made by the said defendant before the Court of first instance (the District Munsiff's Court, Mavelikara) to transfer the decree to the Adoor Munsiff's Court for execution against the decree-holder for realising the costs due to him as per the terms of the appellate decree. That application sets out in clear and unambiguous language the terms of the final decree for redemption and contains a clear admission of the decree-holder's right to redeem the mortgaged property as per the terms of the final decree passed in the case. As the decree is a registered one the application defendant 2 filed was within time. After the decree was transferred to the Adoor Munsiff's Court defendant 2 filed there an execution application on 31-11-1116 against the decree-holder and like his application of 12-10-1114 before the parent court this petition also sets out the terms of the decree for redemption. There is therefore another acknowledgment by defendant 2 of the decree-holder's right to redeem under the decree. It would appear that pursuant to this application defendant 2 succeeded in realising the costs due to him from the decree-holder. A certificate to that effect is seen filed by him on 7-2-1117 before the court executing the decree. That however is only by the way. What is relevant for our present purpose is that the execution application giving rise to this second appeal was filed within six years of the acknowledgment defendant 2 made in his execution application dated 31-11-1116. The question for decision is whether these two acknowledgments have kept the decree alive as to entitle the decree-holder to redeem the mortgaged property pursuant to the application he filed on 24-2-1121.

(4) The first court, that is, the court which passed the decree, before whom this application was made omitted to take notice of the application for transfer of the decree made before it on 12-10-1114 and consequently held that the acknowledgment contained in the execution application defendant 2 filed on 31-11-1116 served the decree-holder no useful purpose inasmuch as more than six years had elapsed after the final decree when that application was made. The lower appellate court however while referring to both the petitions filed by defendant 2 took the view that the statements contained in these petitions did not amount to sufficient acknowledgment of the decree-holder's right to redeem. The court purports to base its decision on the majority view in 'KAKI MUTHALIARU v. SANKARA PILLAI', 1943 Trav LR 257. A reading of the judgments in that case however shows that the execution application the defendant in that case filed to execute the decree in his favour did not contain any reference to that part of the decree

which was in favour of the decree-holder. That, as stated earlier, is not the case here. We are satisfied that defendant 2's petitions contained clear and unequivocal admissions as to the decree-holder's right to redeem and the view the lower appellate court took on this matter cannot therefore be sustained.

(5) This however does not decide the present case. The appellant's predecessor-in-interest gave an 'otti' with reference to the suit property to one Rama Iyen Krishna Iyen on 21-1-1084 and in 1087 Makaram defendants 1 and 2 purchased that 'otti' right. The decree under execution is one passed to redeem the said 'otti'. Both the defendants were alive when the decree was passed but by the time defendant 2 filed his petition before the Mavelikara District Munsiff's Court defendant 1 had died and his legal heirs were brought on record as additional defendants 2 to 6. As noticed earlier the acknowledgments relied upon by the decree-holder were made by defendant 2 alone. Section 19 of the Limitation Act so far relevant enacts that an acknowledgment of liability in respect of any property or right made in writing signed by a party before the expiration of the period prescribed for a suit or an application in respect of that property or right shall give a fresh starting point as against the person who makes the acknowledgment. Explanation IV to section 19 of the Travancore Limitation Act (Explanation III to s. 19 of the Limitation Act of 1908) states that for purposes of the section an application for the execution of a decree or order is an application in respect of a right. The remaining provisions of the section need not be referred to here. The legal heirs of defendant 1 did not derive any title or liability with respect to the decree under defendant 2. Nor had defendant 2 any right or authority to represent them in proceedings in execution of this decree or for that matter in any legal proceeding. Furthermore defendant 2 was taking out execution to realise the amounts due exclusively to him. If at the time when an acknowledgment is made there are more than one person in existence who stand in relation to each other as joint contractors, partners, executors or mortgagees, then the acknowledgment made by one would save limitation as against that person and would be of no avail as against the others. See 'MD. TAQI KHAN v. RAJA RAM', AIR 1936 All 820 (F. B.). The position is not any the different as regards joint judgment-debtors. That the acknowledgments made by defendant 2 will not keep the decree alive as against the legal heirs of defendant 1 was not very seriously disputed before us. That position is clear from s. 19 and s. 22(2) of the Limitation Act in Travancore. (S. 22 corresponds to s. 21 of the Indian Limitation Act.). However as the point was not conceded in so many words we think it proper to refer to some decided cases which lay down that when a joint decree is passed against several persons an acknowledgment of liability by one of them will not save limitation as against the others and that such acknowledgment will save limitation as against the judgment-debtor who makes the acknowledgment. We do not think it necessary to discuss the cases. We shall merely make a reference to some cases on the point we came across: 'CHANDRA KUMAR v. RAM DIN', 13 Ind Cas 702 (Cal.); 'NANDA LAL v. RAMPAL SINGH', 14 Ind Cas 1 (Cal.); 'BAN BEHARY v. JNANENDRANATH', 22 Ind Cas 709(1) (Cal.) and 'JOGENDRA PROSAD v. ASUTOSH GOSWAMI', 37 Ind Cas 738 (Cal).

(6) The result of the foregoing discussion and the effect of these cases is that the acknowledgments we have in this case bind only defendant 2. He has since died and his representative — additional defendant 8 to the execution petition and respondent 6 here — is also bound by them. But on the strength of these acknowledgments the decree cannot be executed against the legal heirs of defendant 1.

(7) Alongside of the argument that the two acknowledgments made by defendant 2 kept the decree alive as against all the defendants the learned counsel for the appellant also stated that a joint decree cannot get barred as against some of the debtors and be alive as against the others. In fact the former argument was only an adjunct to the broader proposition now stated. As with the former, Counsel was rather half-hearted regarding this argument also. Willing to give it up he was reluctant to say so. Numerous illustrative cases can be thought of and also found in the books which refute such a general proposition. We have already dealt with the question that an acknowledgment by one judgment-debtor cannot keep the decree alive against his co-judgment-debtors and also cited decided cases bearing on the point.

(8) Another familiar instance negativing the proposition is where one of the co-judgment-debtors makes a payment towards part of the principal or where interest on the principal is paid as such. One decided case alone we shall refer to in this connection and that is the case reported in 'ASHAN-UL-LAH v. DAKKHINI DIN', 27 All 575. There it was held that a payment made by one of several persons jointly liable under a decree, otherwise than as agent of his co-judgment-debtors cannot operate to save limitation as against any of the judgment-debtors other than the person making the payment.

(9) In 'PARAMESWARAN NAMBUDRI v. SESHAN PATTAR', 51 Mad 583 it was held that where a decree against joint debtors was stayed as against one of them, the period during which the stay had effect cannot be deducted under section 15 of the Limitation Act, 1908, in computing the period of limitation as regards an application for execution against the other joint judgment-debtors. It was further held that Article 182, Explanation 1 of the Limitation Act, 1908 cannot be regarded as if it were a general provision of the Act, or as an explanation annexed to section 15 of the Act. This case furnishes another illustration where a joint decree while barred against some of the debtors was not barred against others.

(10) In 'VENKATRANGA REDDI v. CHINNA SITHAMMA', (1941) 1 Mad LJ 270 execution was first filed against one alone of the joint debtors. It was really barred at that time, but that judgment-debtor did not oppose the application as time barred despite notice to him and an order was passed allowing execution. A subsequent execution application was made against all the joint debtors and on objection being raised to the execution as time barred, it was held that while the judgment-debtor against whom the first application was made was precluded by reason of the order passed on that application allowing execution from raising the plea of limitation, those who were not made parties to it were entitled to raise it. The court upheld their objection and said that the execution was barred as against them. The decree was found to be capable of execution against the joint debtor against whom the first application was made. In 'BALAYYA v. PARVATEESWARARAO', 1947-1 Mad LJ 85 and in 'SIVALINGA THEVAR v. SRINIVASA MUDALIAR', 1947-2 Mad L J 583 it was held that the period intervening between an order adjudging a Hindu father as insolvent and the date of the annulment of the order cannot be deducted in computing the period of limitation for execution against the sons with respect to a joint decree against the father and the sons. As against the father Statute provides that the period should be exempt-

ed, but that had not the effect of keeping the decree alive against the sons. It is unnecessary to multiply instances where courts have held that a joint decree while alive against one or more of the defendants is barred against the others.

(11) Article 166 paragraph 6 of the Travancore Limitation Act (Corresponding to Article 182 (6) of the Indian Limitation Act as it stood before the amendment in 1927) furnishes a statutory provision which would repel the argument that a joint decree cannot be barred as against some alone of the judgment-debtors. Para (6) of Article 166 reads:

"(Where the notice next hereinafter mentioned has been issued) the date of issue of notice to the person against whom execution is applied for to show cause why the decree should not be executed against him, when the issue of such notice is required by the Code of Civil Procedure."

A notice mentioned there would keep alive the decree for a further statutory period only against the person to whom the notice is issued and not against all the debtors. This aspect is referred to by Sundara Ayyar, J. in his judgment in 'ABDUL KHADIR v. AHMMED', 35 Mad 670 at p. 675. The learned Judge's view was clearly that there was no warrant for the proposition that a joint decree cannot be barred against some alone of the judgment-debtors. In that case the question was whether fraud or force on the part of one of several judgment-debtors in preventing execution against him of a decree enables the decree-holder to get an extension of the twelve years provided for execution by s. 48, Civil P. C., only as against that judgment-debtor or his conduct would extend the period as against his other co-judgment-debtors who have not been guilty of such conduct. Sundara Ayyer, J. held there would be extension only as against the judgment-debtor guilty of fraud or force. That view did not prevail first as the other learned Judge, Philip J. was of the opposite view. Under S. 98, C. P. C. the second appeal was dismissed but the matter was taken before a Bench of three Judges in Letters Patent Appeal and their decision which was unanimous restored Mr. Justice Sundara Ayyar's view. We have there yet another instance where it was held that a joint decree can be barred against some of the debtors while it could remain alive against the other judgment-debtors. The decision in the Letters Patent Appeal is reported in 'ABDUL KHADIR v. AHAMMAD SHAIWA RAVUTHAR', 38 Mad 419 (FB) and what Sir Arnold White C. J. (Sankaran Nair and Tyabji JJ. concurring) said about the argument raised there that a joint decree cannot remain alive against some alone of the debtors is very instructive. The relevant discussion occurs at p. 422 of the report and it reads as follows:

"Mr. Ananthakrishna Ayyar (now Sir, Retired Judge of the Madras High Court and sometime Chief Justice of Cochin) has suggested that the policy of the Limitation Act is that where a decree is alive against one of several joint debtors, it is alive against all the joint debtors. I am not sure that I am prepared to accept that as a statement of the general policy of the Act; but even if it be so, when we have on the one side what is said to be the general policy of the Act and, on the other, the express words of a section dealing with a specific matter, I think that the express words ought to prevail.

Reliance has also been placed, in support of the contention against the view adopted by Sundara Ayyar, J., on article 182 of the Limitation Act. Mr. Ananthakrishna Ayyar has pointed out that under Paragraph 5 the time was from the date of applying in accordance with law to the proper Court for execution, and that Explanation 1 says that where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, shall take effect against them all. That seems to me to be a very different matter from the matter which we are dealing with in this appeal. The principle, I take it, is that if the judgment-creditor does something which keeps alive a joint decree as against one of his joint judgment-debtors, the decree is to be regarded as alive as against all the joint judgment-debtors and if it is alive, it is of course capable of execution. That is a very different matter from the present case which is not the case of a judgment creditor having done something but of the judgment-debtor having done something which, as regards him, no doubt entitled the judgment-creditor to say "my time has been extended". So far as I can see, there is no reason or principle why the judgment-creditor should be entitled to say, that, as regards the men who had not prevented by fraud or force, etc., he should also have the benefit of the enactment. I cannot see that there is any equity which the judgment-creditor can set up in this case, although it may be that in the cases which are referred to in article 182 of the Limitation Act there is an equity arising by the fact that he had done something for the purpose of realising the fruits of his judgment. Here the creditor does nothing but relies upon something which one of his joint judgment-debtors has been doing.'

The foregoing discussion and the authorities cited make it clear that the view that where a decree is alive against one of several judgment-debtors it is alive against all the joint judgment-debtors cannot be accepted. No such general principle can be extracted from Article 166, Explanation (1), and be engrafted into one or the other of the sections relating to the computation of the periods of limitation in the Act. The Limitation Act negatives such a general principle by the provisions of sections 19, 20 and 22 (Indian s. 21) and by Article 166 paragraph 6.

(12) The learned Counsel for the appellant however raised another argument in support of the appeal and contended that the decree-holder was entitled to have execution taken out of the entire decree. Before we proceed to examine that argument we think it proper to observe that in case we are not able to accept it a further question will arise for decision whether the decree being one in redemption of a mortgage, acknowledgment of liability by one co-mortgagee-defendant will be effective to sustain an application for redemption of such co-mortgagee's share in the decree.

(13) The further argument the appellant's learned Counsel raised was according to him based on paragraph 5 of Art. 166 (Art. 182 of the Indian Limitation Act) and the second part of the second paragraph of Explanation 1 to the said Article. Paragraph 5 of Art. 166 reads thus:

"(Where the application next hereinafter mentioned has been made) the date of applying in accordance with law to the proper court for execution, or to take some step-in-aid of the execution of the decree or order, or the date of the order passed on such application or the date on which such order was carried out,"

and the relevant portion of Explanation 1 is

"where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all."

What was urged on the purported strength of these provisions was that as the decree was alive against defendant 2 when the present execution

application was made, had the decree-holder confined that application as against the heir of defendant 2 and followed that up by another application within the time prescribed against all the defendants or against the legal heirs of defendant 1 alone, in view of the provision referred to of Explanation 1, it would not have been even open to argument that the latter application was barred by time. We are afraid the argument takes within its ambit more than one false assumption. Before we proceed to examine it, we must state how the argument was sought to be further implemented. On the strength of the assumptions made above, it was urged that justice should not be allowed to be defeated because the decree-holder had chosen to file one application against all the defendants and not two as suggested by Counsel which course according to him would have been fool-proof against any plea as to bar of limitation. We were therefore asked to treat the present application as consisting of two petitions, one against the legal heir of defendant 2 and the other against the legal heirs of defendant 1, the latter application following the former in point of time. According to the appellant's learned Counsel, we would otherwise be using technicality to the prejudice of the decree-holder and to defeat justice.

(14) The argument, as already stated, is founded on several false assumptions. It clean ignores

> "that Statutes of Limitation are in their nature strict and inflexible enactments, intended to quiet long possession and to extinguish stale demands." 'LUCHMEE BUKSH v. RUNJEET RAM', 13 Beng LR 177 (P. C.).

If the argument raised be good it would come to that with respect to joint decrees when it is alive against one judgment-debtor it cannot be barred against another joint judgment-debtor. We have said no such general principle can be extracted from the provisions of the Limitation Act.

(15) In the first place paragraph 5 of the Article relates to a case where there has been a previous application. Then and then alone the question whether a decree is kept alive by a previous application can arise. The execution application giving rise to this appeal is the first application filed in this case and to such an application the question invoking the aid of paragraph 5 cannot arise. The request that the application before us may be treated as two execution petitions is clearly opposed to all known rules of the law of execution. There is no scope for introducing any legal fiction of that kind into the province of the Statute Law relating to execution. To quote from Sir Dinshaw Mulla's judgment in 'NAGENDRA NATH'S CASE', equitable considerations are out of place in construing rules of limitation. 'NAGENDRA NATH v. SURESH', AIR 1932 P. C. 165.

(16) A passage from the judgment Buckland J. delivered in the Full Bench decision in 'AMARKRISHNA v. JAGATBANDHU', 59 Cal 760 at p. 773 may with advantage be quoted here:

> "If, as has been decided, the terms of rule 2 (1) involve no application, and certification is not an application within the meaning of Article 181, the residuary Article to be applied to applications for which no period of limitation is provided elsewhere in the schedule to the Act or by section 48, Civil P. C., how can it possibly be said to be an application made to take some step-in-aid of execution and as such within the meaning of Article 182(5)? In my judgment, the short answer is that there was no application at all, and that being the case Article 182(5) cannot be invoked on behalf of the appellant."

There the question for decision was whether certification under Order XXI R. 2(1) of the Civil P. C. can be treated as an application for a step-in-aid of execution under Article 182(5). The opinion of the Full Bench was that it cannot be and what Buckland J. said in that case quoted above would seem to us to be useful for a proper appreciation of the scope of paragraph 5. That to attract the application of para 5, some action on the part of the decree-holder in the form of a prior application is needed is clear from the judgment of Sir Arnold White, C. J. in 'ABDUL KHADIR v. AHAMMAD SHAIWA RAVUTHAR', 38 Mad 419 (FB), extract from which was quoted earlier.

(17) A second impediment to accept the argument is that when a decree for redemption is passed jointly against several co-mortgagees it is difficult to say that an application against one or some alone of the co-mortgagees will be an application for execution in accordance with law. That is a pre-requisite to invoke the aid of paragraph 5 of the Article to have a fresh starting point of limitation.

(18) Third and last, in order that a petition against one joint judgment-debtor may extend the period for execution against the rest by a further period allowed by law the decree should have been alive against them when the application against the joint debtor was filed. It is only an execution petition filed when the decree is alive that would extend the life of the decree and not one filed after it is dead. When the subsequent application is brought against all the debtors it would be open to such of them as were not made parties in the previous application to show that even on the date of that application the decree was barred. See 'VENKATRANGA REDDI v. CHINNA SITHAMMA', 1941-1 Mad LJ 270 already referred to. To hold otherwise would be the same thing as saying that an acknowledgment by one judgment-debtor could keep alive a decree against all the judgment-debtors. We have definitely said that an acknowledgment by one judgment-debtor has not the effect of keeping the decree alive as against all the judgment-debtors and the learned Counsel for the appellant had practically conceded it when he launched upon this argument.

(19) However ingenious the argument might appear to be at the first blush, it cannot bear examination. It is an indirect attempt to confer on an acknowledgment by a co-judgment-debtor an efficacy which by a direct approach it has become clear it inherently has not.

(20) We have next to consider whether the acknowledgment by defendant 2 would be effective to sustain an execution application against his share in the redemption decree. Unfortunately this aspect of the case did not receive at the Bar the attention it deserved. Based on the doctrine of the indivisibility of a mortgage we have come across several cases which hold that an acknowledgment by one only of several mortgagees of the liability to be redemeed is not sufficient to keep the right to redeem alive even as regards the share of the party acknowledging. The question is seen discussed in Rustomjee's Law of Limitation 5th (1936) Edn. Vol. I pp. 425-426 and in Chitaley's Commentaries to the Indian Limitation Act 2nd (1942) Edn. Vol. I pp. 829-831. The reason given is that except in certain special circumstances the entire mortgage has to be treated as one indivisible unit and the redemption of a portion of a mortgage alone cannot be allowed under law. The earliest Indian decision we came across setting out this view in 'BHOGILAL v. AMRITLAL 17 Bom 173. That case refers to and follows a decision of the Chief Court of the Punjab in 'MUSSUMMAT MAH BIBI v. MOTAN MAL', 61 PR 1877. The judgment Fitzpatrick, J. (Boulnois, J.

concurring) delivered in that Punjab case which is quoted extensively by Jardine J. in 17 Bom 173 at pp. 179-182 will amply repay perusal. It points out that under the English Statute while an acknowledgment by a co-mortgagee binds him alone, provision is made there for apportionment of the mortgage debt between him and others. The absence of a similar provision in the Indian Statutes has been taken by the learned Judge as a test, almost conclusive, to show that on the basis of an acknowledgment by one co-mortgagee piecemeal redemption cannot be allowed in India. That view appealed to Jardine, J. and with respect we venture to think that to be correct approach to the question. The decision in 17 Bom 173 has been referred to and followed in a number of cases. To our knowledge in no case has that been dissented from though from time to time attempts have been made to distinguish it. Among cases which follow the decision may be mentioned, DHARMA v. BALMAKUND', 18 All 458; 'JWALA PRASAD v. ACHCHEY LAL', 34 All 371 and 'NARAYAN v. GOVIND', 29 Bom L R 1563. The earlier Statutes of Limitation in India, Act XIV (14) of 1859 or Act IX (9) of 1871, did not recognise an agent as a person competent to give an acknowledgment for the purpose of giving rise to a fresh starting point for limitation. An agent was introduced as a person competent to give an acknowledgment for the first time by S. 19 of the Act of 1877. In this case we are not concerned with the said legislative change inasmuch as defendant 2 never purported to act as an agent or in any other representative capacity. Admittedly he had no such right. The decisions in 'NADAR SHAH v. ISHAR DAS', AIR 1920 Lah 516; 'AHMAD SHAH v. KARTAR SINGH', AIR 1934 Lah 293 (1) and 'MUKH NARAIN v. RAMLOCHAN', AIR 1941 Pat 147 take the same view as that held in the cases referred to above that where the mortgage is a joint mortgage and not capable of being redeemed piece-meal an acknowledgment by one only of several mortgagees is altogether inoperative and will not bar the statute even as regards the share of the party acknowledging. The cases in 'HIRALAL v. NARSILAL', 11 Bom L R 318 (later affirmed in appeal by the Privy Council in 'HIRALAL ICHHALAL v. NARSILAL CHATURBHUJDAS', 37 Bom 326 (PC) and 'MOTILAL JADAV v. SAMAL BECHAR', 54 Bom 625 are illustrations of exceptions to the rule laid down in the earlier cases and those exceptions only prove the rule. We do not think it necessary to go into the facts of these cases but it will be instructive to quote a passage from the judgment of Madgavkar, J. in the latter case. (page 632).

> "The actual issue in the present case lies, in my opinion, within a narrow compass. The general rule is that a mortgage is one and indivisible and so remains unless and until it is split up with the consent of both the mortgagor and the mortgagee. Neither the property nor the burden can be divided without the consent of both. An acknowledgment under section 19 (1) of the Indian Limitation Act must be signed by the party against whom the right is claimed. Under section 21, clause (2), of that Act, in the case of a joint contract, an acknowledgment signed by one of several joint contractors cannot bind the others."

In that case the learned Judge's (Madgavkar, J.) view did not ultimately prevail, but the other learned Judges who took part in the decision of the case at its different stages only distinguished it from the earlier cases. That will be clear from the following passage from the judgment of Patkar J. occurring at page 641 of the report:

> "The case of 'BHOGILAL v. AMRITLAL', 17 Bom 173 was followed by the Allahabad High Court in 'DHARMA v. BALMAKUND', 18 All 458 where it was held that an acknowledgment of the title of the mortgagor made by one only of the two mortgagees would not avail to save the mortgagor's right of redemption being barred by limitation where the mortgage was a joint mortgage and not capable of being redeemed piecemeal. The case of 'DHARMA v. BALMAKUND', 18 All 458 was decided by a single Judge but the decision was followed in 'JWALA PRASAD v. ACHACHEY LAL', 34 All 371. The principle of these cases would apply where the mortgage is a joint mortgage and incapable of being redeemed piecemeal, and under clause (2) of section 21 of the Indian Limitation Act of 1908, one of several joint mortgagees cannot be bound by an acknowledgment made by, or by the agent of, another co-mortgagee. In the present case, the mortgage debt was split up by the mortgagee on account of a partition between the heirs of the original mortgagee and three acres and eighteen 'gunthas' were allotted to the share of Bechar, the father of defendant No. 1, and the rest of the property was allotted to Bhukhan Girdhar, the ancestor of defendants Nos. 2 to 4. So far as the mortgagee is concerned, there was an effective division not only of the mortgage-debt but also of the mortgaged lands....."

In that case the second appeal was first heard by Sir Norman Macleod, C.J. The learned Chief Justice allowed redemption of a divided half of the mortgaged property on payment of the entire mortgage money. The defendant took the matter in Letters Patent Appeal before a Division Bench composed of Madgavakar and Patkar, JJ. They differed in their conclusions and Madgavakar J's view reversing the decision in the second appeal prevailed, as he was the senior Judge. But on a further appeal under the Letters Patent, heard by a Bench of three Judges (Sir Amberson Marten, Kt. Chief Justice, Mr. Justice Mirza and Mr. Justice Broomfield) Madgavakar J's decision was reversed. All the three learned Judges gave separate but concurring judgments and all of them based their decision on the fact that there was in that case a splitting up of the mortgagee's interest and that the case was therefore distinguishable from the earlier cases. It was pointed out that the divided owner of a part of a mortgage holding cannot be prejudiced when he is sought to be redeemed on payment of the entire mortgage money. In the present case though there was originally only one mortgagee on the material dates when defendant 2 made the acknowledgment that interest had devolved on more than one person. As pointed out in an earlier part of this judgment the material date is the date of the acknowledgment and not the date of the transaction.

(21) All the cases referred to above are no doubt cases relating to redemption of mortgages and not to decrees for redemption. So long as a decree does not split up the mortgage the rule of the decisions referred to above must apply to it. There cannot be a piecemeal execution of a redemption decree which on its terms is one and indivisible.

(22) In this view of the law the acknowledgment made by defendant 2 cannot entitle the decree-holder to seek execution of the decree even for the share of defendant 2 in it.

(23) The Second Appeal fails in the result and we dismiss it. As our decision turns on grounds different from those mentioned by the lower courts we make no order for costs here.

V.R.B.

Appeal dismissed.

A. I. R. 1952 Travancore-Cochin 316

KOSHI AND GOVINDA PILLAI JJ.

Mohamad Ali Shahul Hameed Kunju, Appellant v. Abdul Rahiman Muhammad Kunju, Respondent.

Second Appeal No. 111 of 1950, D/- 10-8-1951.

(a) Civil P. C. (1908), S. 105 — 'Where a decree is appealed from' — Principle of section applies to interlocutory orders in execution.

The principle of S. 105, Civil P. C., can be extended to interlocutory orders passed in execution proceeding. Hence, where the executing Court passes a wrong order granting interest on mesne profits, and the order is not appealed against still it can be challenged in an appeal against the final order passed in the execution provided it is made a ground of objection in the memorandum of appeal. If the appellant has not raised it in the memorandum of appeal it will not be allowed to be raised by the appellate Court. 36 Cal 422; AIR 1917 Mad 404; AIR 1932 All 392 and AIR 1936 Mad 936; 38 Coch LR 672, Rel. on. (Paras 3, 4)

Anno: C.P.C. S. 105 N. 2, 4 Pt. 8.

(b) Civil P. C. (1908), Ss. 9, 11 and 47 — Executing Court on a construction of decree as to mesne profits holding that the decretal amount should carry interest — Order of executing Court even if wrong is not without jurisdiction — Order is binding on the parties till it is set aside on appeal. (Para 5)

Anno: C. P. C., S. 47 N. 76, 81; S. 11 N. 111; S. 9 N. 4.

M. Abraham, for Appellant; T. S. Krishnamoorthi Iyer, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras.

('93) 15 All 119: (1893 All WN 14)	4
('96) 18 All 19: (1895 All WN 134 (FB))	4
('98) 20 All 370: (1898 All WN 75)	4
('32) AIR 1932 All 392: (138 Ind Cas 103)	3
('91) 18 Cal 469	3
('09) 36 Cal 422: (2 Ind Cas 338)	3
('17) 4 Mad LW 411: (AIR 1917 Mad 404)	3
('36) AIR 1936 Mad 936: (168 Ind Cas 413)	3
38 Cochin LR 672	4
33 Trav LJ 340	2

KOSHI J.: This Second Appeal arises out of proceedings in execution of two cross decrees. The decree-holder in O. S. No. 992 of 1083 on the file of the Krishnapuram Munsiff's Court is the judgment-debtor in O. S. No. 297 of 1103. The two lower courts have concurrently found that the decree-holder in the former case is entitled to further amounts after setting off the entire decree-debt in the latter case. The lower appellate court confirmed the execution court's order to the effect on the ground that a prior interlocutory order the execution court passed had become final between the parties and that it was therefore incompetent on the part of the decree-holder in O. S. 297 to seek to reagitate in the appeal the question dealt with by that order. We are afraid the lower appellate court's decision cannot be confirmed on the ground mentioned by the learned Judge.

(2) The execution court passed the order which was the subject of the appeal before the lower appellate court on 13-11-1123. Prior to that on 21-11-1122 the Court directed the parties to file statements setting out the amounts due as per the two decrees and in giving that direction held that the decree-holder in O. S. 992 was entitled to get interest on the mesne profits awarded to him by the decree. It is now agreed on both sides that under the provisions of the Code of Civil Procedure in force at the time when that decree was passed no interest on mesne profits could be allowed unless the decree expressly provided for it. The decree makes no such provision and the execution Court's direction embodied in its order dated 21-11-1122, is therefore clearly wrong. The final order the execution Court passed was on the basis of that order and the view the lower appellate court has taken is that in so far as the order dated 21-11-1122 was not appealed against, it had become final and that precluded the appellant (who is also the appellant here) from raising the correctness of the order as to interest on mesne profits. Reliance was placed for this view on the decision reported in 'JATHIVETHAN NAMBOORIPAD v. REVI NAMBOORI', 33 Trav L J 340. That case however is only authority for the view that it was not open to the execution Court to review or consider its previous order. The order did not preclude the appellate Court from examining the correctness of the position provided the condition laid down in that behalf by the Code of Civil Procedure has been duly complied with.

(3) Section 105 (S. 85 Travancore Code) of the Code of Civil Procedure provides 'inter alia' that where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal. Though the section says: where a decree is appealed from" it is wellsettled on authorities that the principle can be extended to interlocutory orders passed in execution proceedings. See 'CHANDANBALA DEBI v. PROBODH CHANDRA', 36 Cal 422; 'ALAGAPPA CHETTY v. ANNAMALAI CHETTY', 4 Mad LW 411; 'CHITAR SINGH v. L. LACHMI NARAIN', AIR 1932 All 392 and 'MUTHAYYAN SWAMINATHAN v. NARAYANASWAMI SASTRIGAL', AIR 1936 Mad 936. A passage from the decision of Mookerjee and Carnduff, JJ. in the first named case may usefully be quoted here:

> "The learned counsel for the appellant, however, contended that if this view be adopted, the decree-holder ought to have immediately preferred an appeal against these orders. In our opinion it was not necessary for him to do so. As was pointed out by this Court in the case of 'BAHARY LAL v. KEDAR NATH', 18 Cal 469 an appeal need not be preferred against every order in an execution proceeding. If the contrary view prevailed, and if appeals were allowed to be preferred against interlocutory orders, there might be innumerable appeals in the course of one execution proceeding. It is open to the party aggrieved to challenge by an appeal against the final order which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings. Besides, in this case, as the learned Vakil for the respondent pointed out, in the appeal which was preferred against the final order, the order of the 15th August was specifically mentioned as an order which ought not to stand. We are of opinion, therefore, that it was open to the learned District Judge, in hearing the appeal against the orders of the 27th August, to determine the validity of the orders of the 15th August. On these grounds, we must hold that the orders of the District Judge are correct and should be affirmed."

The lower appellate court's view that the prior order of the execution court dated 21-11-1122 disentitled the appellant from agitating the matter in appeal cannot therefore be upheld for the reason stated by the learned Judge.

(4) It however so transpires that the said decree-holder did not in his memorandum of appeal to the lower appellate court raise the question of the correctness of the order regarding interest on mesne profits at all. Under S. 105 in order that advantage may be taken of the provision contained therein the ground of objection must be set out in the memorandum of appeal. Mulla's Commentaries (Eleventh Edn. 1941) to the section at page 383 may with advantage be referred to in this connection. In 'PARUKUTTY NETHIARAMMA v. SETHU AMMA', 38 Coch. L. R. 672 to which one of us was a party a more or less similar question arose for decision and after referring to the passage to the above effect occurring in Mulla's Commentaries the judgment in that case goes on to say as follows:

"The learned author relies on the decision reported as 'TILAK RAJ SINGH v. CHAKARDHARI SINGH', 15 All 119. This case has been followed in two other decisions of the Allahabad High Court. See 'SHEO NATH SINGH v. RAM DIN SINGH', 18 All 19 and 'BANSI LAL v. RAMJI LAL', 20 All. 370. I have not come across any contrary decision or any expression of opinion to the contrary in any of the Commentaries on the Code."

This circumstance that the appellant had not in his memorandum of appeal made the correctness of the execution court's order as to interest on mesne profits a ground of objection disentitled him to raise the question before the lower appellate Court. We therefore feel constrained to uphold the order dismissing the appeal though our reason is different from that given by the learned Judge. In fact the memorandum of appeal to the lower appellate Court states that the execution court should have accepted the statement the appellant filed before that Court. Therein he had included interest on mesne profits. No doubt the Court's direction made it incumbent on him to include interest but in attempting to stand by it in his memorandum of appeal he had practically given away his case. The case was really lost when that memorandum of appeal was filed before the lower appellate Court. No appellate Court will be justified in permitting an appellant to raise a point before it diametrically opposed to that raised in the memorandum of appeal.

(5) Before concluding we must not omit to refer to an argument which Mr. M. Abraham the learned counsel for the appellant raised regarding the execution Court's order dated 31-11-1122. It was contended that the order, the mesne profits awarded by the decree in O. S. 992 should carry interest, was an order without jurisdiction and hence void. We regret we cannot accede to this contention. The order is no doubt erroneous but every wrong order cannot be held to be without jurisdiction. The question before the Court then was as to the true construction or the implication of the decree for mesne profits. If the Court's decision the other way would have bound the parties it is impossible to say its decision the wrong way cannot bind them.

(6) The second appeal fails in the result and we dismiss it. In the circumstances of the case we make no order for costs. The lower appellate Court passed a similar order regarding the costs before it and we are upholding its decision dismissing the appeal on an entirely different ground.

K.S. Appeal dismissed.

A. I. R. 1952 Travancore-Cochin 317

KOSHI AND SUBRAMANIA IYER, JJ.

Lekshmana Iyer Krishnaiyer, Appellant v. Ponnu Ammal Lekshmi Ammal and another, Respondents.

Second Appeal No. 204 of 1125, D/- 6-9-1951.

Hindu Law — Succession — Female heirs — Bandhus — Preference.

According to the Hindu (Mitakshara) Law, if the heir of the last male owner is himself a male, then he becomes a stock of descent and at his death the devolution of the property is traced from him. But if the heir is a female, she does not, except in Bombay, become a fresh stock of descent. At her death the property passes not to her heirs but to those of the last male holder, that is to say, the male holder will be deemed by the law as having lived up to and died at the moment of the death of the female heir. As between the bandhus the male bandhus take precedence over female bandhus though the latter be of a nearer degree of relationship to the deceased. Case law relied on.

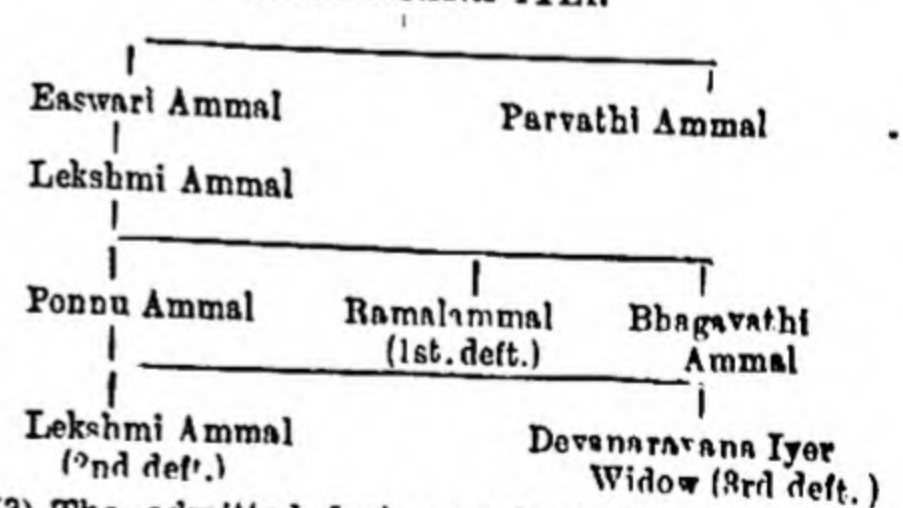
(Paras 5, 6)

T. S. Krishnamoorthi Iyer, for Appellant; N. K. Narayana Pillai, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('80) 7 Ind App 115: (5 Cal 776 (PC)) 5
('24) 51 Ind App 368: (AIR 1924 PC 209) 6
('08) 31 Mad 321: (18 Mad LJ 409) 6
('37) ILR (1937) Mad 948: (AIR 1937 Mad 699 (FB)) 5
('40) ILR (1940) Mad 734: (AIR 1940 Mad 545) 6
('49) 1949-1 Mad LJ 448: (AIR 1949 Mad 779) 6

SUBRAMANIA IYER, J.: The appellant in this Second Appeal obtained a decree for money against the assets of one deceased Devanarayana Iyer in O. S. 282/1090 on the file of the Munsiff's Court of Krishnapuram, impleading the widow, sister, and mother's sister of the deceased, as defendants 3, 2 and 1 respectively. In execution of that decree, certain items of properties were attached as forming part of the estate of the deceased. Defendants 1 and 2 preferred objections to the attachment, claiming the properties as heirs of the mother of the 1st Defendant who is the grand-mother of the 2nd defendant as also of the deceased Devanarayana Iyer. The trial Court overruled the objections but in appeal, the Temporary Second Judge of Mavelikara took a different view and upheld the objections. Hence this Second Appeal by the decree-holder.

(2) The following genealogy is necessary to elucidate the question that arises in the case;



(3) The admitted facts are that the properties belonged to Janardana Iyer on whose death they devolved upon his grand-daughter Lekshmi Ammal, the two daughters having predeceased him. The first and third daughters of Lekshmi Ammal predeceased her who died leaving her surviving her daughter the 1st defendant, her grand-daughter the 2nd defendant and her grandson Devanarayana Iyer who was the husband of the 3rd defendant.

(4) The contention of the claimants viz., that on Lekshmi Ammal's death the properties devolved up

on the 1st defendant as her heir, found favour with the lower appellate Court which took the view that Devanarayana Iyer was only a reversioner who could take only when the reversion opens, that is, on the death of the 1st defendant and that he having predeceased the 1st defendant, had no rights over the properties.

(5) The only question that arises in this second appeal is as to upon whom the properties devolved, whether on the 1st defendant or on the deceased Devanarayana Iyer. It is admitted that the parties are governed by the Hindu (Mitakshara) Law. According to that law, if the heir of the last male owner is himself a male, then he becomes a stock of descent and at his death the devolution of the property is traced from him. But if the heir is a female, she does not, except in Bombay, become a fresh stock of descent. At her death the property passes not to her heirs but to those of the last male holder, that is to say, the male holder will be deemed by the law as having lived up to and died at the moment of the death of the female heir. This principle is well established. (See 'MONIRAM KOLITA v. KERI KOLITANI', 7 Ind App 115 (PC), 'LAKSHMI AMMAL v. ANANTHARAMA', ILR (1937) Mad. 948 (F. B.) Mayne's Hindu Law and Usage, 11th Edition 1950, page 585, paragraph 482).

(6) To determine the devolution of the property after the death of Lekshmi Ammal, it is therefore necessary to consider who is the preferential heir to the deceased Janardana Iyer as between defendants 1 and 2 and deceased Devanarayana Iyer who are all bandhus in relation to the propositus. As between the bandhus the male bandhus take precedence over female bandhus though the latter be of a nearer degree of relationship to the deceased. This principle again is well established. (See 'RAJAH VENKATTA v. RAJAH SURNANI', 31 Mad 321, 'KENCHAWA v. GIRIMALLAPPA', 51 Ind App 368 (PC), 'JAGANNADHAM v. ADILAKSHMI', ILR (1940) Mad 734 'SIVATHWAJA MATAM v. SAMI BHATTAR', (1949) 1 Mad. L. J. 448, Mayne's Hindu Law and Usage 11th edition, 1950, page 666, paragraph 533). Devanarayana Iyer who is the male bandhu takes the properties in question which are, therefore, liable to be attached for the decree.

(7) The second appeal should be allowed. The decree appealed against is set aside and that of the Munsiff restored. The respondent will pay the costs of the appellant here and in both the Courts below.

D.H. Appeal allowed.

A. I. R. 1952 Travancore-Cochin 318

KOSHI AND GOVINDA PILLAI JJ.

Aiyaru Ayyan, Appellant v. Krishnan Kesavan, Respondent.

Second Appeal No. 291 of 1951, D/- 30-11-1951.

Limitation Act (1908), Art. 180 — Travancore Limitation Act (6 (VI) of 1100), Art. 164 — Starting point — Execution sale confirmed when application to set aside exparte decree pending — Application for delivery by decree-holder auction-purchaser — Starting point is date of dismissal of application to set aside exparte decree.

A sale in execution of a decree was confirmed on 22-2-1121 when an application to set aside the exparte decree passed in the suit was pending. The application to set aside the exparte decree was finally dismissed on 30-3-1124. The decree-holder auction-purchaser applied for delivery of possession of the property on 8-5-1124 i.e. more than 3 years from the date of confirmation of sale.

Held that the sale became absolute within the meaning of Art. 164, Travancore Limitation Act, only on 30-3-1124 when the application to set aside the exparte decree passed in the suit was dismissed. Till that date the decree-holder's auction-purchase stood in peril of being avoided or falling through in case the exparte decree was set aside. The application for delivery having been filed within 3 years from that date was not barred by limitation under Art. 164. AIR 1927 Mad 391, Rel. on; 23 Cal 775 (PC); AIR 1934 PC 134, applied. Case law discussed. (Para 12)

Anno: Lim. Act, Art. 180 N. 4.

P. Govindan Nair, for Appellant; R. Neelacanta Kartha, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('96) 23 Cal 775: (23 Ind App 45 (PC)) 11
('34) AIR 1934 PC 134: (61 Cal 945) 4, 5, 10, 11
('50) AIR 1950 Assam 89: (ILR (1950) 2 Assam 119) 4, 6, 8
('14) 22 Ind Cas 497: (AIR 1914 Cal 893) 10
('20) 43 Mad 185: (AIR 1920 Mad 1 FB) 4, 8, 11
('26) AIR 1926 Mad 857: (96 Ind Cas 657) 9
('27) 25 Mad LW 108: (AIR 1927 Mad 391) 8, 9
('45) 1945 Trav LR 251 10

KOSHI J.: This second appeal is by a decree-holder-purchaser. His application to obtain delivery of the property purchased by him at the court auction sale held in execution of the decree he obtained against the respondent was found to be out of time and barred under Article 164 of the Travancore Limitation Act, VI of 1100, by the learned District Munsiff of Alleppey before whom that application was made. On appeal, the learned Second Judge of Alleppey confirmed the Munsiff's decision. This second appeal is brought against these concurrent orders.

(2) Article 164 of the Travancore Limitation Act is in the same terms as Article 180 of the Indian Limitation Act, IX of 1908. It provides that a purchaser of immoveable property at a sale in execution of a decree for delivery of possession, must make the application within three years from the time when the sale becomes absolute. To ascertain when the sale becomes absolute we have to look to the provision in Order XXI r. 89(1), Civil Procedure Code (Travancore) which so far as is relevant for our present purpose is the same as that enacted by r. 92(1) of Order XXI, Civil Procedure Code, Act V of 1908. The said sub-rule states as follows:

> "Where no application is made under r. 86, r. 87 or r. 88 or where such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale shall become absolute."

Rr. 86, 87 and 88 correspond respectively to rr. 89, 90 and 91 of the Indian Code.

(3) In this case there was no application to set aside the sale and the order confirming the sale was passed by the Court on 22-2-1121. The appellant's application to obtain delivery of possession was filed only on 8-5-1124 when more than three years had clearly elapsed after the sale was confirmed. The confirmation was made when an application filed on 2-1-1121 to set aside the ex-parte decree passed in the suit was pending and that application was not disposed of until 30-3-1124. The argument that was raised in the Courts below and repeated before us against the contention that the

application was time barred was that the sale cannot be held to have become absolute within the intendment of Article 164 before the date on which the application to set aside the 'ex parte' decree was disposed of. It is conceded that the Limitation Act contains no provision for exclusion of time occupied by the pendency of the petition to set aside the 'exparte' decree. Section 16 of the Travancore Limitation Act though wider in scope than the corresponding section 16 of the Indian Limitation Act only provides for the exclusion of time during which proceedings to set aside execution sale are pending. Under the Indian Limitation Act such exclusion is permissible only for a suit for possession by a purchaser in execution of a decree and not for an application for possession. The Travancore section extends the scope of the exclusion to an application for possession also. However even under that law the exclusion relates only to the time during which a proceeding to set aside an execution sale is pending and does not refer to a proceeding to set aside a decree. It is also conceded that no equitable grounds for the suspension of the right to apply to obtain possession can be added to the provisions of the Limitation Act. The appellant's case must therefore stand or fall on the construction that he seeks to put on the words "when the sale becomes absolute" occurring in column 3 of Article 164 (Indian Article 180).

(4) Courts have given a liberal construction to those words. Decided cases have held that notwithstanding a formal order of confirmation passed under r. 92(1) of Order XXI (Act V of 1908) when there happens to be a subsequent order affirming the sale wholly or in part in a proceeding started thereafter the sale can be said to have become absolute within the meaning of the article only from the date of the subsequent order. 'MUTHU KORAKKAI v. MADAR AMMAL', 43 Mad 185 (F. B.); 'CHANDRA MANI v. ANARJAN BIBI', AIR 1934 P. C. 134 and 'KRISHNADATTA v. SINDHURAM', AIR 1950 Assam 89. In the first of these cases the sale was in due course confirmed on the expiration of 30 days from the date of the sale as there was no application at all to set it aside. Later on, but within three years of the confirmation, the Court entertained an application for setting aside the sale on the ground of fraud and allowed that application in part, that is, as regards the interests of the sons of a deceased judgment-debtor, the reason given being that they had not been brought on record as the legal representatives of their deceased father, and dismissed the petition as regards the other judgment-debtors. That order was confirmed on appeal and thereupon the purchaser applied for delivery of the shares in respect of which the sale was held to be good. That application was made within three years of the order upholding the sale in part but beyond three years of the original order of confirmation. The court held that the application was not barred under Article 180 of the Limitation Act as time should be computed from the date of the order disallowing the petition to set aside the sale wholly on the ground of fraud and not from the date of the first confirmation.

(5) In 'CHANDRA MANI v. ANARJAN BIBI', AIR 1934 PC 134 the application for delivery of possession was made beyond three years of the order dismissing the application to set aside the sale and subsequent confirmation but within three years of the appellate order affirming the lower court's decision that the sale was not liable to be set aside. It was contended that the application was barred by limitation but the Subordinate Judge repelled the contention. His decision was reversed on appeal by the High Court. The Judicial Committee set aside the High Court's decision and restored the Subordinate Judge's order. In so doing their Lordships said as follows:

"Upon consideration of the sections and orders of the Code, their Lordships are of opinion that in construing the meaning of the words "When the sale becomes absolute" in Art. 180, Limitation Act, regard must be had not only to the provisions of O. XXI, r. 92 (1) of the Schedule to the Civil Procedure Code, but also to the other material sections and Orders of the Code, including those which relate to appeals from orders made under O. XXI, r. 92(1). The result is that where there is an appeal from an order of the Subordinate Judge, disallowing the application to set aside the sale, the sale will not become absolute within the meaning of Art. 180, Limitation Act, until the disposal of the appeal, even though the Subordinate Judge may have confirmed the sale, as he was bound to do, when he decided to disallow the above mentioned application."

(6) In the third case 'KRISHNADATTA v. SINDHURAM', AIR 1950 Assam 89 the formal order of confirmation of an execution sale made under r. 92(1) was challenged within three years by a petition under sections 47 and 151, Civil Procedure Code and after a review of the earlier decisions bearing on the point, the view that when a formal order of confirmation is challenged by a subsequent application imperilling the fate of the confirmation, the order on the subsequent application will mark the starting point for limitation, was re-affirmed.

(7) These no doubt are cases where the execution sales were directly impugned by applications as contemplated by the provisions of the Civil Procedure Code. We have here a case where even before a formal order of confirmation was made the defendant filed an application under Order IX, r. 13, Civil P. C., to set aside the exparte decree passed against him in the case. Had that application been allowed, as the purchaser in this case is the decree-holder himself, the sale would have automatically fallen to the ground. The order dismissing the defendant's application to re-open the suit was passed on 30-3-1124, and until then the sale stood in peril of being avoided. It is well settled that an execution purchase by the decree-holder himself will automatically fail when the suit is re-opened or the decree reversed on appeal.

(8) The objection raised in extending the rule of the decisions referred to above to the present case is that in each of those cases there was a proceeding directly impugning the sale and not a collateral one as we have here. The decree-holder having been the purchaser the scope of the proceeding started was indeed very wide. Had the order in that proceeding been the other way round, that is, had the suit been re-opened, the sale would have stood avoided notwithstanding the confirmation made earlier. If instead of an application to re-open the suit, a petition to set aside the sale was filed on the date that application was made and that happened to be dismissed the period of limitation for the decree-holder purchaser to obtain delivery of possession would have commenced to run only from the date of that dismissal. 'MUTHU KORAKKAI v. MADAR AMMAL', 43 Mad 185 (F. B.) and 'KRISHNADATTA v. SINDHURAM', AIR 1950 Assam 89. On principle, we are unable to find any reason to apply a different rule to the present case. In either case the application to set aside the sale was filed only after it was confirmed under R. 92 (1). We have come across one case where the rule laid down in '43 Mad. 185 (FB)' has been extended to a proceeding to set aside an ex parte decree and even to a suit to set aside the decree. In 'THAYYAMUTHU v. ODAYAPPAN', 25

Mad LW 108 Krishnan J. observed at p. 111 of the report as follows:

"It is no doubt an application to which Article 180 of the Limitation Act would apply and the time from which the period of limitation begins to run would be when the sale becomes absolute. Now, it has been held in 'MUTHU KORAKKAI v. MADAR AMMAL', 43 Mad 185 (FB) that where there are proceedings disputing the validity of the sale or the validity of the decree itself by attempting to set them aside the sale could not be held to have become absolute, till those proceedings are disposed of and final orders are passed in them. If that view is adopted, the time from which the period of limitation would begin to run in this case would be the 14th March 1923 and the present application will be fully in time."

The 14th March 1923 referred to in the above extract marked the culmination of a suit to set aside the decree in which the execution sale in that case had taken place. When the decree-holder purchaser's application for delivery of the property was pending, an application was first filed to set aside the ex parte decree passed in the suit. That application went up in appeal and was finally dismissed. Immediately thereafter a suit was brought to set aside the decree. That suit ended on the 14th March 1923 and when a fresh application was filed for delivery it was contended that the application was barred by limitation. No doubt in that case the learned Judge has given two or three alternative grounds to rest his decision that the application was not barred by time and the ground mentioned in the extract quoted above is only one among them.

(9) The decision in 'THAYYAMUTHU v. MINOR ODYAYAPPA', 25 Mad L. W. 108 was given on 10th September 1926. We are not unaware that earlier in the year on 26th February 1926 a Division Bench of the Madras High Court had held that there was no provision of law for excluding in favour of the auction-purchaser seeking delivery of possession the period of the pendency of a suit filed by the judgment-debtor to set aside the court sale: See 'SORNAM PILLAI v. THIRUVAZHIPERUMAL PILLAI', AIR 1926 Mad 857. With respect, we venture to observe the question is not one of exclusion of any period but when the sale can be said to have become absolute within the meaning of the relevant article of the Limitation Act.

(10) The rule that a formal order of confirmation made under R. 89(1) of O. XXI, Civil P. C. (Travancore) will not 'ipso facto' make the sale absolute within the meaning of Article 164, Limitation Act (Travancore) is one which has gained recognition in the Travancore High Court. See 'MYTHEEN KUNJU v. JANAKI AMMA', (1945) Trav LR 251. There after confirmation of an auction-sale the purchaser and judgment-debtor agreed that on the latter paying a specified amount together with interest on a specified date, the former will surrender his rights over the property to the latter. The latter, that is, the judgment-debtor committed default and when the purchaser applied for delivery of possession within three years of the date of default, but more than three years after confirmation of the sale, he was resisted by the plea that the application was barred by limitation. Following the decision of the Privy Council referred to above 'CHANDRA MANI v. ANARJAN BIBI', AIR 1934 PC 134 the learned Judge who decided that case held that there was no bar of limitation and that the sale cannot be deemed to have become absolute within the meaning of Article 164 until default occurred on the part of the judgment-debtor. Besides the Privy Council decision the learned Judges also relied upon 'JANAK PROSAD v. NET RAM', a Division Bench ruling of the Calcutta High Court reported in '22 Ind Cas 497 (Cal)' where the facts were almost identical. The conclusions arrived at in '1945 Trav LR 251' and '22 Ind Cas 497' could very well have been made to rest on the well-known rule that a party cannot play fast and loose with the Court. Having granted a specified time to the judgment-debtor to pay him off the purchaser could not have applied for delivery before that time expired and the judgment-debtor was precluded by his own conduct from pleading that the subsequent application for delivery was barred by time. No party will be permitted to approbate and reprobate. However the view actually held in those cases was that the sale became absolute only when the judgment-debtor failed to carry out the compromise arrangement.

(11) Reference may be usefully made here to the decision of the Privy Council in 'BAIJINATH SAHAI v. RAMGUT SINGH', 23 Cal 775. In that case the Judicial Committee was called upon to construe the words "when the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought" occurring in column 3 of Article 12 of the Limitation Act. A sale held by the Collector was confirmed by the Commissioner on 25-1-1884 and the suit to set aside the sale was not brought until July 1886. The period of Limitation prescribed by Article 12 for such a suit is one year. On 12-8-1884 the Board of Revenue had set aside the Commissioner's order of confirmation, but the Board subsequently found that they had no jurisdiction to do that and accordingly on 21-8-1886 restored the Commissioner's order of confirmation. The suit brought within one year of the restoration of the confirmation order was held to be within time. Lord Devey who pronounced the Judgment of the Board said:

Their Lordships are of opinion that there was no final, conclusive and definitive order confirming the sale, while the question whether the sale should be confirmed was in litigation, or until the order of the Commissioner of the 25th January 1884 became definitive and operative by the final judgment of the Board of Revenue on the 21st August 1886, or (in other words) that for the purpose of the law of limitation there was no final or definitive confirmation of the sale until that date."

In the Full Bench decision of the Madras High Court referred to earlier 'MUTHU KORAKKAI v. MADAR AMMAD', 43 Mad 185, Seshagiri Ayyar, J. observed that the construction to be placed on the third column of Article 180 of the First Schedule of the Limitation Act was concluded by this pronouncement of the Judicial Committee. It is interesting to notice how the learned Judge (Seshagiri Ayyar, J.) winds up the discussion regarding the effect of the various Privy Council decisions referred to in that case on the construction to be given to the language of the third column of the First Schedule to the Limitation Act. At page 213 of the report occurs the following passage:

"All of them (the Privy Council decisions referred to in the judgment) may be said to go to some extent, behind the actual words of the third column and to import into the decision considerations based on the intention of the legislature; but none of them introduces a principle which adds to or subtracts from the statutory exemptions. That is my view of the decisions of the Judicial Committee. Therefore in my opinion, the true rule deducible from these various decisions of the Judicial Committee is this: that subject to the exemptions, exclusion, mode of computation and the excusing of delay, etc., which are provided in the Limitation Act, the

language of the third column of the First Schedule should be so interpreted as to carry out the true intention of the legislature, that is to say, by dating the cause of action from a date when the remedy is available to the party. This is a rule of construction and not a rule of law."

The rule enunciated in 23 Cal 775 (P.C.) has been applied by Courts in India in large in many cases and while it pleads for liberal construction of the language of the third column of Schedule 1 of the Limitation Act the decision in 'CHANDRA MANI v. ANARJAN BIBI', AIR 1934 P C 134 states that to determine whether a court sale has become absolute within the meaning of the words employed in the third column of Article 180 regard must be had not only to R. 92 (1) of Order XXI, Code of Civil Procedure but also to other provisions of the Code.

(12) The logical extension of the principle underlying the authorities cited in this judgment to the case on hand necessarily involves the conclusion that the sale became absolute within the meaning of Article 164 of the Travancore Limitation Act only on 30.3.1124 when the defendant's application to set aside the exparte decree passed in the suit was dismissed. This view follows as necessary corollary from the decisions referred to. A contrary view will in our opinion lead to several anomalies. The defendant's application to set aside the ex parte decree naturally imperilled the fate of the sale when the purchaser happened to be the decree-holder himself.

(13) In the result we hold that the application for delivery of possession made on 8-5-1124 was within time and setting aside the concurrent orders of the two Courts below we allow this second appeal with costs throughout.

K.S.

Appeal allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 321

KOSHI AND GOVINDA PILLAI JJ.

Raman Ramankutty, Petitioner v. Authrose Joseph, Respondent.

C. R. P. No. 607 of 1950, D/- 23-8-1951.

Civil P. C. (1908), O. 21, R. 89 — Travancore Civil P. C., O. 21, R. 86 — Mistake in calculating the amount to be deposited — Failure to make full deposit in time — Effect.

The provision in O. 21, R. 86, Travancore Civil P. C. corresponding to O. 21, R. 89, Civil P. C. is in the nature of concession shown to the judgment-debtor and therefore strict compliance with it must be insisted upon before relief can be given under it. The responsibility for paying the correct amount within time lies with the person who seeks to set aside the sale. AIR 1947 Mad 56, AIR 1944 Bom 233 (2), AIR 1934 Lah 790, 35 Trav LR 158 and 17 Coch L R 69, Rel. on. (Para 2)

Where an applicant under O. 21, R. 86, Travancore Civil P. C., makes a short deposit merely relying on the sale amin's report and without referring to the sale proclamation or the relevant records, it cannot be said that he has been misled by an act of the Court or its officers when there are no rules of the Court making any of its ministerial officers responsible for checking the correctness of the amount offered to be deposited under R. 86. In such a case if the applicant makes the full deposit after the thirty days have elapsed, the sale cannot be set aside. AIR 1941 Mad 706, Dist., 26 Cal 449, Rel. on. (Para 8)

Anno: C. P. C., O. 21, R. 89, N. 18, 19.

T. S. Krishnamurthi Iyer, for Petitioner; N. K. Narayana Pillai, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('22) AIR 1922 Bom 193: (46 Bom 171) 3
('44) AIR 1944 Bom 233 (2): (46 Bom LR 432) 2
('98) 25 Cal 609 6
('99) 26 Cal 449: (3 Cal WN 283 FB) 2, 4, 6
('30) AIR 1930 Cal 249: (126 Ind Cas 207) 1
('34) AIR 1934 Lah 790: (154 Ind Cas 641) 3
('11) 21 Mad LJ 631: (9 Ind Cas 937) 2
('41) AIR 1941 Mad 706: (199 Ind Cas 432) 1, 9
('47) AIR 1947 Mad 56: (229 Ind Cas 243) 2
('33) AIR 1933 Pat 515: (146 Ind Cas 971) 1
17 Cochin LR 69 2
35 Trav LR 158 2, 4

KOSHI, J.: This civil revision petition was referred to a Bench by one of us by an order dated 13th November 1950. The order sets out the circumstances under which the revision petition happened to be filed and the only question for decision now is whether the petitioner's inability to comply properly with the provision in Order XXI, R. 86 of the Travancore Civil P.C. was occasioned by any mistake on the part of the court. Before proceeding to discuss this question it is convenient to quote here the order of reference:

"This revision petition raises an interesting question and that is whether a person making an application under Order XXI, R. 86 C.P.C. (Travancore) to set aside an execution sale on deposit of due amounts is, when misled into making a short deposit by a report of the officer who held the sale made to the Court as to the amount for which the sale was held, entitled to have the mistake treated as one arising out of an act of the court and relief granted accordingly."

"The court sale was held on 16-10-1123 and the present petitioner who took a private sale from the judgment-debtor on 11-11-1123 of the property sold in court auction deposited in Court on 12-11-1123 the amount which he understood to be the amount mentioned in the Amin's report as the amount for which the decree-holder purchased the property in full satisfaction of the decree debt together with five per cent thereon as enjoined by Rule 86. The amount specified in the proclamation of sale as that for the recovery of which the sale was Fs. 4631¼ and the sale was actually held for that amount. The Amin's report to the Court was however written in such a manner as the sale price could be read "as Fs. 4131¼." It was the latter amount together with five per cent of the same that the petitioner deposited on 12-11-1123. The fact that there was a short deposit was discovered by him only after the thirty days prescribed had expired and immediately on 17-11-1123 he made good the deficit. The Munsiff who heard and disposed of the application took the view that the mistake should be treated as that one arising out of an act of the Court and that the petition should accordingly be allowed. His order to that effect was reversed by the appellate Court and the petitioner has moved this Court in revision."

"It is settled law that the concerned rule should be construed strictly and that to entitle an applicant to have the sale set aside the deposit should be made within thirty days of the date of the sale. The period of thirty days cannot be extended by the Courts, but when a party litigant is not able to make the deposit in time or is

led to make a short deposit on account of the action of the court, Courts always relieve the litigant of the penal consequences of the default, whether the default be to make any deposit at all in time or the deposit made happens to fall short of the requisite amount. It is a vexed question whether that would constitute an act of the Court. Here, admittedly the petitioner did not apply to the Court to fix the amount he had to deposit or even ask for an inspection of the relevant records. The concurrent findings of the Courts below however make it clear that the mistake could very well have happened even if the petitioner had asked for and obtained an inspection of the records."

"Though earlier decisions take a strict view as to what constitutes an act of the court, in jurisdictions where the rules of the Court enjoin on the chief ministerial officer to ascertain the correctness of the amount tendered before issuing a challan for depositing the same and when through any mistake on the part of that officer or his subordinates the parties happen to make short deposits relief is granted against the penal consequences of such mistakes, they being treated as the mistakes of the Courts themselves. See 'RANGINI SUNDARI v. HIRALAL BISWAS', AIR 1930 Cal 249 and 'GOPINATH TEWARI v. HIRAMAN BIBI', AIR 1933 Pat 515. The report which the Amin made in the present case is one which he is bound by the rules to make and the Courts below have held that the Amin's report is capable of being read that the sale was held for Fs. 4131¼. Further it unmistakably shows that the decree-holder purchased the property in full satisfaction of his debt. The decision in 'SREEPATI BALAIAH v. DARSI RAMAYYA', AIR 1941 Mad 706, furnishes the nearest approach to the present case on the facts, but that case does not relate to a similar application to set aside an execution sale."

"As the question raised is important and as no decided case of this, or the Travancore or Cochin High courts dealing with a similar question has been brought to my notice, I would refer this revision petition for decision by a Division Bench and I order accordingly."

(2) The responsibility to find out the correct amount and bring the same to the court within time is that of the person seeking to have the sale set aside. There are no rules of the court here making any of the ministerial officers responsible to check the correctness of the amount offered to be deposited under R. 86. In attempting to discharge his responsibility the petitioner followed a course of action which ultimately landed him in trouble and after giving the matter our best consideration we are unable to accept the argument that the failure to comply with the provision of the law to make the full deposit in time was brought about by a mistake of the court. The order of reference itself makes it clear that Courts have always taken the view that as the provision itself is an indulgence to the judgment-debtor, strict compliance with it must be insisted on before relief is given under it. The responsibility for paying the correct amount lies with the person who seeks to have the sale set aside under this provision. 'KALIDASA CHETTY v. DODDA SIDDHA CHETTY', AIR 1947 Mad 56. The same view has been taken by the Bombay High Court in 'AMRITLAL NARSILAL v. SADASHIV', AIR 1944 Bom 233 (2). An earlier Madras case reported in 'KALINGA v. NARASIMA', 21 Mad L J 631 has stated at p. 635 of the report that the provision in S. 310A (corresponding to Order XXI, R. 86 of the Travancore Code) confers a special right on the judgment-debtor and before he can avail himself of the benefit of the section he must comply strictly with its terms. The authority followed in that case is a Full Bench decision of the Calcutta High Court reported in 'CHUNDI CHARAN v. BANKE BEHARAYLAL', 26 Cal 449, which will presently be referred to. The same view of the section has been taken by the Travancore and the Cochin High Courts. The decisions in 35 Trav L R 158 and 17 Coch L R 69, may be referred to as representing the view held by those courts. Both these cases also rely on the decision in 26 Cal 449.

(3) The Lahore High Court also takes a similar view in 'UDA BAI, MT. v. RAM AUTAR SINGH', AIR 1934 Lah 790. That decision after stating that the provision is in the nature of an indulgence to the judgment-debtor proceeds to state as follows:

"Before the sale takes place he has every opportunity of avoiding it by satisfying the decree. Practically the locus paenitentiae is given him after the conclusion of the sale to retain his property if he complies with certain conditions. Consequently the Courts are bound to see that the provisions of law in this respect are very strictly conformed to. In 'MANAJI KUVERJI v. ARAMITA', AIR 1922 Bom 193, the amount of the decree was not stated at all in the proclamation of sale. Still it was held that the applicant in that case had not complied with the terms of R. 89, in that he had not paid into Court the amount for the recovery of which the sale was ordered. The applicant was a party to the suit and must have known what the amount to be recovered was. The proclamation of sale referred to the decree and the decretal amount was well known to the judgment-debtor. This is not a case in which the judgment-debtor was prejudiced by the act of the Court. The decision of the lower court on this point was in my opinion correct."

(4) Before we refer to the decision in 'CHUNDI CHARAN v. BANKE BEHARAYLAL', 26 Cal 449 a word more may be added with reference to the decision in 35 Trav L R 158. There the applicant had put in a petition praying for orders for the issue of a challan "after ascertaining the amount which was due under the auction and which had to be deposited." On this petition, the Munsiff passed the order "Challan to issue". The execution clerk calculated the amount to be deposited at a certain figure and challan was accordingly issued for that amount. The applicant paid the amount accordingly but it was found that there was a short deposit on account of some mistake committed by the execution clerk. The learned Judges observed:

"There can be no doubt or difficulty in calculating these amounts and the person who makes the application under section 307A has only to thank himself if instead of making the calculation himself he gets it done by others who make the calculation wrongly and is misled by such wrong calculation."

Later on in their judgment the learned Judges stated:

"The mistake in calculation was one committed by the execution clerk and not the mistake of the court. It is no part of the duties of the execution clerk either under the Code or under the circulars of this court to make a calculation of the amount to be deposited under S. 307A. It was irregular on his part to have made any calculation at all and if he makes a wrong calculation and the judgment-debtor chooses to rely and act upon it, the latter does so at his peril. If there was a judicial order of the court directing the issue of a challan for a specified amount and if

that amount happened to fall short of the amount really due, then other considerations would arise; but the present case is, as we have stated already clearly not one of that description. It was held in 26 Cal 449 (FB) — a case which is on all fours with the present — that a short deposit made by the judgment-debtor based on a calculation which was made by some officer of the court and which was not the result of any mistake on the part of the court, would not help the judgment-debtor and that the sale, in these circumstances, should not be set aside."

(5) That was a much stronger case for the applicant. Here the petitioner without seeking the aid of the court or examining the A diary which is open to the litigant public approached the assistant Bench clerk to get the relevant information. The proclamation of sale showed a much higher amount to be due than that mentioned in the Amin's report which the petitioner happened to refer to and he could very well have known that no payment was since made so as to reduce the amount. Even the sale deed in his favour directed him to deposit a higher amount to satisfy the decree debt. He had in fact applied for a challan for depositing that amount. These were in our opinion sufficient to put him on enquiry whether the figure mentioned in the Amin's report was the true figure. Under the relevant rule the material document is the proclamation of sale. Without referring to it or asking for an inspection of any relevant records if the petitioner omitted to pay the full amount he has, in our opinion done it at his peril.

(6) Before concluding, a passage or two from the Full Bench decision in 'CHUNDI CHARAN v. BANKE BEHARAYLAL', 26 Cal 449, may usefully be quoted here. There the short deposit was said to be due to a mistake made by an officer of the court in making the calculation and on which calculation the judgment-debtor relied. At page 458 of the report Maclean, C. J., is seen to have observed:

"'But, even if the respondent could prove what he suggests, that some information was given him as to the amount of the purchase-money, and of the sum mentioned in the sale proclamation by some officer of the court and that he relied on this information it would not avail him. He must show, at the least that it was the duty and within the province of the Court officer to give the information, and that it was incorrect. It is not suggested that any information was supplied in accordance with the rules which govern applications for information and which are to be found in Chapter IV of the General Rules and Circular Orders. It is only in compliance with these rules that information can, or ought to, be given. I may perhaps add, that, as regards the case of 'MAKBOOL AHMED v. BAZLE SABHAN', 25 Cal 609 it now transpires that the amount was fixed by an order of the Munsiff himself, in the presence of and with the assent of the pleaders of both parties. That makes a very material difference."

(7) At Page 459 Ghose, J. observed:

"Here, the Munsiff did not in any way declare what the amount was that should be paid; nor does it appear that the officer of the Court from whom the applicant is said to have received certain information in regard to the amount to be deposited, was the officer who was charged by the Court with the duty of supplying that information. And I think that in this case no facts have been proved, or found, upon which the Court should be justified in giving the applicant relief under section 310A."

What Jenkins, J. said may also be usefully quoted here:

"In my opinion it is essential to the respondent's success that it should be established that he has been prejudiced by the act of the Court and that the mistake that has been made is attributable to that act. What constitutes an act of the Court must depend on the circumstances of each case. It is clear, I think, that a mere casual act by an officer of the Court cannot be treated as the Court's act. For an act to be clothed with that character it appears to me, generally speaking, that it must be the act of the prescribed officer acting in accordance with the prescribed rules of the Court."

(8) In the light of these observations it is in our opinion idle to contend that the petitioner here was misled by any act of the court and the revision must hence fail.

(9) The decision in 'SREEPATI BALAIAH v. DORSI RAMAYYA', AIR 1941 Mad 706, referred to in the order of reference was not concerned with any statutory provision imposing a time limit for payment of the amount. The court's order had fixed the time and the party was misled by a mistaken entry in the rough diary as to the amount he had to pay. Presumably that is a register to which the members of the litigant public have access. In accordance with the view we hold on the question referred to the revision petition will stand dismissed with costs.

K.S.

Revision dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 323

KUNHI RAMAN C. J. AND SANKARAN J.

Mathevan Pillai Vanniaperumal Pillai, Appellant; v. Muthia Pillai Sivasubramonia Pillai and others, Respondents.

A. S. No. 607 of 1123, D/- 22-8-1951.

(a) Civil P. C. (1908), S. 92 — Trust created for public purposes — Travancore Civil P. C., S. 72.

The essential feature of a public trust is that the endowment must be for a public purpose of a charitable or religious nature and that the beneficial interest in the trust must be vested in the public in general or in a considerable section of the public. Endowment for such a purpose is meant to last for ever and when once the trust is established it will not be open to the founders or the trustees to put an end to it or to divert the income of the trust properties either to their own private use or to any purpose other than the purpose for which the endowment was made. So far as private trusts are concerned, the beneficial interest will be vested in one or more ascertainable individuals. The trust itself may be for a limited purpose or for a limited period.

The Gurupooja Dharamam was founded with the sole object of conducting a feast in the village temple of Mutharaman Kovil on the day of the annual Kuta festival. All those present at the temple on that occasion could participate in the feast as a matter of right. The surplus income of the Trust properties had to be conserved and the same could be utilised only for acquiring other properties for the Trust without spending any portion of such income for

any other purpose. The Trust was intended to be permanent and it was with such an idea that the immovable properties described in the plaint schedule were acquired for the Trust. Gurupooja Dharmam Trust was not founded under any deed of endowment. Parties were also not in a position to state when exactly this Trust was founded; it was not also known who were the original founders of this Trust.

Held that on a consideration of all the facts admitted and proved in the case the Gurupooja Dharmam was founded as a charitable one for public purpose. The fact that certain prominent members of the Vellala community in the East Putheri Village asserted their right to manage the affairs of the Trust and also acquired immovable properties for the Trust, by itself would not make the Trust a private Trust belonging to themselves and their descendants. The mere fact that a few of the villagers alone took part in making the later acquisitions on behalf of Trust could not and would not have the effect of altering the nature and object of the Trust or of vesting in them any exclusive right in respect of the Trust. In spite of such acquisitions, the Trust would continue to retain its original character as a public trust.

(Paras 3, 4)

Anno: C. P. C., S. 92, N. 5.

(b) Civil P. C. (1908), S. 92 — Suit in representative capacity and for advancement of interests of Trust.

The plaint Trust was a public Trust. The plaintiffs had instituted the present suit on the allegation that the defendant who was functioning as the managing trustee had mismanaged the affairs of the Trust and had thereby committed a breach of the Trust. They had also sought for the removal of the defendant from the trusteeship and also for a settlement of the accounts relating to his period of management. The plaintiffs had, no doubt, come forward as trustees entitled to manage the affairs of the plaint Trust. But their status as trustees had been denied by the contesting defendant. The plaintiffs had not sought for any declaration of their status as trustees. The representatives of the founder of the Trust had passed proceedings at a meeting appointing these plaintiffs as trustees and authorising them to institute the present suit on behalf of the plaint Trust.

It is on the strength of such authorisation that the plaintiffs instituted the present suit and accordingly they claimed the several reliefs for and on behalf of the Trust.

Held that this was not a suit for a vindication of the personal or individual rights of the plaintiffs. On the other hand, the plaintiffs had brought the suit in a representative capacity and for the advancement of the interests of the plaint Trust. The mere fact that the plaintiffs claimed to be trustees entitled to be in management of the affairs of the Trust would not, under such circumstances, take the suit outside the scope of section 92. Case law rel. on.

(Para 6)

Anno: C. P. C., S. 92 N. 7, 9.

K. P. Abraham, for Appellant; T. N. Subramonia Iyer, Advocate-General and S. Bhoothalingom Iyer, for Respondents (Nos. 1 and 3 respectively.)

REFERENCES: Courtwar/Chronological/ Paras
('22) 45 Mad 113: (AIR 1922 Mad 17 FB) 5
('38) AIR 1938 Mad 92: (ILR (1938) Mad 39) 5
('43) AIR 1943 Mad 466: (ILR (1943) Mad 619 FB) 5
5 Deccan LR (Trav) 150 5

SANKARAN, J.: This appeal has been preferred by the 1st defendant against the decree in O. S. 24/1116 on the file of the District Court of Nagercoil. That suit was instituted by three plaintiffs who claimed to be the joint owners and trustees of the plaint trust known by the name 'Gurupooja Dharmam" along with the 1st defendant and 11 others whose names were given in the list appended to the plaint. All these persons are members of the Vellala community having their permanent residence in the East Putheri Village at Nagercoil. The Gurupooja Dharmam Trust is stated to have been founded by the ancestors of these persons and by some others whose families have become extinct. The initial fund for the Trust is said to have been raised by collecting subscriptions and also by the contributions made by the original founders. Since the idea was that the Trust should exist for ever the immovable properties described in the A schedule of the plaint were, in course of time, acquired in the names of the founders themselves for and on behalf of the Trust.

This trust was founded with the sole object of conducting a feast in the Mutharamman Kovil, the village temple at East Putheri. The feast was to be conducted on the days of the Kuta festival in that temple and everybody present on that occasion should participate in the feast. Two kottas of paddy was to be spent for conducting the feast on each occasion. The surplus income of the Trust properties had to be added on to the assets of the Trust and to be used for acquiring more properties for the Trust. According to the plaintiffs, the founders and their descendants have the exclusive right of managing the Trust's affairs and the custom was to appoint one among them as a trustee in charge of the management of the affairs of the Trust. It is stated that the 1st defendant was thus appointed as managing trustee in the year 1098. The fault in the due performance of the object of the Trust, failure to maintain proper accounts showing the income of the Trust properties and the expenditure incurred on behalf of the Trust and misappropriation of Trust funds are some of the mis-deeds which have been alleged against the 1st defendant.

On these allegations the plaintiffs instituted the present suit for removal of the 1st defendant from trusteeship and for a settlement of the accounts for the period during which he was in charge of the affairs of the Trust. By a resolution passed at a meeting of the representatives of the founders of the Trust held on 6-3-1116 the present plaintiffs are stated to have been appointed as trustees and authorised to institute the suit against the 1st defendant for getting the necessary reliefs. In resisting the suit the 1st defendant questioned the status of the plaintiffs as descendants of some of the original founders of the Trust and also impeached the validity of the proceedings by which these plaintiffs were appointed as trustees and authorised to institute the present suit. The several acts of misconduct attributed to him in the plaint were also denied by him.

He further contended that the plaint Trust having been created for public purposes of a charitable nature is a public trust and that the suit instituted without obtaining the sanction contemplated by section 72 of the Travancore Civil P.C. (Section 92 of the Indian Code) is not maintainable. The learned trial Judge repelled all these contentions of the 1st defendant and passed a decree removing him from trusteeship and directing a settlement of accounts during the period of his management as trustee. Hence this appeal by the 1st defendant.

(2) At the hearing of the appeal the main point of attack against the decision of the lower court was that the finding that the plaint Trust is a private trust is erroneous. The learned advocate for the plaintiffs-respondents has tried to support this finding. An alternative position was also taken up on behalf of the respondents that even if the plaint Trust is found to be a public trust the present suit being one between trustees 'inter se' is maintainable and that a suit of this nature does not come within the mischief of section 72 C.P.C. Thus the real question for determination is whether the plaint Trust is a public trust as contended by the 1st defendant or whether it is only a private trust as claimed by the plaintiffs.

(3) The essential feature of a public trust is that the endowment must be for a public purpose of a charitable or religious nature and that the beneficial interest in the trust must be vested in the public in general or in a considerable section of the public. Endowment for such a purpose is meant to last for ever and when once the trust is established it will not be open to the founders or the trustees to put an end to it or to divert the income of the trust properties either to their own private use or to any purpose other than the purpose for which the endowment was made. So far as private trusts are concerned, the beneficial interest will be vested in one or more ascertainable individuals. The trust itself may be for a limited purpose or for a limited period.

The following passage from "Lewin on Trusts", (15th Edition) page 15—16, is highly instructive on the question of the distinguishing and characteristic feature of public trusts and private trusts:

> "By public (Trusts?) must be understood such as are constituted for the benefit either of the public at large or of some considerable portion of it answering a particular description. To this class belong all trusts for charitable purposes, and indeed public trusts and charitable trusts may be considered in general as synonymous expressions. In private trusts the beneficial interest is vested absolutely in one or more individuals who are, or within a certain time may be, definitely ascertained, and to whom, therefore, collectively, unless under some legal disability, it is, or within the allowed limit will be competent to control, modify, or determine the trust..... A public or charitable trust, on the other hand, has for its objects the members of an uncertain and fluctuating body, and the trust itself is of a permanent and indefinite character, and is not confined within the limits prescribed to a settlement upon a private trust."

The evidence in the present case may be examined in the light of the test indicated by the learned author in the passage quoted above so as to form a conclusion as to the exact nature of the plaint Trust, known as Gurupooja Dharmam.

(4) It is agreed to by the contending parties that the Gurupooja Dharmam Trust was not founded under any deed of endowment. They are also not in a position to state when exactly this Trust was founded. It is not also known who were the original founders of this Trust. Under such circumstances, the nature of the Trust has necessarily to be inferred from the outstanding facts admitted by the parties as well as from the other significant circumstances disclosed by the evidence on record. There is also a clear admission in the plaint that the Gurupooja Dharmam was founded with the sole object of conducting a feast in the village temple of Mutharaman Kovil on the day of the annual Kuta festival. It is also stated that all those present at the temple on that occasion could participate in the feast as a matter of right. The surplus income of the trust properties had to be conserved and the same could be utilised only for acquiring other properties for the Trust without spending any portion of such income for any other purpose. Another admission contained in the plaint is that the Trust was intended to be permanent and that it was with such an idea that the immovable properties described in the plaint schedule were acquired for the Trust. These significant features of the plaint Trust are decidedly against the case of the plaintiffs that the Trust is a private trust. On the other hand, these features are quite characteristic of the trust being a public trust.

The evidence adduced on behalf of the plaintiffs also leads to the same conclusion. The original first plaintiff in the case has been examined as P.W. 7. Even though he has been subsequently transposed as the 2nd defendant in the case his evidence has been accepted as evidence for and on behalf of the plaintiffs. It is so stated by the 2nd plaintiff when he was examined as P.W. 8. Besides these two plaintiffs, six other witnesses have also been examined on the plaintiffs' side to prove the origin and nature of the plaint Trust. P.W. 1 is a member of the Vellala community in the East Putheri Village. He has stated that the Gurupooja Dharmam was founded by the members of his village. According to him, the Trust was founded with the object of feeding the poor members of all castes by conducting a feast on the day of the Kuta festival in the Mutharamman Kovil. It was under Ex. D sale deed of the year 1067 that an item of immovable property was first acquired for this Trust. It is admitted by P.W. 1 that even prior to the acquisition of immovable properties for the Trust the annual feast was being regularly conducted by collecting small quantities of rice from each house in the East Putheri Village as well as in the West Putheri Village.

He has also mentioned about another source which originally helped in the formation of a fund for the Trust. It is stated that on the occasion of the members of his community taking part in the harvesting of paddy crops they used to get a certain quantity of paddy by way of customary dues known by the name "Arival Kettu" and that a portion of such paddy was contributed to the Gurupooja Dharmam Fund. On such occasions the landlords also used to make similar contribution of paddy. According to P.W. 1, it was the fund thus raised and conserved that was utilised subsequently for the acquisition of immovable properties for the Trust. At the same time he has stated that it is not known as to when and by whom such a trust was founded or as to when the Trust fund began to be raised in the manner already mentioned. All that he was able to say is that such house collections were being made and the annual feast conducted for a considerable time even prior to the year 1067 when immovable properties were acquired for the Trust for the first time.

He has also stated that subsequent to the acquisition of all the plaint items the practice of raising the required fund by public contribution was stopped because the income from the immovable pro-

perties was found to be sufficient for the conduct of the annual feast on behalf of the Trust. The evidence given by the other witnesses examined in the case, particularly by P.Ws. 2, 4, 5 and 7, is also more or less in these terms. P.W. 4 and 5 have stated that the benefit of the feast conducted by the Trust is not confined to the poor people of the East Putheri Village alone but that the poor people from the neighbouring villages also used to get the benefit of such feast. In view of such unambiguous evidence given by the plaintiffs and their witnesses it is clear that there is no basis for the case set up in the plaint that the plaint Trust was founded by the ancestors of the plaintiffs and defendants as well as of the eleven other persons mentioned in the plaint and that the ownership of the Trust is vested in these 15 families.

This case rests merely on the ground that the immovable properties of the Trust were acquired in the names of the members of these families. Exs. A to D are the title deeds under which these acquisitions were made. All that could be gathered from these documents is that the persons mentioned in each of those documents asserted themselves as the trustees of the Gurupooja Dharmam and acquired the properties covered by each of those documents for and on behalf of the Trust. But there is nothing in these documents to indicate that they were the only descendants of the original founders of the Trust. The earliest sale deed Ex. D dated 6-7-1067 was taken in the name of 15 persons who are described as trustees of the Gurupooja Dharmam. The next document Ex. B dated 23-8-1075 was also taken in the names of 15 persons who are also described as trustees. But the vendees under these two documents are not identical. The next document is Ex. C dated 23-10-1082 which is a release deed taken in favour of the Trust in the names of 10 persons.

Then there is the sale deed Ex. A dated 10-3-1096 which was taken in the names of 13 persons. All that is gatherable from these documents is that certain prominent members of the Vellala community in the East Putheri Village asserted their right to manage the affairs of the Trust and also acquired immovable properties mentioned in the above documents for the Trust. But that by itself cannot make the Trust a private trust belonging to themselves and their descendants. From the facts admitted and proved it is clear that the Trust was founded by the members of all the Vellala families in the East Putheri Village purely for the purpose of public charity in the nature of the annual feast to be conducted on the occasion of the Kuta festival in the village temple. The mere fact that a few of the villagers alone took part in making the later acquisitions on behalf of the Trust cannot and will not have the effect of altering the nature and object of the Trust or of vesting in them any exclusive right in respect of the Trust. In spite of such acquisitions, the Trust will continue to retain its original character as a public trust. Thus on a consideration of all the facts admitted and proved in the case we are clearly and definitely of opinion that the Gurupooja Dharmam was founded as a charitable (sic) for public purpose and it continues to be a public trust. Accordingly, we reverse the finding of the learned trial Judge that the Gurupooja Dharmam is a private trust and hold that it is a public trust.

(5) The next point for consideration is whether the present suit is unsustainable for want of sanction as contemplated by section 72 of the Travancore Civil P. C. (section 92 of the Indian Code.) This section prescribed the procedure to be followed in instituting a representative suit in respect of a public trust seeking any of the reliefs enumerated in the section. Such a suit had to be instituted by the Diwan or by two or more persons having an interest in the trust and having obtained the written consent of the Diwan. Section 73 further laid down that no such suit should be instituted except in conformity with the procedure prescribed under section 72. These two sections have now been replaced by section 92 of the Indian Civil P. C. containing identical provisions with the only difference that the Advocate General takes the place of the Diwan. The question whether all suits relating to public trusts are controlled by the restrictive provisions contained in this section had been the subject of much controversy.

But such controversy has now been fairly well settled by a series of authoritative judicial pronouncements. The trend of these decisions is that the section governs only suits brought by individuals as representatives of the general public and claiming any of the reliefs specified in the section, but not suits brought by one or more of the trustees merely for the purpose of vindicating their private rights as trustees and for enabling them to discharge their duties and liabilities as trustees. In 'APPANNA PORICHA v. NARASINGHA PORICHA', 45 Mad 113 it was ruled by a Full Bench of five Judges of the Madras High Court that a suit by a trustee of a public trust against a co-trustee for accounts does not come under section 92 C. P. C. and that such a suit could be brought without the sanction of the Advocate General.

This decision was followed in 'SHANMUKHAM CHETTY v. GOVINDA CHETTY', AIR 1938 Mad 92 and the correctness of that decision was again affirmed by another Full Bench of five Judges of the Madras High Court in 'TIRUMALAI TIRUPATI DEVASTHANAM'S COMMITTEE v. KRISHNAYYA SHANBHAGA', AIR 1943 Mad 466 where it was pointed out that the nature of the relief claimed in the suit and also the capacity in which the plaintiffs are suing have both to be taken into account in determining the question whether the suit is one coming under section 92 C. P. C. This is the view accepted by this court also in the Full Bench decision in 'KANAKU MALAYAPPA v. NALLAKANU', 5 Deccan LR (Tr) 150. The question whether the suit is maintainable or not has to be examined in the light of the tests laid down in these decisions.

(6) It has already been found that the plaint Trust is a public trust. The plaintiffs have instituted the present suit on the allegation that the 1st defendant who is functioning as the managing trustee has mismanaged the affairs of the Trust and has, thereby committed a breach of the Trust. They have also sought for the removal of the 1st defendant from the trusteeship and also for a settlement of the accounts relating to his period of management. These are some of the reliefs enumerated in clause 1 of section 92 C. P. C. (Section 72 of the Travancore Civil P. C.). The next aspect to be considered is whether the plaintiffs have instituted the suit merely for the purpose of vindicating their personal or individual rights as trustees or for the purpose of protecting the Trust itself in the larger interests of the public.

The plaintiffs have no doubt come forward as trustees entitled to manage the affairs of the plaint Trust. But their status as trustees has been denied by the contesting defendant. The plaintiffs have not sought for any declaration of their status as trustees. The stand taken by them is that the plaint Trust is a private trust belonging exclusively to the 13 persons mentioned in the plaint. Such a claim is unsustainable in view of the finding that the Trust is a public trust. Even apart from this aspect of the case, it is abundantly clear from a reading of the plaint as a whole that the plaintiffs

have instituted the present suit in a representative capacity and not by virtue of their individual rights as trustees and for the purpose of vindicating any of their personal or individual rights in that capacity. In paragraph 21 of the plaint there is an express averment that the representatives of the founders of the Trust have passed proceedings at a meeting held on 6-3-1116 appointing these plaintiffs as trustees and authorising them to institute the present suit on behalf of the plaint Trust.

The proceedings of the meeting stated to have been held on 6-3-1116 are contained in Ex. F. On the strength of such proceedings Ex. E udampadi dated 13-3-1116 was also executed in favour of these plaintiffs by the persons who participated in the meeting held on 6-3-1116. As per this udampadi the plaintiffs have been expressly authorised to institute suits on behalf of the Trust. It is on the strength of such authorisation that the plaintiffs instituted the present suit and accordingly they have claimed the several reliefs for and on behalf of the Trust. Such being the nature of the suit, it cannot be said that this is a suit for a vindication of the personal or individual rights of the plaintiffs. On the other hand, it is absolutely clear that the plaintiffs have brought the suit in a representative capacity and for the advancement of the interests of the plaint Trust. The mere fact that the plaintiffs claimed to be trustees entitled to be in management of the affairs of the Trust will not; under such circumstances, take the suit outside the scope of section 92 C. P. C.

The authorisation relied on by the plaintiffs by virtue of Exs. E and F cannot also be of any avail in the matter of the sustainability of the present suit. Such authorisation cannot be substituted for the sanction contemplated by section 92 of the Civil P. C. or by section 72 of the Travancore Civil P. C. Admittedly, the present suit was instituted without obtaining any sanction contemplated by section 72. In the nature and scope of the present suit, such sanction was absolutely essential and the absence of such sanction is fatal to the sustainability of the present suit. The suit has only to be dismissed on that ground. In this view of the matter the other questions involved in the case do not arise for consideration.

(7) In the result the appeal is allowed and the decree of the lower court is reversed. The plaintiff's suit is dismissed with costs throughout.

D.H. Appeal allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 327

VITHAYATHIL J.

V. K. Mohammed and another, Petitioners v. State.

Criminal R. P. No. 385 of 1950, D/- 11-10-1951.

(a) Cochin Prevention of Food Adulteration Act (14 (XIV) of 1109), Ss. 13 (2) and 17 — Purchaser — Sanitary Inspector purchasing 'ghee' under S. 13 (2).

There is nothing in S. 17 to indicate that the word "Purchaser" used in that section is limited to the case of a purchaser under a voluntary sale. The delivering of an article for price even when the seller is compelled to deliver the same under S. 13 (2) to a Sanitary Inspector is sale and, therefore the Sanitary Inspector is a purchaser within the purview of S. 17. (Para 5)

(b) Cochin Prevention of Food Adulteration Act (14 (XIV) of 1109), Ss. 4 (a) and 13 (2) — Sale of article under S. 13 (2) — No offence under S. 4 (a) is committed.

Even though the delivering of an article of food to the Local Food Inspector or to his subordinate under S. 13 is a sale such sale will not constitute an offence under the Act. It is only when the purchaser demands an article of a particular nature, substance or quality and an article of a different nature, substance or quality is sold to him that an offence is committed under the Act. AIR 1942 Mad 609, Rel on; AIR 1938 Mad 541, Ref.; AIR 1944 Mad 236, Considered. (Para 6)

M. Bhaskara Menon, for Petitioners; Public Prosecutor, for the State.

REFERENCES: Courtwar/Chronological/	Paras
('38) AIR 1938 Mad 541: (39 Cri LJ 735)	6
('42) AIR 1942 Mad 609: (43 Cri LJ 863)	6
('44) AIR 1944 Mad 236: (45 Cri LJ 724)	6
38 Cochin 519	5

ORDER: The accused in C. C. No. 244/1124 on the file of the 2nd Class Magistrate of Cochin are the revision petitioners in this case. The accused who are two in number were tried for offences punishable under Section 4(1)(d) read with rules 27 and 28 of the Cochin Prevention of Food Adulteration Act (XIV (14) of 1109). The prosecution case is that the 1st accused who is the owner of shop No. 140 in the Mattancheri Town offered for sale in his shop adulterated 'ghee' containing 15 per cent. of pure 'ghee' and 85 per cent. of fat. The 2nd accused who is an employee of the 1st accused sold such 'ghee' to P. W. 1 the Sanitary Inspector of Mattancherri on 28-3-1124. The complaint was filed by the Sanitary Inspector as per order of the Municipal Commissioner of Mattancherry who is the "Local Food Inspector" for the town. Both the accused were found guilty and the 1st accused was sentenced to pay a fine of Rs. 85 and in default to undergo simple imprisonment for one and a half months. The 2nd accused was sentenced to pay a fine of Rs. 50 and in default to undergo simple imprisonment for one month. Both the accused appealed from the decision before the District Magistrate of Trichur who confirmed the conviction and sentence.

(2) The two points urged in this revision petition are that the condition laid down in section 17 of Act XIV (14) of 1109 for instituting prosecution under the Act is not satisfied in this case and that the 2nd accused has not in any case committed an offence as the delivering of 'ghee' to the Sanitary Inspector under section 13 of the Act was not a voluntary sale and hence not an offence under the Act.

(3) As for the first point it is argued that P. W. 1 the Sanitary Inspector who filed the complaint in this case is not one competent to file it under Section 17 of the Act. Section 17 reads thus:

'No prosecution under this Act shall be instituted except on the complaint of the purchaser or of the local Food Inspector or under sanction of the Government."

Section 3(1) of the Act provides that the local Food Inspector may delegate his powers and duties under the Act to such persons and in such manner as may be prescribed. It is argued for the prosecution that the local Food Inspector namely the Municipal Commissioner has delegated his power to file the complaint in this case to P. W. 1 the Sanitary Inspector. It is also contended that P. W. 1 is the purchaser of 'ghee'. The revision petitioners' case is that P. W. 1 is not a purchaser of 'ghee' and that the authority to prefer a complaint under the Act

is not one that can be delegated by the local Food Inspector to any other person.

(4) With regard to the question whether P. W. 1 is a purchaser coming within the purview of section 17, the case of the accused is that the delivering of a sample of 'ghee' to the Sanitary Inspector under section 13 of the Act is not a sale and that therefore the Sanitary Inspector cannot be said to be a purchaser of such 'ghee'. Section 13 reads thus:

"13(1). The local Food Inspector may purchase a sample of any article of food from any person exposing such article for sale or from any person who is in the course of delivering or preparing to deliver it to a purchaser or consignee, and may submit it to be analysed by the Public Analyst appointed for the area within which such sample has been procured, ... (2) Every such person who refuses to sell such sample to the local Food Inspector or any person duly authorised by him at the price at which he usually sells the articles shall be punished with fine which may extend to Rs. 100/-."

(5) It is seen from the evidence that the Sanitary Inspector went to the shop of the 1st accused in his official capacity and demanded a sample of the 'ghee' that was offered for sale in the shop. The 2nd accused who was in the shop was bound to sell him the 'ghee' under section 13(2) of the Act. If he refused to sell the 'ghee' he would be liable to to be punished with fine which may extend to Rs. 100/-. In the circumstances, it is argued that the delivering of the sample of the 'ghee' to P. W. 1 cannot be said to be a sale although P. W. 1 paid price for the same. The question for consideration is whether P. W. 1 can be said to be a purchaser of the 'ghee' even though the sale of the 'ghee' to him was not a voluntary sale.

Apart from the question whether the sale in such circumstances would constitute an offence or not there is no reason to hold that the transaction is not a sale. The words used in section 13 are "purchase" and "sale". There is nothing in section 17 to indicate that the word "purchaser" used in that section is limited to the case of a purchaser under a voluntary sale. The delivering of an article for price even when the seller is compelled to deliver the same is sale. Under the Sale of Goods Act a sale of goods takes place when the seller transfers the property in the goods to the buyer for a price. In this case there was delivery of the article to P. W. 1 for a price paid by him. Therefore the transaction is nothing but a sale, and P. W. 1 is a purchaser coming within the purview of section 17.

In this view of the matter, it is not necessary to consider the question whether the authority to file a complaint under the Act can be delegated by the local Food Inspector to another person, and to canvass the correctness of the decision in 'HAJEE HABEEB HAJEE PEER MOHAMMED v. MATTANCHERRI MUNICIPALITY', 38 Cochin 519, relied on by the prosecution, in which it was held that the local Food Inspector could validly delegate the power or duty vested in him under s. 17 to his subordinate. It may however be observed that section 17 only lays down a condition for instituting prosecution under the Act. One of the conditions is that the complaint should be by the local Food Inspector. It is doubtful whether this is a power or duty that can be delegated under Section 3(1). But as it is not necessary to decide the question in this case, in view of my finding that P. W. 1 is a purchaser competent to file a complaint under the Act, I do not propose to say anything more on the point.

(6) With regard to the 2nd point, namely that the 2nd accused cannot in any case be said to have committed an offence by delivering the sample of 'ghee' to P. W. 1 when demanded by the latter under section 13 of the Act, I think there is some force in the contention. The offence with which the 2nd accused was charged was the sale of adulterated 'ghee' to P. W. 1. Even though the delivering of an article of food to the local Food Inspector or to his subordinate under section 13 is a sale, I do not think that such sale will constitute an offence under the Act. Under sub-section (2) of section 13 any person who refuses to sell the sample is liable to be punished. Therefore the 2nd accused was bound in law to sell the article to P. W. 1.

Under section 4(a) of the Act the sale of an article of food will be an offence only when the food sold is not of the nature, substance or quality of the article demanded by the purchaser. When a sample of the article is demanded by the local Food Inspector or his subordinate under section 13 it is the article that is actually offered for sale that is demanded by him. The sale of such article cannot constitute an offence under section 4(1)(a). It is only when the purchaser demands an article of a particular nature, substance or quality and an article of a different nature, substance or quality is sold to him that an offence is committed under the Act.

In 'IN RE BELLEMKONDA KANAKAYYA', AIR 1942 Mad 609, it was held that the parting with an article of food when it was demanded by the Sanitary Inspector in the exercise of his powers under section 14 of the Madras Prevention of Adulteration Act (III (3) of 1918) (corresponding to section 13 of the Cochin Act) does not amount to a sale within section 5 of that Act (section 4 of the Cochin Act). In that case A was the owner of a shop where he kept and offered 'ghee' for sale. B was working in that shop and his duty was to sell the 'ghee' to customers. The Sanitary Inspector demanded a sample of the 'ghee' from B exercising his powers under Section 14. The sample was found to be adulterated 'ghee'. It was held that A was guilty of the offence of offering adulterated 'ghee' for sale but that B was not guilty of the offence of selling such 'ghee' to the Sanitary Inspector.

This decision was based on an earlier decision of the Madras High Court reported in 'PUBLIC PROSECUTOR v. SRINIVASA RAO', AIR 1938 Mad 541. The decision 'AIR 1942 Mad 609' was distinguished in a subsequent decision of the Madras High Court reported in 'PUBLIC PROSECUTOR v. NARAYANA SING', AIR 1944 Mad 236. In that case the Sanitary Inspector who found the accused offering milk for sale purchased from him milk for two annas with a view to test it. It was held that, as the evidence in the case showed that the Sanitary Inspector purchased the milk for price and that it was after purchasing the same that he noticed that it was adulterated, the sale to the Sanitary Inspector amounted to a sale within section 5 of the Madras Act. It was also observed that in the case reported in 'AIR 1942 Mad 609' there was no proof of sale and that the evidence in that case disclosed that the Sanitary Inspector seized a part of the milk and sent it to the analyst and that therefore there was no sale of the milk.

A reading of the report of the case in 'AIR 1942 Mad 609' does not show that it was a case of seizure of 'ghee' (not milk) by the Sanitary Inspector. It was a case in which the Sanitary Inspector demanded a sample of the 'ghee', under section 14 of the Madras Act as in the present case. If in this case the Sanitary Inspector did not demand a sale of the 'ghee' under section 13 of the Cochin Act in his official capacity, but purchased it in the usual manner the position would have been different.

The evidence in this case is to the effect that the Sanitary Inspector went to the shop for the pur-

pose of taking a sample of the 'ghee' accompanied by two Sanitary Maistries of the Municipality and that the Health Officer also was present when the sample was purchased. In the circumstances it cannot be said that the handing over of the sample by the 2nd accused to the Sanitary Inspector was a voluntary sale of the 'ghee' coming under Section 4 of the Cochin Act.

(7) I am therefore of opinion that the 2nd accused has not committed any offence by delivering to P. W. 1 a sample of the adulterated 'ghee' under Section 13 of the Act. The conviction of the 2nd accused is therefore quashed. The fine paid by him will be refunded.

(8) There are no grounds to interfere with the decision of the lower court so far as the 1st accused is concerned and the revision petition is therefore dismissed so far as the 1st accused is concerned and allowed so far as the 2nd accused is concerned.

(9) Ordered accordingly.

V.R.B. Order accordingly

A. I. R. 1952 TRAVANCORE-COCHIN 329

KOSHI AND GOVINDA PILLAI JJ.

Karthiyani Pillai Bharathi Pillai, Appellant v. Parappan Panicker Kochunni Panicker; Respondent.

Second Appeal No. 199 of 1951, D/- 30-8-1951.

(a) Civil P. C. (1908), O. 6 R. 2 — Suit for ejectment — Decree for redemption.

A Court can in its discretion pass a decree for redemption in a case in which the plaintiff has sued in ejectment. Case law discussed. (Para 2)

(b) Civil P. C. (1908), S. 35 and O. 34 R. 7 — Suit for possession — Redemption decreed — Costs.

In a suit for redemption, pure and simple, the mortgagee should ordinarily get his costs. The same rule is applicable to a case where the plaintiff wants to dispossess the mortgagee without paying him a pie and ultimately obtains a decree in redemption. (Para 7)

Anno: C. P. C., O. 34 R. 7 N. 6.

T. K. Joseph, for Appellant; S. Narayana Potti, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('14) 23 Ind Cas 332: (17 Cal WN 427 PC) 5
('83) 7 Bom 146 3
('84) 8 Bom 168 3
('96) 20 Bom 196 2, 3
('03) 27 Bom 292: (5 Bom LR 91) 3
('01) 28 Cal 517: (5 Cal WN 640) 3
4 Select Decisions 144 3, 4
('23) AIR 1923 Lah 675: (75 Ind Cas 740) 2
('29) AIR 1929 Lah 126: (112 Ind Cas 485) 5
16 Cochin LR 285 4
('44) AIR 1944 Pat 312: (219 Ind Cas 37) 5

JUDGMENT: The sole question in this second appeal preferred by the defendant is whether the lower appellate court went wrong in passing a decree for redemption when the suit was only to recover possession of the property after avoiding two mortgages thereon. The suit giving rise to the second appeal was brought by a Malayalee Brahmin to declare as invalid and inoperative two mortgages executed by his deceased father on the ground that they were not supported by consideration or family necessity. Recovery of possession of the property was also sought for. Though the trial court originally allowed the suit that decision was reversed in appeal by the District Court and the case was remitted for fresh trial. The revised judgment of the trial court was completely in favour of the defendant. An alternative claim for redemption put forward at the final hearing was negatived by the learned Munsiff. In the appeal preferred against the revised judgment and decree the learned District Judge allowed redemption as prayed for orally in the primary court. The present second appeal is against the District Court's judgment and decree.

(2) As stated the only point raised before us was that no redemption decree should have been passed when the plaintiff had not made such an alternative claim in the plaint or sought to introduce such an alternative prayer by way of amendment. We are afraid we cannot accept the contention. The two decisions which the Respondent's learned counsel brought to our notice, namely, PARSHOTAM BHAISHANKAR v. RUMAL ZUNJAR', 20 Bom. 196 and 'PALU v. RASILU', AIR (10) 1923 Lah 675 are clear authorities for the position that a court can in its discretion pass a decree for redemption in a case in which the plaintiff has sued in ejectment. The Lahore decision refers to the decision in 'PARSHOTAM BHAISHANKAR v. RUMAL ZUNJAR', 20 Bom 196 and after referring to the rule enunciated there the judgment proceeds to state as follows:

> "The plaintiffs came into Court alleging that they were entitled to possession on the ground that the alienation was made by a widow without necessity. Cases of this nature are common and decrees constantly have been given for possession on payment of money which has been found to have been a charge on the property as being for necessity."

We may add that our experience also is that in proper cases courts allow redemption even though the plaintiff had only asked for recovery of possession after setting aside an alienation.

(3) In this connection it is interesting to notice the observations made in a very early Cochin case reported in 'RAGHURMA PATTA v. SANKUNNY MENON', 4 Select Decisions 144. What Locke, C. J. and Narayana Marar, J. said in paragraphs 9 and 10 of their judgment may with advantage be quoted here.

> "'Paragraph 9.' There are innumerable decisions of the Bombay High Court in which suits in ejectment have been allowed to be converted into suits for redemption, even without an amendment. 'SANKANA KALANA v. VIRUPAKSHAPA', 7 Bom 146 and the numerous previous decisions collected together in the judgment of Kembell, J. at p. 148; 'RADHABAI v. SHAMRAV', 8 Bom 168; 'PARSHOTAM BHAISHANKAR v. RUMAL ZUNJAR', 20 Bom 196; 'SITRAM v. SRIDHAR', 27 Bom 292. In Calcutta too, the Judges of the High Court were inclined to give a decree for redemption, if only the plaintiff desired it, in a suit which had originally been brought to have it declared that the mortgage was not binding upon and could not be enforced against the joint properties mentioned in the mortgage bond. See 'GOLABCHAND v. LALA SURAJ', 28 Cal 517. 'It seems to me' says the Chief Justice in whose judgment the other two Judges agreed, 'that now the only right of the minor is to redeem, and that, as we now have all the parties before the Court, we can give him that right, if he asks for it'. page 531.
>
> 'Paragraph 10': In a case from Australia where the plaintiff sought to recover possession as if the properties were unencumbered, and the defendant resisted the action not as mortgagees in possession, but as absolute owners, having become such though originally mortgagees, the Privy

Council held that though the suit was only in ejectment a decree for redemption could be made in the circumstance of the case. See Ghose on the Law of Mortgage, 3rd Edition, page 725."

The concluding portion of the succeeding paragraph also contains some relevant observations and they are in these terms:

"'Paragraph 11.' X X X X

The question therefore is whether the suit in ejectment in the present case is so inconsistent with redemption that it would be improper to allow it to be converted into one to redeem. It is not denied that on the allegations contained in the plaint, it is competent for the plaintiff to add, an alternative relief for redemption should the Court be of opinion that there is any mortgage in favour of the defendant. It is therefore difficult to see how in such a case the purposes of the suit can be said to be inconsistent with redemption. It is in fact in such cases that Courts have held that conversion can be allowed. The facts of the case in 'PARSHOTAM BHAISHANKAR v. RUMAL ZUNJAR', ILR 20 Bom 196 are exactly similar to the present."

(4) This case was followed by Varugis, C. J. and Krishna Menon J. in the case reported in 'KUNHUNNI ELAYATH v. SANKARAN NAIR', 16 Cochin LR 285. The learned Chief Judge observed that so far as Cochin Court was concerned the law was that a suit in ejectment may be converted into one for redemption, if the justice of the case demands it. Though the observation was confined to the Cochin Law the authority relied on, namely, '4 Select Decisions 144' clearly shows that the rule is one accepted in other jurisdictions as well.

(5) In the light of the foregoing authorities, we have no hesitation to hold that the learned Judge in the Court below has not exercised the discretion vested in him improperly in allowing the conversion prayed for before him. We have carefully examined the cases brought to our notice by the appellant's learned counsel namely, 'MAHMUDA KHATUN v. MAHOMED ELAHADAD KHAN', 23 Ind Cas 332 (P. C.), 'BISHEN SINGH v. PREM SINGH', AIR 1929 Lah 126 and 'SEETHA BEHERANI v. A. JAGANNATH', AIR 1944 Pat. 312. These cases are clearly distinguishable and hence not very relevant. We think it unnecessary to go into their facts.

(6) In the suit the appellant had contended that in case the mortgages of which he had become owner were set aside he should be allowed the value of his improvements as a condition precedent to the plaintiff obtaining possession. Accordingly a commission was taken out to value the improvements and that was done so late as 'Kanni' 1122. On the strength of the commissioner's report and account and in the light of the oral evidence defendant led in support of his contention the trial court had recorded a finding regarding their value. Even if a fresh suit were to be brought for redemption the appellant could not get anything more than the mortgage money and value of improvements. There is no substance in the complaint that he had not adduced all the evidence to substantiate his claim regarding value of improvements. No objection was raised in the appellate court with respect to the Munsiff's finding on the question. We would therefore affirm the lower appellate court's decision granting redemption and dismiss the second appeal, subject to the modification mentioned below.

(7) The lower appellate court directed the parties to bear their costs before that court. It is settled rule that in a suit for redemption, pure and simple, the mortgagee should ordinarily get his costs. In a case where the plaintiff wanted to dispossess the mortgagee without paying him a pie and when the former ultimately obtains a decree in redemption we cannot find any justification for following a different rule. Accordingly we hold that the plaintiff should pay the appellant all the costs incurred by him before the lower appellate court as well. In the circumstances of the case we make no order for costs in this court. Decree accordingly.

V.R.B. Decree accordingly.

A. I. R. 1952 TRAVANCORE-COCHIN 330

KUNHI RAMAN C. J.
AND SUBRAMANIA IYER J.

Kochu Bava Muhammad Kasim and another, Defendants-Appellants v. Kalu Amma Karthiyayani Amma, Plaintiff-Respondent.

C. M. A. No. 212 of 1951, D/- 12-11-1951.

Civil P. C. (1908), O. 39, R. 1 and O. 40, R. 1 — Application for injunction — Appointment of receiver.

Where in a suit the application before the Court is for an injunction to restrain defendants from entering upon the property it is open to the Judge to act under Order 40, rule 1 and appoint a receiver. AIR 1914 All 4 (2) and AIR 1952 Trav-C 331, Relon; AIR 1951 Mad 706, Ref. (Para 5)

Anno: C. P. C., O. 39, R. 1 N. 3; O. 40, R. 1 N. 2, 13.

N. Varadaraja Iyengar, for Appellants.

REFERENCES: Courtwar/Chronological/ Paras
('14) 36 All 19: (AIR 1914 All 4(2)) 5
('51) AIR 1951 Mad 706: (1951-1 Mad LJ 62) 5
('51) C. M. A. Nos. 174 and 175 of 1951: (AIR 1952 Trav-C 331) 5

KUNHI RAMAN, C. J.: The appellants here are defendants 2 and 3 in the court below. The plaintiff in a suit for cancelling a mortgage deed and a sale deed executed by her only son applied for a temporary injunction to restrain defendants 2 and 3 from entering upon the plaint properties. The plaintiff is described in the order of the learned District Judge as an old woman 76 years of age. The learned Judge on considering the facts that were placed before him in the affidavit filed by the parties, reached the conclusion that there was fraud practised upon the old mother by her only son who is described by the learned Judge as a wayward young man entirely under the undesirable influence of his father-in-law. He professed to mortgage the properties belonging to his mother to defendants 2 and 3 two or three days before these properties were given to him by way of gift.

(2) The Learned Judge reached the conclusion that so far as the B schedule properties mentioned in the application of the plaintiff were concerned, the proper course to adopt would be to appoint a receiver. The properties are garden lands. By an order made by it, the court below directed the Official Receiver of Trivandrum to be receiver of these garden lands pending disposal of the suit.

(3) In view of the sinister moves made by persons who exercised unwholesome influence over the 1st defendant, we are satisfied that a case is made out for safeguarding the interests of the plaintiff and preventing defendants 2 and 3 from interfering with the legal rights of the plaintiff in respect of the garden land which is the subject-matter of this appeal.

(4) In these circumstances, we are not prepared to say that the order made by the court below was not in the exercise of a judicial discretion vested in it.

(5) It is then contended by the appellant's learned counsel that since the application before the court below was for an injunction to restrain defendants 2 and 3 from entering upon the property it was not open to the learned Judge to act under order XL, rule 1 of the Code of Civil Procedure and appoint a receiver. In support of this contention, a decision of the Madras High Court reported in 'NARAYANA DOSSJU v. MADRAS HINDU RELIGIOUS ENDOWMENTS BOARD', AIR 1951 Mad 706 is cited. There the learned Judges mentioned that no authority was cited in support of the procedure adopted in appointing a receiver when the application was not for that relief but for some other reliefs. There is no dearth of authorities on this point. The case reported in 'DAR PRASAD v. GOPIKISHEN', 36 All 19 is a decision directly in point. Moreover there is a decision in 'CHUMMAR ULAHANNAN v. KUNJAMATHI MOITHEEN', C. M. A. No. 174 and 175 of 1951 of this court to which my learned brother was a party in which a similar view was taken. Therefore there is no legal objection that can validly be raised to attack the order made by the learned District Judge. We see therefore no reason to interfere with that order. We accordingly dismiss this appeal with costs.

D.H. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 331

KOSHI AND SUBRAMANIA IYER JJ.

Chummar Ulahannan, Appellant v. Kunjamathu Moitheen & others, Respondents.

C. M. A. Nos. 174 & 175 of 1951, D/- 6-9-51.

Civil P. C. (1908), O. 40, R .1 — Appointment of receiver suo motu.

The provision regarding the appointment of a receiver contained in the Code of Civil Procedure only requires that it should "appear to the court to be just and convenient to appoint a receiver." There is no prohibition contained anywhere in the Code of Civil Procedure that the court should not appoint a receiver 'suo motu' i.e., in the absence of an application in that behalf filed by any of the parties. It is competent for a court to appoint receiver 'suo motu' if it finds that step to be just and convenient in the circumstances of the case. Thus on an application for the appointment of a receiver made by one of the parties only during the pendency of the petition for injunction filed by the plaintiff it is competent for the court to appoint a receiver 'suo motu' during the pendency of the suit. 36 All 19, Rel. on. (Para 6)

Anno: C. P. C., O. 40, R. 1 N. 14.

George Vadakkayil, for Appellant; T. N. Subramania Iyer, Advocate-General, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('14) 36 All 19: (AIR 1914 All 4(2)) 6

SUBRAMANIA IYER, J.: The 3rd defendant in O. S. 144 of 1950 on the file of the District Munsiff's Court, Muvattupuzha is the appellant in both these appeals, and the respondents are the three plaintiffs in the said suit which was one filed by them for a perpetual injunction restraining the defendants from interfering with their possession and enjoyment of the properties scheduled to the plaint.

(2) The plaintiffs purchased certain items of property from defendants 1 and 2. Defendants 1 and 2 had owned certain other properties adjacent to those sold to the plaintiffs which were sold by them to the 3rd defendant. The case set up by the plaintiffs is that they were in possession of these adjacent properties as lessees under defendants 1 and 2, that the sale in favour of the 3rd defendant did not mention the fact of their being in possession as lessees and the 3rd defendant taking advantage of that non-mention was attempting to trespass into the properties on the strength of the assignment in his favour. Along with the suit the plaintiffs applied for an interlocutory order of injunction on which the learned Munsiff passed an 'ad interim' order ex parte and after notice, the 3rd defendant appeared and objected. The 3rd defendant also filed an application for appointment of a receiver pending disposal of the petition for injunction. The learned Munsiff considered both these petitions and made the order of 'ad interim' injunction absolute and made certain directions regarding the usufruct of the properties in the petition for appointment of receiver filed by the 3rd defendant. It is from the orders passed by the learned Munsiff upon these petitions that these appeals are filed.

(3) The 3rd defendant contended that the plaintiffs were actually cultivating the properties under a 'Panku varam' arrangement with defendants 1 and 2, that that arrangement terminated before the date of assignment in his favour and that pursuant to the assignment he had actually obtained khas possession of the properties. There were thus conflicting versions set up by the plaintiffs and the third defendant regarding the actual possession of the properties at the date of the suit. The learned Munsiff stated in his order that that question has to be and can be decided only at the end of the trial of the case. He however found his way to making the 'ad interim' order passed by him absolute for reasons which are not very clear from the order, except that he states that to safeguard the interests of the 3rd defendant, he proposed to make necessary orders in the petition for appointment of receiver.

The safeguards made by him are that "the plaintiffs should intimate the 3rd defendant and the court before harvesting the crops standing on the properties" when the 3rd defendant is entitled to move the court for the issue of a commission to watch and assess the yield from the properties. It is stated that this safeguard has subsequently proved to be illusory on account of the violation thereof by the plaintiffs. This matter however is not before us.

(4) More than a year has elapsed after the passing of the 'ad interim' order which was made absolute by the learned Munsiff. Crops have been admittedly raised on the properties during the pendency of the injunction. Who it was that raised the crops, whether it was the plaintiffs or the 3rd defendant is again a matter of controversy. The 3rd defendant could well say that his case that he is in actual possession is true and that the order of injunction passed in the case being only a prohibitory order restraining him from entering into the properties would not operate and has not operated as a mandatory injunction directing him to quit the properties if he is in possession.

(5) We are not able to find sufficient grounds to justify the issue of an order of injunction in this case. The learned Advocate General who appeared for the respondents referred us to the evidence of the 1st plaintiff and also of a vakil examined as the second witness on the side of the plaintiffs to show that the plaintiffs were cultivating the properties. The mere fact of cultivation by the plaintiffs may not, in facts of this particular case, lead to

any inference as to the right to cultivate relied upon by them because even according to the 3rd defendant they were doing acts of cultivation upon the properties as licensees, but not as lessees. Apart from this circumstance, the court below has not based its order upon the evidence in the case nor are we inclined to base any decision upon the evidence because the question that arises in the interlocutory matter is the identical question that arises in the suit itself. To decide that question in connection with a petition for an interlocutory order of injunction would be pre-judging the case which has to be avoided.

(6) The question then arises as to how can this difficult situation created in the case partly on account of the conduct of parties and partly on account of the order passed by the court below without sufficient justification, be got over without prejudice to any of the parties. If a receiver could be appointed during the pendency of the suit in order that possession may be made over to that party whose it is adjudged to be in the case, it would be a very satisfactory solution. We are however faced with a difficulty which consists in that though there is an application for the appointment of receiver made by the 3rd defendant, that is an application for the appointment of receiver only during the pendency of the petition for injunction filed by the plaintiffs, there is no application made for the appointment of receiver during the pendency of the suit.

The question then arises whether on an application for injunction filed by one of the parties, it is competent for the court to appoint a receiver 'suo motu' that is, in the absence of an application made in that behalf. The provision regarding the appointment of receiver contained in the Code of Civil Procedure only requires that it should "appear to the court to be just and convenient to appoint a receiver". Upon the facts stated above, it is obvious that it is supremely just and convenient to appoint a receiver in this case. There is no prohibition contained anywhere in the Code of Civil Procedure that the court should not appoint a receiver 'suo motu' i.e., in the absence of an application in that behalf filed by any of the parties. We consider that it is competent for a court to appoint receiver 'suo motu' if it finds that step to be just and convenient in the circumstances of the case. We are supported in this view by the decision in 'DAR PRASAD v. GOPIKISHEN', 36 All 19.

We therefore direct that the 3rd plaintiff be appointed receiver of the properties pending the suit. He will furnish security to the satisfaction of the court below for the profits of the properties which is, for this purpose, estimated at Rs. 200/- per year. The security will be furnished for a period of two years from the date of the suit. The court below is also directed to expedite the disposal of the suit. The 3rd plaintiff is directed to furnish security and assume charge of receivership within two weeks of the receipt of this order by the court below. If he defaults in doing so, the 3rd defendant appellant is appointed receiver who will also give similar security.

(7) The two appeals are disposed of by this order. There will be no order as to costs either here or below.

5TH SEPTEMBER 1951.

(8) Soon after we dictated the above order the learned Advocate General appeared and submitted that the provision made by us in the order for security is too onerous, that security for 2 years is not called for and that the time allowed to furnish security was too short. His submission was that he may be directed to furnish security but such security may at present be confined to a period of one year at the rate mentioned in the order and that should the suit happen to be pending even at the end of that year, the court below may be directed to pass appropriate orders in the matter on motion in that behalf to be made by the parties. Mr. Mathew, learned counsel for the appellant not being present then, we posted the case for today, for being mentioned. Mr. Mathew has no objection to our modifying the order to above effect.

We therefore modify the above order by limiting the security to be furnished at present to Rs. 200/- for a period of one year and extend the time for furnishing security to 4 weeks from the date of receipt, of the records by the court below instead of two weeks. It is also directed that if the suit be pending even at the expiry of one year, it is competent for the parties to move the court below for additional security which will then pass appropriate orders.

D.H. Order accordingly.

A. I. R. 1952 TRAVANCORE-COCHIN 332

KUNHI RAMAN C. J.

AND SUBRAMANIA IYER J.

Mathulla Ittan Pillai, Petitioner v. Ouseph Mannanda, Counter-Petitioner.

C. R. P. No. 558 of 1950, D/- 12-11-1951.

† Civil P. C. (1908), O. 40, R. 1 and O. 39, R. 1 — Proceedings for injunction pending — In a fit case court can appoint Receiver suo motu, without an application by party in that behalf — (By the time the revision was disposed of party had however applied for appointment of Receiver — Case held fit for appointment of Receiver). AIR 1951 Mad 706, Dissented from. AIR 1914 All 4 (2) AIR 1952 Trav-C 330; AIR 1952 Trav-C 331, Relied on.

(Paras 1, 2)

Anno: Civil P. C., O. 40, R. 1, N. 2, 3, 13; O. 39, R. 1 N. 3.

M. George, for Petitioner; T. P. Poulose, for Counter-Petitioner.

REFERENCES: Courtwar/Chronological/ Paras
('14) 36 All 19: (AIR 1914 All 4 (2)) 1
('51) AIR 1951 Mad 706: (1951-1 Mad LJ 62) 1
('51) C. M. A. No. 174 and 175 of 1951: (AIR 1952 Trav-C 331) 1
('51) C. M. A. No. 212 of 1951: (AIR 1952 Trav-C 330) 1

KUNHI RAMAN, C. J.: This civil revision petition comes before this Division Bench on a direction given by my learned brother who heard it as a single Judge. The point raised before the single Judge was whether it is open to the court to appoint a receiver under O. XL R. 1 of the Code of Civil Procedure 'suo motu' without an application for such a relief by the parties. We have today held in 'KOCHUBAVA MAHOMED KAZIM v. KARTHIYAYANI AMMA', C. M. A. No. 212 of 1951 that it is competent to a court to make an order for the appointment of receiver when the application pending before it is for an injunction. In deciding that case we pointed out that in 'DAR PRASAD v. GOPIKISHEN', 36 All 19, a similar view was taken by the Allahabad High Court. We were not inclined to adopt the view expressed by a Division Bench of the Madras High Court reported in 'NARAYANA DOSSJU v. MADRAS HINDU RELIGIOUS ENDOWMENTS BOARD', AIR 1951 Mad 706. The reason why the learned Judges of the Madras High Court did not approve the principle that a court could appoint a receiver 'suo motu' was that no authorities were cited before

them to show that such a power could be exercised by the court. We have referred to the case in '36 All 19.' That decision has been approved by a Division Bench of the Lahore High Court in which Sir Shadi Lal, the Chief Justice was a member where the learned Judges held that the court has the right to proceed under Order XL, R. 1 where it appears to be just and convenient to do so and that the court can make an order 'suo motu' without an application for that relief presented by any of the parties. There is also the decision of a Division Bench of this High Court in 'CHUMMAR ULAHANNAN v. KUNJAMATHU MOITHEEN', C.M.A. 174 and 175 of 1951 in which a similar view was taken by two learned Judges of this High Court, one of whom is a member of this Bench.

(2) In these circumstances, there cannot be any difficulty in dealing with this civil revision petition where the question raised is whether in lieu of an injunction that was applied for and obtained the court below could appoint a receiver. The difficulty if any in the present case has vanished subsequent to the direction made by my learned brother to refer this case to a Division Bench for disposal because it is represented that an application has since been made by the appellant before us for the specific relief of appointment of receiver. The property in question consists of a plot of land little over half an acre in extent. Feelings seem to be running high as a result of the dispute between the appellant and the respondent for possession of this land. It is represented that as a result of an attack made on him, the appellant had several bones of his body broken and he has only recently been discharged from the Ernakulam Central Hospital where he was undergoing treatment. In these circumstances, it is highly desirable that a receiver should be appointed to be in charge of the property pending disposal of O. S. No. 594 of 1123 on the file of the District Munsiff of Perumbavoor. Both parties agree that advocate Mr. K. V. Verkey, who was at one time appointed as commissioner for submitting a report on this land may be appointed receiver. He is accordingly appointed receiver subject to his consenting to act as such. The terms of the appointment shall be fixed by the District Munsiff of Perumbavoor having due regard to the income derived from the property and the amount which the parties are willing to pay as commission to the receiver. Pending the receiver taking charge of the property, there will be an order prohibiting both the appellant and the respondent from taking possession of the property and from entering into the property in view of the mischievous tendencies exhibited by them in making violent physical attacks.

(3) The parties shall bear their own costs in this civil revision petition in view of their turbulent attitude. The court below in case it is found that the advocate Varkey is not willing to act as receiver may make a fresh appointment after giving notice to both parties. The court below need not in that case wait till an application is made for the appointment of receiver.

R.G.D. Order accordingly.

A. I. R. 1952 TRAVANCORE-COCHIN 333

FULL BENCH

KOSHI C. J., GOVINDA PILLAI AND VITHAYATHIL JJ.

Sanku Krishnan, Appellant (in No. 779/50) v. Hari Prabhu Govinda Prabhu and others, Respondents (in No. 779/50).

Second Appeals Nos. 779 of 1950, 264 and 936 of 1951, A. S. No. 512 of 1951 and C. M. A. No. 298 of 1951, D/- 1-4-1952.

(a) Civil P. C. (1908), S. 11 — Execution proceedings — Matter in issue different — No res judicata.

Where the question raised and decided in the suit was whether a document was a redeemable mortgage or an irredeemable kanom but the question arising in execution of the decree passed in the suit is whether the document is a kanapattom coming within the purview of S. 2, Travancore-Cochin Holdings (Stay of Execution Proceedings) Act, 1950, the finding of the Court that the document was a redeemable mortgage cannot operate as res judicata in the execution. (Para 3)

Anno: C. P. C. S. 11 N. 23 Pt. 47.

(b) Debt Laws — Travancore-Cochin Holdings (Stay of Execution Proceedings) Act (VIII (8) of 1950), S. 2 — Explanation to section does not enlarge scope of section.

Kanapattom mentioned in the Explanation to S. 2 of the (Travancore-Cochin) Holdings (Stay of Execution Proceedings) Act is in one sense a pattom or lease although it has got the characteristics of a mortgage also. Therefore, it cannot be said that the Explanation enlarges the scope of the definition. (Para 4)

(c) Debt Laws — (Travancore-Cochin) Holdings (Stay of Execution Proceedings) Act (VIII (8) of 1950) S. 2 — 'Under a single transaction', meaning of — Transfer of right to be in possession — (T. P. Act (1882), S. 105).

The use of the words "under a single transaction" in the definition of 'holding' in S. 2 does not restrict the operation of the section to cases in which a person who is in actual possession of a property leases it to another and transfers possession to him. Those words only point out that properties held under a single transaction will be one holding while properties held under more than one transaction will be different holdings. According to the literal interpretation of the section, when a leasehold right is created by a single transaction it will come within the purview of the section. There is no scope for an enquiry into the question as to how the lessor got the property leased out by him. Neither is it necessary that actual possession of the property should be given to the lessee by the lessor himself. For transfer of possession of immovable property, the transferee need not be put in physical possession of the property by the person who executes the deed of transfer. Transfer of the right to be in possession amounts to transfer of possession. That it is so, is clear from the definition of lease as given in S. 105 of the Transfer of Property Act. (Paras 5, 6)

Anno: T. P. Act, S. 105 N. 5.

(d) Debt Laws — (Travancore Cochin) Holdings (Stay of Execution Proceedings) Act (VIII (8) of 1950), S. 2 — 'Kanapattom' tenure — Incidents of — Distinction between kanom and usufructuary mortgage — T. P. Act (1882), Ss. 58 and 105.

The main features which distinguish a kanom from an ordinary usufructuary mortgage seem to be these; Kanom is primarily a demise of land for enjoyment, although it is coupled with an advance of money by the person who takes the demise. But the income from the property will generally have no proportion to the interest the kanom tenant has to realise for the amount advanced by him. Usually a low pattom will be fixed as payable to the jenmi. The relationship between the jenmi and the kanomdar is more of the nature of landlord and tenant than that of debtor and creditor. This feature of the transaction is recognised by the payment of customary dues to the jenmi by the tenant in the form of 'Kalcha' during 'onam' and festivals in the jenmi's family. The right of the tenant to be in possession of the property for a period of not less than 12 years is an essential feature of the transaction, and when the demise is renewed at the expiry of the term the jenmi has to be paid a renewal fee. It will thus be seen that while a kanom transaction has the incidents of a possessory mortgage the dominant feature of the transaction is that of a lease. The question whether a particular transaction is a kanom or a mortgage will have to be decided on the basis of the main features of the transaction. The nomenclature of the document will not be a decisive test. Case law Ref. (Para 14)

A document described as 'patta-panaya Ethiradharam' demised a garden land 90 Cents in extent. A pattom of Fs. 35 Ca. 4 was fixed for the property. The panayartham was 191½ Rs. Fs. 33 was fixed as interest on that amount and a pattamicham of Fs. 2 cash 4 was made payable to the jenmi every year. The tenant was given what is called a kettuthengu and for that the jenmi had to be paid one-fourth of a chothana of cocoanut oil every year. Besides this, the tenant had to pay Fs. 3 Ca. 12 towards Sirkar tax, 25 kadjan leaves and 1¾ fanams as onakazcha. For special feasts in the jenmi's family double the amount had to be paid as onakazcha. The tenant was authorised to plant cocoanut trees and other trees and to enjoy the property for 12 years. Provision was also made for payment of compensation for improvements that may be effected by the tenant. There was provision for surrender after the expiry of the term. A renewal fee of 52 and odd fanams was paid by the tenant on the date of the execution of the document.

Held that the transaction evidenced by the document was not an ordinary usufructuary mortgage but a kanpattom. It was certainly not an irredeemable kanom. (Paras 14, 15)
Anno: T. P. Act, S. 58 N. 37.

(e) Debt Laws — (Travancore-Cochin) Holdings (Stay of Execution Proceedings) Act (VIII (8) of 1950), S. 2, Expl — Kanapattom — Meaning of — (Travancore Jenmi and Kudiyan Act (V (5) of 1071), Ss. 3 (4) and 42).

The word 'kanapattom' as used in Act VIII of 1950 has not the same meaning in which it is used in the Jenmi and Kudiyan Act. The legislature did not intend to include in the Explanation in S. 2 of the Act only kanapattom referred to in S. 42 of the Jenmi and Kudiyan Act. The word 'Kanapattom' is used in Act VIII of 1950 in the ordinary sense in which the term is used viz., a transaction having the features of a kanom tenure. (Para 19)

Section 42 Jenmi and Kudiyan Act shows that a kanapattom need not necessarily be an irredeemable tenure. The fact is that the Jenmi and Kudiyan Act purported to bring within its purview only certain classes of kanapattom. That does not mean that there could be no other kanapattoms. The word kanapattom was defined in the Jenmi and Kudiyan Act for a particular purpose and it will be unsafe to adopt that definition for all purposes. (Para 19)

According to the definition in S. 3 (4), Jenmi and Kudiyan Act, kanapattom can relate only to jennom lands demised on a tenure which is subject to periodical renewal. Obviously, it cannot be in this sense that the term is used in Act VIII of 1950. If the tenure is irredeemable, there is no meaning in providing for stay of delivery of a holding demised under such tenure. For the applicability of the Act the holding must necessarily be a redeemable one. It therefore follows that kanapattom mentioned in the Explanation in section 2 of the Act must be kanapattom not coming within the purview of the Jenmi and Kudiyan Act. 5 Trav LJ 464; 7 Trav LJ 397 and 4 Trav LR 44 FB, Ref. (Para 16)

(f) Debt Laws — (Travancore-Cochin) Holdings (Stay of Execution Proceedings) Act (VIII (8) of 1950), S. 4, Proviso — Scope — Proviso whether enabling or mandatory.

Though the wording of the proviso to S. 4 of the Act is such that prima facie it may appear to be only an enabling provision the context shows that the power conferred on the Court is not one which the Court can arbitrarily refuse to exercise even if the conditions laid down in the proviso are satisfied. At the same time, according to the wording of the proviso the court has got a discretion — of course a judicial discretion — in the matter of deciding whether in a particular case delivery of possession of property should be ordered or not.

If the conditions laid down in the proviso are satisfied in a particular case the court is bound to exercise its judicial discretion and decide whether it would be reasonable to order delivery of possession of the holding. The wording of the proviso and the use of the word "satisfied" go to show that some amount of judicial discretion is given to the Court in the matter of ordering delivery of possession of a holding. There may be cases in which the lessee was prevented by justifiable cause from paying rent on the due date, or there may be bona fide dispute between the parties relating to the amount of rent to be deposited. In such cases the Court may exercise its discretion in a judicial manner and refuse delivery of possession of the holding. (Paras 27 and 29)

(g) Debt Laws — (Travancore-Cochin) Holdings (Stay of Execution Proceedings) Act (VIII (8) of 1950), S. 4, Proviso — Interpretation of — Failure to pay rent on due date — Effect.

'Per Vithayathil J. and Koshi C. J. (Govinda Pillai J. dissenting)': Under the proviso to S. 4, the failure to pay rent on the due date does not by itself entail forfeiture of the benefit under Act. The proviso gives a discretion to the Court for deciding whether in a particular case, delivery of possession should be ordered even if rent was not paid on the due date. The words 'has failed to pay the rent' do not necessarily import failure to pay on the due date. If the idea of the Legislature was that in all cases in which the lessee has defaulted to pay the rent on the due date he should forfeit the benefit under the Act some expression would have been found in the proviso to indicate that intention. This interpretation of the proviso is further strengthened by the use of the words "if the court is satisfied". The omission of words like "on the due date" or "punctually" when referring to failure to pay rent also gives support to this view. The fact that the legislation itself is intended as a beneficial measure to afford temporary relief (for a period of one year) to tenants of holdings also justifies this liberal interpretation of the proviso. Even if it is found that the tenant has not paid the rent that accrued due after the commencement of the Act on the due date the Court has discretion to refuse to order delivery of possession of the holding. This discretion will certainly have to be exercised in a judicial manner. Ordinarily, the Court will not order delivery of possession of the holding if the tenant pays the rent before delivery is ordered. But in exceptional cases the Court may order delivery even if the rent is tendered or paid before delivery is ordered. The question for consideration in such cases will be whether there has been wilful and unjustifiable default on the part of the tenant in paying the rent. As a rule of practice, it may be stated that only in cases in which a demand for rent has been made by the landlord or notice has been given to the tenant by the Court to show cause why delivery of possession of the holding should not be ordered, and the tenant without any lawful excuse fails to pay the rent, that it can be held that the tenant has failed to pay the rent of the holding as contemplated by the proviso. This is however only a rule of practice that may be adopted by the Court, and that the question is primarily one of discretion to be exercised by the Courts in a judicial manner. (Paras 32, 34, 44, 46)

'Per Govinda Pillai J. (dissenting)': The expression "Nothing contained in this section shall preclude the Court" in the proviso to section 4, has the effect of only taking away the bar mentioned in the section. With a judicial determination of the allegations of the decree-holder regarding waste or failure to pay the rent, the Court has no further discretion except in enforcing the decree if the finding is against the lessee. There is already the command of the Court in passing the decree to put the decree-holder in possession of the property. The Legislature then intervened and laid down provisions to stay the enforcement of the decree for a definite period on the lessee abstaining from doing, or doing certain acts. If the lessee does not abstain from doing, or does these acts, then he loses the benefit conferred by the Act, and his liabilities and obligations would be determined by the provisions of the decree. (Para 39)

If a lessee has forfeited his right to the property by non-payment of rent, and the lessor sues to eject the lessee, then under the conditions laid down in sec. 114 of the Transfer of Property Act, the Court without passing a decree for ejectment can allow the lessee to hold the property leased as if the forfeiture has not occurred. The discretion is given to the Court before the decree for eviction is passed and the situation will change entirely when the decree is passed. (Para 40)

The lessee has to pay the rent on the dates mentioned in the lease deed till the date of decree in cases of pending suits for eviction, or on the dates fixed in the decree. If the decree is silent as regards the date of payment of rent, it has to be taken that in the case of rents to be paid periodically the rent was due within the expiry of one period from the date of decree. If the rent is not paid on or before the due date, then the tenant is one who has failed to pay the rent of the holding which has accrued after the commencement of the Act. To hold the property against the provisions of the decree, the lessee had a duty to attend to certain matters and if he fails to do so he forfeits the right. In such cases the power conferred on the Court by the proviso to section 4 has to be exercised. The Court will have no power to condone such a default and the Courts are to hold the scales of justice evenly and without other considerations. (Para 41)

(h) Interpretation of Statutes — Remedial Statute — Civil P. C. (1908), Pre.

The words of a remedial statute must be construed, so far as they reasonably admit, so as to secure that the relief contemplated by the statute shall not be denied to the persons intended to be relieved. AIR 1944 PC 35 and AIR 1949 FC 135, Ref. to. (Paras 32, 44)

Anno: Civil P. C., Pre. N. 7.

P. Govindan Nair, for Appellant; A. Madhava Prabhu, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('44) 71 Ind App 56: (AIR 1944 PC 35) 44
('49) AIR 1949 FC 135: (1949 FCR 292) 32, 44
('81) 3 Mad 382 (FB) 11
('92) 15 Mad 366 12
('07) 30 Mad 300: (17 Mad LJ 189) 12
('21) AIR 1921 Mad 243: (44 Mad 344) 12
('29) AIR 1929 Mad 777: (1929 Mad WN 686) 12
('32) AIR 1932 Mad 305: (55 Mad 519) 12
('51) AIR 1951 Mad 187: (ILR (1952) Mad 92 FB) 12
4 Trav LR 44 18
('15) 5 Trav LJ 464 17, 18

('17) 7 Trav LJ 397 18
('51) 1951 Ker LT 73: (AIR 1951 Trav-C 190) 8
('51) 6 Dom LR (TC) 512: (AIR 1952 Trav-C 104) 9
('51) 1951 Ker LT 568 26, 41
(1951) 2 All ER 716 33
(1859) 2 EL & EL 250: (121 ER 95) 30
(1948) KB 91: (1947-2 All ER 7) 30, 31, 32
(1860) 29 LJ (QB) 169: (8 WR 446) 30
(1817) 7 Taunt 486: (129 ER 195) 30

VITHAYATHIL, J.: These five appeals were heard together since common questions of law arise for consideration in these appeals. S. A. No. 779 of 1950:— The deft. 2 in O. S. No. 1587 of 1119 of the Sherthallai Munsiff's Court is the appellant in this Second Appeal. The appeal relates to an order in execution refusing to stay delivery of the decree-schedule property under the Travancore Holdings (Stay of Execution Proceedings) Act (Act VIII of 1950). The decree is for recovery of possession of property on the basis of a document which, according to the plaintiff, is a mortgage, while according to the defendants, is a kanapattom. When the plaintiff applied for delivery of possession of the property the 1st defendant objected contending that Act VIII of 1950 applied to the case and that delivery of possession of the property should be stayed as provided in that Act. He also contended that the case would come within the purview of Act XXII of 1124 (The Travancore Prevention of Eviction Act). The execution court held that Act VIII of 1950 would not apply to the case, that the 1st defendant was not a kudikidappukaran coming within the purview of Act XXII of 1124 and therefore dismissed his petition and ordered delivery of the property. The appeal filed from this order was dismissed by the District Court. Hence this Second Appeal.

(2) With regard to the contention that the case would come within the purview of Act XXII of 1124, it was not pressed by learned counsel for the appellant since the kudiyirippu has not been registered as required by the provisions of that Act. The only question to be decided in this Second Appeal is whether the decree in this case comes within the purview of Act VIII of 1950. The document which was the basis of the suit was not produced either in the execution Court or in the lower appellate court. These courts proceeded on the basis of the provisions of the document contained in the decree. The appellant produced in this court the document which is the basis of the suit and also two other documents relating to the property in dispute. The respondents also produced in this court some documents relating to the property. All the documents were admitted in evidence. The documents produced by the respondents were marked as Exts. A, B and C and those produced by the appellant as Exts. I, II and III. Ext. I dated 14-6-1074 is a venpattom deed executed by the uncle of the defendants' mother in favour of the plaintiffs' family in respect of the decree-schedule property. On 27-10-1083, the plaintiffs' ancestor executed a pattapanayam, Ext. A, in favour of the defendants' mother. The lessees under Ext. I assigned their leasehold interest in favour of the defendants and their mother under Ext. II dated 13-11-1086. Subsequently, the plaintiffs' predecessor-in-interest executed a pattapanayam, Ext. III, on 17-2-1098 in favour of the defendants' mother in renewal of Ext. A. The suit was brought on the basis of Ext. III for redeeming the property. The defendants contended that Ext. III created an irredeemable kanom and that therefore the suit for redemption was not maintainable. That contention was repelled by the trial Court and the suit was decreed. The appeal filed from that decree was also dismissed.

(3) It is argued for the respondents that the finding of the trial Court that Ext. III is a redeemable mortgage and not an irredeemable kanom is res judicata between the parties so far as the question in issue is concerned. We do not think that it is so. The question that was raised and considered on the trial side was whether Ext. III is a redeemable mortgage or an irredeemable kanom. The present contention of the defendants is that, although the demise under Ext. III is not an irredeemable kanom it is a redeemable kanapattom coming within the purview of section 2 of Act VIII of 1950. The question that has to be decided in these proceedings is not whether the transaction evidenced by Ext. III is an irredeemable kanom or not but whether it is a kanapattom coming within the purview of section 2 of Act VIII of 1950. Section 2 of the Act reads thus:

> "Holding means any immovable property held under a single transaction by which a leasehold right in the property is created and possession of the property is transferred by one person in favour of another. Explanation:— Holding shall also include kanapattom but shall not include varom or pathivaram."

(4) The first argument advanced on behalf of the respondents is that the word "holding" as defined in section 2 of the Act can apply only to a case in which a leasehold right is created and that therefore the explanation in the section cannot enlarge the scope of the definition. We do not think that there is any force in this contention. Kanapattom mentioned in the Explanation is in one sense a pattom or lease although it has got the characteristics of a mortgage also. Therefore, it cannot be said that the Explanation enlarges the scope of the definition.

(5) The next argument advanced on behalf of the respondents is that even if Ext. III created a leasehold right it was not created under a single transaction and possession of property was not transferred under a single transaction as required by section 2. The basis of this argument is that the property was originally given on lease under Ext. I to a third person, that subsequently the defendants' mother got Ext. A pattapanayam without actual possession of the property, that she got possession only under Ext. II, and that under Ext. III which is the basis of the suit no possession was actually transferred to her. The use of the words "under a single transaction" in the definition of 'holding' in section 2 of the Act has indeed created some difficulties. It is argued that those words restrict the operation of the section to cases in which a person who is in actual possession of a property leases it to another and transfers possession to him. According to this interpretation of the section, if a person obtains usufructuary mortgage of a property and then leases the property the section will not apply. Again, if the property is

already outstanding on lease and the owner executes a superior lease in favour of another directing him to recover possession from the prior lessee then also the section will not apply. We do not think that this interpretation is justified by the wording of the section and that the legislature intended to exclude cases of this kind from the purview of the Act. The definition of 'holding' in section 2 of the Act seems to have been borrowed from the Malabar Tenancy Act (Act XIV of 1930), wherein the word 'holding' is defined thus:

"Holding means a parcel or parcels of land held under a single engagement by a tenant from a landlord and shall include any portion of a holding as above defined, which the landlord and the tenant may agree to treat as a separate holding".

The words 'under a single engagement' are used in the definition in order to make it clear that when parcels of land belonging to landlord are held by a tenant under more than one engagement they will be regarded as separate holdings for purposes of the Act. The reason why it should be so made clear is that under the Malabar Tenancy Act a tenant is liable to be evicted from a holding if he commits wilful waste on the holding or defaults payment of rent for the holding or allows a stranger to encroach on the holding or wilfully denies the title of the landlord to the holding. The legislature wanted to make it clear that it will be only in cases in which different properties are held under a single engagement that the tenant will be liable to be evicted from all or any of the properties if he commits any of the acts mentioned above in respect of any one of the properties. The definition in the Malabar Tenancy Act itself seems to have been borrowed from the Madras Estates Land Act (I of 1908). In that Act the term 'holding' is defined thus:

"Holding means a parcel or parcels of land held under a single patta or engagement in a single village; provided that if the landholder and ryot so agree in writing any portion of a holding as above defined shall be treated as a separate holding."

(6) Thus the use of the words 'under a single transaction' in the definition of 'holding' does not justify the interpretation attempted to be put upon the section by learned counsel for the respondents. Those words only point out that properties held under a single transaction will be one holding while properties held under more than one transaction will be different holdings. According to the literal interpretation of the section when a leasehold right is created by a single transaction it will come within the purview of the section. There is no scope for an enquiry into the question as to how the lessor got the property leased out by him. Neither is it necessary that actual possession of the property should be given to the lessee by the lessor himself. For transfer of possession of immoveable property, the transferee need not be put in physical possession of the property by the person who executes the deed of transfer. Transfer of the right to be in possession amounts to transfer of possession. That it is so, is clear from the definition of lease as given in the Transfer of Property Act. Section 105 of the Act defines lease thus:

"A lease of immovable property is a transfer of a right to enjoy such property....."

In this case the leasehold right was created by a single transaction evidenced by Ext. III. It was on the basis of Ext. III that the suit was brought. It cannot be contended that Ext. III embodies more than one transaction. There is therefore no substance in this contention.

(7) The more important question for consideration is whether the transaction evidenced by Ext. III is a kanapattom or not. Before going into the incidents of a kanapattom mentioned in the explanation in section 2 of the Act it is useful to compare the definition of a holding as given in Act XXI of 1124 and Ordinance II of 1125 which preceded Act VIII of 1950 with the definition in the latter Act. In Act XXI of 1124 'holding' was defined thus:

"In this Act unless there is anything repugnant in the subject or context — 'holding' means immovable property held under a single transaction by which a right or interest therein is created and possession is transferred by one person in favour of another and includes, property held on 'pattom', 'otti' 'panayam' with possession, and kanom not governed by the provisions of the Travancore Jenmi and Kudiyan Act (V of 1071) but does not include 'Varom' or Pathivaram".

In Ordinance II of 1125, the following definition was given:

"In this Ordinance unless there is anything repugnant in the subject or context —'holding' means any immovable property held under a single transaction by which a leasehold right in the property is created and possession of the property is transferred by one person in favour of another; but shall not include 'Varom' or 'Pathivaram".

It will thus be seen that according to the definition in Act XXI of 1124 it was not necessary that the right created in the property should be a leasehold right. It was enough if a right or interest was created and possession was transferred under a single transaction. The definition expressly included within the scope of the Act property held on pattom, otti, panayam with possession and kanom not governed by the provisions of the Travancore Jenmi and Kudiyan Act (V of 1071). When referring to Kanom, the qualifying words "not governed by the provisions of the Travancore Jenmi and Kudiyan Act (V of 1071)" were used in order to make it clear that the term did not refer to irredeemable kanom coming within the provisions of the Jenmi and Kudiyan Act but to redeemable kanom. In Ordinance II of 1125, the definition was altered in such a way as to make the Act applicable only to cases of ordinary lease. According to that definition, it was necessary that a leasehold right in the property should be created. Transactions of the nature of otti, panayam with possession, and redeemable kanom were excluded from the purview of the Act. In Act VIII of 1950, "holding" was defined in such a way as to make the Act applicable only to cases in which leasehold right is created in the property but by the explanation kanapattom also was brought within the purview of the Act. Thus Act VIII of 1950 was a compromise between Act XXI of 1124 and Ordinance II of 1125.

(8) From this, it is clear that rulings which relate to cases coming under Act XXI of 1124 or Ordinance II of 1125 cannot govern cases that come under Act VIII of 1950. The decision of this Court in OUSEPH OUSEPH v. RAMA IYEN KRISHNA IYEN', 1951 Ker. L. T. 73, to which one of us was a party, was a case to

which Ordinance II of 1125 applied. As stated above, kanapattom was not included in the definition of 'holding' in that Ordinance. It was therefore not necessary to consider in that case whether the document which was the basis of the suit was a kanapattom or not. It is true that when the appeal was decided Act VIII of 1950 had come into force. But when application for delivery of property was made in that case and when objection was filed by the judgment-debtor it was Ordinance II of 1125 that was in force and therefore that case had to be decided on the basis of the provisions of that Ordinance. The only question that was considered in that case was whether the document which was the basis of the suit evidenced a lease or a mortgage, and it was held that it was a mortgage. The question whether it would amount to a kanapattom was not considered by this Court.

(9) The decision of this Court in 'SANKU VAVA v. AMMUKUTTY NAMBISHTATHIRI', 6 Dom. L. R. (T. C.) 512, which was cited at the Bar is also of no help in deciding whether the transaction in the present case is a kanapattom or not. In that case also, on a construction of the provisions of the document which was the basis of the suit, this court held that it created a usufructuary mortgage. The question whether it would amount to a kanapattom or not was not considered in that case.

(10) We have therefore to consider in this case whether the transaction evidenced by Ext. III amounts to a kanapattom or not. An argument was advanced on behalf of the respondents that the word, 'kanapattom' used in section 2 of the Act has the same meaning as kanapattom used in the Jenmi and Kudiyan Act (V of 1071). Before dealing with that question, it is necessary to consider the incidents of kanapattom tenure as it is generally understood.

(11) The leading case of the Madras High Court in which the incidents of kanapattom tenure were considered is 'SILAPANI v. ASHTAMURTHI NAMBUDRI', 3 Mad. 382 F. B. which was a decision by a Full Bench of 5 Judges. In that case, Innes J. described the characteristics of a kanom tenure in the following words:

> "In some cases it may be a mere lease, a sum being advanced as security for the rent or for proper cultivation, to be repaid on the expiry of the term. In other cases, and most frequently, it is created as a lease by way of mortgage to secure a loan advanced to the jenmi (Proprietor). Rent is payable in the case of every kanom, but all kanoms partake also to a certain extent of the incidents of a usufructuary mortgage. The mortgagee in all such holdings is assumed to be able to derive from the lands placed in his possession enough to pay the interest, at least of the money advanced. The discharge of the principal is not immediately contemplated. The holder of the kanom, therefore, pays himself the interest and also pays the Government tax either directly or through the landlord. The overplus or a certain fixed amount in grain or money is paid to the landlord. If, when viewed scientifically, it cannot be wholly regarded as a mortgage, it certainly cannot be wholly regarded as lease, as undoubtedly the land enures as security, if not for the principal at least for the interest of the loan advanced".

(12) Other decisions of the Madras High Court in which the incidents of kanom tenure are discussed are 'RAMUNNI v. BRAHMADATTAN', 15 Mad. 366; 'KANNAKURUP v. VARMA RAJA', AIR 1921 Mad. 243; 'GOPALAN NAIR v. KUNHAN MENON', 30 Mad. 300; 'UNNIRIKUTTY v. NARAYANA CHETTIYAR' AIR 1929 Mad. 777; 'VALIAKALYANI v. KRISHNAN NAMBIAR', AIR 1932 Mad. 305 and 'PARVATHI v. MAKKAM AMMA, AIR 1951 Mad. 187 (F.B.). The observations of Krishnan Pandalai J. in 'UNNIRAKUTTY v. NARAYANAN CHETTIYAR', are worth reproducing. The learned Judge says:

> "If the contract was really and substantially not for lending money but for a tenure in land the fact that one of the incidents of the tenure is that the kanom tenant advances money to the jenmi and that there are stipulations for the return of the sum or such portion of it as is left after settling of arrears of rent at the termination of the tenure, is not in my opinion sufficient to make the contract one of borrowing or lending ..... To those conversant with the system of property holding in Malabar, including in that expression the whole of the Malayalam speaking country, it would certainly come as a startling surprise to learn that a bargain for a kanom was one for money and not for land.
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> "In the states of Travancore and Cochin, the State has intervened by legislation to confer on the holders of this tenure rights of permanent occupancy which were imperilled by the development of the notions of mortgage and redemption and second mortgage introduced by modern courts interpreting western jurisprudence. It is a matter of public knowledge that similar legislation is in foot in this Presidency. Lawyers are familiar with the early controversies as to whether a kanom is a lease or mortgage. The decisions on this topic which will be found set forth in Moore's Malabar Law were that the kanom is a lease or a combination of a lease and mortgage. The modern doctrine, the result partly of legal analysis and partly of considerations of convenience, is that it is an anomalous mortgage. But to give it a legal label which really means that the so-called mortgage is liable to incidents in it by custom or by contract that do not fit in with any of the recognised forms of mortgage only emphasises that that description alone cannot be a guide in deciding whether the transaction is substantially one of borrowing and lending money or one by which the kanom tenant bargains for a substantial interest in the Jenmi's property for the purpose of occupation, cultivation and improvement".

Reference may also be made to Sundara Iyer's Malabar and Aliyasandanam Law (1922 Edn.) p. 290 - 298 where the characteristics of kanom tenure are dealt with. At page 291 the learned author says:

> "Tenures resembling kanom are to be met with elsewhere also, but the special feature in Malabar is that kanom tenure is the ordinary mode of enjoying land with the territorial magnates so that it is regarded in much the same light as leases from year to year elsewhere".

(13) The definition of kanom given in the Malabar Tenancy Act contains the main incidents of the tenure. Section 3 (1) of the Act defines kanom thus:

"Kanom means the transfer for consideration in money or in kind or in both by a landlord of an interest in specific immovable property to another called the (kanomdar) for the latter's enjoyment, the incidents of which transfer include (1) a right in the transferee to hold the said property liable for the consideration paid by him or due to him which consideration is called "kanartham"; (2) the liability of the transferor to pay the transferee interest on the kanartham; (3) the payment of 'michavaram' by the transferee; (4) the right of the transferee to enjoy the said property for 12 years or any other period; and (5) the liability of the transferee to pay a renewal fee to the transferor if the transferee is permitted to enjoy the said property for a further period after the termination of the original period".

(14) The main features which distinguish a kanom from an ordinary usufructuary mortgage seem to be these; kanom is primarily a demise of land for enjoyment, although it is coupled with an advance of money by the person who takes the demise. But the income from the property will generally have no proportion to the interest the kanom tenant has to realise for the amount advanced by him. Usually a low pattom will be fixed as payable to the jenmi. The relationship between the jenmi and the kanomdar is more of the nature of landlord and tenant than that of debtor and creditor. This feature of the transaction is recognised by the payment of customary dues to the jenmi by the tenant in the form of kalcha during onam and festivals in the jenmi's family. The right of the tenant to be in possession of the property for a period of not less than 12 years is an essential feature of the transaction, and when the demise is renewed at the expiry of the term the jenmi has to be paid a renewal fee. It will thus be seen that while a kanom transaction has the incidents of a possessory mortgage the dominant feature of the transaction is that of a lease. The question whether a particular transaction is a kanom or a mortgage will have to be decided on the basis of the main features of the transaction. The nomenclature of the document will not be a decisive test.

We shall examine Ext. III in the light of the above discussion relating to the distinguishing features of a kanom transaction, The document is described as 'pattapanaya-Ethiradharam.' The property demised is a garden land 90 cents in extent. A pattom of Fs. 35 Ca. 4 is fixed for the property. The panayartham is 191½ Rs. Fs. 33 is fixed as interest on that amount and a pattamicham of Fs. 2 cash 4 is made payable to the jenmi every year. The tenant is given what is called a Kettuthengu and for that the jenmi has to be paid one-fourth of a chothana of cocoanut oil every year. Besides this, the tenant has to pay Fs. 3, Ca. 12 towards Sirkar tax, 25 kadjan leaves and 1¾ fanams as onakazcha. For special feasts in the jenmi's family double the amount has to be paid as onakazcha. The tenant is authorised to plant cocoanut trees and other trees and to enjoy the property for 12 years. Provision is also made for payment of compensation for improvements that may be effected by the tenant. There is provision for surrender after the expiry of the term. A renewal fee of 52 and odd fanams was paid by the tenant on the date of the execution of the document. These provisions clearly show that the demise was one for enjoyment of the land and that it was not a mere arrangement for lending money. The relationship created between the parties to the transaction is not primarily that of debtor and creditor but that of a landlord and tenant. The pattom fixed has obviously no proportion to the actual income derivable from the property and the pattamicham payable to the jenmi is a nominal amount. The provision for payment of cocoanut oil, cadjans and onakazcha are in a way reminiscent of what may be described as feudal relationship.

(15) These facts go to show that the transaction evidenced by Ext. III is not an ordinary usufructuary mortgage but a kanapattom as it is generally understood. It is certainly not an irredeemable kanom, but a kanom is not necessarily irredeemable. Originally all kanoms were redeemable unless otherwise provided for in the kanom deed. It was by legislation that certain classes of kanoms were made irredeemable. In Travancore, Kanapattoms executed in favour of Malayala Brahmin Jenmies in respect of their jenmom properties were made irredeemable by the Royal Proclamation of 1042. This proclamation was implemented by the Jenmi and Kudiyan Act (Act V of 1071). Therefore the mere fact that the tenure created by a kanom is irredeemable after the expiry of 12 years will not take it out of the category of kanom as the tenure was originally understood.

(16) It was strenuously contended on behalf of the respondents that the word kanapattom used in section 2 (Explanation) of the Act should be interpreted in the same sense in which the term is used in the Jenmi and Kudiyan Act. Section 3 sub-section (4) of that Act describes kanapattom thus:

"Kanapattom means a demise of jenmom land made or renewed by the jenmi by whatever name such demise is designated".

According to this definition kanapattom can relate only to jenmom lands. Jenmom land is defined in section 3 sub-section (2) as

"land other than pandaravagai, sripandaravagai, kandukrishi or sirkar devaswom lands recognised as such in the Sirkar accounts, which is either entirely exempt from Government tax or if assessed to public revenue, is subject to rajabhogam only, and the occupancy right in which is created for a money consideration (kanom) and is also subject to the payment of michavaram and customary dues and the periodical renewal of the right on payment of renewal fee".

Jenmi is defined in sub-section (2) as a "person in whom the proprietary right over jenmom lands is vested". According to this definition kanapattom can relate only to jenmom lands demised on a tenure which is subject to periodical renewal. Obviously, it cannot be in this sense that the term is used in Act VIII of 1950. If the tenure is irredeemable there is no meaning in providing for stay of delivery of a holding demised under such tenure. For the applicability of the Act the holding must necessarily be a redeemable one. It therefore follows that kanpattom mentioned in the Explanation in section 2 of the Act must be kanapattom not coming within the purview of the Jenmi and Kudiyan Act. That the legislature contemplated the existence of such kanapattom is evident from the definition of 'holding' given in Act

XXI of 1124. The words used by the legislature in that Act with reference to kanom included in the definition of a 'holding' are: "Kanom not governed by the provisions of the Travancore Jenmi and Kudiyan Act (V of 1071)." The provisions of the Jenmi and Kudiyan Act themselves show that there could be kanapattom not coming within the purview of that Act. Although the Royal Proclamation of 1042 related only to kanapattom in respect of jenmom land, as interpreted by the courts, and although the Jenmi and Kudiyan Act purported to implement this Proclamation as is clear from the preamble to the Act. Section 5 of the Act contains a provision relating to non-jenmom lands. The provision is to the following effect:

"In the absence of an express contract, nothing in this section shall be taken to confer the right of permanent occupancy on the kudiyan of a non-Malayala Brahmin Jenmi unless he or his predecessors-in-interest or both have uninterruptedly held the holding for a period of not less than 25 years".

This shows that even according to the framers of the Jenmi and Kudiyan Act there could be Kanapattoms in respect of non-jenmom land belonging to non-Malayali Brahmin jenmies. It has however to be noted that the use of the word 'Kudiyan' in section 5 of the Act is inconsistent with the definition given for that word in section 3. Apart from that, section 5 clearly indicates that there could be kanapattom not coming within the purview of the Jenmi and Kudiyan Act.

(17) Learned Counsel for the respondents referred to the observations of Viraraghava Iyengar J. in 'PYLI PALI v. NEELKANTAN-SANKARAN', 5 Trav. L.J. 464 at p. 471, where the learned Judge says:

"Kanapattom tenure is ancient tenure and it has all along been understood as applicable to — apart from the operation of the doctrine of estoppel—and to operate upon, jenmom lands. A character of irredeemability and renewability has been attached to it by the legislature first under the proclamation and then by Regulation V of 1071."

At page 472, the learned Judge observes thus:

"The incidents of the kanom tenure being then incidents created by statute and operating only on a particular class of lands there does not appear to be in my humble view—apart from questions of estoppel that may arise—any warrant for holding that the same tenure could be created by the act of the parties with respect to other classes of land. It may be that parties may by the use of apt expressions stipulate for the permanent occupancy right over land other than jenmom land, but then such transactions could not, in my view, be called kanapattom documents carrying with them all the incidents attached by the law to them."

In that case the question that was considered by the learned Judge was whether the transaction in question created an irredeemable tenure or not. It was in the sense in which the term is used in the Jenmi and Kudiyan Act, namely, an irredeemable kanom, that the word kanapattom was used by the learned Judge in his judgment. The question whether the term kanapattom as understood in the ordinary sense will include a redeemable kanom also was not considered in that case. Neither did it arise for consideration.

(18) After the Royal Proclamation of 1042, the question came up for consideration in many cases whether the Proclamation would apply to new-Malayala Brahmin Jenmies, and the Travancore High Court held that it would not apply to such jenmies, and consequently it was held that kanapattom executed in respect of lands not belonging to Malayala Brahmin Jenmies did not create an irredeemable tenure unless the terms of the document conferred on the tenant a permanent right of occupancy. After the Royal Proclamation and the Jenmi and Kudiyan Act the term kanapattom was often used in a restricted sense, viz. an irredeemable kanom. It is in that sense that the term is used by Viraraghava Iyengar J. in 'PYLI PALI v. NEELKANTAN SANKARAN', 5 Trav L. J. 464. The observations of Kunhiraman Nair J. in 'VICAR APOSTOLIC OF MALABAR v. NARAYANAN REVI NAMBOOTHIRIPAD', 4 Trav L. R. 44 F. B., extracted by Viraraghava Iyengar J. in 5 Trav L. J. 464 show that the term kanapattom would include redeemable kanom also. The learned Judge says thus:

"The state of things in the period prior to the issuing of the Royal Proclamation seems to have been this: The jenmi was in theory the absolute owner of the lands and had the right to dispense with his kanom tenant at the end of 12 years. In practice however the bulk of the jenmies continued their tenants by means of the system of renewals though a few jenmies used to assert their full rights and did in some instance successfully exert the right of eviction. This uncontrolled power of eviction at the end of 12 years was felt a hardship and the legislature consequently stepped in to give the tenants of certain classes a statutory right of compelling the Jenmies to renew the leases on certain terms... .....It will thus be seen that the Royal Proclamation of 1042 and the Jenmi and Kudiyan Act conferred permanent right of occupancy on certain classes of kanapattom tenants. That does not mean that there could not be other classes of kanapattom tenants who did not come within the purview of the Proclamation and the Act and could not therefore get the benefit of the permanent right of occupancy."

Rama Menon C. J. who was one of the Judges who took part in the decision in 5 Trav L. J. 464 observed thus in 'OUSEPH v. KRISHNAN NARAYANAN', 7 Trav L. J. 397:

"It is permissible to create by contract irredeemable tenures even in respect of lands which are not 'statutory jenmom'. Whether such tenures can be approximately called kanapattom, I need not pause now to consider."

(19) It was also argued for the respondents that kanapattom mentioned in section 2 of Act VIII of 1950 is kanapattom referred to in section 42 of the Jenmi and Kudiyan Act. Section 42 of the Act provides thus:

"Notwithstanding anything contained in the foregoing, the provisions of this Regulation shall not apply to any kanapattoms executed since the 25th day of Karkadagom 1042 which expressly provide for redemption."

This argument is in one sense against the contention of the respondents that the word kanapattom mentioned in Act VIII of 1950 has got the same meaning as kanapattom as defined in the Jenmi and Kudiyan Act. In other words,

section 42 shows that a kanapattom need not necessarily be an irredeemable tenure. The fact is that the Jenmi and Kudiyan Act purported to bring within its purview only certain classes of kanapattom. That does not mean that there could be no other kanapattoms. The word kanapattom was defined in the Jenmi and Kudiyan Act for a particular purpose and it will be unsafe to adopt that definition for all purposes. The word kanom is defined in the Jenmi and Kudiyan Act as

"the arthom or consideration (in money or in kind) paid for the kanapattom and shall also include the value of improvements made by kudiyans and treated as Arthom or consideration."

If this meaning is given to the word 'kanom' as used in Act XXI of 1124 it will lead to absurd results. In the same way it will not be proper to give the word kanapattom as used in Act VIII of 1950 the same meaning in which it is used in the Jenmi and Kudiyan Act. We do not think that the legislature intended to include in the Explanation in section 2 of the Act only kanapattom referred to in section 42 of the Jenmi and Kudiyan Act. We hold that the word 'kanapattom' is used in Act VIII of 1950 in the ordinary sense in which the term is used viz., a transaction having the features of a kanom tenure.

(20) We saw what the incidents of a kanapattom are. We have no doubt that the transaction evidenced by Ext. III contains those incidents. The result is that the decree schedule property in this case is a 'holding' as defined in section 2 of Act VIII of 1950. The decree being one for recovery of possession of a holding coming within the purview of Section 4 of the Act delivery of possession of the holding has to be stayed as provided in that section. The decree-holders have no case that the defendants have either committed waste on the property or have failed to pay the rent of the holding that accrued due after the commencement of the Act. The defendants are therefore entitled to the benefit of the Act. The orders of the courts below are set aside and Second Appeal No. 779 of 1950 is allowed with costs. C. M. Appeal No. 298 of 1951.

(21) The decree-holder is the appellant in this Miscellaneous Appeal. The appeal is from an order of remand. The decree is for redemption of property on the basis of a document which, according to the decree-holder is a mortgage, while, according to the judgment-debtor, is a kanapattom. In execution of the decree the decree-holder obtained possession of the property on 29-3-1950. Act VIII of 1950 relating to stay of delivery of holdings in execution of decrees was published on 5-4-1950. Under subsection (3) of section 1 of the Act, it shall be deemed to have come into force on 25th March 1950. On the basis of this Act, the judgment-debtor applied for redelivery of the property. The execution court dismissed that application on the ground that the property is not a holding as defined in section 2 of the Act. The reason given was that the property was not held under a single transaction. The property was originally outstanding on kanom with Thathrickal family from whom the predecessor of the defendants first took a sub-mortgage and then an assignment of the kanom. Subsequently, the Jenmi executed the suit document in favour of the first defendant and another. On this ground, the execution court held that the defendants were not holding the property under a single transaction and that therefore it was not a holding.

In appeal this finding was reversed. It was contended on behalf of the decree-holder that the document on the basis of which the suit was filed created a usufructuary mortgage and that therefore the property could not be held to be a 'holding' as defined in Section 2 of the Act. This contention was repelled by the court below which held that the transaction evidenced by the suit document is a kanapattom and not a mortgage. That court therefore held that the judgment-debtor was entitled to the benefit of Act VIII of 1950 and to get redelivery of the property which was wrongly delivered from him. Since the decree-holder had averred in his objection that he had effected improvements in the property after he got delivery of it, the lower appellate court remitted the petition for redelivery to the execution Court with direction for redelivering the property to the judgment-debtor after ascertaining the value of improvements, if any, due to the decree-holder. The appeal is filed from this order.

(22) With regard to the contention that the property was not held under a single transaction we do not think that there is any force in it. The suit was filed on the basis of a document dated 2-11-1097 executed by the decree-holder's family in favour of the 1st defendant and another. If that document evidences a kanapattom there is no reason why it should not come within the purview of the Act. In our judgment, S. A. 779 of 1950 we have explained the meaning of the term 'single transaction' as used in the definition of a holding and it is not necessary to discuss the point again. The learned District Judge has rightly reversed the finding of the execution court on this point.

(23) The real question for decision in this C. M. Appeal, and the one that was pressed by learned counsel for the appellant, is whether the transaction which is the basis of the suit in this case is a mortgage or a kanapattom. In our judgment in S. A. 779 of 1950 we have explained the features of a kanapattom mentioned in the Explanation in section 2 of Act VIII of 1950 and it is not necessary to discuss the question again. A perusal of the document which is the basis of the suit makes it clear that it evidences a kanapattom as found by the learned District Judge. The document is described as a kanapattom. It was a renewal of a prior kanom. An amount of Fs. 1462½ is paid as kanarthom. A pattom of 84 and odd fanams is fixed for the property. The tenant has undertaken to pay michavaram of 23 and odd fanams and also customary dues in the form of cocoanut oil, cadjan leaves and onakazcha. On occasions of special feasts double the amount of the usual onakazcha and cocoanut oil, have to be paid to the jenmi. The tenant is directed to plant trees and effect other improvements and to enjoy the property for 12 years. Adukkuvathu was also paid by the tenant at the time of the execution of the document. The document has all the normal incidents of a kanom demise. In fact the terms of the document are exactly similar to those of the document which was the basis of the suit in S. A. 779 of 1950. We therefore agree with the learned District Judge in his view that the property in this case is a holding com-

ing within the purview of Act VIII of 1950. The C. M. A. is accordingly dismissed with costs.

'S. A. No. 936 of 1951.'

(24) The 3rd defendant is the appellant. The decree is for redemption of property on the basis of a document which according to the decree-holder is a mortgage. The judgment-debtor contends that it is a kanapattom. When the decree-holder applied for delivery of possession of the property the 3rd defendant objected on the ground that the decree would come within the purview of Act VIII of 1950. The decree-holder replied that the Act would not apply to the case and also contended that the judgment-debtor had defaulted payment of rent that accrued due after the commencement of the Act. The execution court held that the document which was the basis of the suit was not a mortgage but a kanapattom coming within the definition of a holding in section 2 of the Act. But since the defendants had, according to that court, defaulted payment of the rent that accrued due after the commencement of the Act it was held that they were not entitled to the benefit of the Act. The 3rd defendant appealed from that order and the decree-holder filed an objection memorandum relating to the finding that the suit document is a kanapattom and not a mortgage. On the question, whether the judgment-debtors had defaulted payment of rent no definite finding was recorded by the learned District Judge. The learned Judge did not think it necessary to go into that question as he was of opinion that the suit document is a mortgage and not a kanapattom. He therefore reversed the finding of the execution court on that point and dismissed the appeal.

(25) The two questions that arise for consideration in this Second Appeal are whether the suit document in this case is a mortgage or a kanapattom and, if it is a kanapattom coming within the purview of Act VIII of 1950 whether the judgment-debtors have forfeited the benefit under the Act by reason of failure to pay the rent of the holding which accrued due after the commencement of the Act. The appellant has produced in this Court the copy of the document which is the basis of the suit. The document is described as a "pattapanayadharam". The terms of the document are similar to those of the document which is the basis of the suit in S. A. 779 of 1950. The document has got all the incidents of an ordinary kanapattom. For the reasons mentioned in our judgment in S. A. 779 of 1950 we hold that the decree in this case is one for recovery of possession of a holding as defined in section 2 of Act VIII of 1950 and that therefore it comes within the purview of the Act. The finding of the learned District Judge on this point is reversed and that of the execution Court is restored.

(26) The other point for consideration is whether the judgment-debtors have forfeited the benefit under the Act by reason of failure to pay the rent of the holding that accrued due after the commencement of the Act. As stated above, the lower appellate Court has not recorded a finding on this point. The Act came into force on 25-3-1950. It is seen that the judgment-debtor deposited 120 and odd fanams on 16-1-1951. That will be one year's rent as per the terms of the decree. The decree was passed on 28-9-1950. Till the date of the decree, rent will have to be paid according to the terms of the lease, and after the decree according to the terms of the decree, as held by this Court in 'NARAYANA PILLAI v. SANKARAN NAMBOORIPAD', 1951 Ker. L. T. 568. The lease deed provides for payment of pattamicham in Makaram and Onakazcha in Chingom. It is not clear whether under the terms of the lease deed any rent accrued due after the commencement of the Act and before the decree was passed, or whether under the terms of the decree any rent accrued due before 16-1-1951. Under the decree, the judgment-debtors are liable to pay mesne profits at the rate of 188 and odd rupees a year from the date of deposit of the kanom amount and value of improvements by the decree-holder. It is represented that the judgment-debtors deposited Rs. 120 on 29-1-1951 towards mesne profits. In the execution application, the decree-holder claimed mesne profits from 21-10-1123, on which date he claims to have set off the kanom amount and value of improvements against the arrears of rent due to him. He did not deposit in Court the kanom amount and value of improvements. The question whether he is entitled to mesne profits or only to rent is also a matter to be decided by the execution Court.

(27) In deciding this question it is necessary, at the outset, to consider the effect of the proviso to section 4 of the Act. Two points were urged by learned counsel for the appellant with regard to the interpretation of the proviso. The first is that the proviso contains only an enabling, and not a mandatory provision. The second is that the question of failure to pay rent will have to be determined with reference to the time when the order for delivery is passed and not the date when the rent accrued due. Section 4 reads thus:

> "Notwithstanding any law to the contrary proceedings in execution of a decree in a suit for the recovery of possession of a holding shall, so far as they relate to the delivery of possession of the holding, be stayed for a period of one year from the date of the commencement of this Act, provided that nothing contained in this section shall preclude the court
>
> (a) from ordering the delivery of possession of the holding to the decree-holder if the court is satisfied either that the lessee has committed intentional and wilful acts of waste or that he has failed to pay the rent of the holding which has accrued due after the commencement of this Act; or (b) from granting any other appropriate relief to which the decree-holder may be entitled".

The distinction between the wording of the section and that of the proviso is note-worthy. While the words used in the section are "proceedings ..... shall ..... be stayed" those used in the proviso are

> "Nothing contained in this section shall preclude the court from ordering the delivery of possession of the holding".

In effect the proviso only says that it shall be lawful for the Court to order delivery of possession of the holding. It is therefore argued that even in a case in which the court is satisfied that the lessee has committed wilful waste or has failed to pay rent the court is not bound to order delivery of possession of the holding. Though the wording of the proviso is such that 'prima facie' it may appear to be only an enabling provision the context shows that the power conferred on the Court is not one which

the Court can arbitrarily refuse to exercise even if the conditions laid down in the proviso are satisfied. At the same time we are of opinion that according to the wording of the proviso the court has got a discretion - of course a judicial discretion - in the matter of deciding whether in a particular case delivery of possession of property should be ordered or not. In other words, the court can go into the question whether it will be reasonable to order delivery of possession of the holding even if the condition laid down in the proviso is satisfied.

(28) Reference may be made in this connection to Maxwell on The Interpretation of Statutes (9th Edition, pages 252 - 256). The learned author says thus:

"According to Lord Cairns such words as "it shall be lawful" are always simply permissive or enabling. They confer a power and do not, of themselves, do more. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise it when called to do so ....Lord Penzance said that the words "it shall be lawful" are distinctly words of permission only, and the true question is, not whether they mean something different, but whether, having regard to all the circumstances - to the person enabled, to the general object of the statute, and to the persons for whose benefit the power may have been intended to be conferred - they do or do not create a duty in the person on whom it is conferred to exercise it ..... The effect of the cases in which the exercise of the power conferred was held to be obligatory was that, though the statutes concerned had in terms only conferred a power, the circumstances were such as to create a duty and to show that the exercise of any discretion by the person empowered could not have been intended."..... The question whether a Judge or public officer to whom a power is given by such words is bound to use it upon any particular occasion, or in any particular manner, must be solved 'aliunde', and in general it is to be solved from the context, from the particular provisions, or from the general scope and objects of the enactment conferring the power..... Lord Blackburn's opinion was that the enabling words gave a power which 'prima facie' might be exercised or not, but if the object for which the power is conferred is for the purpose of enforcing a right whether public or private, there may be a duty cast upon the donee of the power to exercise it for the benefit of those who have that right, when required on their behalf. Where there is such a duty, it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee must exercise it."

At pages 255 and 256, the learned author says:

"It is important here to notice the distinction between a discretion to exercise a power and a discretion to determine only whether the occasion for it has arisen..... An arbitrary or capricious exercise of a discretion would be no exercise at all."

(29) In the light of these principles, it is clear that if the conditions laid down in the proviso are satisfied in a particular case the court is bound to exercise its judicial discretion and decide whether it would be reasonable to order delivery of possession of the holding. The wording of the proviso and the use of the word "satisfied" go to show that some amount of judicial discretion is given to the Court in the matter of ordering delivery of possession of a holding. There may be cases in which the lessee was prevented by justifiable cause from paying rent on the due date, or there may be bona fide dispute between the parties relating to the amount of rent to be deposited. In such cases, the Court may exercise its discretion in a judicial manner and refuse delivery of possession of the holding.

(30) With regard to the second point, namely the date with reference to which the question of failure to pay rent should be determined, the wording of the proviso is rather ambiguous. The words used are:

"if the court is satisfied..... that he (the lessee) has failed to pay the rent of the holding which has accrued due after the commencement of the Act."

It is not clear whether the failure to pay should be on due date or when the application for delivery of the holding is made or when the court passes the order for delivery. It was argued for the appellant that, according to the language of the proviso, the court will get jurisdiction to order delivery of possession of the holding only if the lessee fails to pay the rent that has accrued due after the commencement of the Act before the order for delivery is made. It was also argued that, in any case, if the payment has been made before the date of the application for delivery of the holding the Court will have no jurisdiction to order delivery. Lastly, it was argued that failure to pay the rent on the due date does not entail forfeiture of the benefit under the Act and, that in any case, the Court must be satisfied that the lessee has, without any lawful excuse, failed to pay the rent even after he was given a reasonable opportunity to pay the same.

Reliance was placed by learned counsel for the appellant on the decision in 'BIRD v. HILDAGE', (1948) K B 91. That was a case under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. Schedule I to that Act provided thus:

"A Court shall for the purposes of section 3 of this Act have power to make..... an order .....for..... possession of any dwelling house within the Rent Restriction Act..... without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if (a) any rent lawfully due from the tenant has not been paid or any other obligation of the tenancy..... has been broken or not performed....."

The tenant failed to pay the rent due on March 25, 1946 and the landlord filed a plaint on May 21, 1946 claiming possession of the dwelling house on the ground of (a) non-payment of rent and (b) alleged breaches of covenant. The County Court Judge decided the case against the landlord on both grounds. It was found that the rent was not paid on the due date but the Judge held that in view of the previous conduct of the parties in relation to the payment and the acceptance of rent after the due

date he had no jurisdiction under section 3 of the Act and the 1st schedule to make an order for possession.

The landlord appealed from that decision. Their Lordships held that the reason given by the Judge did not justify the conclusion which he had reached. Their Lordships then went into the question whether by the terms of the Statute the court had jurisdiction to make an order for possession. It was found that the rent due on March 25 had been tendered before action was brought by the landlord and that the tenant subsequently paid the rent into the court. The tenant contended that no rent lawfully due from him remained unpaid. In dealing with the question, their Lordships observed thus:

"The first question that arises is the date on which we have to determine whether the rent had been paid or not. Counsel for the landlord argued that that date was the date fixed by the contract for the payment thereof. He pointed out that, under the second branch of paragraph (a) of the schedule, in determining whether an obligation had been broken, the court had merely to look at the terms of the obligation and see whether it had in fact been broken. The fact that the breach had been made good would not deprive the court of jurisdiction though, it would, of course, be relevant in determining whether it was reasonable to make an order for possession. So, said counsel, in the case of rent, events subsequent to the due date fixed by the terms of the tenancy for the payment of rent are relevant only on the question of reasonableness. We are unable to accede to this argument. It requires, as it seems to us, the word 'punctually' to be read into the language of the paragraph before the word 'paid'. Alternatively, had the argument been well-founded, the paragraph would, we think, have read somewhat as follows: "Any obligation of the tenancy (whether as regards rent or otherwise and whether under the contract of tenancy or under the principal Acts) so far as the obligation is consistent with the provisions of the principal Acts has been broken or not performed."

"Section 3 and schedule I lay down the circumstances in which the court may make an order or give a judgment for recovery of possession and we think that in reaching a conclusion whether any rent is lawfully due and has not been paid, the court must look at the date of institution of the proceedings by which the landlord is seeking to recover possession. The rights of the parties crystallized at that date, and nothing happening thereafter could, in our opinion, deprive the court of jurisdiction to make an order for recovery of possession, if the court thought it reasonable to do so.....Before the Court can have jurisdiction the landlord must prove two things viz., (1) that some rent was lawfully due from the tenant at the date of the institution of the proceedings and (2) that that rent was unpaid.

The question, therefore, arises in the present case, was any rent lawfully due from the tenant on May 21, 1946 to the landlord? In our view, rent is not lawfully due unless it can be recovered by process at law. A landlord may recover rent lawfully due in two ways, that is, either by distress or by judgment in an action. In this case, it is admitted that a valid tender of the rent due on March 25, 1946, amounting to 15£. 5s. was made on May 16, 1946. As a result of that tender the landlord could not thereafter distrain for his rent: 'JOHNSON v. UPHAM', (1859) 2 EL & EL 250, and see Hill & Redman, Law of Landlord and Tenant (10th Edn. page 323). Equally, in view of that tender and the payment into court which the tenant was entitled to make and did make as a result of that tender, the landlord could not obtain judgment for his rent and in fact did not do so: See 'JOHNSON v. CLAY', (1817) 7 Taunt 486 and 'JAMES v. VANE', (1860) 29 L J (Q B) 169—per Cockburn C. J. The result is, in our view, that, where tender of rent is made, even after the due date, where time is not made the essence of the contract, such a tender prevents rent from being lawfully due from the tenant to the landlord within the meaning of the schedule."

(31) It will be seen that this decision is based mainly on the construction of the words "rent lawfully due". Their Lordships held that so long as the landlord could not recover rent from the tenant either by distress or by judgment in an action, it could not be said that rent was lawfully due from the tenant. On this ground, their Lordships held that the Court had no jurisdiction under Schedule I of the Act to order delivery of the dwelling house. We do not think that this reasoning will apply to a case coming under section 4 of Act VIII of 1950. It cannot be said that if the lessee was bound to pay rent on a particular date such rent was not lawfully due from him, especially when a decree for rent has been passed against him. Moreover, the expression "rent lawfully due" does not find a place in the proviso to section 4 of Act VIII of 1950. We therefore do not think that the decision in 'BIRD v. HILLDAGE', (1948) K B 91 is an authority for the position that in a case in which rent that has accrued due after the commencement of Act VIII of 1950 has not been paid on the due date but was tendered or paid before the court orders delivery of possession of the property the Court has no jurisdiction to order delivery of possession of the property. We do not also think that on the basis of that decision we can hold that in a case in which the lessee tenders or pays the rent before the decree-holder applies for delivery of possession of the property but after the due date of payment the court has no jurisdiction to order delivery of the property. We are of opinion that even in cases in which the lessee has tendered or paid rent before the decree-holder applies for delivery of possession of the property, but after the due date of payment, the Court has jurisdiction to order delivery of possession of the property if it is reasonable to do so.

(32) With regard to the argument that failure to pay rent on the due date does not by itself entail forfeiture of the benefit under the Act and that the proviso gives a discretion to the Court for deciding whether in a particular case delivery of possession should be ordered even if rent was not paid on the due date, we think that this position is supported by the wording of the proviso and that it should be accepted. We also think that the words 'has failed to pay the rent' do not necessarily import failure to

pay on the due date. If the idea of the legislature was that in all cases in which the lessee has defaulted to pay the rent on the due date he should forfeit the benefit under the Act we would have found some expression in the proviso to indicate that intention. As observed by their Lordships in 'BIRD v. HILLDAGE', (1948) K B 91,

"it requires, as it seems to us, the word "punctually" to be read into the language of the paragraph before the word "paid"."

As we have already observed, the proviso itself is in the form of an enabling provision, and such a provision implies a judicial discretion in the Court to decide whether the facts of the case justify the exercise of the power conferred on it by the statute. This interpretation of the proviso is further strengthened by the use of the words "if the court is satisfied". The omission of words like "on the due date" or "punctually" when referring to failure to pay rent also gives support to this view. The fact that the legislation itself is intended as a beneficial measure to afford temporary relief (for a period of one year) to tenants of holdings also justifies this liberal interpretation of the proviso. Reference may be made in this connection to the following observation of Mahajan J. in 'RAM TARAN v. MRS. HILL', AIR 1949 F C 135:

"The words of a remedial statute must be construed, so far as they reasonably admit, so as to secure that the relief contemplated by the statute shall not be denied to the persons intended to be relieved."

(33) Reference may also be made to the decision of the Court of Appeal in 'DELLENTY v. PELLOW', (1951) 2 All E R 716. That also was a case under the Rent and Mortgage Interest Restrictions (Amendment) Act 1933. The landlord claimed possession on the ground of non-payment of rent. On the date of the hearing the tenant paid the arrears into Court. There was evidence that the tenant had been frequently in arrears and that on a number of occasions it had been necessary to issue summonses against him. Their Lordships held that once the landlord showed in proceedings under the Rent Acts that at the commencement of those proceedings rent was in arrear, the court had jurisdiction to make an order for possession, the only effect of the payment of rent into Court being that 'prima facie', it would not then be reasonable to make an order, Jenkins L. J. observed thus:

"I would agree that, prima facie, where possession is sought on the ground of non-payment of rent in the ordinary case and the tenant pays the rent into court or tenders the rent before judgment, it would not be reasonable to make an order for possession if there was no more in the case than that."

It is true that in Schedule I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 there are the words "where the court considers it reasonable so to do" which do not find a place in the proviso to section 4 of Act VIII of 1950. But if the language of the proviso gives a discretion to the court in the matter of ordering delivery of possession of a holding coming within the purview of the Act the absence of these words cannot make the principle laid down in the above decision inapplicable to the present case.

(34) We therefore hold that even if it is found that the tenant has not paid the rent that accrued due after the commencement of the Act on the due date the Court has discretion to refuse to order delivery of possession of the holding. This discretion will certainly have to be exercised in a judicial manner. Ordinarily the court will not order delivery of possession of the holding if the tenant pays the rent before delivery is ordered. But in exceptional cases the court may order delivery even if the rent is tendered or paid before delivery is ordered. The question for consideration in such cases will be whether there has been wilful and unjustifiable default on the part of the tenant in paying the rent. As a rule of practice it may be stated that only in cases in which a demand for rent has been made by the landlord or notice has been given to the tenant by the court to show cause why delivery of possession of the holding should not be ordered, & the tenant without any lawful excuse fails to pay the rent, that it can be held that the tenant has failed to pay the rent of the holding as contemplated by the proviso. We wish however to make it clear that this is only a rule of practice that may be adopted by the Courts & that the question is primarily one of discretion to be exercised by the courts in a judicial manner.

(35) In this particular case, the execution court has not exercised its discretion in the matter and the lower appellate court has not decided the question. In the circumstances, we set aside the orders of the courts below and remand the case to the execution court for fresh disposal according to law, and in the light of the observations made above. There will be no order as to costs.

A. S. No. 512 of 1951.

(36) The 1st defendant is the appellant in this case. His petition for staying delivery of possession of the holding was rejected by the Court below on the ground that he has forfeited the benefit under the Act on account of failure to pay the rent that accrued due after the commencement of the Act. The decree in this case was passed on 17-3-1951. The first defendant deposited Rs. 125/- on 9-5-1951. The Court below dismissed the petition of the 1st defendant on the ground that the payment of rent was after the due date. The question whether he has forfeited the benefit under the Act by reason of default to pay the rent on the due date will have to be reconsidered by the court below in the light of the observations made by us in our judgment in S. A. No. 936 of 1951. The order of the learned Munsiff is therefore set aside and the case is sent back to the court below for fresh disposal according to law. There will be no order as to costs in this appeal.

S. A. No. 264 of 1951.

(37) Defendants 4 and 5 are the appellants in this Second Appeal. The decree is for recovery of possession of a holding coming within the purview of Act VIII of 1950. When the decree-holder applied for delivery of possession of the decree schedule properties defendants 4 and 5 objected contending that they were entitled to the benefit of Act VIII of 1950. The execution Court held that the defendants had forfeited the benefit under the Act by reason of their failure to pay the rent that accrued due after the commencement of the Act on the due dates. This order was confirmed in appeal. The decree in this case was passed on 21-2-1949. The defendants paid Rs. 1700 towards

the decree debt on 6-6-1125 and a further sum of Rs. 260/- on 28-2-1951. The Courts below have not taken into account the payment on 28-2-1951. The question whether the defendants have forfeited the benefit under the Act by reason of their default to pay the rent on the due dates will have to be reconsidered in the light of the observations made by us in S. A. No. 936 of 1951. We therefore set aside the orders of the courts below and remand the case to the execution court for fresh disposal according to law. There will be no order as to the costs of this appeal.

(38) GOVINDA PILLAI, J.: I accept the conclusions of my learned brother Vithayathil, J. regarding the requisites of a Kanapattom. It is an anomalous mortgage and will not come under the category of a lease as is ordinarily understood. But the Legislature by the proviso to section 2 included that also in the category of the holdings to which the stay of execution regarding delivery of possession is applied. I also agree to the finding that the judgment-debtor would forfeit the benefit under the Act by failure to pay the rent of the holding that accrued due after the commencement of the Act or by committing intentional and wilful acts of waste in the holding. I regret I cannot agree with the qualified conclusion arrived at in paragraph 11 (para 34 of this report) of the judgment in S. A. No. 936 of 1951.

(39) The expression "Nothing contained in this section shall preclude the Court" in the proviso to section 4, has the effect of only taking away the bar mentioned in the section. With a judicial determination of the allegations of the decree-holder regarding waste or failure to pay the rent, the court has no further discretion except in enforcing the decree if the finding is against the lessee. There is already the command of the court in passing the decree to put the decree-holder in possession of the property. The Legislature then intervened and laid down provisions to stay the enforcement of the decree for a definite period on the lessee abstaining from doing or doing certain acts. If the lessee does not abstain from doing or does these acts, then he loses the benefit conferred by the Act, and his liabilities & obligations would be determined by the provisions of the decree.

(40) If a lessee has forfeited his right to the property by non-payment of rent, and the lessor sues to eject the lessee, then under the conditions laid down in sec. 114 of the Transfer of Property Act. the Court without passing a decree for ejectment can allow the lessee to hold the property leased as if the forfeiture has not occurred. The discretion is given to the Court before the decree for eviction is passed, and all the decisions referred to by my brother relate only to actions in ejectment, and not to decrees passed after hearing the defendant or giving him an opportunity to defend himself. The situation will change entirely when the decree is passed. I respectfully adopt the opinion of Maxwell quoted in paragraph 5 (para 28 of this report) of the judgment in S. A. 936 of 1951. If the object for which the power is conferred on the Court is for the purpose of enforcing a right whether public or private, there may be a duty cast upon the court to exercise it for the benefit of those who have that right when required on their behalf. Where there is such a duty it is not inaccurate to say that the words conferring the power are equivalent to saying that the Court must exercise it.

(41) The lessee has to pay the rent on the dates mentioned in the lease deed till the date of decree in cases of pending suits for eviction, or on the date or dates fixed in the decree (Vide 'NARAYANA PILLAI v. SANKARAN NAMBOORIPAD', 1951 Ker L T 568 referred to in paragraph 3 (para 26 of this report) of the judgment). If the decree is silent as regards the date of payment of rent, it has to be taken that in the case of rents to be paid periodically the rent was due within the expiry of one period from the date of decree. If the rent is not paid on or before the due date, then the tenant is one who has failed to pay the rent of the holding which has accrued after the commencement of the Act. To hold the property against the provisions of the decree, the lessee had a duty to attend to certain matters and if he fails to do so he forfeits the right. In such cases, the power conferred on the court by the proviso to section 4 has to be exercised. The Court will have no power to condone such a default and the courts are to hold the scales of justice evenly and without other considerations.

(42) I agree to the decisions in S. A. 779 of 1950 and C. M. A. 298 of 1951. As regards S. A. 936 of 1951, the lower appellate Court had not decided the question whether the tenant had defaulted to pay the rent that accrued after the commencement of the Act. So the case has to go back to the District Court for the determination of this question and disposal of the appeal. There is default of payment of rent on the due dates in A. S. 512 and S. A. 264 of 1951 and these two appeals are to be dismissed.

(43) KOSHI, C. J.: I agree to the reasoning and conclusion of the judgments my learned brother Joseph Vithayathil has delivered in these appeals. As Mr. Justice Govinda Pillai differs from the leading judgment and from me on one aspect common to some of these cases I think it proper to add a few words of my own setting out the reasons which induce me to differ from him.

(44) In my view the words which introduce the proviso to section 4 of Act VIII of 1950 sufficiently indicate that on the happening of the events mentioned in the proviso the Court is only given a discretion to order delivery of the holding. If the Legislature intended that on either of the events referred to in the proviso happening the lessee shall lose the benefit conferred by the body of the section it had only to state that he shall not be entitled to the benefit of the section if he commits wilful waste or fails to pay rent. That is not what the Legislature has stated. It has stated that nothing contained in the section shall preclude the Court from ordering the delivery of possession of the holding to the decree-holder if the Court is satisfied either that the lessee has committed intentional and wilful acts of waste or that he has failed to pay the rent of the holding which has accrued due after the commencement of Act. When the Legislature has thought fit to regulate post-decree relations between the decree-holder and the judgment-debtor I venture to state that the analogy of section 114, T. P. Act, cannot be of much help

to solve the question whether the provision should be deemed to be mandatory or not. It is a settled rule of interpretation that the words of a remedial statute must be construed, so far as they reasonably admit, so as to secure that the relief contemplated by the statute shall not be denied to the persons intended to be relieved. See 'RAGHURAJ SINGH v. HARI KISHAN DAS', 71 Ind App 56 at 63 (PC) and 'RAM TARAN v. MRS. HILL', AIR 1949 F C 135 at p. 139.

(45) To construe the proviso as mandatory will, in my view, lead to serious hardships. The delay to pay rent may sometimes be of one day or of a like short period. Likewise a short payment may be of a very small sum like a fraction of a rupee. To my mind it is difficult to believe that in a remedial statute intended to be in force for a transitory period the Legislature contemplated that the drastic consequences the opposite view would bring should follow such delays or short payments. This approach would show the Legislature could not have intended the proviso to be mandatory.

(45a) The passages my learned brothers refer to from Maxwell only go to show that the discretion should not be exercised arbitrarily or capriciously.

(46) The proviso does not enjoin on Courts to direct delivery whenever and wherever the events referred to in it are seen to be present. The Court is given a discretion in the matter; the only thing is that it should be exercised in a judicial manner.

K.S. Order accordingly.

A. I. R. 1952 TRAVANCORE-COCHIN 347

KOSHI AND GOVINDA PILLAI JJ.

Arithottathu Swamiar, Appellant v. Chacki Mamma and others, Respondents.

A. S. No. 287 of 1124, D/- 28-11-1951.

Limitation Act (1908), S. 14 (1) and Art. 132 — Suit on hypothecation bond — Previous suit by defendants — Exclusion of time under S. 14 — Fresh cause of action.

Where a claim has been satisfied out of Court or through Court and that arrangement is later annulled, the obligee would get a fresh cause of action for the original claim. (Para 6)

The appellant in pursuance of the provision in the hypothecation bond of 10-4-1099 executed in his favour by defendant 1, brought a suit against defendant 1 and the hypotheca to realise the arrears of interest accrued due. In execution of the decree obtained in the suit, the equity of redemption was purchased by the appellant himself. Not long thereafter defendants 2 and 3 brought a suit on 5-8-1108 for a declaration that the properties charged under the hypothecation bond belonged to a tarwad composed of themselves and defendant 1 and that the decree and the execution proceedings were invalid and inoperative as against the tarwad and the hypotheca. The High Court in appeal ultimately decided on 21-1-1120 in favour of defendants 2 and 3. On 30-3-1120, the appellant brought his suit on the hypothecation bond.

Held (1) that S. 14 of the Limitation Act could not apply to the case and, therefore, the period between 5-8-1108 and 21-1-1120 could not be excluded: AIR 1933 Nag 13; AIR 1924 Bom 39; AIR 1927 Mad 597; AIR 1933 Sind 379 and AIR 1939 Bom 1. Rel. on. (Para 4)

(2) that the cause of action to sue for the hypothecation amount had got extinguished with the purchase by the appellant, the hypothecatee of the equity of redemption over the hypotheca. That position was annulled by the ultimate decision the High Court gave on 21-1-1120. The hypothecatee then got a fresh cause of action and the suit was hence not barred by limitation. Case law discussed. (Para 14)

Anno: Lim. Act, S. 14 N. 17 Art. 132 N. 25.

V. G. Sankaranarayanan Pillai, for Appellant; T. K. Joseph, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('67-69) 12 Moo Ind App 244: (2 Beng LR (PC) 10) 6, 7, 11
('83) 9 Cal 255: (9 Ind App 82 PC) 7
('89) 11 All 47: 15 Ind App 211 (PC) 8, 11, 13
('13) 35 All 227: (40 Ind App 74 PC) 13
('16) 43 Cal 660: (AIR 1916 PC 96) 9, 11, 13
('27) 49 All 565: (AIR 1927 All 446) 9
('44) AIR 1944 All 88: (ILR (1944) All 197) 12
('24) AIR 1924 Bom 39: (76 Ind Cas 557) 4
('39) AIR 1939 Bom 1: (ILR (1939) Bom 173) 4, 11
('08) 35 Cal 209: (12 Cal WN 326) 13
('35) AIR 1935 Cal 333: 62 Cal 66 10, 13
('20) 43 Mad 845: AIR 1920 Mad 663 7, 13
('20) 43 Mad 185: (AIR 1920 Mad 1 FB) 13
('27) AIR 1927 Mad 597: (50 Mad 417) 4
('33) AIR 1933 Nag 13: (28 Nag LR 348) 4
('33) AIR 1933 Sind 379: (27 Sind LR 422) 4
('48) 1948 Trav LR 968 13
S. A. No. 333 of 1116, D/- 21-1-1120 (Trav) 1, 6

KOSHI J.: This is a plaintiff's appeal against a judgment and decree of the Kottayam District Munsiff's Court dismissing his suit on a hypothecation bond as barred by limitation. The bond was in the sum of Rs. 800/- and it bears the date 10-4-1099. The suit was instituted only on 30-3-1120 long after the expiration of twelve years after the money became due. 'Prima facie' the suit was therefore barred by time but this 'prima facie' case was endeavoured to be answered by invoking the aid of sections 14, 15 and 19 of the Limitation Act and also on the ground that in the events that happened the plaintiff had obtained a fresh start well within time to entitle him to bring the suit when it was actually brought. These grounds did not however find favour with the learned District Munsiff who tried the suit and he therefore dismissed it. Hence this appeal by the plaintiff.

(2) The facts of the case and the events the appellant relies on for exclusion of time or for a fresh start can be briefly stated as follows: The suit hypothecation bond was executed by defendant 1 on 10-4-1099 and the document proceeded as if the properties over which the charge was created belonged exclusively to the executant. Provision was made in the document for payment of interest every year and the document expressly gave authority to the hypothecatee, if need be, to sue for arrears of interest alone. Defendant 1 allowed interest to fall into arrears and in O. S. 280 of 1105 on the file of the lower court the hypothecatee

brought a suit against defendant 1 and the hypotheca to realise the arrears of interest accrued due. In execution of the decree obtained in that suit, the equity of redemption over the hypotheca was sold and purchased by the decree-nolder himself.

Not long after the execution sale was confirmed, defendants 2 and 3 instituted O. S. 1125 of 1108 before the lower court for a declaration that the properties charged under the hypothecation bond belonged to a Marumakkathayam Ezhuva tarwad composed of themselves and defendant 1, that the hypothecation bond was not supported by consideration or tarwad necessity and that the decree and the execution proceedings were invalid and inoperative as against the tarwad and the hypotheca. That suit was instituted on 5-8-1108 and the suit had a chequered career. The predecessor-in-interest of the present plaintiff contested it, but a decree allowing the suit in its entirety was passed by the trial court on 4-6-1111.

On appeal before the District Court the Munsiff's decision was reversed and the case was sent back for fresh trial and disposal. On 25-7-1114, the trial court passed a revised decree upholding the validity of the hypothecation bond, the decree and the execution proceedings to the extent of a one-half share over the properties. This time the plaintiffs preferred an appeal to the District Court and their appeal was allowed with the result that the original decree of the Munsiff was restored. Against this appellate decision, the present appellant preferred S. A. 333 of 1116 before the Travancore High Court and it was disposed of by a Division Bench consisting of Krishnaswamy Iyer, C. J., and K. C. Abraham, J.

By their judgment dated 21-1-1120 the learned Judges found that the hypothecation bond was valid and binding on the tarwad of the present defendants inasmuch as it was supported by consideration and tarwad necessity. The decision of the lower appellate court that the decree in O. S. 280 of 1105 did not bind the tarwad as it was not obtained in conformity with the provisions in section 27 of the Ezhuva Act, III (3) of 1100 was however confirmed. The operative portion of the judgment runs thus:—

> "In the result we hold that Ext. I hypothecation is supported by consideration and necessity and executed by competent persons so as to be binding on the tarwad of plaintiffs and second defendant, but that Exhibit H decree has not been validly obtained against the tarwad and cannot be enforced against the tarwad properties as such. The decree and the execution proceedings will be to that extent stand set aside and declared inoperative."

Not long after the High Court pronounced the above judgment the plaintiff brought the present suit. It was instituted on 30-3-1120.

(2) To get his suit free from the objection that it was barred by limitation the appellant mentioned in his plaint more than one ground. First it was stated that the period between 5-8-1108 and 21-1-1120 when O. S. 1125 of 1108 was pending in one or the other of the three courts should be excluded in computing the period of limitation for the suit. Secondly, the plaintiff set up an acknowledgment of the plaint claim by defendants 2 and 3 in their plaint in O. S. 1125. A third ground mentioned in the plaint is that the decision of the High Court gave the appellant a fresh right or cause of action to claim payment of the amount under the suit bond.

(3) The question for our consideration is whether the lower court's decision that the suit is time barred is wrong. It is common ground that the article of Limitation Act applicable to the case is Article 119 of the Travancore Limitation Act (corresponding to article 132 of the Indian Limitation Act) which provides a period of 12 years from the time the money sued for became due. The hypothecation bond does not contain any provision that the money would become due only after a prescribed period. The money therefore became due immediately the bond was brought into existence. The lower court has held that there was no valid acknowledgment at all and that view was not sought to be challenged before us.

It is therefore clear that unless the exclusion claimed is permissible, or the case that a fresh start or cause of action became available to the appellant can be substantiated, the lower court's decision dismissing the suit must stand. No equitable ground for the suspension of a cause of action can be added to the provisions of the Limitation Act. We shall therefore proceed to examine the grounds relied upon in the appeal to take the case out of the bar of limitation.

(4) Except for repelling the ground as to acknowledgment the only other matter considered by the lower court is whether section 14 of the Limitation Act would entitle the appellant to claim exclusion of the period between 5-8-1108 and 21-1-1120. That question was answered in the negative and in our opinion that view is right. We need only concern ourselves in this case with sub-section 1 of the section 14 which is in these terms.

> "In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it".

In the prior suit the appellant was a defendant defending the suit brought against him and not a plaintiff prosecuting his suit. The only relief the appellant claimed there was the dismissal of the suit brought against him and not the relief he now claims for the recovery of the hypothecation amount. Though the suit arose out of one and the same transaction of the hypothecation bond, the cause of action of the plaintiff in that case was different from the appellant's cause of action in the present suit. The Court was not incompetent from defect of jurisdiction or other like cause to grant the appellant any relief he sought there.

The lower court has relied on the decision in 'HIRALAL v. KRIPALSINGH', A.I.R. 1933 Nag 13—in support of its view that section 14 could not apply to the case. In that case, the executant of a promissory note sued for a declaration that the promissory note sued for was discharged and had hence become unenforceable. That suit was ultimately dismis-

sed but it was held that the period of the pendency of the suit could not be deducted in computing the period of limitation for a suit on the promissory note by the payee. Besides that case, the decisions in 'SOMSHIKHARSWAMI v. SHIVAPPA', A. I. R. 1924 Bom. 39, 'SATYA NARAYANA BRAHMAN v. SEETHAYYA', A. I. R. 1927 Mad. 597, 'PRIBHADINOMAL v. MT. CHUTI', A. I. R. 1933 Sind 379 and 'NARAYANAN JIVAJI v. GURUNATHGOUDA', A. I. R. 1939 Bom. 1 also support this view. The lower court's view that section 14 of the Limitation Act does not render any assistance to the appellant is therefore affirmed.

(5) The question whether section 15 can be applied to the case has not been considered by the learned Munsiff. Before us a faint suggestion was made that that section would apply. The earliest order or decree of which it might possibly be said that it stood as a bar to a suit for the hypothecation amount being brought earlier is the decree which the lower court passed on 4-6-1111 in O. S. 1125 of 1108. By that time 12 years had already expired after the money became due and section 15 cannot therefore be invoked at all in the case.

(6) The third and the last ground urged before us to make out that the suit is not barred is that the decision of the High Court in S. A. 333 of 1116 gave a fresh start or furnished a new cause of action to claim the hypothecation amount. The suit is not only well within 12 years of that decision but also within 12 years of the earliest decree passed in O. S. 1125 of 1108. The present suit was brought within 12 years even of the institution of O. S. 1125 of 1108. Before 4-6-1111 when that suit was first decreed the appellant was in the position of a satisfied creditor. Subject to the hypothecation right in his favour, the equity of redemption of the hypotheca had been brought to sale in execution of the decree obtained by him for the arrears of interest due to him and himself purchased the same. He had thus become the owner of the property. So long as that status remained, it was not open to him to bring a suit on the hypothecation bond.

However the litigation in O. S. 1125 of 1108 upset that position and there is a line of cases which clearly lay down that where a claim has been satisfied out of court or through court and that arrangement is later annulled the obligee would get a fresh cause of action for the original claim. The High Court's decision in S. A. 333 of 1116 cancelled both the decree and the execution proceedings in O. S. 280 of 1105. The effect of the cancellation of the sale was to revive the obligation to pay the hypothecation amount. See 'MT. RANEE SURNO MOYEE v. SHOOSHEE MOKHEE BURMONIA', 12 Moo. Ind. App. 244 (P.C.). The principle behind this decision has been explained in a large number of subsequent cases and we shall now proceed to refer to some of them.

(7) In 'MUTHUVEERAPPA CHETTY v. ADAIKAPPA CHETTY', 43 Mad. 845: A. I. R. 1920 Madras 663, a debtor who satisfied, by payment, his creditor's claim for balance of money due sued to annul the satisfaction on the ground of coercion and obtained a decree for refund. It was held that the annulment gave the creditor a fresh cause of action to the original claim and that time began to run from the date of annulment. The case was heard by Sir John Wallis, C. J. and Seshagiri Ayyar J., and the learned Chief Justice who gave the judgment in the case posed the question for decision thus:—

> "The question then is whether as the result of the previous suit he (the plaintiff) has not acquired a fresh cause of action in the nature of his original cause of action, for an account which was satisfied so long as the adjustment to which I have referred stood"

and then went on to answer it as follows:—

> "In my opinion he has.
>
> "It is unnecessary to refer to all the cases which were cited before us. There is 'MT. RANEE SURNO MOYEE v. SHOOSHEE MOKHEE BURMONIA', 12 Moo Ind App 244 (PC), a decision of the Privy Council which has been explained by their Lordships in 'HURO PERSHAD v. GOPAL DAS', 9 Cal 255 (PC). The latter case contains at p. 259, a clear statement of the principle which is applicable to this case. Their Lordships say:—
>
> 'The effect of that case 'MT. RANEE SURNO MOYEE v. SHOOSHEE MOKHEE SURMONIA', may be shortly stated. The Zamindar brought a certain patni taluk to sale, and sold it to a purchaser who was put in possession of it, and out of the purchase money the arrears of rent were paid. Subsequently this sale was set aside for irregularity; the zamindar had to refund the purchase money received by her, and the 'patnidar', who succeeded in setting it aside, obtained also the mesne profits for the time during which he was ousted. Under those circumstances, this Committee, whose judgment was delivered by Sir James Colvile, observed: 'it is clear that until the sale had been finally set aside, she, that is, the plaintiff was in the position of a person whose claim had been satisfied, and that her suit might have been successfully met by a plea to that effect.' In other words, the effect of the judgment of this Board is, that under the peculiar circumstances, the patnidar having recovered possession, together with mesne profits it was equitable that he should pay the amount of rent that was in arrear; but that amount of rent did not accrue until the sale of the 'patni' had been set aside, and, therefore, until that time the statute could not run.'
>
> "Applying those observations to the present case, it is equitable that the plaintiff should be allowed to prefer a fresh claim seeing that he has been deprived of the satisfaction which he had originally obtained. The fact that satisfaction was obtained by coercion was good reason for ordering the money to be refunded but that is no reason for depriving the plaintiff of all remedy on his original claim. In the case cited, the Privy Council say that a fresh claim for the arrears of rent accrued when the 'patni' sale was set aside, and that until the 'patni' sale had been set aside the statute could not run. That, in my opinion, amounts to saying that a fresh cause of action arose. Both in that case and in this, the statute ran as against the original claim. But when the original claim was satisfied there was an end of the statute running in respect of that cause of action and on the annulment of that satisfaction a fresh cause

of action arose and the statute began to run again. If there was a fresh cause of action, this suit is in time whatever article is applicable."

The above extract makes it unnecessary for us to refer to a good number of other cases bearing on the point.

(8) However before we come to the next Indian decision, reference may usefully be made to another Privy Council decision, namely 'BASSU KUAR v. DHUM SINGH', 11 All. 47 (PC). There, in contemplation of a sale of land by the debtor to the creditor, it was agreed that the debt owed by the former should be treated as discharged in satisfaction of a part of the price, but the parties afterwards failed to agree to certain other terms and a suit brought by the intended vendor for specific performance was dismissed on the ground that no effectual agreement had been made. It was held that that decree had brought about a new state of things and imposed a new obligation on the debtor. He became bound to pay that which he had retained in return for his land, the date of the decree giving the date of the origin of the fresh cause of action.

(9) In 'RAM CHARAN SAHU v. MATA PRASAD', 49 All 565 the question arose whether the period of limitation can be suspended once it had begun to run unless that suspension is itself provided for in the Limitation Act. In giving the answer in the negative, the learned Judges, Lindsay and Sulaiman, JJ. discussed a large number of decided cases and explained the decision in 'NRITYAMONI DASSI v. LAKHAN CHANDRA SEN', 43 Cal. 660 (P. C.)-- which had often been taken to lay down a contrary rule in the following terms:

"Similarly the case of 'NRITYAMONI DASSI v. LAKHAN CHANDRA SEN' was an exceptional one. In a previous suit of 1896, certain defendants had associated themselves with the plaintiffs in that action and had asked for an adjudication in those proceedings of their rights. A distinct issue was framed in respect of their claim. The subordinate Judge actually passed an effective decree in their favour for delivery of possession which was capable of execution. While that decree remained in force they had obtained all that they wanted. So long as that decree stood in their favour it was not open to them to institute a fresh suit for attachment of the very object which had been successfully achieved by them. It was under these peculiar circumstances that their Lordships held that the period during which they were litigating for their rights on the previous occasion should be deducted. This case can be explained on the ground that when an effective decree had been obtained by a party which, if executed, would give him all the relief he can claim, time does not run against him but that he would have a fresh start when that decree is reversed. This case also is, therefore, distinguishable, and the principle underlying it cannot be applied to the converse case where, although the plaintiff was asking for a decree, it was not granted to him owing to his own default."

(10) The next case we would refer is a Calcutta decision reported as 'JATEENDRA CHANDRA v. REBATEEMOHAN DAS', A.I.R. 1935 Cal. 333. There the auction-purchaser had applied for delivery of possession. In a suit for a declaration by another, it was declared that the auction-purchaser had obtained no right on the basis of the auction-purchase. This declaration was set aside on appeal whereupon the auction-purchaser again applied for delivery of possession. It was contended that it was barred by time. The court's decision was that there was a cancellation of the cause of action for delivery of possession by the declaratory decree operating to suspend the rights of the auction-purchaser and that consequently he was entitled on removal of the cancellation by the court of appeal to avail of a fresh cause of action which arose by reason thereof.

(11) There is also a decision of the Bombay High Court bearing on the point and that is the decision in 'NARAYANAN JIVAJI v. GURUNATHGOUDA', A. I. R. 1939 Bom. 1 which we have already referred to in another context. Rangnekar J. who gave the leading judgment in that case said as follows on the question of a fresh cause of action arising under circumstances similar to the present:

"The other cases have proceeded upon the facts therein, and the only consistent principle that can be drawn from them is that laid down by Mitra in the passage cited above. The principle is that, where a claim is satisfied either by agreement of parties or by a decree of the court, and if the satisfaction or the decree is set aside subsequently in a judicial proceeding, then a new cause of action will arise, in respect of which the claimant will either get a fresh period of limitation provided for in the Act or the cause of action will be revived and he will be entitled to deduction of the time occupied in the proceedings resulting in the annulment of the satisfaction or the setting aside of the prior decree. This seems to me to be the principle underlying the decisions in MT. RANEE SURNO MOYEE v. SHOOSHEE BURMONIA', 12 Moo Ind App 244 (PC) and 43 Cal 660.....
....
The decisions in '12 Moo Ind App 244 (PC)', 'BASSU KUAR v. DHUM SINGH', 15 Ind App 211: 11 All. 47 (P C) and 'NRITYAMONI DASSI v. LAKHAN CHANDRA SEN', 43 Cal 660 (PC) were based upon the ground that in the circumstances there proved to exist a new cause of action had arisen in favour of the plaintiff."

(12) The above extract occurs at p. 17 and the quotation from Mitra's Limitation is given on page 12. We consider it helpful to quote that passage, taken from volume I at pp. 307 and 308 (6th Edition) also here. The extract reads:—

"The right to bring an action may arise on various events; but it has always been held that (in the absence of an express provision) limitation runs from the earliest time at which an action could be brought. The right to sue however has been held to be revived by reason of a previous satisfaction of the claim being nullified by a decree between the parties. Time begins to run when the cause of action first accrues, but when the claim is satisfied by a sale of the debtor's property or by an agreement to sell his pro-

perty, the right to sue is suspended; and so long as the satisfaction of the claim is not rendered nugatory by the sale or the agreement being declared by a decree to be void the plaintiff is precluded from bringing a suit, and the defendant may allege that he is absolved from all liability. But when such a decree is passed, it brings about a new state of things and gives the plaintiff a fresh cause of action".

In 'CHANDRA DEVI v. NATHU SINGH', AIR 1944 All 88, a Division Bench extended the principle underlying the decisions referred to above with reference to the execution of a decree. By a later decree of a competent court, a decree was declared to be a nullity. That declaration was set aside afterwards and the court held that the decree-holder got a fresh cause of action for the execution from the date of the decree which set aside the decree rendering the original decree incapable of execution.

(13) Lastly, we shall cite a decision of the Travancore High Court by Abraham and Krishna Pillai JJ. The question for decision was whether the cause of action once arisen can be said to have been suspended except as per the provisions of the Limitation Act. A large number of the cases we have referred to in this judgment are cited in the judgment in that case and incidentally this question of a fresh cause of action on the avoidance of a discharge or adjustment of a claim also happened to be considered. See 'SOOLAPANI v. PATHUKUTTY', 1948 Trav LR 968. Abraham J. who gave the decision of the Bench in that case said as follows about it:—

"The Privy Council case in 'BASSU KUAR v. DHUM SINGH', 11 All 47 (PC) — where the lamentable result of a vain litigation was deplored, was a case where no remedy was available to the creditor during the intervening litigation. A new obligation and a fresh cause of action for the debt arose on the contract for sale being set aside. The original cause of action for the debt had been satisfied or discharged by the contract for sale, but where such satisfaction or discharge had been nullified by the decree of court, the plaintiff became entitled to a fresh cause of action and a fresh period of limitation. This case can hardly be taken to support a suspension of the cause of action or of the period of limitation.

Similar was the case in 'JATEENDRA CHANDRA v. REBATI MOHAN DAS', 62 Cal 66: A. I. R. 1935 Cal. 333 and 'MUTHUVEERAPPA CHETTI v. ADHIKAPPA CHETTY', 43 Mad 845. Where the original cause of action is extinguished by the earlier proceedings, a fresh cause of action and period of limitation is obtained on the proceedings being set aside. But this is different from any suspension of limitation. The Privy Council in, 'NRITYAMONI DASSI v. LAKHAN CHANDRA SEN', 43 Cal 660 (P C), confirming as it did the decision in 'LAKHAN CHANDRA v. MADHU SUDAN'—35 Cal 209 — is difficult to be reconciled with 'SONI RAM v. KANHAYIA LAL', 35 All 227 (PC) above mentioned except on this principle of a fresh cause of action being generated, and made available with a fresh period of limitation.

Reconciliation was sought to be effected by a Full Bench of five Judges in 'MRITHUKORAKKI v. MADAR AMMAL', 43 Mad. 185 (FB). Their Lordships generally agreed that the Privy Council cases only enunciated liberal principles of construction of the wording of the third column of the Article namely that the right to sue or make an application (the latter being impressed into s. 9 of the Indian Act) revives by reason of a previous satisfaction of claim being nullified by decree or order between the parties..... ... . where by a wrong act or decision of the court, the right has been negatived, a fresh period is counted from the time when the right is restored. Where otherwise there is a discharge, satisfaction or cancellation of the claim or cause of action and such discharge, satisfaction or cancellation is later avoided, a fresh cause of action may arise which may be sued upon as from the accrual of such fresh cause of action. There would hardly be any scope for such fresh cause of action where the original cause of action has not been extinguished and no new cause of action accrued."

(14) In this case, we have already pointed out that the cause of action to sue for the hypothecation amount had got extinguished with the purchase by the appellant, the hypothecatee of the equity of redemption over the hypotheca. That position was annulled by the ultimate decision the High Court gave on 21-1-1120. The hypothecatee then got a fresh cause of action and the suit was hence not barred by limitation. The appeal is accordingly allowed. The lower court's decree dismissing the suit is set aside and the appellant is given a decree as sued for by him with costs throughout.

V.R.B.

Appeal allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 351

GANGADHARA MENON AND VITHAYATHIL JJ.

Krishna Pillai, Appellant v. Damodaran Pillai Respondent.

A. S. No. 730 of 1950, D/- 21-2-1952.

Transfer of Property Act (1882), S. 6 (a) — Deed of divorce by father and mother — Provision for son's maintenance — Son not entitled to claim share in father's property — Father dying intestate — Extinguishment of son's right — (Travancore Nayar Act, 1099 (II (2) of 1100), S. 11).

By the deed of divorce executed by the plaintiff's father and mother, the father gave a certain sum of money to the mother for the maintenance of the plaintiff who was a minor. It was further provided in the deed that neither the plaintiff nor his mother would be entitled to any share in the properties of the father. The mother did not execute the deed as guardian for the plaintiff. The father died intestate survived by the plaintiff and a second wife.

Held that as on the date of the divorce deed the plaintiff had no right in the properties of his father, but a 'spes successionis', the deed did not extinguish the plaintiff's right to inherit one-half of the properties

of his father under S. 11 of the Nayar Act.
Case law Ref. (Paras 5, 6)
Anno: T. P. Act, S. 6 N. 4.

O. Sankaranarayana Pillai, for Appellant; P. Kochukrishna Pillai, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras
('06) 30 Bom 304: (7 Bom LR 742) 5
('07) 31 Bom 165: (8 Bom LR 781) 5
('12) 24 Mad LJ 258: (18 Ind Cas 185) 5
('18) 41 Mad 365: (AIR 1918 Mad 119) 5
27 Trav LJ 523 5
(1890) 45 Ch D 51: (59 LJ Ch 666) 5

JUDGMENT: The second defendant is the appellant. The suit is for declaration of the plaintiff's title to one half of the plaint properties and for recovering possession of the same after setting aside a sale deed executed by the first defendant in favour of the second defendant and also the decree and court sale in O. S. No. 1006 of 1108 of the Thiruvella Munsiff's Court. The plaint properties belonged to one Easwara Pillai. The plaintiff is his son by his first wife. The 1st defendant is his 2nd wife. The marriage between Easwara Pillai and the plaintiff's mother was dissolved in 1105 and after that the former married the 1st defendant. The plaintiff's mother died after some time, and subsequently Easwara Pillai died intestate. After the death of Easwara Pillai, the 1st defendant executed the sale deed Ext. A in favour of the 2nd defendant for the plaint properties.

Easwara Pillai had executed an hypothecation bond charging plaint items 1 and 2. O. S. No. 1006 of 1108 was filed by defendants 3 and 4 for the money due under that bond. Ext. B is the copy of the judgment in that case and Ext. C is the copy of the decree. It is alleged that the plaintiff who was a minor on the date of the suit was not properly represented in the suit and that the decree and execution sale are not binding on him. On these grounds, the plaintiff sued for recovery of possession of one half of the plaint properties with mesne profits.

(2) Defendants 2, 3 and 4 contested the suit. The 3rd defendant died during the pendency of the suit and defendants 13 and 14 were impleaded as his legal representatives. The 2nd defendant contended that Ext. A is a valid sale deed supported by consideration and good faith, that Easwara Pillai and the mother of the plaintiff had entered into an udampady, Ext. I by which the plaintiff ceased to have any interest in the properties of Easwara Pillai, that after the death of Easwara Pillai the 1st defendant alone was entitled to the plaint properties and that she was therefore competent to execute the sale deed. It was also contended that the 2nd defendant had discharged certain liabilities that were subsisting on the properties and that in any case he was entitled to get back the amounts utilised by him for discharging those liabilities. He also claimed value of improvements and denied liability for mesne profits. Defendants 3 and 4 contended that the decree and execution sale in O. S. No. 1006 of 1108 were valid and binding on the plaintiff, that the plaintiff was properly represented in that suit and that the decree and sale were not liable to be set aside.

(3) The court below held that the plaintiff's right to inherit the properties of his father was not extinguished by the udampady, Ext. I executed by his father and mother. It was therefore held that the plaintiff was entitled to one half of the plaint properties and that the sale deed Ext. A executed by the 1st defendant was not valid and binding on the plaintiff's share in the properties. So far as the decree and court sale in O. S. No. 1006 of 1108 were concerned, the court below held that they were valid and binding on the plaintiff. Plaint items 1 and 2 were sold for the decree-debt in that case and the plaintiff was therefore not allowed to recover possession of these properties. Some of the plaint properties were outstanding on mortgage executed by Easwara Pillai. Plaintiff was allowed to recover possession of one half share in plaint items 4 and 7 and in items 5 and 6 excluding 51 cents. Mesne profits were allowed from the date of decree at the rate of Rs. 160/- per year, and the parties were ordered to suffer their respective costs.

(4) The main point urged in this appeal is that the plaintiff's right in the plaint properties has been extinguished by the 'udampady', Ext. I executed by his father and mother. The plaintiff was only 3 years old on the date of Ext. I. The document was not executed by his mother in her capacity as the guardian of the plaintiff. That was a deed of divorce. Easwara Pillai paid Rs. 200/- to the plaintiff's mother on the date of Ext. I and directed her to maintain the plaintiff with the interest on that amount until he attained majority and to pay the amount to him thereafter. It was also provided that neither the plaintiff nor his mother would be entitled to any share in the properties of Easwara Pillai and that Easwara Pillai also would have no right in the properties of the plaintiff's mother. It is contended that by reason of this udampady the plaintiff ceased to have any interest in the properties of Easwara Pillai.

(5) It is admitted that Easwara Pillai died intestate and under the Nayar Act the plaintiff who is the son of Easwara Pillai is entitled to one half of his assets while the Ist defendant, his widow is entitled to the other half. The question for consideration is whether the plaintiff's right to inherit the half of the assets of Easwara Pillai has been extinguished by Ext. I. On the date of Ext. I, the plaintiff had no right in the properties of his father. He had only a mere chance of succession in case Easwara Pillai would die intestate, in 'spes successionis'. This is clearly not an interest in property which is capable of being transferred. Section 6 (a) of the Transfer of Property Act provides that

> "the chance of a heir apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature cannot be transferred."

The law was stated thus in 'IN RE PARSONS'. 'STOCKLEY v. PARSONS', (1890) 45 Ch D 51:

> "It is indisputable law that no one can have any estate or interest at law or in equity, contingent or other, in the property of a living person to which he hopes to succeed as heir at law or next of kin of such living person. During the life time of such person no one can have more than a 'spes successionis', an expectation or hope of succeeding to his property."

Reference may also be made to the decision in 'SAMSUDDIN v. ABDUL HOOSEIN', 31 Bom. 165. It was a case in which A had two sons and a daughter. In consideration of Rs 9000 paid to the daughter by A the former executed a release of her right to share in the inheritance to A's property. A subsequently died intestate. When the daughter claimed her share in the inheritance the sons resisted the claim on the basis of the release deed executed by her. It was held that it was no defence as the release was a transfer of a 'spes successionis.' To the same effect are the decisions in 'ABDOOL v. GOOLAM', 30 Bom 304, 'ASA BEEVI v. KARUPPAN CHETTY', 41 Mad 365; and 'MEERANGANI ROWTHER v. KARUPATHI NAGUR MEERA', 24 Mad LJ 258.

In 'RAMAN v. RAGHAVA VARMA RAJA', 27 Trav L J 523 a partition deed in a Nayar 'tarwad' provided that on any one of the branches becoming extinct the properties allotted to that branch should devolve on the remaining branch. The plaintiff's wife who was the last member of one of the branches died intestate. The sole surviving member of the other branch was the 1st defendant. The plaintiff claimed the properties of the extinct branch under section 19 of the Nayar Act. The 1st defendant contended that under the provisions of the partition deed the properties devolved on him. It was held by the Travancore High Court that the stipulation in the partition deed was opposed to the express provision in section 19 of the Nayar Act and that it did not affect the plaintiff's right to inherit the properties under that Act.

(6) It is thus clear that Ext. I has not extinguished the plaintiff's right to inherit one half of the properties of his father under section 11 of the Nayar Act. Ext. A cannot affect the interest of the plaintiff in the plaint properties. It has therefore to be set aside to the extent of the plaintiff's one-half share.

(7) It was however argued on behalf of the appellant that he has discharged certain debts binding on the properties and that in any case he is entitled to reimbursement of the amount utilised by him for discharging those debts. But no evidence has been adduced by the 2nd defendant in the court below to prove this contention. Neither did the 2nd defendant go into the witness box to swear to this case. He has however produced in this court certain documents to show that he has discharged some liabilities. One such document is the copy of the decree in O. S. No. 226 of 1113 and the other is the copy of the execution diary in that case. The third document is a 'chitty' hypothecation bond which purports to have been executed by the plaintiff's father and contains an endorsement to the effect that the 2nd defendant paid Rs. 122 on 21-10-1110 in satisfaction of the claim under that bond.

The respondent's learned Advocate strongly objected to the admitting of those documents in evidence in this court. No explanation was given by the appellant for not producing these documents in the court below. The case has been pending long in the court below for evidence, and there is no reason why the documents should not have been produced in that court. We, therefore, do not admit in evidence those documents. The plaintiff's learned counsel however conceded that the plaintiff is prepared to give credit for one half of the amount paid by the 2nd defendant in satisfaction of the decree in O. S. No. 226 of 1113. It is admitted that the 2nd defendant paid Rs. 114 towards this decree debt on 3-4-1119. The plaintiff's learned Advocate agreed to give credit for one half of that amount, namely Rs. 57. The plaintiff will therefore deposit this amount in the court below before recovering possession of his share in plaint items 5 and 7 which are in the possession of the 2nd defendant.

(8) With regard to the claim for value of improvements, no evidence was adduced by the 2nd defendant in the court below to prove that he has effected improvements in the properties in his possession. There was no application for the issue of a commission. In the written statement it is not stated what the nature of the improvements is and what its value would be. In the circumstances we do not think it necessary to give the 2nd defendant a further opportunity to take out a commission for assessing value of improvements.

(9) With regard to mesne profits, the court below has not found what the mesne profits from items 5 and 7 would come to. These are the only items in the possession of the 2nd defendant. In the plaint, it was alleged that the mesne profits from all the plaint properties would come to Rs. 100. But when the plaintiff was examined he swore that the mesne profits would come to Rs. 300 per annum. The court below allowed future mesne profits at the rate of Rs. 160 per annum. There is no basis for this award. The plaintiff has not adduced any evidence to prove the mesne profits of the properties. The 2nd defendant's case is that the mesne profits of items 5 and 7 will be only Rs. 25 a year. In the absence of any reliable evidence relating to the matter, we do not think that anything more than the amount admitted by the 2nd defendant can be awarded as mesne profits. The court below did not award past mesne profits and no objection memorandum was filed by the plaintiff relating to this matter.

(10) With regard to the mesne profits of the properties in the possession of defendants 4, 13 and 14 there is absolutely no evidence in the case. In the circumstances, the plaintiff can be allowed mesne profits only of items 5 and 7 at the rate admitted by the 2nd defendant i.e., Rs. 25 a year. The plaintiff can claim only one half of that. Mesne profits will be allowed only from the date of deposit by the plaintiff of the sum of Rs. 57 mentioned above. Subject to these modifications the decree of the court below is confirmed and this appeal is dismissed.

(11) The parties will pay and receive costs in this court in proportion to their success.

B/ V.R.B.

Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 353

GANGADHARA MENON AND VITHAYATHIL JJ.

Parameswaran Padmanabhan Nampi, Appellant v. Ramakrishna Iyer Raghava Iyer, Respondent.

Second Appeal No. 653 of 1124 (Tr), D/- 18-9-1951.

Civil P. C. (1908), O. 22, R. 2 — Death of one of defendants — Legal representative already

on record — Omission to make entry as required under O. 22, R. 2 — Effect.

The omission on the part of the Court to make an entry on the record to the effect that the legal representative of the deceased defendant was one of the surviving defendants in the case as required by O. 22, R. 2 does not make the decree subsequently passed a nullity, and the legal representative of the deceased defendant, who is a party to the decree, cannot contend in execution that the decree is a nullity. AIR 1951 Trav-C 225, Disting. (Para 6)

Anno: C. P. C., O. 22, R. 2 N. 1.

V. G. Sankara Narayana Pillai, for Appellant; T. R. Atchutha Warrier, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('51) AR 1951 Ajmer 64 (1) : (1948 AMLJ 38) 6
('29) AIR 1929 All 347 (1): (116 Ind Cas 746) 6
('40) AIR 1940 Bom 259: (ILR (1940) Bom 487) 6
('33) AIR 1933 Lah 710: (144 Ind Cas 618) 6
('30) AIR 1930 Mad 579: (126 Ind Cas 486) 6
('33) AIR 1933 Nag 95: (29 Nag LR 12) 6
('36) AIR 1936 Pat 548: (15 Pat 326) 6
('51) 1951 Ker LT 144: (AIR 1951 Trav C 225) 5

VITHAYATHIL, J.: The 2nd defendant in O. S. No. 957 of 1110 of the Kuzithura Munsiff's Court is the appellant in this Second Appeal. The appeal is from an order in execution. The decree is for arrears of jenmi dues payable by the family of defendants 1 and 2 for the decree schedule properties. Defendants 1 and 2 belong to a joint Hindu family governed by the Mitakshara Law. When the suit was instituted, the 1st defendant was the manager of the joint family. The 2nd defendant is the eldest son of the 1st defendant and he was impleaded in the suit as a person in possession of the properties under the 1st defendant. Defendants 2 to 8 were impleaded as persons having some interest in the suit properties. Defendants 3 and 4 alone contested the suit. The 1st defendant died on 30-2-1111. But no one was impleaded in his place and the suit was decreed on 30-6-1111. In execution of the decree, the plaintiff filed a petition on 23-12-1119 for impleading the 2nd defendant and his younger brother as the legal representatives of the 1st defendant. Without issuing notice to the persons sought to be impleaded, the execution court recorded the 2nd defendant as one of the legal representatives of the 1st defendant and impleaded his brother as additional 9th defendant. When the decree-holder subsequently applied for execution of the decree the 2nd defendant objected on the ground that the decree was a nullity as the legal representatives of the 1st defendant had not been impleaded before the suit was decreed.

(2) The trial court held that since the 2nd defendant was the legal representative of the 1st defendant and since he was already on the array of parties the suit had not abated and that the decree was not a nullity. In appeal filed in the District Court the order of the trial Court was confirmed.

(3) The question to be decided in this second appeal is whether the decree is a nullity by reason of the fact that the legal representatives of the deceased 1st defendant were not impleaded before the suit was decreed. It is not disputed that the 2nd defendant who is the eldest son of the 1st defendant and who became the manager of the joint family on the death of the 1st defendant was the legal representative of the latter. It is stated in the objection petition of the 2nd defendant that on the death of the 1st defendant the suit properties devolved on him. It is therefore clear that on the death of the 1st defendant the right to sue survived against the 2nd defendant. Order 22, Rule 4, C. P. C., can have no application in such cases. It is only where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone or a sole defendant or sole surviving defendant dies and the right to sue survives, that the court should, on application made in that behalf, cause the legal representative of the deceased defendant to be made a party to the suit, and it is only where within the time limited by law no application is made for the purpose that the suit will abate as against the deceased defendant. Therefore no question of abatement under Order 22 Rule 4 arises in this case.

(4) It is Order 22, Rule 2 that applies in such cases. That rule reads thus:

"Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants."

It is admitted by the plaintiff that in this case no entry was made by the court on the record to the effect that the suit survived against the 2nd defendant after the death of the 1st defendant. The question for consideration is what the effect of this omission is so far as the decree is concerned. Will the decree in such cases be a nullity?

(5) Reliance was placed by the learned advocate for the appellant on a ruling of this Court reported in 'ITHAPPIRI MATHAI v. SRI DEVI ANAHARJANAM', 1951 Ker L T 144. That was a suit instituted against a Namboodiri Illom. The 1st defendant who was the karnavan of the illom died during the pendency of the suit and no one was brought on record as his legal representative. The next senior member of the Illom was already on the array of parties but he was not brought on record as the karnavan of the illom and the suit was decreed. Two members of the Illom brought a suit to set aside the decree and execution proceedings alleging, among other grounds, that the decree was not validly obtained against the Illom. It was held that

"as long as the karnavan of the illom was not brought on record as such after the death of the 1st defendant, in the eye of law there was no representation of the illom in the suit and so the decree obtained cannot be valid and binding on the illom."

The question whether the decree was a nullity was not considered in that case. What was held in that case was that the decree was not valid so far as the illom was concerned as it was not obtained against the karnavan as such. The validity of the decree was questioned in a fresh suit by persons who were not parties to the decree. In the present case, the 2nd defendant who is a party to the decree is con-

tending in execution that the decree is a nullity and that it is not binding on him. We do not think that the decision in '1951 Ker L T 144' is an authority for this position.

(6) The question for consideration in this case is whether the omission on the part of the court to make an entry on the record to the effect that the legal representative of the deceased defendant was one of the surviving defendants in the case will make the decree subsequently passed a mere nullity. Order 22, rule 2 requires that the court should cause an entry to be made on the record to the effect that the suit survived against the surviving defendant or defendants. It is not necessary to implead the persons against whom the suit survives as the legal representative of the deceased defendant. It has been held in various cases that when the legal representative of a deceased defendant is already on the array of parties it is not necessary that an application should be filed for substituting him as the legal representative of the deceased defendant. 'DAWLOO MA v. KARNAM GHOWDAPPA', AIR 1930 Mad 579; 'SANKRU v. BHOJU', AIR 1936 Pat 548; 'HIRMAL v. SUNDAR SINGH', AIR 1933 Lah 710; 'NARANLAL v. SHIVA PRASAD', AIR 1940 Bom 259; 'NANKOO AHIR v. BHAGELU AHIR', AIR 1929 All 347 (1); 'MT. LAXMI BAI v. AMRITLAL', AIR 1933 Nag 95; 'KANAKMAL v. UDAI CHAND', AIR 1951 Ajmer 64(1) are some of the cases in which the law was laid down as stated above.

According to the wording of Rule 2 of Order 22, it is the duty of the court to make an entry on the record on the death of a defendant that the suit survived against one or more of the surviving defendants. Of course when a defendant dies and the suit survives against one or more of the surviving defendants the court has to be apprised of the fact so that the court may make the entry on the record as enjoined by rule 2 of Order 22. Under Article 609 of the Travancore Civil Courts' Guide

> "a written intimation made to the court that a party to the suit is dead and that no fresh persons need be impleaded. the party's heirs being already parties to the suit, shall be treated as a petition"

and court-fee paid accordingly. That rule relates only to the court fee to be paid when a written intimation is made to the court. The Civil Procedure Code does not provide for any application being made in such cases. In some of the cases mentioned above, it was held that oral intimation will be sufficient; vide 'AIR 1930 Mad 579 and AIR 1936 Pat 548'. There is nothing in the Code to support the view that the failure to give the intimation and the consequent omission on the part of the Court to make the entry as required by Rule 2 of Order 22 will make the decree a nullity. That may be a ground for setting aside the decree in appropriate proceedings by the legal representative of the deceased defendant if he is able to make out that he has been prejudiced by the omission on the part of the court to make the entry on the record as required by the rule. But we do not think that party to the decree who is the legal representative of the deceased defendant can contend in execution that the decree is a nullity.

(7) It was brought to our notice that in this case after the suit was decreed the 2nd defendant executed a gift deed in respect of the decree-schedule properties in favour of his wife who subsequently mortgaged the same to a stranger and that in the mortgage deed a sum of Fs. 5000 was recited for payment towards this decree debt. The document was presented for registration by the 2nd defendant himself as mukthiyar holder of his wife. The mortgagee paid Rs. 200/- on 24-4-1120 and Rs. 150/- on 3-5-1120 towards the decree debt. Subsequently, the decree-schedule properties were sold by the donee to three persons and one of the vendees paid 2706 fanams towards this decree debt. Thus it will be seen that the 2nd defendant has treated the decree as one valid and binding on him.

(8) For the above reasons, we hold that the decree in this case is not a nullity. We therefore confirm the order of the lower courts and dismiss this Second Appeal with costs.

V.B.B. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 355

KOSHI AND GOVINDA PILLAI JJ.

Valliamma Malu Pillai, Appellant v. Umathanu Pillai, Respondent.

Civil Misc. Appeals Nos. 292 and 304 of 1951, D/- 6-12-1951.

(Travancore) Nanjinad Vellala Act (6 (VI) of 1101), S. 17 — Scope.

It cannot be said that S. 17 is intended to cover cases where the widow or widows co-exist with the mother of the deceased when the succession opens. When there are no lineal descendants the section entitles the widow to enjoy the whole of the intestate's property until her death or re-marriage without any power of alienation. (Para 3)

Advocate-General T. N. Subramonia Iyer, for Appellant; N. Varadaraja Iyengar, for Respondent.

JUDGMENT: These two civil miscellaneous appeals arise from a consolidated order passed by the learned District Judge of Nagercoil on two applications for the grant of succession certificates. One Thiraviam Pillai, a Nanjinad Vellala, died on the 9th 'Chingom' 1125 leaving a childless widow and a brother. To collect certain amounts due to the deceased the widow as also the brother made two separate applications each claiming to be the heir of the deceased. The widow's application which is succession No. 5 of 1125 comprised three items while the brother's application which is Succession No. 1 of 1950 related to items 1 and 3 in the widow's application and two other outstandings in favour of the deceased. Item 2 in the widow's petition represents the gratuity amount due from the Government.

Thiraviam Pillai was a Government servant and he died in harness. The court allowed a certificate to be granted to the widow in respect of that item. As for the other items of debts the Court took the view that the widow had no right to them as the brother was the sole heir of the deceased. Accordingly the brother's application for the grant of the certificate was allowed. The widow has hence preferred these appeals. It was stated that two appeals have been preferred since there were two applications before the lower court.

(2) The court allowed the brother's application as in its view the Nanjinad Vellala Act VI (6) of 1101 contained no provision as to in-

heritance and succession when an intestate male died leaving a childless widow and a lineal descendant or descendants of the mother and the mother did not survive him. Accordingly the saving provision in section 34(b) was invoked and applying the pre-existing law the Court held that the brother is the heir.

(3) We are afraid the learned Judge has taken a very narrow view of section 17 of the Nanjinad Vellala Act and also omitted to notice section 20 and the implications thereof. Section 17 reads as follows:

"On the death of an intestate male leaving him surviving no children or the lineal descendants of deceased children but only his widow or widows and his mother, the widow or widows shall enjoy the whole of his property until her or their death or remarriage without any power of alienation, provided, however, that if the income from the property is insufficient even for bare maintenance, the widow or widows may alienate such property. On the death or remarriage of the widow or widows, the property shall devolve on the mother."

Though the section is not very happily worded we are unable to share the view the learned Judge holds that the section is intended to cover cases where the widow or widows co-exist with the mother of the deceased when the succession opens. When there are no lineal descendants the section entitles the widow to enjoy the whole of the intestate's property until her death or re-marriage without any power of alienation and it further provides that if the mother survives the widow or widows the property shall devolve on her.

To interpret the section as meaning that the widow would get nothing when the intestate's mother does not survive him is perhaps, though not unwarranted by the language of the section, opposed to its intendment. A perusal of Chapter IV dealing with intestate's succession would show that the provision for the widow or widows of a deceased male always comes next to that for his children or the lineal descendants of the children and before all other persons treated as heirs are thought of. Further, section 20 makes it clear that a brother would immediately succeed to the properties of a deceased male only when none of the heirs mentioned in sections 15 to 19 survive him (the deceased). Section 20 is in these terms:

"On the death of an intestate male leaving him surviving none of the heirs mentioned in Sections 15 to 19, his property shall devolve on his mother's lineal descendants."

The heirs mentioned in sections 15 to 19 are the children, the lineal descendants of deceased's children, the widow or widows, the mother and the father. Assuming section 17 is not clear enough under section 20 the brother cannot succeed so long as the widow is alive. If this section had been kept in view the learned Judge would certainly not have resorted to the saving clause (b) of section 34.

(4) The widow is hence a preferential heir to the brother though her right to the deceased's property is not absolute. We are here concerned with fluid assets, to wit, certain outstandings due to the deceased and under the law governing the parties the widow is entitled to realise those outstandings and to use them during her lifetime. She must however leave the corpus to the next heir, that is, the brother. In this view of the law, a certificate to collect items 1 and 3 in her application has to be granted to her provided she would furnish security to the satisfaction of the lower court to make the amounts available to the brother on her death. As the widow makes no claim with respect to the other two items mentioned in the brother's application no interference with the lower court's order regarding them is called for.

(5) To provide for all eventualities, we will however make a further direction. In case the widow does not take out a certificate within six months from this date after furnishing adequate security the brother will be entitled to move the lower court for a certificate to be issued to him in respect of items 1 and 3 of the widow's petition also provided he would furnish security to the lower court's satisfaction for the interest on these amounts till the widow's death at such rate as the lower court may deem fit.

(6) The appeals are allowed to the extent indicated above. In the circumstances of the case we make no order for costs.

V.R.B. Order accordingly.

A. I. R. 1952 TRAVANCORE-COCHIN 356

KOSHI AND GOVINDA PILLAI JJ.

Nanikutti Pisharasya, Appellant v. Anthoni, Respondent.

Second Appeal No. 109 of 1124, D/- 13-8-1951.

Cochin Verumpattamdars Act (8 (VIII) of 1118), S. 5 (2) (amended by Amending Act (17 (XVII) of 1120) — Cocoanut if major produce — Burden of proof — Point of time of determining.

In order to enable the plaintiff to take advantage of S. 5 (2), it must first be established by him that cocoanut is the major produce of the holding. The point of time with reference to which the question whether cocoanut is the major produce of the holding has to be decided is the date of the demise and not the date when 'pattom' is claimed. (Paras 3 and 4)

V. Sankara Menon and M. Narayana Menon, for Appellant; P. Raman Menon and R. Kochukrishnan, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras
S. A. No. 33 of 1124 (Cochin) 3

KOSHI J.: There is no substance in this second appeal preferred by the plaintiff.

(2) The suit was for recovery of arrears of pattom due as per the terms of a registered lease deed Ext. A dated 30-9-1116 and according to the plaintiff a portion of the pattom for 1119 and the pattom due for the first half of 1120 were in arrears. The suit was instituted in Dhanu 1120 when two out of the four instalments per year had already fallen due. The annual pattom fixed by the lease deed is Rs. 24-6-0 and a bunch of banana for Onam. Admittedly, the defendant had paid an amount of Rs. 15 towards the pattom due for 1119. Before the trial court, there was some controversy whether there has been a tender of the subsequent arrears. That however does not concern us here in the second appeal. The entire arrears due according to the defendant's contention had been paid into the court.

The real dispute in the case is, as the lease is of garden lands whether the plaintiff was entitled to take advantage of the provision enacted by S. 5(2) of the Cochin Verumpattamdars Act VIII (8) of 1118. That provision as originally enacted was as follows:

"Where cocoanut is the major produce of a garden land and the pattom fixed therefor under the contract of tenancy is payable in money, it shall be obligatory on the part of the 'verumpattomdar' to give and the lessor to accept the 'pattom' accruing due after the commencement of this Act in kind computed on the basis of the market value of cocoanuts prevailing on the date of the contract of tenancy or the money value thereof computed at the market rate prevailing on the date on which such pattom accrues due."

This provision has since been amended by Act XVII (17) of 1120 dated 14th Mithunom 1120 and with the amendment the provision read thus:

"Where cocoanut is the major produce of a garden land and the pattom fixed therefor under the contract of tenancy is payable in money, it shall be obligatory on the part of the verumpattamdar to give and the lessor to accept the pattom accruing due after the commencement of this Act in kind computed on the basis of the average market value of cocoanuts for a period of twenty years prior to the date of the contract of tenancy or the money value thereof computed at the market rate prevailing on the date on which such pattom accrues due."

There are certain provisos added to it by the amendment Act but they are not material for the purpose of this second appeal. The Verumpattamdars Act now in force contains no provision for payment of pattom in kind. According to the plaintiff S. 5(2) as amended has no application here while the defendant's case is that S. 5(2) itself has no application but if it has application it is only the provision as amended that could apply and not the original provision. In the view we take of the case, the dispute as to which provision applies does not at all arise.

(3) In order to enable the plaintiff to take advantage of S. 5(2), it must first be established that cocoanut is the major produce of the holding. The trial court which held that the plaintiff was entitled to the benefit of the provision did not even advert to this aspect. Before the lower appellate Court there was a sharp controversy whether the point of time with reference to which the question whether cocoanut is the major produce of the holding has to be decided is the date of the demise or the date when 'pattom' is claimed. The lower appellate Court reversed the Munsiff's decision that the plaintiff was entitled to the benefit of the provision and in our opinion decided the question referred to above rightly when it held that the material date was the date of the demise. If the provision as originally stood gave any room for doubt about it the provision as amended has dispelled it altogether. The said view was taken recently by a Bench of this Court in 'S. A. 33 of 1124 (Cochin)'.

(4) The holding consists of four items comprising an area of 6 acres and 16 cents of garden lands. As mentioned, the 'pattom' fixed is Rs. 24-6-0 and one bunch of banana. The 'pattom chit' shows that on item 3 there was one cocoanut tree and that on item 4 there were 12 cocoanut trees. Admittedly, when Ex. A came into existence, the first three items were outstanding under an earlier registered lease deed which included three other items of property also. That lease deed is Ext. 11, dated 1-11-1093. Item 3 of the present lease deed is item 1 in Ext. 11. In 1093 there was only one cocoanut tree in all the six items taken together and that was on the present item 3. The pattom fixed there is Rs. 22-12-10 and the defendant's contention that the proportionate 'pattom' for the three items included in Ext. A came to Rs. 10-10-0 has not been disputed by the plaintiff.

The fourth item included in Ext. A was on its date outstanding in the possession of defendant himself under an oral lease on a 'pattom' of Rs. 11-12-0. The defendant was therefore paying Rs. 22-6-0 to the plaintiff when Ext. A was executed and under which the 'pattom' is enhanced by Rs. 2 with the result that Rs. 24-6-0 came to be fixed as the 'pattom'. These facts as mentioned by the lower appellate court are 'prima facie' sufficient to show that cocoanut was not the major produce of the holding in 1116. The burden to show that it was is on the plaintiff and there is no evidence worth the name to come to a conclusion different from that arrived at by the lower appellate Court.

(5) The learned Counsel for the appellant referred to an account furnished by a commissioner deputed to conduct a local inspection of the properties. Either Court below has not referred to that report nor has the commissioner been examined. It is clear what the commissioner was trying to find out was whether the cocoanut was the major produce of the holding at the time of the suit. That was the basis on which the plaintiff fought her case in the lower appellate court & now since in S. A. 33/1124 a different view was taken the attempt of the Counsel was to show that there was evidence in the case that the cocoanut was the major produce even in 1116 when the plaint demise was made. Ext. A itself shows the 'pattom' was fixed with reference to the land and the lessor's trees on the holding. If the tenant has since by his labours increased the productive capacity of the land and what was originally barren or waste land has been converted into cocoanut gardens by him the lessor cannot seek to take advantage of the same for the purpose of S. 5(2) in its original form or as amended in 1120.

(6) The second appeal therefore fails and we dismiss it with costs.

V.R.B. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 357

SANKARAN AND GANGADHARA MENON JJ.

Padmanabhan Nadar Paramu Nadar, Appellant v. Kumaran Satyanesan, Respondent.

A. S. No. 403 of 1950, D/- 7-9-1951.

Travancore Civil P. C., S. 8 (as amended by Act XXV (25) of 1121) — Retrospective effect.

The amendment of the section has not in any way destroyed or curtailed the plaintiff's rights under the decree. His right to realise the decree amount from the judgment-debtor and his properties remains unaffected. But a change in the procedure to be followed in the matter of executing the

decree has been affected by section 8 as amended by Act XXV of 1121. It is a well-recognised principle that such changes in the law of procedure are retrospective in effect. Consistent with this principle it has to be held that the procedure prescribed by section 8 as amended is applicable not only to proceedings in execution started after the amended section came into force but also to the execution proceedings which were initiated prior to the amendment of the section and which were pending on the date when the amendment came into force. The Court could proceed with any application in furtherance of execution only if the required sanction was also produced along with the application. But the Court is not justified in totally rejecting the proclamation schedule filed by the decree-holder. The new procedure insisting on the production of Government sanction along with the application to proceed in execution against kandukrishy lands was brought into force during the pendency of the execution proceedings started in accordance with the procedure that was till then in force. In such a situation, the decree-holder should have been allowed a reasonable time to obtain and produce the Government sanction as required by section 8 and the case should have been adjourned for that purpose. The Travancore Civil Procedure Code has now been replaced by the Indian Civil Procedure Code which does not contain any provision similar to that contained in section 8 of the Travancore Code. Thus, the decree-holder is now entitled to proclaim and sell the attached properties for realising the decree amount due to him by following the procedure prescribed by the Indian Code and he is not obliged to produce any Government sanction in respect of kandukrishy lands. The judgment-debtor is not in any way prejudiced by the new situation brought about by the Indian Civil Procedure Code having been made applicable to the State of Travancore. (Para 2)

M. Madhavan Nair, for Appellant; T. K. Narayana Pillai, for Respondent.

SANKARAN, J.: The plaintiff decree-holder is the appellant. In execution of the decree in this case, certain properties belonging to the defendant were attached as early as in the year 1112. The defendant's son had preferred a claim against that attachment. The execution court dismissed the claim petition. The fresh suit instituted by the claimant to set aside that order and to have his right to the attached properties established also went against him. During the pendency of these proceedings the execution of the decree in the case had been stayed. On 23-6-1116, the decree-holder filed E. P. No. 200 of 1116 seeking to recover the decree amount by selling the attached properties and by the issue of warrant against the judgment-debtor. While the execution proceedings were in progress on the basis of this petition the 1st defendant filed an objection petition and applied for sanction to admit the objection petition.

The objection petition was accordingly admitted and the decree-holder was called upon to answer the objection raised by the 1st defendant. On 24-1-1124, the decree-holder filed a statement in answer to the objections raised by the 1st defendant. By a special petition filed on 27-2-1124, the 1st defendant requested the court that the plea of limitation raised by him may be considered and decided in the first instance. Accordingly, arguments on the question of limitation were heard and on 30-5-1124 the execution court upheld the defendant's plea of limitation and dismissed the execution petition as barred by limitation. The decree-holder took the matter in appeal to the High Court in A. S. No. 361/1124. That appeal was allowed and it was held that the execution petition dated 23-6-1116 was only a continuation of the prior execution petition and that there was no bar of limitation for proceeding with the execution of the decree in the case. After the records were received back in the execution court, the decree-holder filed a petition on 3-12-1949 praying that the attached properties may be proclaimed and sold for the realisation of the decree amount.

On 31-1-1950, the 1st defendant again filed a petition raising several objections to the proclamation schedule filed by the decree-holder and praying for a rejection of the proclamation schedule. One such objection was that the properties proclaimed for sale were kandukrishi lands and, as such, these properties should be proceeded against in execution only after obtaining the sanction of Government as contemplated by section 8 of the Travancore Civil Procedure Code as amended by Act XXV of 1121. No such sanction had been obtained and produced by the decree-holder in this case. The execution court therefore accepted the contention of the 1st defendant and by the order dated 23-3-1950 allowed his objection petition. The present appeal is against that order.

(2) As already stated, the decree-holder is proceeding to sell the attached properties on the basis of the execution petition filed on 23-6-1116 and which is still pending. The law of procedure as it stood at the time of filing that execution petition did not insist on the production of any Government sanction along with the execution petition to enable the decree-holder to bring to sale the judgment-debtor's interest in the kandukrishi lands which had been attached in execution of the decree. The scope of Section 8 of the Travancore Civil Procedure Code as it stood at that time was limited to the institution of suits. The section was as follows:

"No Civil court shall take cognisance of any suit relating to Pensions, Kandukrishi, Viruthi, or service Inam lands, or to any benefits arising out of such lands, unless the plaint is accompanied by an order of OUR GOVERNMENT permitting the plaintiff to seek redress in Civil Courts."

But subsequently this section was amended by Act XXV of 1121 so as to insist on the production of the Government sanction contemplated by the section along with applications in execution also, when such applications relate to pensions and to the lands of the category specified in the Section. The amended section stands as follows:

"No Civil Court shall take cognizance of any suit or 'execution proceedings' relating to pensions, to Kandukrishy, Viruthi, or Service Inams lands, or to any benefits arising out of such lands, unless the plaint or 'execution

application' is accompanied by an order of OUR GOVERNMENT permitting the plaintiff or 'the decree-holder' to seek redress in Civil Courts."

This amendment came into force on 17-12-1121. It is contended on behalf of the decree-holder-appellant that the procedure prescribed by the amended section can be insisted on only in respect of execution applications presented subsequent to 17-12-1121 and that it cannot affect the proceedings in this case which are being conducted on the basis of the execution petition filed on 23-6-1116.

The amendment of the section has not in any way destroyed or curtailed the plaintiff's rights under the decree in this case. His right to realise the decree amount from the judgment-debtor and his properties remains unaffected. But a change in the procedure to be followed in the matter of executing the decree has been affected by Section 8 as amended by Act XXV of 1121. It is a well-recognised principle that such changes in the law of procedure are retrospective in effect. Consistent with this principle, it has to be held that the procedure prescribed by Section 8 as amended is applicable not only to proceedings in execution started after the amended section came into force but also to the execution proceedings which were initiated prior to the amendment of the section and which were pending on the date when the amendment came into force. The court could proceed with any application in furtherance of execution only if the required sanction was also produced along with the application. In the present case, the proceedings initiated by the execution petition dated 23-6-1116 were pending when the amended section 8 came into force. It was long after such amendment that the decree-holder applied on 3-12-1949 that the attached properties may be proclaimed and sold. Necessarily, therefore, the execution court could proceed to proclaim and sell the kandukrishy lands included in the proclamation schedule only on production by the decree-holder of the sanction of Government as contemplated by the section.

To this extent the view taken by the lower court is correct. All the same it cannot be said that the court was justified in totally rejecting the proclamation schedule filed by the decree-holder. It has to be remembered that the new procedure insisting on the production of Government sanction along with the application to proceed in execution against kandukrishy lands was brought into force during the pendency of the execution proceedings in this case started in accordance with the procedure that was till then in force. In such a situation the decree-holder should have been allowed a reasonable time to obtain and produce the Government sanction as required by section 8 and the case should have been adjourned for that purpose. It is stated on behalf of the decree-holder that he had already applied to Government for the issue of the required sanction. The production of such sanction has now become unnecessary in view of another change that has taken place in the law of procedure.

The Travancore Civil Procedure Code has now been replaced by the Indian Civil Procedure Code which does not contain any provision similar to that contained in Section 8 of the Travancore Code. Thus, the decree-holder is now entitled to proclaim and sell the attached properties for realising the decree amount due to him by following the procedure prescribed by the Indian Code and he is not obliged to produce any Government sanction in respect of Kandukrishy lands. On behalf of the respondent, it is argued that his rights will be prejudicially affected by allowing the decree-holder to take advantage of the new situation brought about by the Indian Civil Procedure Code being made applicable to this State also. We see no force in this contention. It cannot be said that when Section 8 of the Travancore Civil Procedure Code was amended by Act XXV of 1121 any special right had been created in favour of the judgment-debtor in this case. His liability under the decree remained the same as before. The only effect of the amendment of Section 8 was to insist on a particular procedure being followed by the decree-holder in the matter of enforcing such liability against the defendant.

Just as the decree-holder was obliged to follow the new procedure prescribed by Section 8 as amended, he is entitled to be relieved of such an obligation, when the matter is to be governed by the Indian Civil Procedure Code. Even if the Indian Civil Procedure Code had not been made applicable to this State the decree-holder could have enforced the decree against the defendant after obtaining and producing the necessary sanction under Section 8 of the Travancore Code. Viewed in all these aspects, it is clear that the respondent-judgment-debtor is not in any way prejudiced by the new situation brought about by the Indian Civil Procedure Code having been made applicable to this State.

(3) In the result, this appeal is allowed and in modification of the order of the lower court the decree-holder is allowed to proceed with the execution of the decree in accordance with the law in force and in the light of the observations made above.

D.H. Appeal allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 359

SUBRAMANIA IYER AND VITHAYATHIL JJ.

Sivjnanam Abraham and another, Appellants v. Mathevan Pillai Bhoothalingam Pillai and others, Respondents.

Second Appeal No. 118 of 1124, D/- 24-7-1951.

(a) Civil P. C. (1908), S. 11 — Suit for recovery of rent and possession before expiry of lease — Decree refusing possession on ground that there was no forfeiture clause in lease deed and that the lease was subsisting — Subsequent suit after determination of lease for possession held not barred, cause of action being different. (Para 6)

Anno: Civil P. C., S. 11, N. 72.

(b) T. P. Act (1882), S. 108 (q) — Determination of lease — Law implies obligation of tenant to surrender possession.

The landlord's claim for recovery of possession of the properties from a tenant on the determination of the tenancy need not be based on any contract expressly entered into in that behalf. The right of the landlord to get, and the liability of the tenant to surrender possession of the properties leased, on the determination of the tenancy, is inherent in the very relationship of landlord and tenant and will be implied by the

law. Section 108 (q) has recognised this obligation on the part of the tenant: (1869) LR 4 QB 170, Rel. on; 8 Bom 160, Ref. (Para 7)

Anno: T. P. Act, S. 108, Cl. (q) N. 1.

(c) T. P. Act (1882), S. 116 — Mortgagor in possession as lessee from mortgagee—Transfer of possession by mortgagor — Lessee without transferring interest as lessee — No privity of estate is created between lessor-mortgagee and transferee — Transferee holding over after expiry of lease is liable for mesne profits for use and occupation.

Where the mortgagor of the properties is in possession of the mortgaged properties as a lessee from the mortgagee, mere transfer of possession by the lessee to third person without transferring his interests as lessee to the transferee will not make the transferee liable to the landlord as the transfer does not create an estate in the transferee nor is possession necessary to fasten liability on the transferee if the lessee transfers his interests as lessee. Transfer in such a case is a transfer of ownership of property possessed by lessee antecedent to the lease. To fasten liability on account of the principle of privity of estate on the transferee the transfer must be of the leasehold whether accompanied or not accompanied by possession. AIR 1939 PC 14, Rel. on.

The original tenant or any person deriving possession from him who continues to hold over after the expiry of the terms of the lease without the consent of the landlord would be liable to the landlord for damages for use and occupation. If the continuance in possession is against the landlord's dissent, the party in possession would be liable for mesne profits subject to the bar of limitation. The transferee from lessee cannot even plead want of notice of the lessor's claim in this regard assuming that knowledge is necessary or material. (Paras 8, 11)

Anno: T. P. Act, S. 116, N. 13.

N. Varadaraja Iyengar, for Appellants; T. R. Subramonia Iyer, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('39) 66 Ind App 50: AIR 1939 PC 14 8
('84) 8 Bom 160 7
(1869) LR 4 QB 170: (38 LJQB 73) 7

SUBRAMANIA IYER J.: Defendants 2 and 3 are the appellants in this Second Appeal. Appellants 2 to 8 in the lower appellate Court who are the legal representatives of the deceased appellant there (Plaintiff) are respondents 1 to 7 here. They have filed a memorandum of objections. The 1st defendant is the 8th respondent.

(2) The 1st defendant who was the owner of the properties shown in the schedule attached to the plaint gave a possessory mortgage thereof to the plaintiff under Ex. A dated 27-4-1106. On even date he took the properties back on lease for a period of 3 years certain and executed Ex. B in favour of the plaintiff, fixing an yearly rent and providing for half-yearly payment. Ex. B creates a charge over the 1st defendant's interests over the properties for the rent payable under the lease. On 18-8-1107, the first defendant assigned his ownership over the properties to the second defendant under Ex. J, without mentioning the fact that he was holding the properties as a lessee. The 2nd defendant, in his turn, assigned the rights obtained by him under Ex. J to the 3rd defendant under Ex. H dated 26-1-1115.

(3) On 4-10-1107, the plaintiff brought a suit impleading defendants 1 to 3 and another party for arrears of rent for the years 1106 and 1107 as also for recovery of possession of the properties on the ground that the sale deed by the 1st defendant to the 2nd defendant was brought about in collusion between defendants 1 to 3 on a deliberate suppression of the fact that the 1st defendant was holding as lessee with a view to defeat the rights of the plaintiff. Relief in respect of the rent after the date of the sale deed was claimed also against defendants 2 and 3 on the ground that the sale in the name of the 2nd defendant was really for the benefit of the 3rd defendant. Ex. D is the judgment in that case which was pronounced on 15-4-1108 and Ex. VI is the plaint therein. A decree was given for arrears of rent against the 1st defendant. No relief was granted against defendants 2 and 3. The prayer for recovery of possession of the properties was refused on the ground that Ex. B does not stipulate for forfeiture of the term (which expires only on 27-4-1109) on default of payment of rent and the suit having been brought before the term expired, that is, during the subsistence of the lease, it was premature.

(4) The present suit (O. S. 182/116 of the District Munsiff's Court, Nagercoil) was brought on 4-3-1116 for recovery of possession of the properties on foot of the lease as also for recovery of arrears of rent from 1108 onwards and for future rent, seeking to recover the entire rent from defendants 1 to 3 as also by sale of the equity of redemption over the properties subject to the mortgage in his favour. The 3rd defendant alone contested. He resisted the claim for recovery of possession of the properties on the ground that it was barred by 'res judicata' on account of the decision in the prior suit (Ex. D). The relief claimed against defendants 2 and 3 for arrears and future rent was repudiated. The allegation made in the plaint that the assignment taken in the name of the 2nd defendant was for and on behalf of the 3rd defendant was also denied. The Munsiff granted a decree for recovery of properties and rent both, arrears and future, against the 1st defendant but refused the relief that was asked for personally against defendants 2 and 3. In respect of the relief for recovery of arrears of rent by a charge upon the properties it was allowed, but was confined to one year, that is in the third and last year of the lease. The Munsiff decreed costs against the 1st defendant and directed that the 3rd defendant should bear his costs.

(5) The plaintiff filed an appeal (A. S. 152/1122) in the District Court of Nagercoil against that part of the decree that was against him and the 3rd defendant filed a memorandum of objections regarding the relief granted by the Munsiff for recovery of possession of, as also in respect of the charge over, the properties allowed by the Munsiff. The District Judge dismissed the memorandum of objections as also the appeal except in respect of the personal relief against defendants 2 and 3. He

granted personal relief against the 2nd defendant for arrears of rent from 18-8-1107 to 26-1-1115, that is for the period for which the title to the properties vested in him, and against the 3rd defendant from 26-1-1115 when he purchased the properties. The 3rd defendant was made liable for future rent also. The order for costs passed by the Munsiff was confirmed. As regards the costs in appeal, the learned Judge directed that the parties should bear their respective costs. The plaintiff-appellant died pending the appeal in the District Court and his legal representatives were brought on record as appellants 2 to 8.

(6) Learned counsel for the appellants urges two points in this Second Appeal. One is that the courts below erred in granting the relief for recovery of possession of the properties and the other that the District Judge erred in granting personal relief against defendants 2 and 3 for arrears of, and future rent. The first point is sought to be sustained by stating that Ex. D, the judgment in the previous case, operates as 'res judicata' and that even if the claim be not so barred, there being no undertaking in Ex. B, on foot on which the suit is brought, to deliver possession back to the lessor on the expiry of the term the claim for recovery cannot be allowed. The reason for the dismissal of the earlier suit, as already stated, was the subsistence of the tenancy. The judgment also says that the document evidencing the lease does not provide for a forfeiture of the term on account of arrears of rent. This suit having been filed after the expiry of the term of the lease and the determination of the lease being the cause of action, the plea of 'res judicata', which is based on the decision in the prior suit which refused recovery of possession on account of the subsistence of the lease, has no foundation and has only to be stated, to be rejected, nor has the second ground on which recovery of the properties is resisted, any better claim for consideration.

(7) The landlord's claim for recovery of possession of the properties from a tenant on the determination of the tenancy need not be based on any contract expressly entered into in that behalf. The right of the landlord to get and the liability of the tenant to surrender possession of the properties leased, on the determination of the tenancy, is inherent in the very relationship of landlord and tenant and will be implied by the law. This is known as the rule in 'HENDERSON v. SQUIRE', (1869) L R 4 Q B 170.

"The duty of the tenant upon the determination of the tenancy..... ....is simply to yield up peaceable and complete possession of the premises demised to him together with all fixtures except those which he is entitled to remove... .....This duty will be implied in law if not expressed in the contract between the parties and the tenant will not discharge the duty by merely going out of possession unless he restores possession to the landlord". Foa on the Relationship of Landlord and Tenant, 6th Edn. P. 838.

"A lease usually contains a covenant on the part of the lessee to deliver up the premises on the determination of the term. In the absence of such a covenant or of any express stipulation, the tenant is under an implied contract to restore possession to the landlord." The complete Law of Landlord & Tenant by Redman, edited by Hill, 8th Edn. (1939) p. 459.

See also 'VENKATESH NARAYAN v. KRISHNAJI ARJUN', 8 Bom 160. Section 108 (q) of the Transfer of Property Act has recognised this obligation on the part of the tenant. Indeed one does not come across an instance of this plea having been ever seriously put forward.

(8) The second point raised in the Second Appeal relates to the personal liability of the appellants for the arrears of, and future rent claimed in the plaint. The learned Judge decreed the claim against the appellants for the reason stated in paragraph 4 of his judgment thus:—

".....The 1st defendant has sold the property to 2nd defendant in 1107 and he released his right to 3rd defendant on 26-1-1115. So they are virtually assignees of the lessee. There is a privity of estate between them and the lessor. A covenant to pay rent runs with the land and will be binding upon the assignee, though the liability does not extend to rents accrued due before the date of assignment. Since 2nd defendant purchased all the rights of 1st defendant by Ex. J. and was in possession till 1115 the prior lease is binding on him, and he is personally liable for the rent during the period he was in possession of the property. So also the 3rd defendant will be liable personally for the rent from 26-1-1115 till delivery subject to the limit under O. 20, R. 12. The fact that they were ignorant of the lease is of no consequence....."

Every part of this reasoning is erroneous. The lease evidenced by Ex. B terminated by the efflux of time limited thereby on 27-4-1109. Even before the expiry of term, the lessee (who in this case happened even before the lease to be the owner of the properties) assigned that ownership alone to the 2nd defendant and put him in possession. The 2nd defendant in his turn assigned his interests in favour of the 3rd and put the latter in possession in Chingom 1115. Thus, from the time of the expiry of the period of the lease till the date of suit, possession continued to be with the 2nd and 3rd defendants as aforesaid without their being in any manner connected with the lease. The case of the plaintiff in the prior suit was that the non-reference to the 1st defendant's leaseship in the transfer made by him in favour of the 2nd defendant was deliberate with a view to defeat him. It is thus clear that the transfer made by the 1st defendant was not of his rights as lessee at all, though possession was delivered to the transferee. Mere transfer of possession by a lessee, without transferring his interests as lessee to a transferee will not make the transferee liable to the landlord as the transfer does not create an estate in the transferee nor is possession necessary to fasten liability on the transferee if the lessee transfers his interests as lessee. To fasten liability on account of the principle of privity of estate on the transferee the transfer must be of the leasehold whether accompanied or not accompanied by possession. This will be the position when the lessee has an estate to transfer (see 'RAM KINKAR v. SATYA CHARAN', in 66 Ind App 50: AIR 1939 PC 14.

(9) A lessee having been in possession after the termination of the lease is called 'a tenant at or on sufferance'.

"One who enters on land by a lawful title and after his title has ended, continues in possession without obtaining the consent of the person then entitled, is said to be a tenant at sufferance." Coke on Littleton 57b.

"A tenancy at sufferance does not arise upon the holding over by one whose title was created by act of law, and there can be no tenancy at sufferance against the Crown". Ibid

"The recognition of a tenancy at sufferance in other cases probably arose from a desire to prevent the person holding over from being a disseisor, and therefore in a position to acquire a title by adverse possession. The abolition of the old doctrine of adverse possession has rendered this use of the tenancy obsolete." Halsbury's Laws of England, Hailsham Edition, Vol. XX. P. 122 Footnote (1).

"A tenant at sufferance has possession but no privity of estate." Ibid, Footnote (m)

"A tenancy at sufferance is merly a fiction to avoid continuance in possession operating as a trespass. It therefore cannot be created by contract and arises only by implication of law when a person who has been in possession under a lawful title continues in possession after that title has determined without the consent of the person entitled".

"The Madras High Court has observed that the fiction has no place after the enactment of the Transfer of Property Act but the Act, as already observed, is not exhaustive and the term is a useful one to distinguish a possession rightful in its inception but wrongful both in its inception and in its continuance. A tenant holding over after the expiration of his term is a tenant at sufferance. If he holds over against the landlord's consent, he is a trespasser and is liable for mesne profits. A mortgagor left in possession under an English mortgage is a tenant at sufferance and cannot grant a lease without the concurrence of the mortgagee and if he does, the mortgagee can treat the lessee as a trespasser. A tenancy at sufferance does not create the relationship of landlord and tenant, and in a suit for ejectment of a tenant holding over without the landlord's consent limitation runs under Article 139 from the expiration of the term and not from the termination of the tenancy at sufferance." Mulla's T. P. Act, 3rd edn. p. 629.

There was not, nor can there have been a case put forward on behalf of any of the parties that the continuance of possession after the determination of the lease was with the consent of the plaintiff. Indeed, the plaintiff wanted possession even before the expiry of the lease as is evident from the earlier suit filed by him. Under the circumstances obtaining in this case, the possession after the determination of the tenancy by the efflux of the time was not even that of a tenant at sufferance but was that of a trespasser. This case is not complicated by any claim for value of improvements or for other payment which may give rise to other questions for consideration. Even if there had been a tenancy at sufferance, that tenancy is not one that could be transferred.

(10) In this case, there has been no transfer of any tenancy. The transfer was merely of the ownership of the properties possessed by the lessee antecedent to the lease. There not having been even a purported transfer of any tenancy in any manner, nó question of liability based on the principle of privity of estate can possibly arise in this case. The decree passed by the lower appellate court against defendants 2 and 3 based on the principle of privity of estate cannot, therefore, be supported.

(11) This however does not conclude the question of their liability. The lease relied upon by the plaintiff is proved. That he is entitled to get rent from the lessee for the period of 3 years covered by the lease, that is, from 27-4-1106 to 27-4-1109 is not also disputed. The assignment in favour of the 2nd defendant was on 18-8-1107 (Ext. J) at the time when the lease had yet 2 years to run. That assignment, however, not having been of the leasehold, no liability for rent can be fastened upon the transferee, the 2nd defendant for that period. Different considerations prevail in respect of the period after the determination of the lease, when the lessor became entitled to the vacant possession of the properties. The original tenant or any person deriving possession from him who continues to hold over without the consent of the landlord would be liable to the landlord for damages for use and occupation. If the continuance in possession is against the landlord's dissent as is the case here, the party in possession would be liable for mesne profits. Defendants 2 and 3 cannot even plead want of notice of the plaintiff's claim in this regard assuming that knowledge is necessary or material. They are therefore liable for mesne profits of the properties during the period of their respective possession of the properties. The 2nd defendant was in possession between the dates of Exs. J and H, that is from 18-8-1107 to 26-1-1115, and the 3rd defendant was in possession thereafter and they incurred liability for mesne profits for the respective periods of their possession. The plaintiff has not rested his claim for personal relief against defendants 2 and 3 upon any specific ground. Any ground available to them in law and appearing upon the evidence in the case can be relied upon to sustain the relief claimed by the plaintiff. The ground of relief against defendants 2 and 3 for mesne profits can only be subject to the bar by limitation. The suit was filed on 4-3-1116 and the liability can only be for three years next before the suit that is, from 4-3-1113. From that date till 26-1-1115 the 2nd defendant and from 26-1-1115 till date of suit as also until delivery of possession to the plaintiff, the 3rd defendant would be liable for mesne profits. The relief claimed by the plaintiff against defendants 2 and 3 is not at a rate higher than the rent fixed in the lease. There is no case put forward that the rent fixed is in excess of the income available from the properties. Though the plaintiff might have got more if the properties would yield more, such a claim has not been made and, therefore, has not to be considered.

(12) The questions raised in the memorandum of objections relate to the charge claimed

in the plaint over the properties. Ex. B creates a charge only for a period of 3 years. It has already been found that there was no tenancy in the real sense of the term subsequent thereto. The question does not, therefore, arise whether had the tenancy continued, the charge created by Ex. B would be for the term of the lease, subject to which the lessee would hold subsequent to the termination of the original lease by efflux of time. Reliance was placed by the respondents on the fact that a landlord is entitled to a charge on the holding apart from any contract in that behalf. Assuming that the lessor is entitled to such a charge, the claim here made is not for a charge upon the holding but on the rights possessed by the lessee over the properties prior to the lease which does not form part of and in no sense, can be regarded as comprised in, the holding. The claim for the charge over the properties cannot therefore be granted. As regards costs, it appears to us that as both parties have raised untenable claims and contentions, the proper order to make is to direct each party to bear their costs throughout.

(13) The result is that over and above the decree already granted against the 1st defendant by the Courts below, there will be a decree in favour of the plaintiff's representatives (1-7) for recovery of possession of the properties and for mesne profits at the rate claimed in the plaint against the 2nd defendant from 18-8-1107 to 26-1-1115 and against the 3rd defendant from 26-1-1115 to the date of suit and thereafter for three years from date of decree of this Court or till delivery of properties to the plaintiff whichever is earlier. The paddy should be valued at the nirak rate every year when the pattam is payable under Ex. B i.e., in Kanni and Kumbham. The executing court will assess the value. The decree passed by the courts below will be modified in the manner and to the extent above indicated. The S. A. and memo of objections are dismissed.

R.G.D. Order accordingly.

A. I. R. 1952 TRAVANCORE-COCHIN 363

KOSHI AND GOVINDA PILLAI JJ.

Girvadis Kunjuvariathu and others, Appellants v. Chacku Vareethu and others, Respondents.

A. S. No. 324 of 1123 (T), D/- 23-10-1951.

Transfer of Property Act (1882), S. 61 — Consolidation of mortgagees — Deed of further advance.

The plaintiff filed a present suit for redemption of a mortgage. The mortgage was admittedly a usufructuary mortgage relating to plaint items 1 and 2, and another property which was not included in the plaint. The proportionate mortgage amount charged on the property left out was Rs. 49. Provision had been made in the document for the payment of Michavaram to the mortgagor and it was provided that in case the property not included in the plaint had to be surrendered to its Jenmi, then certain other terms would govern the parties. The property was not however redeemed till 1095. The mortgagors then took a further advance of Rs. 1144 in addition to Rs. 49 charged on the property left out so that the total credit given that day was for Rs. 1193. Provision was also made there that in case the item of property not included in the plaint came to be surrendered the amount advanced would be a charge on the plaint properties. It was mentioned by the defendants in their written statement that they had to surrender possession of the third item in the usufructuary mortgage because of a decree of Court. Michavaram was in arrears and such arrears amounted to much more than the mortgage amount at the time the decree was passed in the case.

Held that as the mortgagees could not have obtained any portion of that mortgage amount, they were entitled to claim the whole amount advanced by them under the later document. That amount was a charge on plaint items. 1 and 2. It is now settled law that the mortgagee was entitled to consolidate the two documents and could claim the amount due thereunder before he was compelled to surrender possession of the property: 1946 Trav LR 546 and 1948 Trav LR 612, Foll. (Para 4)

Anno: T. P. Act, S. 61, N. 5.

P. Govinda Menon, for Appellants; N. Varadaraja Iyengar (for No. 1) and T. S. Krishnamurthi Iyer (for No. 6), for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('46) 1946 Trav LR 546 4
('48) 1948 Trav LR 612 4

GOVINDA PILLAI J.: Defendants 1, 2 and 5 to 7 are the appellants. The plaint properties along with another property over which the illom of defendants 10 and 11 had a mortgage right were given on mortgage to Chacku Vareedu, the deceased father of the 1st defendant, grand-father of defendants 2 and 3 and father-in-law of the 4th defendant for Rs. 1210-9-5. The illom of defendants 10 and 11 was the mortgagor and the mortgagee of Ext. 1 dated 17-10-1093 was in possession of these properties after whose death defendants 1 to 4 were in possession and enjoyment of the same. There was a provision relating to the third item of property included in Exhibit 1 but omitted in the plaint that in case the mortgagor's illom had to surrender possession of the mortgage certain deduction would be made in the Michavaram to be paid by the mortgagee. Since the plaintiff had come to understand that the above property had been surrendered to its Jenmi, it was not included in the present suit. The plaintiff had taken a superior mortgage and so he had filed a present suit for redemption of Ext. 1 mortgage.

Defendants 1, 2, 5, 6 and 7 by a joint written statement admitted the mortgage, but contended that in addition to Ext. 1, they were also entitled to get the amount due under a Puravaippa, Ext. 11, that the amount under that came to Rs. 1193 and interest up to a moiety of the principal, that on receipt of the said amount and also another sum of Rs. 300 towards the value of improvements, they were prepared to surrender possession of the property. They also questioned the validity of the superior mortgage relied on by the plaintiff, for according to them, it was not a valid document as it was not executed by the necessary parties. They also stated that over the

item left out in the plaint, the illom of defendants 10 and 11 had only a mortgage right from the Thirunarayanapuram Devaswom, that the said Devaswom had filed a suit O. S. 812 of 1103 for recovery of possession of all the properties covered by the mortgage after setting off the arrears of Michavaram against the mortgage amount, that a decree had been obtained on the same, that the entire mortgage amount was set off against the arrears of Michavaram so that the mortgagee had nothing to get from the mortgagor Devaswom and that pursuant to the decree in that case they had on 29-10-1115 executed a release. Ext. XI in favour of the trustees of the said Devaswom.

One of the trustees was the 10th defendant himself. So they had claimed interest on Ext. 11 amount from 29-10-1115 as provided for in the document itself. Defendants 10 and 11 who filed their written statement more than two months after the other defendants filed their written statement had stated that the mortgagees were incompetent to question the validity of the superior mortgage and that the plaintiff was entitled to a decree as prayed for. The plaintiff by a replication stated that if any other amount was due to the mortgagees from the mortgagor's tarwad they were to realise the same by a separate suit.

(2) The court below found the superior mortgage to the plaintiff to be valid. It also held that the mortgagees were not entitled to claim the amount advanced by them under Ext. 11. So, a decree was passed allowing the plaintiff to recover possession of plaint items 1 and 2 on deposit of Rs. 1161-9-5 towards mortgage amount chargeable under Ext. 1 and also Rs. 20 as value of improvements. The plaintiff was allowed mesne profits at the rate of 150 paras of paddy a year from the date on which the mortgage amount was deposited by the plaintiff. Arrears of Michavaram at the rate of 2½ Edangalies of paddy and eight annas a year were also allowed to be recovered by the plaintiff with interest. The appeal is against this decree.

(3) This appeal came up once for argument before a Division Bench of the High Court. The Court then allowed the appeal by directing the plaintiff to deposit Rs. 1161-9-5 under Ext. 1 and Rs. 1193 under Ext. 11 with 12 per cent. interest from 29-10-1115 the date of Ext. XI release deed till the date of decree and thereafter at 6 per cent. until the date of deposit. The respondent had filed a memorandum of objection claiming additional amount towards mesne profits. That was dismissed. Defendants 10 and 11 then filed an application to restore the appeal to file as they had no opportunity to present their case before the High Court. Though the other respondents had entered appearance this court set aside the judgment passed in appeal as it was seen that the notices to defendants 10 and 11 were not properly served. The appeal has therefore come up again before us.

(4) Ext. 1 is admittedly a usufructuary mortgage relating to plaint items 1 and 2 and another property which is not included in the plaint. The proportionate mortgage amount charged on the property left out was Rs. 49. Provision had been made in Ext. 1 for the payment of Michavaram to the mortgagor and it was provided that in case the property not included in the plaint had to be surrendered to its Jenmi, then certain other terms would govern the parties. The property was not however redeemed till 1095. The mortgagors then took a further advance of Rs. 1144 in addition to Rs. 49 charged on the property left out so that the total credit given that day was for Rs. 1193. Provision was also made there that in case the item of property not included in the plaint came to be surrendered, the amount advanced under Ext. 11 of 1095 would be a charge on the plaint properties and that the executants would also be personally liable for the amount together with 12 per cent interest.

It was mentioned by the defendants in their written statement that they had to surrender possession of the third item in Ext. 1 because of a decree of court though they surrendered it to the Devaswom itself by executing a registered release. The plaintiff in the plaint admitted that item 3 in Ext. 1 had been surrendered. He had no case that the mortgagees were incompetent to surrender possession of the property. Ext. H, the judgment in that case, would show that the illom of defendants 10 and 11 had left the Michavaram in arrears and such arrears amounted to much more than the mortgage amount at the time the decree was passed in the case. Necessarily therefore, Ext. X mortgagees could not have obtained any portion of that mortgage amount, and so they are entitled to claim the whole amount advanced by them under Ext. 11. That amount is a charge on plaint items 1 and 2.

It is now settled law that the mortgagee is entitled to consolidate the two documents and can claim the amount due thereunder before he is compelled to surrender possession of the property. The decisions in 'BHASKARAN MOOTHATHU v. AGNISARMARU NAMBOORI'. 1946 Trav L R 546 and 'KUNJU SANKARAN v. PETER D'CRUZ'. 1948 Trav L R 612 are for this position. This court has adopted the principle laid down in these two rulings in a recent decision in 'A. S. 68 of 1123'. The appellants are therefore entitled to claim the amount due under Ext. 11 also before they could be compelled to surrender possession of the property. It was admitted that the plaintiff had secured possession of the plaint properties by depositing in court the amount decreed by this court in its earlier decision. In that decision there are certain mistakes which are to be corrected. It is not necessary to go into a minute examination of the mistakes appearing there, since the direction which we give in the decretal portion of this judgment will cover the same.

We therefore modify the decree of the lower court and allow the plaintiff to recover possession of plaint items 1 and 2 on deposit of Indian rupees 1161-9-5 and another sum of Indian rupees 1193 with interest up to a moiety of this latter amount. Both parties were directed to suffer their costs in the lower court. We do not disturb that direction. The appellant is however entitled to get the costs of this appeal. The cross-appeal filed by the plaintiff is dismissed with costs. If the amount deposited by the plaintiff before he secured delivery of possession of the property was not sufficient to meet the mortgagee's claim then he will be liable to pay six per cent. interest on the deficit amount. Arrears of Michavaram at 2¼ Edangalies of paddy and annas eight a year from the date of suit are allowed to the

plaintiff till the date on which the properties were surrendered. These will not however carry interest.

D.H. Order accordingly.

A. I. R. 1952 TRAVANCORE-COCHIN 365

SANKARAN AND GANGADHARA MENON JJ.

Porkkala Pillai Kuppamuthu Pillai, Appellant v. Sivakami Pillai Ramalekshmi and others. Respondents.

Second Appeal No. 267 of 1125, D/- 21-12-1951.

(a) Limitation Act (1908), Art. 182 (5) — Debt Relief petition dismissed — Subsequent payment by judgment-debtor — Execution application within three years of date of payment — Application is barred by time — (Debt Laws — Travancore Debt Relief Act (2 (II) of 1116), Ss. 9 and 10).

A decree-holder can get the benefit of the suspension of the execution of the decree by virtue of section 10 of the Debt Relief Act only when valid payments under S. 9 are being made by the judgment-debtor. Such valid payments can be made and accepted by the mutual consent of the parties or under orders of Court. Where the payment made and accepted does not come under either of these categories and is made subsequent to the dismissal of the Debt Relief petition, an application for execution made within three years of the date of such payment but more than three years of the date of dismissal of the petition, is barred by limitation. (Paras 3 and 4)

Anno: Lim. Act. Art. 182, N. 31.

(b) Limitation Act (1908), Art. 182 (5) — Step-in-aid of execution — Certification of payment — (Civil P. C. (1908), O. 21, R. 2).

A mere certification of a payment by a judgment-debtor cannot be deemed to be an application to take some step-in-aid of execution of the decree. (Para 5)

Anno: Lim. Act, Art. 182, N. 129, Pt. 7; C. P. C., O. 21, R. 2, N. 18 Pt. 5.

T. R. Subramonia Iyer, for Appellant; N. Varadaraja Iyengar, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('33) 55 All 393: (AIR 1933 All 364) 5
('32) 59 Cal 760: (AIR 1931 Cal 719 FB) 5
('36) 59 Mad 424: (AIR 1936 Mad 118) 5
29 Trav LJ 391 5

SANKARAN J.: The plaintiff decree-holder is the appellant. The question raised in this second appeal is one of limitation. The decree in the case was passed on 11-7-1115. On 24-7-1116, the first defendant filed a petition under sections 8, 9 and 15 of the Debt Relief Act (Act II (2) of 1116 of Travancore) and prayed that she may be allowed to pay up the decree-debt in instalments and that the amount of the debt for such payment may be fixed by the Court. After paying a few instalments at the rate admitted by the defendant petitioner, she defaulted to make further payments. The Debt Relief petition itself was dismissed on 6-4-1118. The decree-holder filed the first execution petition on 11-1-1122. To this execution petition the first defendant raised an objection that the decree had become barred by limitation. The execution Court overruled this objection and held that the instalment payments made under the Debt Relief petition have kept the decree alive and that therefore there was no bar of limitation for the execution of the decree. On appeal by the defendant, the lower appellate Court reversed the decision of the execution Court and held that the decree has become barred by limitation. Hence this second appeal.

(2) During the pendency of the Debt Relief petition, the first defendant had made instalment payments into Court on three occasions i.e., on 27-7-1116, 26-1-1117 and 20-7-1117. The two instalments due in the year 1118 were defaulted and the Debt Relief petition itself happened to be dismissed on 6-4-1118. Subsequently, the 1st defendant is stated to have made one more payment out of court to the decree-holder's Advocate on 31-1-1119. This payment is denied by the 1st defendant. But, on a consideration of the evidence adduced by the decree-holder, the lower courts have concurrently found that the alleged payment on 31-1-1119 is true. We do not see any reason to interfere with that finding in this second appeal.

(3) The position taken up by the decree-holder is that the execution petition filed by her on 11-1-1122 being within three years of 31-1-1119 is within time. It is contended that the decree-holder could not execute the decree while the judgment-debtor was making payments under Sections 8 and 9 of the Debt Relief Act. Section 10 of the Act lays down that the execution of a decree shall not be in contravention of Sections 8 and 9 of the Act. Section 9 prescribes the manner in which the decree debt should be reduced and discharged by making payments in instalments. Clause 3 of that section lays down that only when the judgment-debtor has committed default in the payment of three consecutive instalments or the last instalment, the decree-holder will be entitled to take out execution for the balance of the amount remaining due under the decree and that in other cases the decree-holder could take out execution only for realising the defaulted instalments.

On the strength of these provisions, it is argued on behalf of the decree-holder that when the first defendant made the instalment payment on 31-1-1119, the earlier two instalments alone had been defaulted and as such the decree-holder could not take out execution for realising the entire amount due under the decree. This contention would have prevailed if the payment made on 31-1-1119 was made and accepted as an instalment payment under S. 9 of the Debt Relief Act. The decree-holder could get the benefit of the suspension of the execution of the decree by virtue of Section 10 of the Debt Relief Act only when valid payments under Section 9 are being made by the judgment-debtor. Such valid payments could be made and accepted by the mutual consent of the parties or under orders of Court The payment made and accepted on 31-1-1119 does not come under either of these categories.

The decree-holder had never conceded the 1st defendant's right to have the decree-debt discharged by making instalment payments under Ss. 8 and 9 of the Debt Relief Act. In fact, the decree-holder had gone to the extent of contending that the decree-debt in this case was outside the scope of the Debt Relief Act.

She had filed objections to the 1st defendant's Debt Relief petition and had contended that she had no assets other than the amount due under this decree and that therefore the 1st defendant was not entitled to have this debt discharged by making concessional payments under Sections 8 and 9 of the Debt Relief Act. The decree-holder had also contended that the first instalment deposited by the 1st defendant was not proper and sufficient. It was while these objections were pending consideration that the Debt Relief petition was dismissed for default on 6-4-1118.

(4) The effect of the dismissal of the Debt Relief petition was negation of the 1st defendant's right to have the debt discharged by making instalment payments under Sections 8 and 9 of the Debt Relief Act. The fact that there was no adjudication on the merits of the objections raised by the decree-holder is of no consequence. She must be deemed to have succeeded in her objections on the dismissal of the Debt Relief petition. That petition has not been revived or restored and as such there has been no scope for any order being passed under section 15 of the Act fixing the amount of the debt for the purpose of making instalment payments. Similarly there has been no scope for passing an order overruling the decree-holder's objection regarding the sustainability of the Debt Relief petition and permitting the 1st defendant to discharge the debt under section 9 of the Act.

Under these circumstances, it cannot be said that the payment made by the 1st defendant on 31-1-1119 was an instalment payment under section 9 of the Act. The order dismissing the Debt Relief petition had denied to the 1st defendant the right to make any such instalment payments. The decree-holder who had questioned the 1st defendant's right to make any such instalment payments could not also be taken to have received that payment as a payment under the Debt Relief Act. On the other hand, consistent with the stand taken by her, the decree-holder can only be deemed to have received the payment towards part satisfaction of the decree-debt.

This position is made clear by the memo filed on 31-1-1119 itself by the decree-holder's advocate. There is nothing in that memo to indicate that the amount received on that date from the defendant was towards any instalment due under the Debt Relief Act. On the other hand, it is expressly stated in that memo that the amount was received merely towards part satisfaction of the decree-debt. The decree-holder, who has been consistently maintaining the position that the 1st defendant had no right to pay up the decree-debt under the Debt Relief Act, cannot at this late stage be permitted to turn round and take up a totally inconsisent position by saying that the payment on 31-1-1119 was made and accepted as an instalment payment under section 9 of the Debt Relief Act. No doubt that is the only way in which the decree-holder could now escape from the bar of limitation. But such considerations have no place in deciding the question of limitation. That question has to be decided in the light of the facts as they are.

From those facts, it is clear that subsequent to the dismissal of the Debt Relief petition on 6-4-1118, there was no scope for the discharge of the decree-debt in this case under the provisions of the Debt Relief Act. The payment on 31-1-1119 was not accepted by the decree-holder as an instalment payment under section 9 of the Act as is evident from the memo filed on that date by the decree-holder's Advocate. The Debt Relief petition was by the 1st defendant and the payment dated 31-1-1119 relied on by the decree-holder was not by the 1st defendant. The decree-holder's Advocate has deposed as P. W. 2 that it was the second defendant who made that payment.

These circumstances also indicate that the payment on 31-1-1119 could not have been an instalment payment under section 9 of the Debt Relief Act, but could only have been a payment towards partial discharge of the liability under the decree. It follows therefore that there is no substance in the decree-holder's contention that even up to 31-1-1119 the 1st defendant was availing herself of the benefits conferred by the Debt Relief Act and was making instalment payments under Section 9 and as such the decree could not be executed. Subsequent to the dismissal of the Debt Relief petition on 6-4-1118, there was nothing preventing the decree-holder from executing the decree. His failure to take out execution within three years from that date has resulted in the decree becoming barred by limitation.

(5) The memo filed in court by the decree-holder's advocate on 31-1-1119 was only a certification of the payment made by the 2nd defendant on that date. Such a mere certification cannot be deemed to be an application to take some step-in-aid of execution of the decree as contemplated by Article 182 (5) of the Limitation Act, so as to give a fresh starting point of limitation. This position is well settled by the decisions of the several High Courts in India. Vide 'PRESIDENT UNION BOARD, PENTAPADU v. VENKATA SRINIVASACHARYULU', 59 Mad 424; 'ADYA PRASAD SINGH v. LAL GRISH BAHADUR', 55 All 393; 'AMARKRISHNA v. JAGATBANDHU', 59 Cal 760 and 'ABDALKATHIRU KUNJU v. AYIAPPAN', 29 Trav L J 391. There is also nothing on record to show that subsequent to the dismissal of the Debt Relief petition on 6-4-1118 there has been any valid acknowledgment in writing of the liability under the decree by any of the judgment-debtors in this case. Thus, in any view of the case, it is clear that the decree in this case became barred long prior to 11-1-1122 and that the execution petition filed on that day is out of time and could only be dismissed on that ground. The finding of the lower appellate court to that effect does not therefore call for any interference.

(6) In the result, this second appeal fails and it is accordingly dismissed with costs.

V.R.B. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 366

KUNHI RAMAN C. J.
AND SUBRAMANIA IYER J.

Narayanan Nair Neelakantan Nair and another, Appellants v. Narayanan Panickathi Janaki Panickathi, Respondent.

Second Appeal No. 47 of 1125, D/- 30-8-1951.

Debt Laws — Travancore Debt Relief Act (II (2) of 1116), S. 4 (1) — Vendor's lien — Release of mortgage rights.

Where a mortgagee releases the mortgage right to the owner of the equity of redemption and receives in satisfaction of his mortgage and also of the value of improvements due to him, a hypothecation over the entire ownership of the item in respect of which this was given as also over another item of property belonging to the releasee it cannot be said that after having accepted that security as on a property which is unencumbered it is open to him for no reason to go back upon that acceptance and say that the mortgage though released still exists and will continue to exist for the benefit of his being enabled to enforce a vendor's lien. The consequence of the transaction of release is to extinguish the mortgage right and that mortgage right having ceased to exist, there is no property on which the vendor's lien could fasten or against which such a lien could be enforced. The vendor's lien that is contemplated in clause (i) to section 4 is the kind of lien that equity in England recognised and enforced. 31 Cal 57 PC, Ref. (Para 2)

T. S. Krishnamurthy Iyer, for Appellants; N. K. Job, for Respondent.

REFERENCE..... /Para.
('04) 31 Cal 57: (30 Ind App 238 PC) 2

SUBRAMANIA IYER J.: This second appeal raises a question of the interpretation of Section 4, clause (i) of the Travancore Debt Relief Act, 2 of 1116. The appellants before this court purchased the equity of redemption over an item of property which had been mortgaged with possession to the respondent. After such purchase, they wanted to redeem the mortgage and for that purpose negotiated for and obtained a release from the mortgagee who had effected certain improvements upon the mortgaged property. Accordingly, the respondent executed a deed of release in favour of the appellants and as consideration therefor the appellants executed a deed of hypothecation over the property whose equity of redemption had been purchased by them and whose mortgage right had been got released by them from the respondent.

In the deed of hypothecation besides this item of property another item of property was also included. The respondent as hypothecatee sought to recover the debt by sale of the hypotheca and filed O. S. No. 386 of 1113 on the file of the Munsiff's Court of Krishnapuram and obtained a decree. Act 2 of 1116 having come into force thereafter, the appellants sought relief under that Act by way of scaling down of the debt. The respondent contended that the liability in question is one contemplated by clause (i) of Section 4 of Act 2 of 1116 and is not, therefore, liable to be scaled down. This contention has found favour with both the courts below, who have dismissed the application of the appellants who have come before us in second appeal.

(2) Section 4 of Act 2 of 1116 provides that "nothing in this Act should affect a liability falling under the following debts" and clause (i) provides:

"any liability arising out of sale of immovable property in respect of the balance of purchase money for which the vendor has a lien on the property sold."

Mr. T. S. Krishnamoorthy Iyer, the learned counsel for the appellants, contends that in order to attract the application of this clause, there are two conditions to be satisfied, namely, that there should have been a sale of immovable property and that in respect of the liability arising on account of such a sale the vendor should have a lien on the property sold. He contends that neither of these conditions is satisfied in this case because, according to him, a release of a mortgage right by a mortgagee is not a sale within the meaning of that clause. He contends also that assuming a release of a mortgage right can be considered to be a sale, the result of the transaction is to vest the mortgage right in the owner of the equity of redemption and there being no intervening estate or interest in between the two, the result of the transaction would be to extinguish the mortgage right.

Mr. Job, the learned counsel for the respondent, contends that his client had effected improvements upon the mortgaged properties and as those improvements were also surrendered to the appellants under the deed of release, the transaction though called a release must be construed as a sale. He seeks support for this argument by stating that if the transaction of release was one entered into by the respondent in fraud of his creditors it would have been open to those creditors to impeach the transaction and proceed against the interests released notwithstanding the release. No such event has happened in this particular case. We are here concerned with the consequence of a transaction between the immediate parties thereto. There may be cases where, notwithstanding the purported coalescence of a mortgage right and equity of redemption in the same individual, the mortgage right may get revived on account of causes either existing but unknown or even afterwards emerging.

For instance suppose a mortgagee purchases the equity of redemption and at the time of the purchase the existence of an intervening estate was unknown so that for all intents and purposes there was extinction on account of the coalescence of the two interests in the same individual. But if afterwards the existence of an intermediate estate is discovered, it will be a case where it can be held that the supposed extinction of the mortgage right by merger in the high right has not really happened. There may also be cases where the purchase of the equity of redemption fails for some reason. The case may also arise as instanced by Mr. Job of a third party intervening and contending that the transaction is in fraud of that third party and therefore ought not to be upheld. There are cases also where releases have been held to be transfers. For instance, suppose a tenant of immoveable property after effecting improvements thereto and after creating a mortgage over his lease-hold in favour of another person, surrenders the holding to a landlord receiving or not receiving compensation for improvements.

Such surrender can in appropriate cases be considered to be a transfer of the leasehold to the landlord. These cases apart, in a simple case like the present where a mortgagee releases the mortgage right to the owner of the equity of redemption and receives in satisfaction of his mortgage and also of the value of improvements due to him, a hypothecation over the entire ownership of the item in respect of

which this was given as also over another item of property belonging to the release it cannot be said that after having accepted that security as on a property which is unencumbered it is open to him for no reason to go back upon that acceptance and say that the mortgage though released still exists and will continue to exist for the benefit of his being enabled to enforce a vendor's lien. In order that a vendor's lien may exist, the property transferred must exist over which the lien could be enforced. In this case the consequence of the transaction of release in favour of the appellants is, as already stated, to extinguish the mortgage right & that mortgage right having ceased to exist, there is no property on which the vendor's lien could fasten or against which such a lien could be enforced.

Here, as already stated, besides accepting the hypothecation on the item which is the subject-matter of the lease as unencumbered, he has enforced the security of filing a suit and obtaining a decree for sale of the entire item as also another item belonging to the appellants. The Transfer of Property Act had not been brought into the Statute Book of Travancore from which area this case has arisen, though that Act has from 1st April 1951 been brought into force in the Travancore-Cochin State. The vendor's lien that is contemplated in clause (i) to section 4 of Act II of 1116 is the kind of lien that equity in England recognised and enforced. When a mortgagee has accepted towards the consideration for surrender of a mortgagee's rights security over the property which had been enlarged as in this case into complete ownership with another item and when he has enforced that security by obtaining a decree for sale of the items as in this particular case, it would be inequitable to allow him to turn round, when it is to his advantage to do so in view of the Debt Relief Act and say that the mortgage right still exists and is available to be proceeded against in enforcement of his vendor's lien.

Had it been a case under section 55, clause 4(c) of the Transfer of Property Act, where the vendor has a charge and the question that arises is as to whether the conduct of the vendor in taking a security over the item with or without other items or taking a bond from the vendee with or without other persons would operate as a contract to the contrary other considerations might have been prevailed. What is provided by the Transfer of Property Act is a charge, and not a lien. The two are different in their origin and nature, see 'WEBB v. MACPHERSON', 31 Cal 57 PC. In the case of a lien which equity gives to a vendor he cannot be permitted to claim or to enforce it after he has more than once accepted the position according to which no lien existed. We consider, therefore, that the liability in question is not one that is saved by section 4(1) of Act. II of 1116. The result is that the second appeal should be allowed and the orders passed by the courts below set aside. The case is remitted to the Munsiff's Court for disposal of the petition for scaling down. In view of the special features of this case, we direct that the parties shall bear their respective costs throughout.

Appeal allowed.

D.H.

A. I. R. 1952 TRAVANCORE-COCHIN 368

KUNHI RAMAN C. J.
AND SUBRAMANIA IYER J.

Mariam and another, Appellants v. Sreedevi Antharjanam and others, Respondents.

A. S. No. 219 of 1122, D/- 31-8-1951.

(a) Travancore Malayala Brahmin Act (3 (III) of 1106), S. 5 — Object — Transaction in violence of section — Validity.

The plain purpose of the Section is to restrict the power of the Karnavan in the matter of transactions mentioned in the section in a particular manner. What is prohibited by the section is a transaction as mentioned in that section which has not had the consent in writing of all the adult members of the family. The provision is clearly mandatory and would render any transaction in violence of it, void and inoperative as against the members for whose benefit the provision was made and whose consent has not been obtained as provided therein. It may not be void in the sense that it is an absolute nullity as though no transaction took place so as to enable strangers to question and contend that persons claiming under a transaction otherwise than in conformity with that section have obtained no rights at all. Except in this regard the transaction is void and of no effect. (Paras 5, 7)

(b) Limitation Act (1908), S. 3 — Arrears of mesne profits, rent or other dues — Recovery barred by limitation — Realisation by setting off.

Arrears of mesne profits, rent or other dues whose recovery is barred by limitation, can be availed of by the person to whom they are due by making use of the same to reduce or wipe out any sum that may be or found to be due or payable to the other side in respect of the property or transaction, that is to say, by setting off the claims against each other. (Para 6)

Anno: Lim. Act, S. 3, N. 14.

(c) Travancore Malayala Brahmin Act (III (3) of 1106), S. 5 — "Immovable property" — Term applies to property over which family has mortgage right — (General Clauses Act (1897), S. 3 (25)) — (Travancore General Clauses Act (2 (II) of 1072), S. 2). (Para 7)

Anno: Gen. Clauses Act, S. 3, N. 13.

(d) Travancore Malayala Brahmin Act (3 (III) of 1106), S. 5 — "Immovable property".

It is not necessary that the various kinds of transactions which are prohibited under Section 5 must all be available in respect of an item of property in order that it may be regarded as immovable property under Section 5, because transactions must be read not collectively but distributively. (Para 6)

(e) Court-fees Act (1870), Sch. I, Art. 1 — Claim for improvements — Valuation of appeal.

In a case where value of improvements is claimed in the Court below and disallowed by that Court, the appellants should value the appeal as for the amount claimed and pay 'ad valorem' court-fee thereon. In the absence of valuation and court-fee, the question cannot be agitated in appeal. (Para 14)

Anno: Court-fees Act, Sch. I, Art. I, N. 6 Pt. 1.

M. T. Paikaday, for Appellants; K. Narayana Panicker, for Respondents.

Para.

REFERENCE..... 7

32 Trav LJ 919

SUBRAMANIA IYER J.: The suit out of which this appeal arises was filed by a female member of a Namboodiri Illom who was brought into it by marriage. The members of the Illom are governed by the Travancore Malayala Brahmin Act, III (3) of 1106.

(2) A possessory mortgage right owned by the 'illom' was assigned by defendants 1, 2 and 3 in favour of the 6th defendant on 10-3-1108 (See Ext. 11 or A). This assignment was sought to be declared void by the plaintiff on the ground that it violates the mandatory provisions contained in the Malayala Brahmin Act in that it was executed without the knowledge and consent of the plaintiff as also of the 5th defendant who were the other two adult members of the 'illom' and that the document is devoid of consideration and necessity so far as the family is concerned. The 6th defendant assigned item No. 1 with proportionate mortgage amount to the 9th defendant on 30-3-1108 under Ext. 1. He assigned items 2 and 3 with an aliquot part of the mortgage money to the 2nd defendant on 2-11-1109 under Ext. VIII.

The 2nd defendant in his turn assigned item No. 3 with a proportionate part of the mortgage money to the 7th defendant on 28-8-1114 under Ext. IX. The aforesaid subsequent transfers were alleged in the plaint to be not binding on the plaintiff's family as the transfer under Ext. II was void. Defendants 7 and 9 contested the suit. They contended, inter alia that the plaintiff had not become a member of the family on the date of Ext. II and that on its date the 5th defendant was 'non compos mentis' and for that reason her nonjunction in the document is immaterial. Pleas were also raised as regards the necessity and the binding character of the consideration for Ext. II.

(3) The court below found that the plaintiff had become a member of the family by marriage before the date of Ext. II and that the 5th defendant was free from the disability ascribed to her by the contesting defendants, that these two adult members of the family had not consented to the conveyance under Ext. II as required by Act III(3) of 1106, and that therefore the assignment impeached was void.

(4) On a review of the evidence relating to the various items of consideration for Ext. II, the court below came to the conclusion that it was supported by consideration binding upon the family only to the extent of Rs. 716/- made up of the 3rd item of consideration, Rs. 520/- and a part of the 4th item of consideration, Rs. 196. The court below directed delivery of possession of the properties to the plaintiff on behalf of the family with mesne profits at the rate claimed in the plaint for a period of three years next before the suit and thereafter until three years from the date of decree or until delivery whichever may happen earlier. It also directed that the plaintiff must make good to the defendants who claimed title to the mortgage right pursuant to Ext. II, the binding portion of the consideration, viz., Rs. 716/- which amount was directed to be set off against the mesne profits decreed to the plaintiff.

(5) The main contention urged by Mr. Palkaday, learned counsel for the appellants is that section 5 of Act III (3) of 1106 on which reliance was placed by the plaintiff is inapplicable. He contends that the prohibition contained in that section is only against an alienation by karnavan alone and that an alienation by the karnavan in conjunction with one or more other members of the family is not prohibited by the Section. The acceptance of this contention would lead to this viz., that a sale of the immovable property of a family could be effected by any other member of the family than the karnavan. The plain purpose of the Section is to restrict the power of karnavan in the matter of transactions mentioned in section 5 in a particular manner. In respect of other transactions, which are of a less far-reaching character, Section 6 makes a different provision. A comparison of these two sections will demonstrate that what is prohibited by section 5 is a transaction as mentioned in that section which has not had the consent in writing of all the adult members of the family.

Mr. Paikaday also contends that what is prohibited is only transactions regarding immovable property which expression, according to him, connotes properties over which the family has proprietorship, that is to say, properties over which the family has only a mortgage right, as in this case, or other rights short of absolute ownership, would be beyond the operation of the Section. He also contended that the finding of the court below regarding certain items of consideration as not proved is not correct, and that the court below was not right in granting a decree for mesne profits because the possession of the transferees under Ex. II and of the persons claiming title from that transferee is not wrongful because, according to him, even if Section 5 of Act, III (3) of 1106 applies, it will only render the transaction voidable and not void and that the transaction being good until set aside, the party in possession will not be liable for mesne profits at any rate for any period before suit. He also urged that the court below erred in granting a decree for mesne profits for more than three years.

(6) Arrears of mesne profits, rent or other dues whose recovery is barred by limitation, can be availed of by the person to whom they are due by making use of the same to reduce or wipe out any sum that may be or found to be due or payable to the other side in respect of the property or transaction, that is to say, by setting off the claims against each other. The law of limitation does not bar this mode of realisation which enables the claimant only to extinguish his liability in whole or in part as the case may be, and not to recover anything from his opponents. The law of limitation only bars the remedy by way of recovery by action and does not extinguish the debt or liability.

(7) Section 5 of the Malayala Brahmin Act, III (3) of 1106 provides that:

'5. Except for consideration and illom necessity, and with the written consent of all the major members of the illom, no karnavan or other managing members shall sell illom immovable properties or execute kanom deeds in respect thereof, or mortgage it with possession for a period of more than twelve years or lease it with or without premium for a period of more than twelve years.

Nothing in this Section shall affect the right of the karnavan to execute solely renewals of 'kanom' deeds already executed."

The provision is clearly mandatory and would render any transaction in violence of it, void

and inoperative as against the members for whose benefit the provision was made and whose consent has not been obtained as provided therein. It may not be void in the sense that it is an absolute nullity as though no transaction took place so as to enable strangers to question and contend that persons claiming under a transaction otherwise than in conformity with that section have obtained no rights at all. Except in this regard, the transaction is void and of no effect. The finding of the court below is that the plaintiff had become a member of the family by marriage before the date of Ex. II and that the 5th defendant was not 'non compos mentis' as contended by the defendants. It is not contended that there has been a written consent of either the plaintiff or the 5th defendant in connection with Ext. III.

The only argument urged is that they, being members of the family and residents in the family house, must have come to know about Ext. II, as it is probable that there would have been some talk about it. Mr. Paikaday also says that Section 23 of the Act, saves the custom prevalent in the community and that the Act abrogates the custom only to the extent to which the customary law has been expressly altered. The contention is that female members of the family according to the custom were not accustomed to participate in the matter of transactions of properties of the family. Act III (3) of 1106 provides that female members of the family who are born in it or are brought into it by marriage are as much members of the family as the male members and it is provided that in order to have a transaction regarding an immovable property of the family as contemplated in Section 5, the written consent of every member is necessary.

Assuming that, according to the custom, prevailing before the Act, the female members were not accustomed to co-operate in transactions, this is a case where that custom has been expressly altered by the statute. The contention of Mr. Paikaday that the term "immovable property" in Section 5 would apply only to properties over which the family has got a right of absolute ownership, cannot be accepted. The term is not defined in the Act itself. We have therefore to look into the General Clauses Act, the definition in which reads as follows:

> "2. In this Regulation and in every Regulation, now in force or passed after the commencement of this Regulation, unless there be something repugnant in the subject or context (7) 'Immovable property' shall include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth, but not standing crops."

The definition obviously comprises properties over which the family has got a mortgage right. It was not contended by Mr. Paikaday that if the definition of immovable property contained in the General Clauses Act is to be looked into to understand the meaning of 'immovable property' contained in Section 5 of Act III (3) of 1106, then the mortgage right dealt with under Ext. II will not be immovable property. Reference may usefully be made to the decision in '32 Trav L J 919' upon the meaning of the term 'immovable property' which has been held therein to include mortgage rights over an immovable property.

If the term of immovable property in Section 5 is taken as limited to properties over which the family has absolute proprietorship, then, properties over which the family has a kanom right or a leasehold right and even a perpetual lease would all be excluded. Many illoms may possess only properties over which rights short of absolute proprietorship are possessed. The other argument of Mr. Paikaday is that the various kinds of transactions which are prohibited under Section 5 must all be available in respect of an item of property in order that it may be regarded as immovable property under section 5. This argument is also unacceptable because transactions must be read not collectively but distributively. Whichever property would admit of a particular transaction should not be dealt with in that manner is all the meaning that can be reasonably given to Section 5.

(8) Ext. II being thus a sale of immovable property, the written consent of all the members was a 'sine qua non' for a valid sale regarding it and there not having been that consent, and the plaintiff whose consent has not been obtained having challenged the transaction, it is void and of no effect.

(9) In this view, the contention raised by Mr. Paikaday that his clients are bona fide transferees for value without notice need not be considered because that plea would be available and of any effect only if the transaction in question had been a voidable one.

(10) As regards the consideration for Ext. II, Mr. Paikaday contended that the non-production of certain documents evidencing the parts of consideration cannot be made a ground to decide against them because those documents are in the possession of the 6th defendant and he has failed to produce them. Whosoever might be at fault in not producing them, documents which constitute the primary evidence have not been produced and in their absence it is not possible to come to a conclusion different from that come to by the Court below. Regarding the 4th item of consideration, Mr. Paikaday's contention is that the amount paid for the purchase of a decree is only Rs. 196/-. The decree itself being for a larger amount that larger amount should have been allowed by the Court below. In the written statement of defendants 7 and 9, they have claimed only Rs. 196. The Court below is not in error therefore in not having upheld the claim for a larger amount covered by the decree.

(11) Mr. Paikaday also contended that the Court below was in error in not accepting the evidence of the 1st defendant as D. W. 4. That evidence was read before us and we are not able to find any part of his evidence which can be relied upon for a view different from the conclusion come to by the court below. As regards the item of consideration which is stated to be a debt due to one Kutten Pillai under a promissory note, the evidence of the 1st defendant shows that he saw the promissory note with the 2nd defendant before Ext. II. This is evidence of the extinction and against the existence of the debt because the law presumes discharge of the debt when the instrument creating it is with the obligor. This presumption stands unrebutted. Mr. Paikaday urged before us that the pronote may have been taken back by the 2nd defendant for purposes of renewal and might have been renewed and

returned to the payee. This is mere speculation which cannot be heeded or indulged in by a court of law.

(12) As regards the debt under Ext. VII which is a decree obtained by one Kolathu Iyer which forms part of one item of consideration the claim is obviously not binding upon the family because Ext. VII shows that the decree was obtained by an endorsee of a promissory note executed by the 2nd defendant who was the first defendant in that suit in favour of the 2nd defendant therein. Ext. VII does not show that any relief was granted against the family. No relief could have been given in that suit against the family because the only member of the family who was party therein was the 2nd defendant in this case who could not represent the family. In the absence of the karnavan, the family cannot be represented. Further, under Section 12 of Act III (3) of 1106, no decree will bind the 'tarwad' unless it be obtained against the 'karnavan' as such and the senior 'anandaravans' of his branch and of every collateral branch, if any.

(13) Mr. Paikaday's answer to this was that the debt that led to this promissory note was a debt binding upon the family as it is contended that the 2nd defendant who was the executant of the promissory note sued on was the manager of the family. The plaint in paragraph 3 stated that the 1st defendant was the karnavan and manager of the family. Paragraph 2 of the written statement admits the statements contained in paragraph 3 of the plaint. There is nowhere any contention raised in the written statement that the 2nd defendant was the manager. As a junior member of the family it was beyond the competence of the 2nd defendant to contract a debt on behalf of the family. Assuming that the debt was one binding upon the family, the suit having been one brought by the endorsee of the promissory note, it was beyond the competence of the endorsee to claim relief based on the original debt except in a case where the rights under the original debt are also transferred in the appropriate manner. There is nothing to indicate that there has been any such transfer in this case.

(14) Mr. Paikaday also contended that the court below should have directed an enquiry into the value of improvements alleged to have been effected upon the property by defendants 7 and 9. The court below found against the appellants on this point on the ground that there has been no evidence let in by them. There is no valuation in the appeal as regards the improvements nor is there court-fee paid. In a case where value of improvements is claimed in the court below and disallowed by that court, the appellants should value the appeal as for the amount claimed and pay ad valorem court fee thereon. In the absence of valuation and court fee, the question cannot be agitated in appeal.

(15) Certain other points were also urged by Mr. Paikaday which arise only if the impugned transaction is found to be only voidable, i.e., good until set aside. As our view of the nature of the transaction is different, these points do not fall to be decided in this case.

(16) The court below has discussed the evidence in detail and given good reasons for the conclusions arrived at by it. It is not necessary for us to enter into a detailed rehearsal of the various grounds. It is sufficient for us to say that we are in agreement with the conclusions come to by the court below.

(17) The contention of Mr. Paikaday as regards mesne profits is that more than 11 years' mesne profits have been asked for and granted. We are afraid that this contention is raised on account of a misapprehension. Ext. II is of the year 1108 and the suit was filed in the year 1119. It appears to us that it is on the basis that the plaint has claimed mesne profits from the date of Ext. II, that this contention is urged. The plaint however claims mesne profits only for 3 years next before suit & not for 11 years, that is from the date of Ext. II. If the plaintiff is entitled to mesne profits, the plaintiff is entitled to claim mesne profits for three years before suit and thereafter until three years from date of decree or delivery of property whichever is earlier, under O. 21, R. 12 of the Code of Civil Procedure.

If the contention of Mr. Paikaday means that no mesne profits could be allowed during the pendency of the suit, it is only to be stated to be rejected. The direction contained in the decree of the court below for setting off the amount ordered to be paid against the mesne profits is also justified. Plaintiff will be entitled to mesne profits till date of delivery or 3 years from date of decree under O. 21, R. 12 of the Tr. C. P. C. corresponding to O. 21, R. 14 of the Indian Code which will be the decree that is final, that is, the decree of this court in this case.

(18) Having found that the transaction is void, there would have arisen a question as to whether it was competent for the court to direct payment of any portion of the consideration paid pursuant to a void transaction. The plaintiff however not having preferred an appeal against the decree of the court below this question does not arise in this appeal.

(19) The appeal should therefore be dismissed with costs.

V.R.B.

Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 371

SANKARAN J.

Ayyaswami Nadar, Petitioner v. Joseph and others, Counter-Petitioners.

O. P. No. 68 of 1950, D/- 25-1-1951.

(a) Constitution of India, Art. 254 — Industrial Disputes Act (Central) has replaced Travancore-Cochin Industrial Disputes Act — (Industrial Disputes Act (1947) (as amended by Act 48 (XLVIII) of 1950), S. 1) — (Travancore-Cochin Industrial Disputes Act (16 (XVI) of 1950), S. 1).

According to Art. 254, when there are two competing Statutes relating to a concurrent subject, the statute passed by Parliament has to prevail over the statute passed by the State Legislature. AIR 1951 Trav-C 203, Foll. (Para 6)

The Industrial Disputes Act passed by the Central Legislature as amended by Act 48 (XLVIII) of 1950 and made applicable to the whole of India except the State of Jammu and Kashmir has, therefore, replaced the Travancore-Cochin Industrial Disputes Act which no longer continues to be in force. (Para 6)

(b) General Clauses Act (1897), S. 24 — Repeal may be express or by necessary implication — Appointment of Industrial Tribunal under State Act — Repeal of Act by Central Act — Continuance of Tribunal — (Travancore-Cochin Interpretation and General Clauses Act (7 (VII) of 1125), S. 23) — (Industrial Disputes Act (1947) (as amended by Act 48 (XLVIII) of 1950), S. 7).

S. 24 as it stands is not confined to cases of express repeals. All that is contemplated by the section is that there must be a repeal of an existing Act by a subsequent Act. Such repeal may be by express words or it may be by necessary implication. Where the later Act has in substance and in effect repealed the earlier Act, the section will be attracted. (Para 7)

The Industrial Disputes Act (Central) has in effect repealed the Industrial Disputes Act passed by the State of Travancore-Cochin. Necessarily, therefore, the provisions contained in S. 23 of the State General Clauses Act are to govern the appointments which had been made under the State Industrial Disputes Act. Therefore, where the appointment of an Industrial Tribunal under the State Act was not superseded by any order passed under the Central Act, it must be deemed to continue as the Industrial tribunal even after the Central Act was made applicable to the State and it must be deemed to have been appointed under the relevant provisions of the Central Act. (Para 7)

Anno: Gen. Cls. Act S. 24 N. 1.

(c) Industrial Disputes Act (1947), S. 10 (1) (c) — Order of reference — Issue of notice — Necessity of.

The order of reference is only an administrative order passed by the Government. It is not necessary that Government should issue notice to the contending parties and hear them before passing such an administrative order. The question of violation of the principles of natural justice cannot arise in the matter of passing such administrative orders. (Para 8)

(d) Industrial Disputes Act (1947), S. 2 (j) — Doing business by way of purchase and sale of cocoanut oil is industry. (Para 9)

(e) Industrial Disputes Act (1947), S. 36 (3) and (4) — Restrictions imposed by Cls. (3) and (4) — Validity.

The restrictions imposed by clauses 3 and 4 of S. 36 cannot be said to be void or inoperative and in passing an order refusing a party's request to be represented by a legal practitioner the Tribunal does not act without jurisdiction. (Para 10)

(f) Constitution of India, Art. 226 — Award by Industrial Tribunal — Remedy available to challenge award — Petition under Art. 226 — High Court will not express opinion on award — (Industrial Disputes Act (1947), S. 7).

When a remedy is available to the petitioner to challenge the sustainability of award given by an Industrial Tribunal, it will not be proper for the High Court to usurp the jurisdiction of the appellate Tribunal while dealing with the petition presented under Art. 226 of the Constitution and to express any opinion on the merits of the award. (Para 12)

Anno: C. P. C. Appendix III, Constitution of India, Art. 226 N. 8.

N. Varadaraja Iyengar, for Petitioner; P. Balagangadhara Menon, for Counter-Petitioners, 1 and 4 to 9; Advocate General T. N. Subramania Iyer, for Counter-Petitioner No. 2.

REFERENCE..... /Para.
('51) 1951 Ker LT 121: (AIR 1951 Trav-C 203) 6

ORDER: This is a petition under Article 226 of the Constitution praying for certain reliefs in the nature of writs of certiorari and Mandamus in respect of an industrial dispute pending adjudication in Industrial Dispute No. 7 of 1950 on the file of the Industrial Tribunal at Alleppey. The petitioner is a firm doing business by way of purchase and sale of cocoanut oil. The firm has its Head Office at Virudhunagar with branches at Quilon and Alleppey. Respondents 4 to 9 are workers who had been engaged by the petitioner in connection with the business conducted by the Alleppey branch of the firm. These respondents are members of the Ambalapuzha "Head-load Conveyance Workers' Union" at Alleppey. The first respondent is the General Secretary of the said Union. The 2nd respondent is the Industrial Tribunal at Alleppey and the 3rd respondent is the Travancore-Cochin State.

(2) Respondents 4 to 9 had complained that the petitioner has made a reduction in the rates at which wages were being paid to them for their work and also about the stopping of the "noon-meal allowance" that was being given to them. They also claimed that they were entitled to get bonus for the years from 1945 onwards. Dearness allowance was also claimed by them. The petitioner repudiated evey one of these claims. The Assistant Labour Commissioner called together a conference of the disputants and attempted to effect an amicable settlement of the disputes between them. Since his attempt in that direction proved unsuccessful, he made a report to Government stating the nature of the disputes and also the results of his efforts at conciliation. Government, on a consideration of the report and on being satisfied that an Industrial dispute exists as between the petitioner and respondents 4 to 9, referred the several points of dispute to the 2nd respondent for adjudication under section 10(1) (c) of the Industrial Disputes Act, Act 14 (XIV) of 1947 (Central). Copy of the order of reference has been produced on behalf of the petitioner and the same has been marked as Ext. A.

(3) The 2nd respondent registered the reference as Industrial Dispute No. 7 of 1950 on his file and issued notice to the parties. The petitioner, who appeared in pursuance of the notice issued by the 2nd respondent, filed his objection on 5-9-1950 contending that Government had no jurisdiction to make the reference in question and that the 2nd respondent Tribunal had no jurisdiction to entertain and dispose of the same. The petitioner also applied for permission to be represented by a legal practitioner. This request was opposed by the opposite party and on the strength of such opposition the 2nd respondent passed an order on 5-9-1950 refusing the petitioner's request to be represented by a legal practitioner.

By another order, dated 20-9-1950 the objection that the Tribunal had no jurisdiction to entertain the reference and adjudicate upon the points at dispute between the parties was also overruled. Exhibit B is copy of that order.

On 2-9-1950 respondents 1 and 4 filed a petition before the 2nd respondent Tribunal complaining that pending adjudication of the disputes, the petitioner had declared a lock-out and had kept respondents 4 to 9 entirely out of employment and praying for appropriate reliefs. This application was also objected to by the petitioner who contended that respondents 4 to 9 were having work with other employers and that there was no lock-out by the petitioner subsequent to the commencement of the proceedings before the 2nd respondent and that the reference itself was 'ultra vires'. On 20-10-1950, another application was filed by respondents 4 to 9 reiterating the complaints made in the earlier petition filed by respondents 1 and 4 on 2-9-1950. After enquiring into these complaints, the 2nd respondent passed an award on 21-11-1950 directing the petitioner to pay compensation to each of the respondents 4 to 9 at the rate of Rs. 100/- per mensem from 1-8-1950 till they are reinstated or re-employed for work. This award was submitted to Government who caused the same to be published in the Government Gazette dated 12-12-1950. Ext. C is that award.

(4) The several orders mentioned above commencing from Ext. A are attacked by the petitioner on the following grounds:

(a) The petitioner firm is not an "Employer" and respondents 4 to 9 are not "workmen" employed under the firm and the dispute between the petitioner and these respondents does not amount to an "Industrial Dispute" as defined in the Industrial Disputes Act and hence Government had been acting without jurisdiction in passing the order, Ex. A;

(b) Even if the matter comes within the scope of the Industrial Disputes Act, the relevant Act in force was Act 16 (XVI) of 1950 of the Travancore-Cochin State and the order Ext. A which had been passed under Section 10(1) (c) of the Central Act 14 (XIV) of 1947 is incompetent and invalid;

(c) The order of reference Ext. A was passed in violation of the principles of natural justice because it was passed without hearing the petitioner and without any judicial consideration of the questions involved;

(d) The 2nd respondent has not been validly appointed as a Tribunal under Central Act 14 (XIV) of 1947 and hence he is incompetent to entertain the reference purporting to have been made under section 10(1) (c) of that Act;

(e) The 2nd respondent acted without jurisdiction in passing the order dated 5-9-1950 refusing the petitioner's request to be represented by a legal practitioner and that order amounts to a denial of the Fundamental Rights guaranteed under the Constitution;

(f) The order dated 20-9-1950 overruling the objection that the 2nd respondent had no jurisdiction to entertain the reference Ext. A amounts to a usurpation of jurisdiction by him;

(g) The award Ext. C passed on 21-11-1950 in favour of respondents 4 to 9 is totally lacking in jurisdiction. The petition filed by respondents 4 to 9 on 2-9-1950 did not disclose any legal grounds to support the award. The petitioner had no notice of the subsequent petition filed by respondents 4 to 9 on 20-10-1950. The finding in Ext. C that there was a lock-out subsequent to the reference Ext. A is not based on any legal evidence and on the basis of such a finding no award under section 33 of the Act could be made. The compensation granted under the award is extravagant in scope and is merely arbitrary and vindictive and it is unsupportable so far as respondents 5 to 9 are concerned.

(5) On the above allegations the petitioner has prayed that this Court may, in the exercise of its powers under Article 226 of the Constitution, call up the records of this case from respondents 2 and 3 and

(i) to issue a writ in the nature of Mandamus directing the 3rd respondent to recall the reference made by the order Ext. A dated 27-7-1950 under section 10 (1) (c) of (Central) Act 14 (XIV) of 1947 and to grant a declaration that there is no industrial dispute within the meaning of that Act as between the petitioner on the one hand and respondents 4 to 9 on the other;

(ii) to issue a writ in the nature of Certiorari quashing the order passed by the 2nd respondent on 5-9-1950 refusing the petitioner's request to be represented by a legal practitioner and also the award Ext. C passed on 29-11-1950 in favour of respondents 4 to 9;

(iii) to issue a writ in the nature of Mandamus directing that the petitioner should be permitted to be represented by a legal practitioner in the proceedings before the 2nd respondent; and

(iv) to issue such further directions as the circumstances of the case demand.

(6) The main ground on which the Government order Ext. A is attacked is that it was not passed under a valid law in force in the State. According to the petitioner, the law governing industrial and labour disputes in the State even on the date of the order Ext. A was the Travancore-Cochin Industrial Disputes Act, Act XVI (16) of 1950, and hence it was incompetent for the State to exercise jurisdiction under section 10 (1) (c) of the Central Act, Act 14 (XIV) of 1947 and to pass the order Ext. A. It is not disputed that both these Acts deal with the same subject of industrial and labour disputes. This subject is included in List III—concurrent List—in the VII schedule to the Constitution and as such it is within the competence of Parliament and also of the State Legislature to make a law governing the subject. Act 16 (XVI) of 1950 passed by the State was therefore a valid Act.

But while this Act was in force, Parliament exercised its jurisdiction to legislate on the same subject and passed Act XLVIII (48) of 1950 by which Act 14 (XIV) of 1947 was amended and its jurisdiction enlarged by making it applicable to the whole of India except the State of Jammu and Kashmir. Act 48 (XLVIII) of 1950 was passed on 20-5-1950. Thus there have been two enactments, one by the State (i.e., Act 16 (XVI) of 1950) and the other by Parliament (Act 14 (XIV) of 1947 as amended by section 34 of Act 48 (XLVIII) of 1950) dealing with the same matter. Both these Acts cover the same field and in fact the provisions of these Acts are almost identical. When there are two such competing Statutes relating to a concurrent subject, the law is that the sta-

tute passed by Parliament has to prevail over the statute passed by the State Legislature. The provision contained in Article 254 of the Constitution is to that effect.

The very same question arose for the consideration of this Court in 'FIRM NAGALINGA NADAR SONS v. B. K. NAYAR', 1951 Ker L T 121. After an exhaustive review of the case law on the subject and after a due consideration of the effect of Article 254 of the Constitution, it was ruled in that case that where it is evident that the Central Parliament intended to make its legislation upon a concurrent subject so exhaustive as to exclude any State legislation upon the same subject, it has to be taken that the Central Act has replaced the State law on the subject. The correctness of this position has not been challenged by the learned Advocate for the petitioner. Thus, it cannot be said that after the Central Act 14 (XIV) of 1947 was amended by Act 48 (XLVIII) of 1950 and made applicable to the Travancore-Cochin State also, Act 16 (XVI) of 1950 passed by the State continued to be in force.

On the other hand, it is clear that it was the Central Act which was in force and in operation on the date when the order Ext. A was passed by the State Government. That order was passed in exercise of the power conferred on the State under section 10 (1) (c) of the Central Act. The objection that the order is invalid for the reason that it was passed in exercise of the power conferred on the State by Section 10 (1) (c) of the Central Act is therefore unsustainable and I hold accordingly.

(7) The next objection to the validity of the order Ext. A is that the reference under it has been made to a Tribunal who has not been validly appointed by the competent authority. The 2nd respondent's jurisdiction to entertain the reference is also questioned on the very same ground. The appointment of the 2nd respondent as the Industrial Tribunal at Alleppey was made by the Government of the Travancore-Cochin State by virtue of the authority conferred on the Government under the Travancore-Cochin Industrial Disputes Ordinance (Ordinance No. V (5) of 1950) which was then in force. This Ordinance was subsequently replaced by Act XVI (16) of 1950 of the State and all the sections made under the Ordinance were expressly kept alive by that Act.

It was while the 2nd respondent was thus functioning as the Industrial Tribunal at Alleppey that Act XVI (16) of 1950 was replaced by the Central Act XIV (14) of 1947 as amended by Act XLVIII (48) of 1950. The petitioner's contention is that when the Central Act replaced the Act passed by the State, the appointment of the 2nd respondent made by virtue of the authority conferred by the latter Act must also be deemed to have come to an end and that he could validly function as a Tribunal under the Central Act XIV (14) of 1947 only after he has been re-appointed as a Tribunal under that Act. In support of this position, reliance is placed on the definition of "Tribunal" as given in clause (r) of Section 2 of Act XIV (14) of 1947. The definition is as follows: "Tribunal" means an Industrial Tribunal constituted under this Act.

It is conceded on behalf of the respondents that the 2nd respondent has not been expressly re-appointed as a Tribunal under Act XIV (14) of 1947. The question for consideration is whether without such re-appointment the 2nd respondent could function as an Industrial Tribunal under that Act and whether Industrial Disputes could be referred to him for adjudication under Section 10(1)(c) of that Act. The answer to this question is furnished by the provision contained in section 23 of the Travancore-Cochin Interpretation and General Clauses Act, Act VII (7) of 1125, corresponding to section 24 of the Central Act, Act X (10) of 1897. The relevant portion of that section runs as follows:—

> "Where any Act is repealed and re-enacted with or without modification, then unless it is otherwise expressly provided any appointment, order....., made or issued under the repealed Act shall, so far as it is not inconsistent with the provisions re-enacted, continue in force and be deemed to have been made or issued under the provisions re-enacted, unless and until it is superseded by any appointment, notification, order .....made or issued under the provisions so re-enacted."

The learned advocate for the petitioner argues that this provision can apply only where the earlier Act has been expressly repealed by the later. Accordingly to him Act XVI (16) of 1950 has not been so expressly repealed by the Central Act XIV (14) of 1947 as amended by Act XLVIII (48) of 1950. I see no reason for restricting the scope of the provision contained in the General Clauses Act by reading more words into it. The provision as it stands is not confined to cases of express repeals. All that is contemplated by the section is that there must be a repeal of an existing Act by a subsequent Act. Such repeal may be by express words or it may be by necessary implication. Where the later Act has in substance and in effect repealed the earlier Act, the above-mentioned provision of the General Clauses Act will be attracted.

It has already been found that when the Central Act was made applicable to this State also, it has completely superseded Act XVI (16) of 1950 of the State. Thus there can be no doubt that the Central Act has in effect repealed Act XVI (16) of 1950 passed by the State. The entire field covered by the repealed Act has been covered by the Central Act and the provisions also are almost identical. Thus, it is clear that virtually there has been a repeal and re-enactment of Act XVI (16) of 1950 by the Central Act XIV (14) of 1947 when it was made applicable to the State, by the passing of Act XLVIII (48) of 1950. Necessarily, therefore, the provisions contained in Section 23 of the General Clauses Act, Act VII (7) of 1125, are to govern the appointments which had been made under Act XVI (16) of 1950.

The appointment of the 2nd respondent as the Industrial Tribunal at Alleppey was not superseded by any order passed under the Central Act. Hence, he must be deemed to continue as the Industrial Tribunal even after the Central Act was made applicable to the State and he must be deemed to have been appointed under the relevant provisions of the Central Act. Even under the Central Act, the power to appoint the Industrial Tribunal is vested in the Government of the State con-

cerned. Since the State Government had already appointed the 2nd respondent as the Industrial Tribunal and since his appointment had not been in any way terminated by the authority competent to do so, the utmost that the State Government had to do when the Central Act was made applicable to the State was to treat him as a Tribunal functioning under that Act. He has been so treated by Government when the industrial disputes enumerated in the order Ext. A were referred to him for adjudication under section 10 (1) (c) of the Central Act.

Thus, in any view of the matter, the objections raised by the petitioner that the 2nd respondent is not an Industrial Tribunal functioning under the Central Act, that the reference order Ext. A to him is invalid and that he is incompetent to entertain the reference, are unsustainable.

(8) Then there is the contention that there is no industrial dispute between the petitioner firm and respondents 4 to 9 and that therefore the Government have been acting without jurisdiction in making the reference as per the order Ext. A. It is not for the Government to finally decide the questions as to whether the petitioner firm is an employer, whether respondents 4 to 9 are workmen employed by the petitioner, whether the business conducted by the petitioner firm amounts to an industry and whether the disputes between the petitioner and respondents 4 to 9 would amount to industrial disputes, as defined in Act XIV (14) of 1947. The Industrial Tribunal is the proper authority to enquire into and decide all such questions arising between the disputants.

So far as the Government are concerned, they can refer such point of dispute to the Tribunal when they are satisfied, on the materials placed before them, that there is a case for enquiry and decision by the Tribunal. Section 10 of the Act empowers the Government to refer the points of dispute for adjudication by a Tribunal even when an industrial dispute between the contending parties is apprehended. The very fact that the Government are only referring the points of dispute for adjudication by the Tribunal is sufficient to show that the Government by themselves are not coming to any decision on the points of dispute. The order of reference is only an administrative order passed by the Government. It is not necessary that Government should issue notice to the contending parties and hear them before passing such an administrative order. The question of violation of the principles of natural justice cannot arise in the matter of passing such administrative orders.

The objection that the order Ext. A was passed without any judicial consideration of the question involved, is also untenable for the obvious reason that no judicial decision has been made as per that order. Such judicial decisions on the questions involved in the reference will be passed only by the Tribunal and only after hearing the contending parties. Since the order of reference Ext. A has not finally decided any question against the petitioner, there is no force in his contention that the order has been passed in violation of the principles of natural justice.

It cannot also be said that there was not sufficient material before the Government to justify the reference made under Ext. A. Admittedly, the petitioner firm has been doing the business of purchase and sale of cocoanut oil at Alleppey. It is also not disputed that respondents 4 to 9 had been at least occasionally engaged by the petitioner for loading and unloading oil tins in and from the boats used for the transport of oil.

From the affidavit filed by the Asst. Labour Commr. at Alleppey, it is seen that a representation had been made to him by the 1st respondent about certain disputes that arose between respondents 4 to 9 and the petitioner firm regarding the reduction of wage rates and the claim for noon-meal allowance, bonus and dearness allowance. It is also seen that the Assistant Labour Commissioner tried and failed to effect an amicable settlement of the disputes between the contending parties. The facts stated by him in his report to the Government were by themselves sufficient to justify the action taken by the Government under Section 10 (1) (c) of the Industrial Disputes Act and the order of reference Ext. A cannot be said to be invalid or to have been passed without jurisdiction.

(9) When the matter came up before the 2nd respondent Tribunal, the petitioner raised a preliminary objection that the reference itself was incompetent and that the 2nd respondent was not competent to entertain the reference. This objection was overruled by him as per the order Ext. B dated 20-9-1950. It is urged on behalf of the petitioner that this order amounts to an usurpation of jurisdiction by the 2nd respondent. It has already been found that the 2nd respondent has been validly appointed as an Industrial Tribunal and was functioning as such even after the Central Act had been made applicable to the Travancore-Cochin State and that therefore it was competent for him to entertain the reference made under the order Ext. A, provided that the matters referred to him come within the scope of the Industrial Disputes Act.

In view of the preliminary objection raised on behalf of the petitioner, the 2nd respondent had necessarily to consider the questions whether the business conducted by the petitioner firm amounts to an 'industry' as defined in the Industrial Disputes Act and whether the petitioner is an 'employer' and respondents 4 to 9 are 'workmen' as defined in the Act. The Act defines 'industry' as follows:—

> "'Industry' means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen".

This definition is comprehensive enough to take in the trade business that was admittedly being carried on by the petitioner firm at Alleppey. The definition of 'Workmen' is also very comprehensive:

> "'Workmen' means any person employed (including an apprentice) in any industry to do any skilled or unskilled manual or clerical work for hire or reward and includes, for the purposes of any proceedings under this Act in relation to an industrial dispute, a workman discharged during that dispute, but does not include any person employed in the Naval, Military or Air Service of the Government."

'Industrial Dispute' is defined as follows:—

> "'Industrial dispute' means any dispute or difference between employers and employers,

or between employers and workmen, or between workmen or workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour of any person."

In the nature of these definitions the facts admitted on both sides make it 'prima facie' clear that the disputes between the petitioner and respondents 4 to 9 come within the scope of the Industrial Disputes Act. Such a 'prima facie' conclusion is alone possible at the stage of disposing of a preliminary objection raised by the petitioner that the 2nd respondent has no jurisdiction to entertain the reference made under Ext. A. The further questions as to whether respondents 4 to 9 were only casual labourers engaged by the petitioner as and when their services were deemed necessary and whether they are entitled to be permanently retained as workmen, on the same terms and conditions as before, under the petitioner and to get the noon-meal allowance, bonus etc., as claimed by them, can properly be decided by the Tribunal only after taking the whole of the evidence which the parties may adduce and at the stage of passing the final order on the reference after due consideration of such evidence.

The correctness of the findings to be recorded at that stage on the several points of dispute between the parties could be challenged by either party by preferring an appeal against the final award that may be passed by the 2nd respondent, before the appellate Tribunal constituted under Act XLVIII (48) of 1950. The order Ext. B has only gone to the extent of holding that the 2nd respondent has jurisdiction to entertain the reference made under Ext. A. On the facts as admitted by the petitioner, it cannot be said that the decision arrived at by the 2nd respondent in his order Ext. B is unwarranted or erroneous. There is no force in the objection that by that order he has been usurping a jurisdiction which is not really vested in him. It follows therefore that the proceedings before the 2nd respondent cannot be quashed by the issue of a writ of 'certiorari' on the ground that he has no jurisdiction to entertain the reference made under the order Ext. A and to proceed with it.

(10) The next point for consideration is whether the 2nd respondent's order dated 5-9-1950 refusing permission to the petitioner to be represented by a legal practitioner is liable to be quashed. The relevant provision governing this matter is contained in section 36 of Act XIV (14) of 1947 as amended by Act XLVIII (48) of 1950. In clause 3 of this section, it is stated that no party to an industrial dispute shall be entitled to be represented by a legal practitioner in any conciliation proceeding under the Act or in any proceedings before a Court. In clause 4 it is stated that in any proceeding before a Tribunal, a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceeding and with the leave of the Tribunal.

In the present case, the Tribunal refused the leave applied for by the petitioner because of the objection raised by respondents 4 to 9. In passing such an order the Tribunal was only exercising the power conferred on him by clause 4 of section 36 of the Industrial Disputes Act. But it is contended on behalf of the petitioner that the said provision as well as the order in question have in effect denied the petitioner's fundamental right to be represented by a legal practitioner. The Industrial Tribunal is a Special Tribunal created under the Industrial Disputes Act and the extent of his powers and jurisdiction are specified in the Act itself.

Special provisions are also made in the Act regarding the procedure to be followed by the Tribunal in dealing with industrial disputes referred to him for adjudication. The provisions regarding the representation before him of the parties to such disputes are contained in section 36 of the Act. It is clear from a reading of these provisions that they are made applicable to industry and labour alike. No discrimination has been shown in favour of or against either party. It cannot also be said that by these provisions there has been a negation of any of the Fundamental Rights guaranteed to a citizen of India under the Constitution. Under such circumstances, the restrictions imposed by clauses 3 and 4 of Section 36 of the Act cannot be said to be void or inoperative or that in passing the order dated 5-9-1950 refusing the petitioner's request to be represented by a legal practitioner, the 2nd respondent was acting without jurisdiction. It follows therefore that the said order is not liable to be quashed by the issue of a writ of certiorari.

(11) Lastly, there is the objection regarding the legality and sustainability of the interim award made under Ext. C in favour of respondents 4 to 9. The main ground of attack against this award is that in passing such an award the 2nd respondent was acting upon a complaint preferred by respondents 4 to 9 on 21-11-50 without giving notice of the same to the petitioner. There is not much force in this objection. The complaint filed by respondents 4 to 9 on 21-11-1950 contained no fresh allegations against the petitioner. On the other hand, that complaint petition merely reiterated the allegations which had already been made against the petitioner in the earlier petition filed by respondents 4 to 9 on 2-9-1950. The petitioner had notice of that petition and he had filed his objections to the several allegations contained therein. Thus, there is no basis for the contention that the petitioner had no opportunity to meet the allegations made against him on behalf of respondents 4 to 9 and that the enquiry into these allegations was conducted without due notice to the petitioner.

(12) According to respondents 4 to 9, the petitioner had, during the pendency of the proceedings before the Tribunal, kept them out of employment and had virtually declared a lock-out as against them. It was alleged that he has given the work usually done by those respondents, to new workmen engaged by him and has thus altered, to the prejudice of these respondents, the conditions of service prevailing before the commencement of the proceeding before the Tribunal. The 2nd respondent enquired into these allegations and found them to be true and his conclusions regarding those matters are recorded in the award, Ext. C. The correctness of these conclusions is challenged by the petitioner.

But it has to be pointed out that the present petition filed under Article 226 of the Consti-

tution cannot be deemed to be an appeal against the Award Ext. C. Under Act XLVIII (48) of 1950 an Appellate Tribunal has been constituted and the jurisdiction to hear appeals against awards passed by Industrial Tribunals has been vested in that Appellate Tribunal. Section 7 of Act XLVIII (48) of 1950 has made provision for such an appeal, subject to the limitations imposed by the section itself. If Ext. C amounts to an award as contemplated by that section, there can be no doubt that the proper remedy available to the petitioner in the matter of getting the relief against that award is by way of an appeal to the appellate Tribunal. Section 2 of Act XIV (14) of 1947 has defined "Award" in the following terms:

> "'Award" means an 'interim or final determination' by an Industrial Tribunal of any industrial dispute 'or of any question relating thereto' ".

Section 33 (A) of the Act lays down:

> "Where an employer contravenes the provisions of section 33 during pendency of proceedings before a Tribunal, any employee aggrieved by such contravention, may make a complaint in writing, in the prescribed manner to such Tribunal and on receipt of such complaint that Tribunal shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit its Award to the Appropriate Government and the provisions of this Act shall apply accordingly."

The complaints made in the petitions filed by respondents 1 to 4 and respondents 4 to 9 were to the effect that the petitioner had contravened the provisions of section 33 by altering to their prejudice the conditions of service applicable to them immediately before the commencement of the proceedings. The award under Ext. C was passed by the 2nd respondent under section 33 (A) of the Act after enquiring into the allegations which came within the scope of section 33. Thus it is clear that Ext. C is an interim award as contemplated by the Act. A right of appeal against that award is clearly available to the petitioner under section 7 of Act XLVIII (48) of 1950 and it is the function of the Appellate Tribunal to examine the award on its merits, and to decide whether it calls for any interference.

When a remedy is thus clearly available to the petitioner to challenge the sustainability of this award, it will not be proper for this Court to usurp the jurisdiction of the appellate Tribunal while dealing with the present petition presented under Article 226 of the Constitution. Hence I do not propose to express any opinion on the merits of the award, Ext. C. The finding already recorded that the award was passed by the 2nd respondent in the proper exercise of the jurisdiction vested in him under the provisions of the Industrial Disputes Act, is sufficient to disallow the petitioner's prayer for the issue of a writ of 'certiorari' to quash that award.

(13) In the result, I hold that this petition is unsustainable on any of the grounds urged by the petitioner. No case has been made out to justify the issue of any of the writs under Article 226 of the Constitution against the respondents as prayed for by the petitioner. Accordingly, this petition is dismissed with costs, one set to respondents 1 to 3 and another set to the remaining respondents. Advocate's fee Rs. 50/- each.

V.R.B. Petition dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 377

KUNHI RAMAN C. J.
AND SUBRAMANIA IYER, J.

Parukutty Amma Barati Amma, Appellant v. Ramayyan Ramanathayyan, Respondent.

Second Appeal No. 204 of 1124, D/- 31-8-1951.

Tenancy Laws —Cochin Verumpattomdars Act (VIII (8) of 1118), S. 5 (2) — Applicability.

In order to attract the application of Cl. (2), the land which is the subject-matter of the lease must have been a garden land at the time of the lease and cocoanut must have been the major produce thereof. If, in respect of property which was not garden land at the time of the lease but which had been improved and converted into garden land by the tenant, the landlord is given a right to get rent based on the produce of that garden land on which cocoanut trees were planted by the tenant, the result would be to give to the landlord a part of the benefit arising out of the improvement effected by the tenant. (Para 2)

V. Bhaskara Menon, for Appellant; A. S. Krishna Iyer, for Respondent.

REFERENCE..... /Para.
('01) 24 Mad 47: (10 Mad LJ 321 FB) 2

SUBRAMANIA IYER, J. : The only question for consideration in this second appeal is the interpretation of clause 2 of section 5 of the Cochin Verumpattomdars Act, VIII of 1118 which runs thus:—

> "Where cocoanut is the major produce of a garden land and the pattam fixed therefor under the contract of tenancy is payable in money, it shall be obligatory on the part of the Verumpattamdar to give and the lessor to accept the pattam accruing due after the commencement of this Act in kind computed on the basis of the average market value of cocoanut for a period of twenty years prior to the date of the contract of tenancy of the money value thereof computed at the market rate prevailing on the date on which such pattam accrues due".

The plaintiff who is the appellant before us contends that clause 2 applies to the case and that he is entitled to get the pattam as calculated according to the provisions of this subclause. The tenancy in this case is evidenced by Ext. A dated 27-6-1079. The schedule in Ext. A shows that the property was not garden land. Indeed, it is admitted that at the time of the lease, the property was not a garden land but that it had been afterwards converted into a garden land by the tenant and that at the time of the suit which is of the year 1121 the property had been converted into a garden land. The contention urged on behalf of the plaintiff appellant is that clause 2 will be attracted if the property in question is a garden land at the time of the suit though it had not been such at the time of the tenancy. It is contended on behalf of the tenant respondent that to attract the application of clause 2, the property must have been a

garden land at the time of the lease and to sustain this contention reliance is placed upon the second part of clause 2 wherein the method of computation of the market value of cocoanuts is mentioned with reference to the date of the contract of tenancy.

(2) The learned counsel for the appellant contends that the Verumpattamdars Act is an expropriatory legislation encroaching upon the right of the landlord and conferring benefits upon the tenant and that, therefore, the clause ought to be construed strictly. He also relies upon the provision contained in Ext. A to the effect that if the tenant effects improvement in the property by way of 'Arazcha chamayangal' i.e., trees and other improvements, he is entitled to be paid the value therefor. We consider that in order to attract the application of that section, the lease must relate to garden land, that is to say, the property must be garden land at the time of the lease, that the major produce of that garden land must be cocoanut and that the pattam fixed in the contract of tenancy must be payable in money. Otherwise, the result would be to construe the Act as expropriatory of the rights of the tenant for whose benefit the enactment was made. The right of a tenant to effect improvements upon the property and to get compensation therefor has been recognised by the law of the State at all times, by statute from the year 1090 as also by custom that preceded it.

If in respect of property which was not garden land at the time of the lease but which had been improved and converted into garden land by the tenant, the landlord is given a right to get rent based on the produce of that garden land on which cocoanut trees were planted by the tenant, the result would be to give to the landlord a part of the benefit arising out of the improvement effected by the tenant. When during the tenancy, improvements are effected by the tenant by way of planting trees or otherwise, it would be competent for the tenant to remove those improvements if that could be done without impairing the land and subject to obligations, if any, created by contract or custom. 'VASUDEVAN NAMBUDRIPAD v. VALIA CHATHU ACHAN', 24 Mad. 47 (F. B.). In the case of a cocoanut plantation, it is well known that the trees admit of transplantation with advantage to the tenant. In the case of land which was paddy land at the time of the lease but which has been reclaimed into garden land by planting cocoanut trees thereon if the contention urged on behalf of the plaintiff be accepted it would come to this viz., that it would be competent for the landlord to get rent calculated on the basis of the produce from the cocoanut trees which are planted by the tenant and if such a rent could be fixed and recovered by the landlord, the landlord would continue to have that right even after the tenant removes the trees from that holding and even after the garden land ceases to be such or even after the major produce of the garden land ceases to be cocoanut.

What is the time at which the land should be a garden land is the question. Is it at the time of the tenancy or is it at any other time? Suppose the land was a paddy land at the time of the lease. Some years after the tenancy, the tenant reclaims the property and plants it with cocoanut trees. The trees begin to bear and the landlord comes in for rent as calculated under clause 2 and gets a decree for rent. Thereafter, the tenant transplants all the trees and the land ceases to be garden land whose major produce is cocoanut. It cannot be that in the case of a property, which as already mentioned, is capable of becoming a garden land and ceasing to be such according as trees are planted or taken away at the desire of the tenant, the basis of the calculation of the rent should change from time to time. Law does not provide that the landlord should share the benefit of the improvement of the tenant except at the time of eviction when the landlord need pay in respect of the improvements of this description only three-fourths of their value.

Except in this respect, we are not aware of any contingency in which the landlord can have the benefit of the labour of the tenant. The definition of the word 'pattom' which is given in the Tenancy Act and which in fact is agreed to be the proper definition by the learned counsel for the appellant, is that it is the landlord's share of the produce of the land. The landlord can have a share only of the produce of the holding that he lets to the tenant. He cannot have a share of the produce of the property which is not demised by him. The latter part of clause (2) which refers to the mode of calculation of the number of cocoanuts to be delivered in case pattam is to be paid in kind or the money value on the due date shows that the calculation is to be made on the basis of the price of cocoanut with reference to the date of the contract of tenancy. It is presumed that the land at the time of the lease was a garden land and that cocoanut was the major produce therefrom; the pattam being made payable in money, the number of cocoanuts which would be necessary to fetch that amount at the time is calculated and the tenant is given an option to deliver that number of cocoanuts in kind if the pattam becomes due after the date of the act or to pay money according to the market value prevailing at the time when the rent becomes due.

It is clear that the clause is enacted to enable the landlord to have the advantage of the increase in the price of cocoanuts at the time the Act was passed notwithstanding the fact that the rent is payable in money in respect of a garden land whose major produce is cocoanut. To this extent, it is intended to benefit the landlord to enable him to have the advantage of the produce from the property that was let by him. The learned counsel for the appellant relies upon the word 'is' used in clause 2 which says "where cocoanut is the major produce of the garden land". That stands qualified by the succeeding words" and the pattam fixed therefor under the contract of tenancy is payable in money". That part clearly indicates that the time at which the land should have been a garden land and cocoanut the major produce thereof is the time when the 'pattam' was fixed. It is thus clear that viewed from whatever aspect the only conclusion that is possible is that in order to attract the application of clause (2) the land which is the subject-matter of the lease must have been a garden land at the time of the lease and that cocoanut must have been the major produce thereof. In this view the

interpretation put upon the section by both the courts below is correct and the second appeal should be dismissed with costs.

D.H. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 379

KUNHI RAMAN C. J. AND
SUBRAMANIA IYER J.

Haridas Pillai and others, Appellants v. State.

Criminal Appeal No. 123 of 1951 and Criminal R. P. No. 245 of 1951 D/- 17-10-1951.

(a) Penal Code (1860), Ss. 362 and 366 — Consent — Necessity of — Force — Use of — Intention of accused — (Cochin Penal Code, (I (1) of 1059), Ss. 342 and 346).

In the case of an offence under S. 362, no question arises as to whether there was consent or absence of consent. It is not necessary, according to the definition of abduction, that any force should be used. It is enough if by deceitful means a woman is induced to go from any place. If the intention of the accused is that she may be seduced to illicit intercourse by which is meant intercourse between a man and woman who are not husband and wife, that would make the accused liable for this offence under S. 366. Where it is clear from the evidence that the person who is charged had abducted the woman in order that she may be seduced to illicit intercourse, he can be brought under section 366 and punished. (Para 4)

Anno: Penal Code S. 362 Notes 1 and 2, Section 366, N. 5.

(b) Penal Code (1860), S. 366 — Intercourse by all accused — Necessity of, for conviction.

It is not necessary to bring the guilt home to the accused under S. 366 that there must be definite evidence that all the accused taking part in abduction had intercourse with the woman abducted . (Para 4)

Anno: Penal Code S. 366, N. 5.

M. Bhaskara Menon and Komattil Achutha Menon, for Appellants; Public Prosecutor, T. R. Balakrishna Iyer, for the State.

KUNHI RAMAN C. J.: The appeal is presented on behalf of the six accused persons who were tried in Sessions Case No. 4 of 1951 in the Sessions Court at Anjikaimal. The learned Judge after hearing the evidence for the prosecution found that all the six persons were guilty under Ss. 129, 346 and 456 of the Cochin Penal Code. Section 129 corresponds to S. 143 of the Indian Penal Code which refers to an unlawful assembly consisting of five or more members. Section 346 corresponds to S. 366 of the Indian Penal Code which provides punishment for abducting a woman to compel her to illicit intercourse. Section 356 of the Cochin Penal Code corresponds to S. 376 of the Indian Penal Code which provides punishment for rape.

After convicting them under these sections, the learned Judge has sentenced accused 1, 2 and 4 to 6 to rigorous imprisonment for five years and to a fine of Rs. 100/- with a direction that in default of payment of fine they should undergo rigorous imprisonment for a further period of three months. The third accused who was found to be the person who played the chief part in perpetrating these offences was sentenced to seven years' rigorous imprisonment and to pay a fine of Rs. 100 with a similar direction for undergoing imprisonment in default of payment of fine. All these accused persons have brought the criminal appeal to this court. On behalf of the State, a revision petition has been filed which is already referred to. The point taken in the revision petition is that the sentences are not adequate in view of the offences committed by the accused persons. The prayer is for enhancing the sentence.

(2) The victims of the offences of abduction and rape are Pws. 1 and 2 who are two young women who arrived in Ernakulam from their native place which they said is Thodupuzha. They are both 18 years of age and they are first cousins being the daughters of two brothers. On the date of occurrence, they seem to have run away from their home in Thodupuzha. They travelled by motor bus to Alwaye and from there they got into the train and got down at Ernakulam at about mid-day on 12-8-1125 corresponding to the 25th of March 1950. After they got out of the railway station, their version is that they went to a water tap in the vicinity of the level crossing not far from Ernakulam South Railway Station and there while they were waiting to proceed further, the third accused who was going about on a cycle noticed them.

Their case is that they had come to Ernakulam in order that they may go to a convent. The exact position they wanted to secure in the Convent is not clear. There is a suggestion made that in Thodupuzha the father of P. W. 1 approached the priests in charge of the local convent and he found that it would be very expensive to get P. W. 1 admitted with the idea of ultimately becoming a nun in the convent. The intention of both these girls who are Roman Catholic Christians, was that they should enter the convent in Ernakulam in some capacity or other. The idea that emerges from the vague statements made by them seems to be that they wanted to employ themselves at least as servants in the convent in Ernakulam. They were strangers to the place. They had not come to this place on any prior occasion. Therefore, they did not know their way to the convent. That was why they were loitering to ascertain how best they could reach the convent and make their request to the Mother Superior of the convent.

The 3rd accused, as already stated, passed up and down the road on his bicycle when he noticed these two girls standing and looking puzzled. He thought that they needed some sort of assistance and, therefore, he accosted them and started talking to them. He gathered from their conversation that they were strangers to this place, that they had just arrived a short while before his talking to them by train and that they were anxious to reach the convent in order that they may attain their object. He thereupon told them that he would show them the way to the convent. According to the prosecution, this was by way of enticement. He never intended to fulfil that promise. He merely wanted to have some control over the two girls with a nefarious scheme in his head. That is what is suggested on behalf of the prosecution and that is what appears from the subsequent conduct of the accused person.

This accused accordingly asked the girls to go with him and he walked along with them leading the cycle and not riding on it. He took them to the residence of P. W. 11 Khathija who was a Muslim married lady with whom the 3rd accused was slightly acquainted and he requested her to permit P. Ws. 1 and 2 to remain in her house for a time. In the interval he was to go out and get the necessary permission to get the girls admitted into the convent. P. W. 11 did not like the idea of accommodating these two girls who were absolute strang-

ers to her even for a time and therefore she refused the request made by the 3rd accused. He accordingly took the girls with him to the residence of P. W. 12 who is the wife of P. W. 13.

The third accused was slightly acquainted with these persons as well. He made a similar request to P. W. 12 when her husband was not at home and she consented to permit the girls to remain in her house for a few hours in order that the 3rd accused may make the necessary arrangements which they wanted to make. Accordingly after leaving P. Ws. 1 and 2 in the house of P. Ws. 12 and 13 during the absence of P. W. 13 who had gone for his work, the 3rd accused left the place for a time. In the evening when P. W. 13 who is the husband of P. W. 12 came back and saw these two girls in the house he objected to their presence and he suggested that they may leave the house. They accordingly left the house and were standing near the entrance to the house from the road.

At that stage the 3rd accused came back. He told them that he had gone to make arrangements for getting them admitted to the convent as they desired and he took them along with him up to Ravipuram Junction. At that place he engaged two rickshaws which were pulled by P. Ws. 10 and 19. At that stage the 4th and 5th accused joined the third accused. The procession started from that spot, the two girls riding in the rickshaws engaged for them, the 3rd accused riding on his cycle and accused 4 and 5 walking. They had given directions to the rickshawmen to take the two passengers P. Ws. 1 and 2, to Karikamuri where the 6th accused had taken up a room on rent belonging to an advocate of this place. The 3rd accused seems to have secured the key of this room from the tenant. He opened the room and asked the girls to get inside.

While they were inside the room, the 3rd accused went out and got a packet of rice. P. W. 1 did not like to eat it, but P. W. 2 ate a portion according to her version. By this time, it was nearly 9.30 P. M. At that stage, the second accused came on a cycle to the room and reported that the first accused wanted the girls to be taken to the convent. P. Ws. 1 and 2 were meant to hear this announcement. After delivering the message, the 2nd accused left the place. The third accused accompanied by accused 4, 5 and 6, the tenant of the room who had arrived in the meantime, proceeded towards Valanjambalam and there they were joined by the first and second accused. The first accused asked whether the two girls had their food and on hearing that only P. W. 2 had eaten the rice which was supplied by the third accused, he wanted P. W. 1 also to be given her dinner. At his direction, accordingly P. W. 1 was taken to a Muslim hotel called the Swarj Hotel in the vicinity, and there she was given all that she wanted and after she had finished her dinner she was taken out and all the six accused persons accompanied by P. Ws. 1 and 2 walked towards the scene of occurrence which, according to the prosecution evidence, was a paddy field not far from the Swaraj Hotel.

While they were proceeding in that direction, P. W. 1 seems to have entertained some suspicion especially when she noticed that they were taking a route which was not frequented by a number of pedestrians and she asked the question whether that was the way to the convent. The answer was given by the first accused that they will soon be there in the 'Madhom'. That was the expression that he used. After some time when they reached a lonely place where there was a cemetry, the version given by P. Ws. 1 and 2 is that they were taken to different parts. P. W. 1 was taken to a low wall by the side of the cemetry. P. W. 2 was taken down into the field and their version is that all the accused persons committed rape upon them. After the incident, all the accused with the exception of accused 4 and 5 left the place. The suggestion is that they left taking P. W. 2 with them.

Accused 4 and 5 are alleged to have committed rape on P. W. 1 after the other accused had left and then they walked towards the room in the occupation of the 6th accused. The girl was walking between the two men and the evidence is they were holding her hands while they were proceeding. On the way, three other witnesses, P. Ws. 5, 6 and 7 happened to be coming from the opposite direction, P. W. 5 was a police constable who was on leave. The two accused persons who were walking with P. W. 1 recognised him and they promptly ran away leaving P. W. 1 alone on the road. This excited the suspicion of these three people and they went up to her and asked her why her two companions had bolted. Then she made a statement about all that had happened previous to the three witnesses meeting her.

They then took her to the Police station. They gathered on their way that the Police Sub Inspector was not in the station. Therefore, they proceeded to his house where in answer to the questions put to her by the Police Sub Inspector P. W. 1 made a statement which has been reduced in writing and marked as Ext. A in the trial court. This contains an abstract of the events that had transpired before P. W. 1 was met by the police Constable and taken to the Sub-Inspector. The Sub-Inspector did a bit of vigorous investigation. He thought that since P. W. 1 was a stranger to the place the proper persons to approach for ascertaining the place where the room of the 6th accused is situated would be the two rickshawmen.

Fortunately, when he approached the place where rickshaws are usually kept, he saw both of them there. They are P. Ws. 10 and 19. They showed the Police Sub Inspector the room in Karikamuri to which place they had taken P. Ws. 1 and 2 in their rickshaws. The Police Sub-Inspector found the door of the room bolted from inside. He knocked at the door loudly and then it was opened. When the door was opened the Police Officer found all the six accused persons congregated there inside the room. The suggestion made on behalf of the prosecution is that when accused 4 and 5 ran away from P. W. 1 on seeing the Police Constable P. W. 5 they must have gone straight to the room to sound a note of warning to the other accused.

The Sub Inspector suspected that P. W. 2 might be somewhere in the room. He demanded that he must be shown where P. W. 2 is. Then it was discovered that she was lying behind a screen evidently introduced for the purpose of preventing her from being seen by any Policeman who wanted to come to the room. She was taken charge of by the Police Officer who also arrested all the six accused persons and sent them to the Police lock-up with a proper escort.

(3) The main contention urged on behalf of the appellants is with reference to the offence of rape under S. 356 of the Cochin Penal Code. Learned counsel who pointed out all the weaknesses in the prosecution stresses the fact that there was no satisfactory evidence to show that the offence was committed. The suggestion made is that there is nothing to indicate that the act was done without the consent or against the will of the victims. These contentions may be well founded. The evidence of the two doctors who were examined at the trial shows that on an examination of the two women by the lady doctor who was examined as P. W. 4 she was not able to notice any signs which would conclusively show that there was forcible intercourse. She noticed certain marks which ac-

cording to her did not necessarily indicate that there was any force used and rape was committed.

Similarly, the evidence of P. W. 3 is to the effect that there was no indication on the persons of the six accused persons who were convicted by the court below to support the case of rape. Moreover, there is no evidence of violence on the bodies of the two girls. They had said that when they were about to shout out two of the accused caught them by the throat and threatened to kill them. No marks of violence were found on the necks of these two girls. The dress worn by them was not in any way torn or damaged. Applying all the usual tests that are generally applied in cases of this kind, it is not possible to assert that the offence of rape was committed by the six accused persons.

They all admit that they had sexual intercourse with the two girls except accused 2 and accused 6. Against them, there is evidence to show that they also participated. But it cannot be positively asserted that the evidence called for the prosecution has definitely made out that the offence of rape was committed. This is a case in which the six accused persons are entitled to the benefit of a reasonable doubt. There are very strong suspicious circumstances but in the absence of legal proof, it is not correct to convict them of the offence of rape.

We accordingly hold that the evidence on record is not sufficient to hold that the offence of rape was committed. On the other hand, the evidence creates a reasonable doubt as to whether the offence was committed in the manner alleged by P. Ws. 1 and 2. Giving the six accused persons benefit of the doubt, we hold that although there are very strong suspicious circumstances against them, the conviction for rape cannot be upheld. The conviction under section 356 of the Cochin Penal Code must therefore be set aside.

(4) With regard to the offence under section 346, in our judgment, there is sufficient evidence that all the accused persons have committed this offence. Abduction is defined in S. 362 of the Indian Penal Code corresponding to S. 342 of the Cochin Penal Code as follows:

> "Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person."

Section 366 of the Indian Penal Code provides the punishment for abducting a woman, in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse, which is imprisonment of either description which may extend to ten years and also fine. It will be noticed that no question arises as to whether there was consent or absence of consent in the case of an offence under this section. It is not necessary according to the definition of abduction, that any force should be used. It is enough if by deceitful means a woman is induced to go from any place. If the intention of the accused is that she may be seduced to illicit intercourse by which is meant intercourse between a man and woman who are not husband and wife, that would make the accused liable for this offence under section 366.

The framers of the Code deliberately introduced this section into the Code with the object of providing for cases like the present, where there may be difficulty in asserting positively whether there was consent or no consent, and that question will have to be decided specially with reference to the evidence of the woman who complains of the offence. In such cases, where it is clear from the evidence that the person who is charged had abducted the woman in order that she may be seduced to illicit intercourse, he can be brought under section 366 and punished. In the present case, we have no doubt whatsoever from the evidence that has been called on behalf of the prosecution, that deceitful means were employed by the accused.

The learned Sessions Judge has found that they were all acting in concert, that they were all members of an unlawful assembly, with the common object of seducing these girls. We have no doubt that this conclusion is correct supported as it is by the evidence adduced on behalf of the prosecution. The girls had announced their intention when the third accused first accosted them. Their object was to go to the convent in Ernakulam. They wanted to find their way to that institution. The 3rd accused and afterwards his comrades including all the other accused from time to time deceived them by telling them that they will soon be taken to the convent. The 3rd accused went to the length of saying that he would interview the sister in charge of the convent and get her permission for admitting the two girls in that institution.

At every stage of their progress from the water tap in the vicinity of the railway station Ernakulam South, to the place of occurrence, the statement was repeated as is evident from the testimony of witnesses especially the two householders who were approached by the accused. The girls were taken to their houses as evidenced by the testimony of the rickshaw pullers who had overheard the conversation from the evidence about the announcement made by the 2nd accused that he purported to bring a message from the first accused to the room of the 6th accused where the two girls were kept for a time by the 3rd accused. On all these occasions, the idea is prominently brought forward that the girls were anxious to reach the convent and the 3rd accused and his companions were encouraging them by telling them that they are making all necessary arrangements to see that they are admitted as inmates of the convent.

In the meantime, they were showing considerable kindness and hospitality to P. Ws. 1 and 2. Their attitude must have deceived the two young women. They were treated to good food and they were taken for rickshaw rides. They were taken out for a walk on the representation that they were being taken to the convent. When they were near the place of occurrence which was a lonely spot, and P. W. 1 asked loudly whether that was the way to the convent the first accused announced that they would soon be there in the Madhom.

We have no doubt whatsoever from the evidence in this case that all the six accused persons were acting in concert, that they had all this idea of practising deception of these two young women, to abduct them so that they may be seduced to illicit intercourse. The fact of the intercourse is admitted by four out of the six accused persons. It is not necessary to bring the guilt home to the accused under S. 366 that there must be definite evidence that all the accused had intercourse with these women. They were all acting in concert, they were all walking together with these women, they all proceeded to the scene of occurrence and that there was admittedly illicit intercourse for the purpose of section 366. It is therefore clear that the conviction under S. 346 of the Cochin Penal Code as also under S. 129 of the Cochin Penal Code corresponding to Ss. 366 and 143 of the Indian Penal Code is correct. These convictions must, therefore be upheld.

(5) The next question is as to sentence. In view of the revision petition presented on behalf of the State for enhancing the sentence, there is not much difficulty in deciding what sentence should be passed. The trial court after convicting the accused under Ss. 129, 346 and 356 passed a sentence only

in respect of the offence under S. 356 which is the major offence. We have set aside that conviction. We have upheld the conviction under Ss. 346 and 129. The learned Public Prosecutor represents that in view of the maximum punishment provided for under S. 346 of the Cochin Penal Code, the same sentence which has been passed by the trial court may be upheld and regarded as punishment for the offence under section 346.

We accept this contention and sentence accused 1, 2 and 4 to 6 to rigorous imprisonment for five years and to pay a fine of Rs. 100/-. In default of payment of fine, they shall undergo rigorous imprisonment for a further term of three months. It is necessary that deterrent punishment should be given to a person like the third accused who can aptly be described as a human vulture waiting for its prey. The presence of such people in a busy town like Ernakulam will be a menace to the safety of unprotected women in the locality and therefore we agree with the learned Sessions Judge that a more severe sentence is necessary in the case of the 3rd accused.

The 3rd accused is accordingly sentenced to rigorous imprisonment for seven years and to pay a fine of Rs. 100/-. In default of payment of fine, he shall undergo a further term of rigorous imprisonment for three months. The criminal appeal is accordingly dismissed and in the revision we have already directed the extent of the penalty to be undergone by the accused persons. Cancel bail bonds of accused 1, 4 and 5 who have availed themselves of the order directing them to be released on bail.

V.R.B. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 382

SANKARAN AND GANGADHARA MENON, JJ.

Narayanan Guptan Namboori, Appellant v. Varki Mani, Respondent.

Second Appeal No. 322 of 1124, D/- 16-11-1951.

Travancore Jenmi and Kudiyan Act (12 (XII) of 1108) — Wrong registry of property as if it were Puthuval land — Fixing of Jenmikaram.

The fixing of jenmikaram is an inevitable incident of a Kanam demise. A Jenmi can resist such settlement only if he is able to conclusively establish that the property was not jenmom property and that it happened to be included in the Kanom deed as a result of a bona fide mistake. A subsequent wrong registry of the property by the Sirkar as if it were a Puthuval land will not in any way affect the pre-existing rights as between the jenmi and his Kanom tenant if the property was really jenmom property at the time of the demise. What really matters is the nature of the property at the time of the original demise in favour of the tenant. 4 Trav LJ 117; 5 Trav LJ 268 and 32 Trav LJ 164, Ref. (Para 2)

P. Sankara Narayana Kukkilya, for Appellant; K. P. Abraham, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('13) 4 Trav LJ 117 2
('14) 5 Trav LJ 268 2
('41) 32 Trav LJ 164 2

SANKARAN J.: The defendant is the appellant. The plaintiff's suit is for a decree fixing the jenmikaram recoverable by the defendant in respect of the plaint property. This property along with other properties were demised on 'kanom' as per Exhibit A kanam deed dated 30-1-1090 in favour of the plaintiff from the defendant's illom. All the properties included in Ext. A were described as 'jenmom' properties of the defendant's Illom and the demise is one satisfying the requirements of a regular 'kanapattom' tenure as contemplated by the Jenmi and Kudiyan Act. As per the amended, Jenmi and Kudiyan Act of the year 1108, the jenmikaram due in respect of the properties included in Exhibit A except the plaint property, has been settled.

No jenmikaram has been settled in respect of the plaint property for the reason that it is a Puthuval registry in favour of the defendant. The plaintiff's suit to have the jenmikaram settled for this property also is resisted by the defendant on the ground that the property is Pandarapattam property & as such not liable to be treated as kanapattom property. Both the lower courts overruled the contention of the defendant and passed a decree in favour of the plaintiff fixing the jenmikaram payable in respect of the plaint property. The defendant has therefore come up in second appeal.

(2) Exhibit A kanam deed dated 30-10-1090 was executed in renewal of the prior kanam deed Ext. B dated 1-3-1081. Both these documents were executed by the prior karnavan of the defendant's Illom. The defendant is a Malayala Brahmin Jenmi. In Exts. A and B the properties demised on kanam have been expressly described as the jenmom properties belonging to the defendant's Illom. These documents also provide for periodical renewal on payment of renewal fees. All the other requirements of kanom demise are also satisfied by both these documents. Thus there can be no doubt that the tenure created under Exts. A and B is a 'kanam' tenure coming within the scope of the Jenmi and Kudiyan Act.

The fixing of jenmikaram covered by these documents is an inevitable incident of such a demise. The defendant jenmi could resist such settlement in respect of the plaint property only if he is able to conclusively establish that the plaint property was not jenmom property even at the time of the original demise under Ext. B of the year 1081 and that this property happened to be included in Ext. B and treated as jenmom property as the result of a bona fide mistake. But the defendant has not adduced any such evidence in this case. On the other hand, his own assertion in the later document of the year 1090 is to the effect that the plaint property was really the 'jenmom' property of his 'Illom' and that the rights created in favour of the tenant as per the original demise will continue to be in force in spite of the fact that there has been a subsequent registry of this property by the Sirkar as if it were a Puthuval land.

It is settled law that any such wrong and unauthorised dealing of jenmom properties by the Sirkar will not in any way affect the pre-existing rights as between the jenmi and his 'kanom' tenant in respect of the property which was really jenmom property at the time of the demise. (Vide 'KUMARAN KUMARAN v. NARAYANAN PARAMESWARAN', (4 Trav. L. J. 117), 'MATHAI MATHU v. NARAYANAN KRISHNAN NAMBOORI', (5 Trav. L. J. 268) and 'VARKI v. CHAKO OUSEPH', (32 Trav. L. J. 164). What really matters is the nature of the property at the time of the original demise in favour of the tenant. As already stated, there is the unequivocal admission of the defendant 'jenmi' himself in Exts. A and B that the plaint property was the jenmom property of his Illom at the time of the kanom demise in favour of the plaintiff and that the rights created as per that demise will continue to be in force even in respect of this property in spite of the fact that there has been a subsequent 'Puthuval' registry in respect of this property in favour of the defen-

dant. There is also no evidence to show that there has been any mistake in demising this property on kanom in favour of the plaintiff as the jenmom property of the defendant. Under such circumstances the lower courts were right in holding that the plaint property is also the jenmom property of the defendant demised on kanom under Exts. A and B and that the plaintiff's claim to have the jenmikaram payable in respect of this property fixed is sustainable. The correctness of the rate of such jenmikaram as fixed by the lower court is not challenged in this appeal. In fact the rate has been fixed in accordance with the calculation made by the defendant himself in his written statement.

(3) In the result the decree of the lower court is confirmed and this appeal is dismissed with costs. The defendant will be at liberty to take the necessary steps on the basis of the decision in this case to have the necessary entries made in the jenmikaram Register for the particular locality and to recover the jenmikaram due to him in respect of the plaint property at the rate fixed by the decree in this case.

V. R. B. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 383

KOSHI AND GOVINDA PILLAI, JJ.

Madhavan Padmanabhan and others, Appellants v. Kumaran Kochan and others, Respondents.

A. S. No. 659 of 1123 (T), D/- 13-8-1951.

(a) Civil P. C. (1908), S. 11 — Subsequent suit deliberately overvalued — Decision in previous suit operates as res judicata.

A plaintiff cannot get rid of the bar of res judicata by including in a subsequent suit a clearly unsustainable and, therefore, not a bona fide claim and bringing it in a Court of higher jurisdiction. Nor can he evade the rule by deliberately or arbitrarily overvaluing the same claim in the subsequent suit to take out the case from the competency of the court which tried the previous suit. Chitaley's Civil P. C. 1950, Edn. Ref. (Para 3)

Anno: C. P. C., S. 11, N. 80.

(b) Civil P. C. (1908), S. 11, Expl. 3 — Redemption suit — Plaintiff asking for direction to defendants to remove buildings put up by them — Defendants claiming to be co-owners of the building along with plaintiff — Determination of title necessary for giving directions for removal — Finding on question operates as res judicata.

The plaintiffs, in their right as mortgagors, had wanted a redemption of the property and also a direction to the mortgagees to remove the buildings, which they had put up in the plaint item No. 1. Defendants 1 to 7 contended that they were co-owners with the plaintiffs, that the property was being held and enjoyed in Oodukoor shares, that the buildings were put up by them in their capacity as co-owners of the property and that the buildings were not liable to be removed. The question, whether a direction was to be given to remove the buildings, arose directly and substantially in the case. Even if the point was not properly raised by the plaintiff, both parties had, without protest, chosen to join issue upon that point. The title to the property had, therefore, to be decided in that case between the parties, and any finding entered there would conclusively determine the rights of the parties.

Held that the decision on the point operated as 'res judicata' between the parties. A. I. R. 1932 P. C. 50, A. I. R. 1934 Cal 179. Rel. on. (Para 4)

Held also that though in the previous suit only the right to plaint item No. 1 was agitated, that decision would apply to all the properties which belonged to the common family of the plaintiffs and defendants 1 to 7: 'A. I. R. 1922 P. C. 80; A. I. R. 1921 P.C. 11, Rel. on.' (Para 5)

Anno: Civil P. C., S. 11, N. 7.

T. R. Subramonia Iyer, for Appellants; P. Govindan Nair, for Respondents 1 to 6.

REFERENCES: Courtwar/Chronological/ Paras

('21) AIR 1921 PC 11: (48 Cal 499)	5
('22) AIR 1922 PC 80: (45 Mad 320)	5
('32) AIR 1932 PC 50: (136 Ind Cas 412)	4
('28) AIR 1928 All 127: (108 Ind Cas 462)	3
('34) AIR 1934 Cal 179: (150 Ind Cas 214)	4
('10) 6 Ind Cas 287: (21 Mad LJ 154)	3
('26) AIR 1926 Mad 829: (95 Ind Cas 968)	3
('41) AIR 1941 Nag 346: (199 Ind Cas 537)	3
('17) AIR 1917 Pat 409: (39 Ind Cas 551)	3
('43) AIR 1943 Pesh 37: (207 Ind Cas 282)	3

GOVINDA PILLAI J: Plaintiffs 1 and 3 to 6 and the legal representatives of the 2nd plaintiff are the appellants. According to the plaint, the plaint schedule properties, two in number, belonged to two brothers, Poothathan Varathan and Poothathan Mallan, who were governed by the Hindu law. Defendants 8 to 11 are the descendants of Poothathan Varathan and they are entitled to a half share in the plaint properties. The plaintiffs are the descendants of Pothathan Mallan. According to them, Mallan had only one son by name Madan and the plaintiffs are this Madan's descendants. So, the plaintiffs were entitled to the remaining half of the plaint properties. The ancestor of the plaintiffs had mortgaged an oodukoor right over 1/4th of plaint item No. 1 to Mayacontan Kelan, the father of defendants 6 and 7. This was in renewal of a prior mortgage, Ext. D, of 1057 in favour of Poothathan Kumaran, father of defendants 1 to 3 and Mayacontan Kelan mentioned above. The plaintiffs stated that the mortgagees came into possession of this oodukoor 1/4th share in the plaint item No. 1 and the remaining 3/4th share was being enjoyed by the plaintiffs and defendants 8 to 11. The plaintiffs filed O. S. 871 of 1100 for the redemption of Ext. 1, the mortgage of 1075 to the ancestor of defendants 1 to 7.

The mortgagees contended that they were in possession of 1/4th of the property as mortgagees and of another 1/4th as jenmis, being the heirs of Mallan Poothathan, the direct brother of Mallan Madan who was admittedly the ancestor of the plaintiffs and that, therefore, the building put up by them in the mortgage holding were not liable to be removed. The plaintiffs resisted this claim of defendants 1 to 7. But the defence contentions were accepted and they were allowed to retain the buildings put up by them in plaint item No. 1. The plaintiffs would say that a decision, on the question of the defendants' title to the property, was out of the purview of that case and, as such, that decision was no bar to the present suit. Mallan Madan, according to them, had no brother by

name Mallan Poothathan and defendants 1 to 7 are not members of Kuzhinjamvila family, to which the plaintiffs and defendants 8 to 11 belong. The present suit was, therefore, necessitated because of the finding in the redemption suit, that defendants 1 to 7 were not liable to remove the buildings from item No. 1 of the plaint schedule and since, on the strength of the said finding, defendants 1 to 7 were attempting to trespass into other portions of the plaint properties.

The suit was, therefore, filed for a declaration of the plaintiffs' right to the plaint properties. Another declaration that defendants 1 to 7 had only a mortgage right over a 1/4th share in the plaint schedule item No. 1 and that they were not entitled to any other right over the plaint properties was also sought for. An injunction was applied for to be issued against defendants 1 to 7 not to enter upon any portion of the plaint properties, except the portion held by them on mortgage. Defendants 1 to 7 contended that their ancestor, Mallan Poothathan, was the direct brother of Mallan Madan, who was the predecessor of the plaintiffs, that they were entitled to 1/4th share in the plaint schedule properties, that they were in possession of the same, that this suit was barred by 'res judicata' by reason of the findings in O. S. 871 of 1100 and O. S. 851 of 1083, that the plaint properties were over-valued and unnecessary reliefs were prayed for with the object of bringing the suit within the jurisdiction of the District Court, to enable them to plead that the decision in O. S. 871 of 1100, filed in the Munsiff's Court, would not be a bar to the present contentions, and that the alleged title of the plaintiffs, if any, to the portion claimed by them was barred by limitation and adverse possession.

The plaintiffs filed a replication in which it was stated that Mallan Madan had no brother by name Poothathan, that defendants 1 to 7 and the plaintiffs did not belong to the same family, that defendants 1 to 7 had no right over the plaint properties except that obtained by them on mortgage, that excluding the property thus mortgaged the remaining 1/4th share in item No. 1 was in the possession of the plaintiffs and that defendants 1 to 7 could not have perfected the title by adverse possession.

The Court below found that the present suit was unnecessarily over-valued and filed in the District Court, that the same would not affect the question of 'res judicata', that the present suit was barred by 'res judicata' by virtue of the decision in O. S. 871 of 1100 of the Munsiff's Court, that the findings in O. S. 851 of 1083 would not operate as 'res judicata,' since the findings entered there were expunged by the appellate court in its decision evidenced by Ext. E, that Mallan Madan had a brother by name Poothathan who was the ancestor of defendants 1 to 7, that defendants 1 to 7 had, therefore, an oodukoor 1/4th right over the plaint items 1 and 2, that, in view of the finding as to title no question of adverse possession would arise and that the plaintiffs were not entitled to any relief. The suit was therefore dismissed with costs.

(2) The first question for consideration is whether the present suit is barred by 'res judicata' by virtue of the decision in O. S. 871 of 1100 of the Neyyattinkara Munsiff's Court. O. S. 871 of 1100 arose under the following circumstances. The plaintiffs are admittedly entitled to 1/4th share in the plaint item No. 1. The plaintiffs' ancestor, Mallan Madan, had, on 1-10-1057, mortgaged that 1/4th share to Poothathan Kumaran, father of defendants 1 to 3, and Mayacontan Kelan, father of defendants 6 and 7. It was stated there that the mortgagees were in possession under a prior mortgage and that credit for the same had been given in this mortgage, copy of which was Ext. D. This was renewed in 1075 in the name of Mayacontan Kelan and Kochen Mayacontan, father of defendants 4 and 5. Ext. 1 is that document. O. S. 871 of 1100 was instituted by the plaintiffs to redeem this mortgage. Defendants 1 to 11 were defendants 1 to 11 in that suit also. In that case, the present plaintiffs had contended that the mortgagees had put up some buildings, which were scheduled there as items 2 to 4, in the mortgage holding and that they should be compelled to remove the same as they were put up without the mortgagor's consent. Defendants 1, 5, and 6 contended that they had no objection to surrender the mortgaged properties on receipt of the mortgage amount and value of improvements, that defendants 8 and 9 were entitled to a half share in the property, that the remaining 1/4th share belonged to them, that the buildings in the property were put up in their capacity as owners of that 1/4th share, that, therefore, they should be allowed to retain possession of the buildings, and that the buildings should not either be recovered by the plaintiffs or compelled to be removed. The plaintiffs, by a replication, denied the allegations of the defendants.

Ext. III is copy of the judgment of the trial court in that case. It was held that the mortgagees were to surrender the mortgaged holding on receipt of the mortgage amount of 375 fanams and value of improvements coming to 25 fanams and that they were not to remove any of the buildings as they put up the same in their capacity as part owners of the property. The plaintiff's suit was, therefore, dismissed as regards their claim to compel defendants 1 to 7 to remove the buildings. The plaintiffs took up the matter in appeal to the District Court in A. S. No. 636 of 1103. The learned Judge was of the opinion that, since the decision of the Munsiff was made without raising issues as to whether defendants 1 to 7 were entitled to a 1/4th share in the property or whether the plaintiffs were entitled to a half share of the same including the mortgage right, the case should be sent back for findings after raising the issues relating to the different cases put forward by the plaintiffs and defendants 1 to 7 as to their title to the property.

After remand, the Munsiff's court recorded its finding that the plaintiffs were entitled to a half share in the property and that defendants 1 to 7 had no right whatever in the property except the mortgage right and that the buildings should not be compelled to be removed; but should be recovered by the plaintiffs on payment of their value. These findings were objected to; and the learned District Judge elaborately went into the evidence in the case and entered a definite finding that the plaintiffs' branch had only a right to 1/4th share in the property, that 1/4th share in the oodukoor belonged to the branch of defendants 1 to 7, that it was the plaintiffs' 1/4th share that had been mortgaged to the ancestor of defendants 1 to 7, that they put up the buildings in the property by virtue of their part-ownership in the mortgaged property and that they were not to be compelled to remove those buildings. Ext. V is copy of the judgment of the District Court after remand. Against this decree of the District Court, the present plaintiffs 1, 2, 3, 5 and 6 filed S. A. 599 of 1107 in the High Court. The findings of the District Court were upheld and the appeal was dismissed by the High Court. Ex. V is copy of the judgment in that case. That judgment was pronounced on 14-4-1110 and the present suit was filed on 6-2-1120 in the District Court.

(3) Defendants 1 to 6 had contended that the present suit has been over-valued, so that the suit

could be filed in the District Court. This was done with the object to overcome the effect of the decision in O. S. 871 of 1100, for that decision would operate as 'res judicata, only in case the present suit could be tried by the Munsiff's Court. The defendants had contended that the reliefs had been overvalued and in the replication the plaintiffs had no answer to the same.

The allegations in the plaint would show that the valuation given was wrong and that it was deliberately done. The properties, scheduled in the plaint, are the entire properties in Lekkoms 22 and 23, now bearing the same survey No. 60/1, with an extent of 9 acres and 89 cents. It is the market value for this entire property that is shown in the plaint. Admittedly, one half of these properties belonged to defendants 8 to 11 and 1/4th belonged to the plaintiffs. There could, therefore, have been dispute relating to only the remaining 1/4th of these properties and, to get a declaration of the plaintiffs' title to this 1/4th, court fee on 1/4th of the market value for the properties was alone necessary. The allegations in paragraphs 2 to 6 in the plaint would show that the plaintiffs claimed one half of the plaint schedule properties. So, by the plaint schedule properties they meant the whole of plaint items 1 and 2. As mentioned already, there was absolutely no dispute as to the one half right belonging to defendants 8 to 11. That was conceded by all parties. If at all, the plaintiffs were to pay only court-fees on the market value for one half of the properties if they thought that their title to the same was in danger. In the plaint, the market value of the plaint properties was shown to be 14500 fanams. They were liable to pay court fees only for one half of this, that is, for 7250 fanams. If that had been the correct valuation, the present suit could be tried by the Munsiff whose pecuniary jurisdiction extended to 14000 fanams. The court below had found that the suit had been over-valued intentionally and without any bona fides. That appears to be correct. If that be so, the present suit was one which could have been tried by the Munsiff. In Chitaley's Civil Procedure Code, 1950 edition, the decisions of the several High Courts on the point had been analysed and the principle that would govern cases of this nature was mentioned there thus at page 294 of volume I:

> "A plaintiff cannot get rid of the bar of 'res judicata' by including in a subsequent suit a clearly unsustainable and, therefore, not a bona fide claim and bringing it in a court of higher jurisdiction. 'VELAYUDA PANDARAM v. SUNDARA BALAKUMARASWAMI', AIR 1926 Mad 829; and 'VENKATA NARASIMHA v. NARASIMHACHARYULU,' 6 Ind Cas 287 (Mad). Nor can he evade the rule by deliberately or arbitrarily overvaluing the same claim in the subsequent suit. 'AMIR KHISRO v. FEROZ SHAH', AIR 1943 Pesh 37; 'MITHOOLAL v. JAINARAYAN', AIR 1941 Nag 346; 'BADRI SINGH v. LOBHI SINGH', AIR 1917 Pat 409; and 'TAMIZ UN NISSA BIBI v. MOHAMMAD HUSAIN', AIR 1928 All 127."

Thus, by the mere presentation of the plaint in the District Court, the plaintiffs could not escape the binding nature of the findings entered in O. S. 871 of 1100, for, in our view, as mentioned already, this was a suit that could have been tried by the Munsiff.

(4) This would lead us to the consideration whether the findings relating to the pedigree of defendants 1 to 7 and their right to 1/4th of plaint item No. 1 in O. S. 871/100 were on account of matters which were directly and substantially in issue in that suit. The facts of that case had already been mentioned. The plaintiffs, in their right as mortgagors, had wanted a redemption of the property and also a direction to the mortgagees to remove the buildings, which they had put up in the plaint item No. 1. Defendants 1 to 7 contended that they were co-owners with the plaintiffs, that the property was being held and enjoyed in oodukoor shares, that the buildings were put up by them in their capacity as co-owners of the property and that the buildings were not liable to be removed. The question, whether a direction was to be given to remove the buildings, did directly and substantially arise in that case. The plaintiffs stated that, since the mortgagees put up the buildings, they were to be removed; whereas the defendants contended that they are put up in their capacity as co-owners. The question, therefore, whether the defendants 1 to 7 were part-owners along with the plaintiffs did arise directly and substantially in that case. That was why the appellate court thought that specific issues on these contentions were necessary. Explanation 3 to Section 11 (Indian Code) C. P. C. made it clear when a matter could or could not be directly in issue. When a matter was alleged by one party and either denied or admitted expressly or impliedly by the other, the matter arose directly and substantially in that case. That was exactly the case in O. S. 871 of 1100. The title to the property had, therefore, to be decided in that case between the parties and any finding entered there would conclusively determine the rights of the parties, so far as the plaint item No. 1 was concerned. Even if the point was not properly raised by the plaintiff, both parties had, without protest, chosen to join issue upon that point. The decision on the point would, therefore operate as res judicata between the parties. The rulings in 'KRISHNA CHENDRA GAJAPATI NARAYANA DEO v. CHALLA RAMANNA', AIR 1932 PC 50 and 'MAHAMED ALI v. UPENDRANADH', AIR 1934 Cal 179 are authorities for this position. Therefore, the decisions in Exts. III to V, as to the status of defendants 1 to 7 and to their right to 1/4th of the property in that case, would operate as res judicata in the present suit.

(5) It was contended that O. S. 871 of 1100 related only to the plaint item No. 1, so that it could in no way be res judicata so far as plaint item No. 2 was concerned. We do not think so. It was by virtue of the finding on the status of defendants 1 to 7 in the family of the plaintiffs and defendants 8 to 11 that they were held to be entitled to 1/4th of that property. That would be res judicata so far as all the properties of that family were concerned. This question arose for consideration before the Judicial Committee of the Privy Council in 'RAMCHANDRA v. RAMCHANDRA', AIR 1922 P C 80. In land acquisition proceedings relating to a small portion of the family properties, a question arose whether a part-owner had only a limited interest or an absolute interest in the properties allotted to that party under a will of the previous owner. In the land acquisition proceedings, it was held that this party had only a limited interest in the properties obtained. In a subsequent suit relating to other properties taken by that owner, it was contended that since the land acquisition proceedings in the District Court related only to a small portion of the estate it would not operate as res judicata in a subsequent suit relating to several other properties. It was held there that it was not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision, no longer open to appeal, given by another Court having jurisdiction to try the second case, that if the decision was wrong it ought to have been appealed from in due time, that in such circumstances the interested parties could not be heard to say that the value of the subject-matter on which the former deci-

sion was pronounced was comparatively so trifling that it was not worth their while to appeal from it, that if such pleas were admissible there would be no finality in litigation, that the importance of a judicial decision was not to be measured by the pecuniary value of the particular item in dispute, that the principle which prevented the same case being twice litigated was of general application and that this principle was not limited by the specific words of the Civil Procedure Code. A previous decision of the Privy Council in 'HOOK v. ADMINISTRATOR-GENERAL OF BENGAL', AIR 1921 PC 11 on the same subject was followed. In view of these authoritative rulings, it is unnecessary to refer to other decided cases.

Thus, though in the previous suit only the right to the plaint item No. 1 was agitated, that decision would apply to all the properties which belonged to the common family of the plaintiffs and defendants 1 to 11. That decision would, therefore, operate as res judicata against the plaintiffs as regards plaint item No. 2 also. On these findings we can dispose of the appeal and dismiss the same.

(6) At any rate, a word on the merits of the appeal would not be out of place. The plaintiffs would say that defendants 1 to 7 were of an entirely different family. In Ext. D, the mortgage of 1057, the mortgagors and the mortgagees were described as belonging to the same house, Kuzhinjamvila. That would be sufficient to hold that the parties belong to the same house. An attempt was made to show that the description of the mortgagees might have been because of their residence in the property as mortgagees, for even before 1057 this property was being enjoyed by the ancestor of defendants 1 to 7 as mortgagee. But the mortgage holding was described in Ext. D as Moolayil Veetuvilagom. An attempt was, therefore, made to show that this Moolayil Veetuvilagom was also known as Kuzhinjamvila thekkethattu. This was a deliberate attempt made to mislead the Court. Exts. XI & XII are the ozhugu forms for Lekkoms 22 and 23. Lekkom 22 is Moolayil Veetuvilagom whereas Lekkom 23 is Kuzhinjaravila. These are two distinct and separate items of properties and one is given as the boundary of the other in Exts. XI and XII. There is, therefore, no force in the contention that the mortgagees, by virtue of their possession of Moolayil Vettuvilagom as mortgagees, were described as belonging to Kuzhinjamvila, because Moolayil Veetuvilagom was also known as Kuzhanjamvila. This description in Ext. D was followed in Ext. 1 also between the ancestors of the plaintiffs and defendants. In Ext. VII, a document of 1048, executed by a stranger to Poothathan Kochen, the grand-father of defendants 4 and 5, he was described as belonging to Kuzhinjamvila. This also would show that, even from very early times, the ancestors of the defendants 1 to 7 were considered to be members of Kuzhinjamvila. The ancestor of defendants 1 to 7 was one Mallan Poothathan. The ancestor of the plaintiffs was Mallan Madan. Both were of Kuzhinjamvila and so it was more probable that Mallan Madan and Mallan Poothathan were of the same house and that they are brothers. That was the opinion of the High Court also in its judgment, Ext. V. We, therefore, confirm the finding of the Court below that the defendants and plaintiffs are members of the same family and that defendants 1 to 7 are entitled to 1/4th of the properties belonging to that family. The findings in the previous case would show that defendants 1 to 7 were in possession of their oodukoor right at least in Moolayil Veetuvila. Being oodukoor owners, their possession could be assumed when it was shown that at least they had possession of one of the properties held in common.

We would, therefore, confirm the decree of the Court below that defendants 1 to 7 were part owners with the plaintiffs. There is, therefore, absolutely no substance in this appeal, which is dismissed with costs.

B/R.G.D. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 386

KOSHI AND GOVINDA PILLAI JJ.

Krishnaru Narayanaru Pandarathil, Appellant v. Krishnaru Parameswararu, Respondent.

Second Appeal No. 212 of 1124, D/- 29-11-1951.

Transfer of Property Act (1882), S. 60 — Superior mortgage for certain period — Direction to redeem pre-existing mortgage — Suit to redeem such mortgage after such period was over — Maintainability of suit — (Limitation Act (1908), Art. 148).

Where a superior mortgage is for a certain period, such period is only for the benefit of the mortgagee to keep possession of the property for that period and it does not in an way shorten the period within which the mortgagee can file a suit for redemption of a pre-existing mortgage which he is directed in the mortgage deed to redeem, such latter period being the period during which the mortgagor himself could file a suit for redemption. (Para 2)

Anno: T. P. Act, S. 60 N. 48; Lim. Act, Art. 148 N. 21.

Advocate General T. N. Subramonia Iyer, for Appellant; K. N. Narayanan Nair, for Respondent.

GOVINDA PILLAI J.: The plaintiff is the appellant. The suit was for redemption of Ext. C mortgage, executed from the Edavoor Matom to one Sankaran Narayanan in 1086. That mortgage was obtained on assignment by the defendant, who is a junior member of the mortgagor Matom. There was a stipulation in the mortgage deed for payment of four paras of paddy as annual michavarom. From the said Matom a superior mortgage had been executed for the plaint and other properties in 1101 to Kandaru Vasudevaru of Thazhamon Matom. There was a direction in that document to redeem Ext. C mortgage. The superior mortgagee did not redeem this. In execution of a decree against the superior mortgagee, his rights under the melotti were purchased in court auction by the plaintiff. Exhibit B is the sale sannad for the same. The suit is to redeem Ext. C mortgage. The plaintiff also wanted a decree to set off the arrears of annual michavarom against the mortgage amount.

The defendant contended that the plaintiff had no cause of action, that the melotti was not supported by consideration, that it had not come into operation in respect of the plaint property, that the plaintiff had obtained only the right to the extent of Rs. 2129 Chs. 20 cash 12, that the right to claim 'michavarom' had not devolved on the plaintiff, that he was not liable for payment of the michavarom by virtue of a special covenant with the karnavans of his 'Matom' at the time of the assignment in his favour in 1093 authorising him to effect improvements without any liability to pay 'michavarom', that the right of the mortgagor to claim 'michavarom' was barred by res judicata by the decree in O. S. 400 of 1102 of the Chengannur Munsiff's Court, that he had effected improvements to the value of Rs. 500/-, and that he was entitled to claim that amount in case he was redeemed.

The Courts below found that the superior mortgagee had only a period of twelve years from 1103 to redeem the mortgage and, since that period was over, the present suit for redemption was not maintainable.

(2) Exhibit A is the superior mortgage by which the plaint and other properties were given on mortgage to one Vasudevaru Thanthri from the Thazhamon Matom. He had been directed to deposit the major portion of the consideration for the melotti to avoid a sale as regards item No. 1 in that document. He did so; and he got possession of items 1 and 4. There could, therefore, be no doubt that the superior mortgage was a valid one. The rights of the superior mortgagee were sold in court auction and purchased by the plaintiff; so that all the rights the superior mortgagee had under Exhibit A devolved on the plaintiff. The plaintiff could bring the suit for redemption of Ext. C mortgage within the period during which the mortgagor himself could file the suit for redemption. The period of twelve years mentioned in Ext. A was only for the benefit of the mortgagee to keep possession of the property for that period from 1103. That would not in any way shorten the period within which the mortgagee could file the suit for redemption of a pre-existing mortgage which he was directed to redeem. The view expressed by the Courts below, that this suit is not maintainable, is wrong. The plaintiff is entitled to file the suit for redemption.

The Courts below had, however, not considered the other issues raised in the case and so, after recording the decision relating to the plaintiff's competency to bring the suit for redemption, we have to send back the case to the trial court for passing the necessary decree after trying and deciding the other issues raised in the case. It is so ordered. The appeal is thus allowed and the appellant will get his costs here and in the lower Appellate Court from the respondent. The costs of the trial court shall be costs in the cause.

B/V.R.B. Appeal allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 387

GANGADHARA MENON AND VITHAYATHIL, JJ.

Kochu Varki, Appellant v. Cochin Thirumala Devaswam, Respondent.

A. S. No. 87 of 1124 (C), D/- 10-8-1951.

(a) Cochin Verumpattamdars Act (8 (VIII) of 1118), S. 5 (2) — Sub-section is to be interpreted according to natural meaning of words used.

The court has to interpret S. 5 (2) according to the natural meaning of the words used therein. It will be unsafe to speculate on the intention of the Legislature apart from what is expressed by the words used in the sub-section. It is only in case of ambiguity with regard to the meaning of the words used in the sub-section that the court will be justified in referring to other provisions in the Act for ascertaining the intention of the Legislature. (Para 8)

(b) Cochin Verumpattamdars Act (8 (VIII) of 1118), S. 5 (2) — Object.

The object of the Legislature in enacting the sub-section is to enable the 'jenmis' of cocoanut gardens to get as 'pattom' the same number of cocoanuts which they would have got on the date of the lease transaction with the money fixed as 'pattom' for the property, or in other words, to enable them to get the benefit of the rise in the price of cocoanuts. (Para 8)

(c) Cochin Verumpattamdars Act (8 (VIII) of 1118), S. 5 (2) — Applicability — Garden land forming portion of lease-hold.

If the other conditions laid down in the sub-section are satisfied, the sub-section will apply to a case in which a portion of the lease-hold is garden land. (Para 9)

(d) Cochin Verumpattamdars Act (8 (VIII) of 1118), S. 5 (2) — Separate fixing of 'pattom' for garden land and paddy land — Proof of — Bar of, under Ss. 91 and 92, Evidence Act — (Evidence Act (1872), Ss. 91 and 92).

As S. 5 (2) allows parties to plead and prove that 'pattom' was separately fixed for the garden land and for the paddy land in a holding although it is not so stated in the lease deed, Ss. 91 and 92 of the Evidence Act will not be a bar to adducing evidence to substantiate the plea. (Para 15)

Anno: Evidence Act, S. 91, N. 7 S. 92, N. 34.

(e) Cochin Verumpattamdars Act (8 (VIII) of 1118), S. 5 (2) — Applicability — Leasehold consisting of garden land and paddy land — Separate 'pattom' fixed for both lands — Lease deed however mentioning total 'pattom' — Sub-section applies.

If it can be proved that in the case of a leasehold consisting of garden land and paddy land 'pattom' was separately fixed by the parties for the garden land and for the paddy land when the lease transaction was entered into and that it was the total 'pattom' so fixed that is mentioned in the lease deed as the 'pattom' payable for the holding, S. 5 (2) will apply to the 'pattom' fixed for the garden land. The expression " 'pattom' fixed therefor under the contract of tenancy" in the sub-section will apply to such cases also. (Para 16)

K. Rama Iyer, for Appellant; M. Madhava Prabhu, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('29) AIR 1929 PC 34: (53 Bom 230) 14
('24) AIR 1924 Cal 452: (81 Ind Cas 641) 14
('28) AIR 1928 Mad 546: (111 Ind Cas 677) 14
('43) AIR 1943 Mad 181: (206 Ind Cas 260) 9
('30) AIR 1930 Oudh 105: (5 Luck 465) 14

VITHAYATHIL J: The plaintiff in O. S. No. 77 of 1121 of the District Court of Anjikaimal is the appellant in this case. The plaint schedule properties belong to the Cochin Thirumala Devaswom which on the date of the suit was under the management of the Cochin Government. The Devaswom is now managed by its own trustees. The properties have been originally leased to one Puthenangadi Cheriathu Ouseph on 31-9-1094. Exhibit A is the lease deed. The extent of the properties is 11 acres and 15 cents. They consist of paddy lands and cocoanut gardens. According to the plaintiff, the paddy land on the date of the lease, was 4 acres and 57 cents in extent, the remaining area being garden land. The annual rent is Rs. 306 As. 11 Ps. 7 inclusive of puravaka consisting of one bunch of cocoanuts and 451 cocoanut leaves valued at Rs. 20-1-11 pies. The plaintiff took an assignment of the lease-hold right from Cheriathu Ouseph.

(2) According to the plaintiff a sum of Rs. 1531-11-2 was due to the Devaswom as arrears of

pattom for the years 1116 to 1120. But the Devaswom claimed a much larger amount as arrears of pattom and took steps under the Cochin Revenue Recovery Act to realise the same. The plaintiff was therefore forced to pay Rs. 2069-11-7 in different instalments. It is alleged that the Devaswom collected an excess sum of Rs. 538–0-5. The suit is for reimbursement of the amount with interest at 6 per cent per annum.

(3) The Devaswom collected 'pattom' in respect of the garden land on the basis of section 5, sub-section 2 of the Cochin Verumpattamdars Act, VIII (8) of 1118. Section 5, sub-section 2 of that Act reads thus.

"Where cocoanut is the major produce of a garden land and the pattom fixed therefor under the contract of tenancy is payable in money, it shall be obligatory on the part of the 'Verumpattomdar' to give and the lessor to accept the pattom accruing due after the commencement of this Act in kind computed on the basis of the market value of cocoanuts prevailing on the date of the contract of tenancy or the money value thereof computed at the market rate prevailing on the date on which such pattom accrues due".

On the basis of this sub-section, the 'Devaswom' treated the 'pattom' in respect of the garden land as one payable in kind computed on the basis of the market value of cocoanut prevailing on the date of the lease deed and claimed its money value computed at the market rate prevailing on the date on which pattom accrued due. It was on that basis that the Devaswom realised Rs. 2069-11-7 as arrears of pattom from 1116 to 1120.

(4) The plaintiff's case is that section 5, sub-section 2 of the Cochin Verumpattamdars Act VIII (8) of 1118 does not apply to the lease transaction in question. There is a further allegation in the plaint that in any case pattom ought to have been computed on the basis of the Cochin Verumpattamdars Amendment Act XVII (17) of 1120. By that Act the basis of computation provided in section 5, sub-section 2 of Act VIII (8) of 1118 was varied. According to the Amendment Act the pattom accruing after the commencement of that Act should be computed on the basis of the average market value of cocoanuts for a period of 20 years prior to the date of the contract of tenancy or the money value thereof computed at the market rate prevailing on the date on which such pattom accrues due.

This amendment however came into force only on the 23rd Mithunam 1120, and it is expressly made applicable only to pattom that accrues due after that date. The pattom in respect of which the reimbursement is claimed by the plaintiff is that which accrued due before 23rd Mithunam 1120. Therefore, the Amendment Act can have no application to the present case. The only point to be decided in this appeal is whether section 5, sub-section 2 of Act VIII (8) of 1118 applies to the lease transaction in question. If the sub-section applies then the Devaswom was justified in claiming Rs. 2069-11-7 as arrears till 1120. If, on the other hand, the sub-section does not apply the plaintiff will be liable to pay pattom only at the rate of Rs. 306-11-7 as provided in Ext. A.

(5) According to the learned Advocate for the appellant three conditions will have to be satisfied for the application of the sub-section. One is that the leasehold should consist only of garden land. The second is that the major produce of the garden land should be cocoanuts. The third condition is that there must be a 'pattom' fixed for the garden land under the contract of tenancy which is payable in money.

(6) It was also argued by the learned advocate for the appellant that sub-section 2 of Section 5 should be strictly construed in the light of the provisions contained in sub-section 1 of that section.

(7) Sub-Section 1 reads thus:-

"Subject to sub-section 2 and to any remission to which a Verumpattamdar may be entitled under the provisions of this Act, the pattom payable by him in respect of his holding under the contract of tenancy shall not be enhanced or reduced".

Therefore, it is argued by the learned Advocate, sub-section 2 should be interpreted in such a manner as to give effect as far as possible to the principle laid down in sub-section 1. According to the learned Advocate for the respondent the object of the Cochin Verumpattamdars Act is to give fixity of tenure to Verumpattamdars as is clear from the Preamble to the Act. Section 4 of the Act provides that notwithstanding any law, custom or contract to the contrary, every Verampattamdar shall have fixity of tenure in respect of his holding and shall not be evicted therefrom except as provided in section 8 of the Act. Section 8 allows eviction only in certain specified cases. It is therefore argued that section 5 sub-section 2 was enacted for the purpose of giving some compensation to jenmis in return for their virtual loss of ownership in lease-hold properties. In this view of the matter, it is contended that sub-section 2 of section 5 should be given a liberal interpretation.

(8) We have only to interpret the sub-section according to the natural meaning of the words used therein. It will be unsafe to speculate on the intention of the Legislature apart from what is expressed by the words used in the sub-section. It is only in case of ambiguity with regard to the meaning of the words used in the sub-section that we shall be justified in referring to other provisions in the Act for ascertaining the intention of the Legislature. The object of the legislature in enacting the sub-section is to enable the jenmis of cocoanut gardens to get as pattom the same number of cocoanuts which they would have got on the date of the lease transaction with the money fixed as pattom for the property, or in other words, to enable them to get the benefit of the rise in the price of cocoanuts. The question for consideration is whether according to the wording of the sub-section the jenmis are entitled to claim this benefit in the case of a composite holding, i. e., a holding consisting both of garden land and paddy land.

(9) With regard to the first point raised by the learned Advocate for the appellant, i. e., that the sub-section applies only to cases of leasehold consisting of garden land alone, we do not think that such a restricted interpretation is justified by the wording of the sub-section. According to the sub-section, it is enough if there is a garden land included in the leasehold. We do not think that the mere fact that some paddy land also is included in the lease-hold will exclude the garden land from the operation of the sub-section. Relying on the ruling reported in 'KUNHAMMAD KOYA v. GOPALA MENON', AIR 1943 Mad. 181 the lower court has taken the view that if the holding is used principally for growing fruit-bearing trees or if the principal user of the holding as a whole is growing fruit-bearing trees it should be regarded as a garden land. That ruling is based entirely on the definition of "garden land" as given in the Malabar Tenancy Act.

The expression "garden land" is defined in clause (g) of section 3 of that Act as "any land used prin-

cipally for growing fruit-bearing trees". The term garden land is not defined in the Cochin Verumpattamdars Act. We agree with the learned Advocate for the appellant in his contention that in the absence of the definition of the term 'garden land" in the Proclamation it will not be proper to adopt the definition given to it in the Malabar Tenancy Act for certain purposes and to treat the paddy land portion in the lease-hold also as garden land if the principal user of the holding as a whole is growing fruit-bearing trees. But that does not mean that the portion of the holding which is really garden land as understood in the ordinary meaning of the expression should not be treated as such merely because another portion of the holding is paddy land.

Even according to the appellant's learned Advocate out of the total area of 11 acres 15 cents an extent of 6 acres 58 cents consists of garden land. Therefore, admittedly the major portion of the properties included in the lease-hold is garden land. The mere fact that an extent of 4 and odd acres consists of paddy land cannot take the lease transaction in respect of the garden land out of the purview of the sub-section. If the other conditions laid down in the sub-section are satisfied we are of opinion that the sub-section will apply to a case in which a portion of the lease-hold is garden land.

(9a) With regard to the second condition, namely, that cocoanut should be the major produce of the garden land, it is not disputed in this case that cocoanut is the major produce of that portion of the lease-hold which consists of garden land.

(10) The third condition is that there should be a pattom fixed for the garden land under the contract of tenancy payable in money. It was strenuously argued by the learned Advocate for the appellant that under the contract of tenancy in this case no separate 'pattom' is fixed for the garden land forming part of the lease-hold. Under Ext. A a total pattom of Rs. 306-11-7 is fixed for the whole lease-hold including the garden land and the paddy land. It is therefore argued that it cannot be said that pattom is fixed for the garden land under the contract of tenancy. According to the learned Advocate for the respondent, pattom was fixed separately for the garden land and for the paddy land although it is not so stated in the lease deed. He referred to the evidence in the case both documentary and oral in order to show that pattom was fixed separately for the garden land and the paddy land when the lease transaction was entered into.

(11) Exhibit 1 is the Devaswom File relating to leases including Exhibit A lease transaction. The original lessee was one Lekshmana Iyer. The Government of Cochin which was in management of the Devaswom published rules relating to the renewal of leases of properties belonging to the Devaswom. Exhibit XI is a copy of the Gazette Notification embodying the rules. Those rules prescribe the basis on which pattom should be fixed for garden lands and for paddy lands. Notice was issued to Lekshmana Iyer demanding renewal of the lease on the basis of the rules published by Government. Exhibit 1 contains the copy of the notice. That will show that the Devaswom calculated 'pattom' separately for the paddy land and for the cocoanut garden.

Exhibit 1 and the evidence of D. W. 1 the then Revenue Kariakar of the Devaswom show how pattom was fixed for the garden land and for the paddy land. On the basis of the method of calculation contained in Exhibit XI (Rules) Rs. 197-5-0 was fixed as pattom for the cocoanut trees in the leasehold and Rs. 85-6-8 as pattom for the paddy land and Rs. 3-14-0 as Payatu Pattom. These three items and the puravaka of Rs. 20-1-11 make up the total pattom of Rs. 306-11-7. There is no reason to doubt the authenticity of Exhibit 1 or to disbelieve D. W. 1. D. W. 2 the pattamali of the Devaswom and D. W. 3 the Devaswom manager also support the evidence of D. W. 1.

(12) We have therefore no doubt that pattom was separately fixed for the garden land and for the paddy land included in the leasehold and that it was the sum total that was mentioned in the document as the annual pattom for the leasehold. Lekshmana Iyer refused to take a renewal on the terms mentioned in the notice. He objected to the rate fixed both for the paddy land and for the cocoanut garden. But Cheriathu Ouseph agreed to the terms and executed Exhibit A lease deed. It is therefore argued for the respondent that in this case 'pattom' was in fact fixed separately for the garden land & for the paddy land under the contract of tenancy although it was not so mentioned in the lease deed.

(13) The further question for consideration is whether in a case in which it is not stated in the lease deed that 'pattom' was separately fixed for the garden land & for the paddy land the court can go into the question whether pattom was as a matter of fact separately fixed for the garden land and for the paddy land.

(14) The learned advocate for the appellant argues that since Ext. A fixes Rs. 306-11-7 pies as pattom for the whole leasehold and since no separate pattom is fixed for the garden land and for the paddy land the defendant cannot be allowed to adduce extrinsic evidence to prove that pattom had been separately fixed by the parties when the lease transaction was entered into. According to him the admission of such evidence is prohibited by sections 91 and 92 of the Evidence Act. Section 91 only provides that the terms of a written contract should be proved by the document itself or by secondary evidence of its contents. In this case, there is no dispute between the parties with regard to the terms of Ext. A, and there is no attempt on the part of the defendant to prove those terms by extrinsic evidence.

The learned Advocate for the appellant referred to various rulings in support of position that when terms of a contract have been reduced to writing it is only the final written contract that can be referred to for proving the terms thereof and not the correspondence or verbal negotiations that preceded it or the antecedent communings that led up to it. 'KUPPUSWAMI GOUNDAN v. CHINNASWAMI GOUNDAN', AIR 1928 Mad 546; 'LUCKNOW IMPROVEMENT TRUST v. P. L. JAITLY & CO.', AIR 1930 Oudh 105 at p. 107; DULA MEAH v. ABDUL RAHAMAN', AIR 1924 Cal 452 and 'BOMANJI ARDESHIR v. SECY. OF STATE', AIR 1929 PC 34, are the cases cited by him. But extrinsic evidence was not adduced in this case for proving the terms of Ext. A, and therefore we do not think that these rulings apply to the facts of this case.

(15) Section 92 provides that when the terms of a written contract have been proved no evidence of any oral agreement shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from, its terms except in certain specified cases. In this case, there is no attempt on the part of the defendant to adduce evidence for the purpose of contradicting, varying, adding to, or subtracting from, the terms of Exhibit A. The defendant only wants to show how pattom mentioned in Exhibit A was arrived at. In other words, he wants to show that the 'pattom' of Rs. 306-11-7 pies mentioned in Exhibit A is the sum total of 'pattom' separately fixed for the garden land and

for the paddy land in the lease-hold. We do not think that this would amount to contradicting, varying, adding to, or subtracting from, the terms of Exhibit A.

In this view of the matter, neither section 91 nor section 92 of the Evidence Act can be a bar to the defendant adducing evidence to show that pattom was separately fixed by the parties for the garden land and for the paddy land and that it was the sum total of the pattom so fixed that was mentioned in Exhibit A as the total pattom for the holding. If section 5 sub-section 2 of the Verumpattamdars Act allows parties to plead and prove that pattom was separately fixed for the garden land and for the paddy land in a holding although it is not so stated in the lease deed, we do not think that sections 91 and 92 of the Evidence Act will be a bar to adducing evidence to substantiate the plea.

(16) The real question for decision therefore is whether section 5, sub-section 2 applies only to cases in which pattom for the garden land is separately fixed in the lease deed itself or whether it applies also to cases in which the pattom for the garden land & for the paddy land although not separately mentioned in the lease deed, was as a matter of fact separately fixed by the parties when they entered into the lease transaction & the total pattom so fixed is mentioned in the document as the pattom payable for the holding. We are of opinion that section 5, sub-section 2, will apply to the latter class of cases also. In other words, if it can be proved that in the case of a lease-hold consisting of garden land and paddy land pattom was separately fixed by the parties for the garden land & for the paddy land when the lease transaction was entered into and that it was the total pattom so fixed that is mentioned in the lease deed as the pattom payable for the holding we are of opinion that section 5 sub-section 2 will apply to the pattom fixed for the garden land. The expression "pattom fixed therefor under the contract of tenancy" in the sub-section will, in our view, apply to such cases also. It cannot be said that in such a case it was not under the contract of tenancy that pattom was separately fixed for the garden land and for the paddy land. The fact that pattom was not separately mentioned in the document cannot preclude the parties from proving that as a matter of fact it was separately fixed. The words used in the sub-section are "fixed therefor under the contract of tenancy" and not "in the contract of tenancy."

(16a) For the above reasons we hold that S. 5, sub-section 2 of the Act applies to the pattom payable to the defendant Devaswom in respect of the garden land included in Ext. A.

(17) The Devaswom was therefore justified in calculating pattom for the garden land on the basis of section 5, sub-section 2 of the Act. If pattom is so calculated it is not disputed by the plaintiff that the 'Devaswom' was entitled to the whole amount of Rs. 2069-11-7 pies realised as arrears of 'pattom' for the years 1116 to 1120. Therefore, the plaintiff is not entitled to reimbursement of any amount.

(18) It was represented by the appellant's learned Advocate that in the decree of the lower court a mistake was committed with regard to the advocate's fee due to the plaintiff, namely, instead of Rs. 150 only Rs. 50 was entered as the Advocate's fee. The respondent's learned Advocate has no objection to this mistake being corrected. This mistake will therefore be corrected.

(19) Subject to this direction the decree of the lower court is confirmed and the appeal is dismissed with costs.

B/V.R.B. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 390

SANKARAN AND GANGADHARA MENON JJ.

Avira Abraham, Appellant V. Kaloor Desiga Bank Ltd, Respondent.

Second Appeal No. 241 of 1124, D/- 7-12-1951.

Civil P. C. (1908) Ss. 37 and 150 — Transfer of territorial jurisdiction of Court passing decree — Necessity to transfer decree for execution to successor Court — (Travancore Civil P. C. (8 (VIII) of 1100) Ss. 34 and 114).

By the transfer of territorial jurisdiction from one Court to another, all the powers of the first Court are automatically transferred to the transferee Court. The provisions of S. 150 are mandatory in this respect. Therefore, though normally a decree can be executed only by the Court which passed the decree or by the Court to which the decree has been transferred for execution, no such special transfer is necessary where there has been a territorial transfer of the jurisdiction of the Court which passed the decree to another court. (Para 1)

Anno:C. P. C., S. 37, N. 5 Pts. 12 to 16 S. 150, N. 2 Pts. 3 and 4.

R. Subramania Iyer, for Appellant; M. Abraham, for Respondent.

SANKARAN J: The 1st defendant has preferred this appeal against the lower court's order rejecting his plea that the execution petition filed on 18-10-1121 is barred by limitation. The decreeholder contended that the present execution petition having been filed within three years of the prior execution petition which had not also been judicially disposed of, is in time. The objection of the 1st defendant is mainly based on the fact that the prior execution petition was filed in the Thiruvella Munsiff's Court to which Court the decree which had been passed by the Changanacherry Munsiff's Court, had not been transferred for execution, by the latter court.

Normally, a decree can be executed only by the court which passed the decree or by the Court to which the decree has been transferred for execution. But no such special transfer is necessary where there has been a territorial transfer of the jurisdiction of the Court which passed the decree to another Court. This is obvious from the definition given in Section 34 of the Travancore Civil Procedure Code to the expression "Court which passed the decree". It is clear from clause (b) of that section that where the court of first instance has ceased to exist or to have jurisdiction to execute the decree the court which would have jurisdiction to try the suit can execute the decree.

By the transfer of territorial jurisdiction from one Court to another, all the powers of the first Court are automatically transferred to the transferee court. The provisions of S. 114 (Travancore C. P. C.) are mandatory in this respect. It is laid down in that section that where the business of any court is transferred to any other court, the latter court shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under the Code upon the Court from which the business is so transferred. When a portion of the territorial jurisdiction of the Changanacherry Munsiff's Court was transferred to the Thiruvella Munsiff's Court the business of the Chaganacherry Munsiff's Court, pertaining to such territorial jurisdiction has become transferred to the Thiruvella Munsiff's Court. The defendant in the case resides within such territorial limits and hence it is the Thiruvella Munsiff's Court which

could pass a decree against him or execute the decree which had already been passed against him. It is seen that the Exn. Petn. prior to the present one was passed in the Thiruvella Munsiff's Court which had jurisdiction to entertain that execution petition and to execute it. It was filed within time and it was dismissed without notice to the decree-holder and for the simple reason that the records had not been received in that Court. It was no judicial disposal. The present E. P. could therefore be treated as a revival and continuation of the prior execution petition. Since the records have now been received in the Thiruvella Munsiff's Court, it can go on with the execution of the decree. There is no bar of limitation.

(2) In the result the order of the lower court is confirmed and this appeal is dismissed with costs.

B/V.R.B. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 391

KUNHI RAMAN C. J. AND SANKARAN J.

Subramonia Sastrigal Ananthanarayana Iyer, Appellant v. Sankara Rama Iyer Subramonia Iyer and others, Respondents.

A. S. Nos. 603 of 1123 and 45 of 1124, D/- 20-7-1951.

(a) Debt Laws — Travancore Debt Relief Act (II (2) of 1116), S. 5 (i), Exception (b) and Ss. 8 and 9 — Usufructuary mortgage — Suit for recovery of amount.

Section 5 which excludes usufructuary mortgages as defined in the Act from the operation of the Act is subject to the exceptions mentioned in that section itself. The fact that a claim for the mortgage amount in a suit had been made is by itself sufficient to entitle defendants to pay the debt under Exception (b) to S. 5 (i). It follows therefore that the debt comes under the Debt Relief Act and, as such, defendants are entitled to the benefits of the concessional payment contemplated by sections 8 and 9 of the Act. (Para 4)

(b) Debt Laws — Travancore Debt Relief Act (II (2) of 1116), S. 3 — Usufructuary mortgage — Requirements.

One of the two essential conditions required to bring the transaction within the definition of usufructuary mortgage is that the mortgagee must be in a position to appropriate the rents and profits accruing from the property in lieu of interest due on the mortgage money or partly in lieu of interest and partly in payment of the mortgage money.

From the stipulations contained in the document the rents and profits accruing from the property were not even sufficient to cover the interest on the mortgage amount. It was expressly stated in the document that such income was sufficient only to cover the interest due on Rs. 680/- representing only a portion of the mortgage amount. For the balance of the mortgage amount of Rs. 300/-, the mortgagor was to pay interest out of his own pocket.

Held that these facts were sufficient to take the document out of the definition of a usufructuary mortgage. (Para 5)

(c) Debt Laws — Travancore Debt Relief Act (II (2) of 1116), S. 3 — Usufructuary mortgage or simple mortgage.

The defendant executed a document professing to be a mortgage with possession. On the same day, the mortgagors executed a lease deed in respect of the same property in favour of the mortgagee. In the receipts obtained by the mortgagors for the payment of the rent due under the lease the amount received by the mortgagee was described as "Pattompalisavaka".

Held that the clear meaning of this expression was that the amount received as pattom was towards the interest due. This was a sure indication of the fact that the parties intended the mortgage and the lease together to form a simple hypothecation and not as distinct and separate transaction of usufructuary mortgage and lease as the documents purported to be. (Para 5)

N. Varadaraja Iyengar, for Appellant; K. P. Abraham, for 2nd Respondent.

SANKARAN, J.: The appellant in both these appeals is the same. The main question for determination in these appeals is also substantially the same. The appellant is the 2nd defendant in O. S. 511/12 on the file of the District Munsiff's Court of Parur. He is also the petitioner in D. R. P. No. 215/16 on the file of the same Court. A. S. 603/23 is against the final order passed by that Court on D. R. P. No. 215/16 and A. S. 45/24 is against the decree in O. S. No. 511 of 1112.

(2) The facts relevant for the proper consideration of the question involved in these two appeals may be briefly stated. The original owners of the property involved in O. S. 511 had executed a document professing to be a mortgage with possession for a sum of Rs. 980/-. It is Exhibit XIII dated 24-5-1093 in favour of one Narayana Iyer. On the same day, the mortgagors executed Ex. J lease deed in respect of the same property in favour of the mortgagee who is the 13th defendant in the suit and thus retained possession of the mortgaged property. Subsequently, under the sale deed, Ext. XX, dated 29-5-1097 the property was purchased by the deceased father of defendants 1 and 2. This right devolved on defendants 1 and 2 and they are now claiming to be in possession of the property as the owners thereof.

In the meanwhile, the 13th defendant, the mortgagee under Ext. XIII, hypothecated the mortgage right under a chitty hypothecation bond executed by him. The rights under this bond devolved on the 3rd defendant in the suit who obtained the decree in O. S. 84/1101 on the basis of that bond and in execution of that decree purchased the mortgage right on 23-11-1106. Thereafter, the 3rd defendant instituted O. S. 618 of 1107 against defendants 1 and 2 for recovery of the mortgage amount together with interest thereon due under Ext.. XIII and obtained a decree. Prior to this suit, the partition deed Ext. A dated 25-5-1101 had been executed by the 13th defendant and the other members of his family and as a movable item of asset the debt due under Ext. XIII mortgage was set apart to the deceased father of the plaintiffs in O. S. 511. According to them, they are not bound by the decree and execution proceedings in O. S. 84/1101 to which themselves and their father were not parties and in spite of the decree and execution proceedings they continue to be owners of the rights under Exts. XIII and J.

On the strength of the lease deed Ext. J, they instituted the present suit O. S. 511 for recovery

of the property with arrears of pattom from defendants 1 and 2. At first, the trial Court dismissed the suit holding that the rights under Exts. XIII and J had devolved on the 3rd defendant who is the decree-holder in O. S. 618 of 1107. Against that decree, these plaintiffs preferred A. S. 70/18 to the erstwhile Travancore High Court. All the contesting parties were represented in that appeal. On the strength of certain admissions made by the advocates appearing for those parties the rights of the rival parties who had put forward conflicting claims to the amounts due under Exts. XIII and J were adjusted in a particular manner and a declaration to that effect was made in the judgment dated 25-2-1121 passed in A. S. 70/18.

These rights were to be enforced against defendants 1 & 2 who had already filed D. R. P. No. 215/16 for a complete discharge of their liability under Exts. XIII and J. The position taken up by them in the written statement filed in O. S. 511/12 and also in D. R. P. 215/16 was that Exts. XIII and J together formed only a hypothecation and, as such, they were entitled to pay off the mortgage amount together with interest legally due thereon under sections 8 and 9 of the Debt Relief Act (Act 2 of 1116 of Travancore). Since the plaintiffs had questioned the right of these defendants to claim reliefs under sections 8 and 9 of the Debt Relief Act and since such a dispute had not been finally decided by the Court the suit as well as the D. R. P. were both remanded to the trial court as per the direction contained in the judgment in A. S. 70/18 for fresh disposal after due consideration of the dispute between these parties. The present decree and the order were passed as a consequence of that remand.

(3) The plaintiffs and defendants 3 and 4 are bound by the declaration contained in the judgment in A. S. 70/18 as to the extent and manner in which their rights have to be worked out in respect of the claims which could be enforced on the basis of Ext. XIII and the lease back. But so far as the nature and extent of the liability of defendants 1 and 2 were concerned, there was no final adjudication in that judgment and such rights were left to be determined by the final order to be passed on D. R. P. 215/16. It is seen from the judgment in A. S. 70/18 that it was agreed on behalf of the present plaintiffs that even though the suit was for recovery of the property with arrears of rent due under Ext. J they were prepared to treat the suit as one for a realisation of their entire interests in the mortgage transaction in the light of further transactions that had taken place. It was also agreed that the rights of defendants 3 and 4 may be provided for to be adjusted and satisfied. It was on the basis of these admissions that it was declared in the judgment in A. S. 70/18 that the rights of the 3rd defendant as per the decree in O. S. 618/107 have to be adjusted and satisfied in the manner indicated in the judgment in A. S. 70/18.

(4) From the facts stated above, it is clear that the decree in O. S. 618/107 had become final and that its validity had also been upheld by the judgment in A. S. 70/18. O. S. 618/107 was a suit for the mortgage money due under Ext. XIII. The fact that such a claim for the mortgage amount had been made is by itself sufficient to entitle defendants 1 and 2 to pay this particular debt under the provisions of the Debt Relief Act. Section 5 of the Act which excludes usufructuary mortgages as defined in the Act from the operation of the Act is subject to the exceptions mentioned in that section itself. Exception (b) to clause (i) of section is as follows: "A claim by the mortgagee whether arising under a decree or otherwise for recovery of the mortgage amount." Such a claim was expressly made in O. S. 618/107 which was a suit for recovery of the mortgage amount with interest. It follows therefore that this debt comes under the Debt Relief Act and, as such, defendants 1 and 2 are entitled to the benefits of the concessional payment contemplated by sections 8 and 9 of the Act.

It may also be mentioned in this connection that in the final order passed by the lower court on D. R. P. 215/16, there is a definite finding that defendants 1 and 2 who are the petitioners are entitled to pay the mortgage debt and interest as per the provisions of the Debt Relief Act. The plaintiffs-respondents have not filed any objection to this finding which has therefore to be taken to have become final. But it is seen that the lower court has recorded another finding that Ext. XIII (mortgage) and Ext. J (lease) are separate and distinct transactions and it is on the strength of such a finding that a decree has been passed in favour of the plaintiffs in O. S. 511/12. This finding is obviously inconsistent with the other finding that defendants 1 and 2 are entitled to pay the mortgage debt and interest due under Ext. XIII as per the provisions of the Debt Relief Act. The mortgage and lease could be treated as distinct and separate transactions only if it is found that Ext. XIII represented a usufructuary mortgage and if Ext. J, lease, was independent of the mortgage, the mortgage debt could not come under the Debt Relief Act.

It has also to be pointed out that the identical mortgage Ext. XIII cannot be construed in two different ways, one for the purpose of O. S. 618/107 and another for the purpose of O. S. 511/12. If this mortgage is deemed to be only hypothecation or simple mortgage for the purpose of O. S. 618/107 it has necessarily to be construed in the same manner for the purpose of O. S. 511/12 also. The plaintiffs who are bound by the agreement recorded in the judgment in A. S. 70/18 which was to the effect that the claim of the present 3rd defendant as per the decree in O. S. 618/107 may be satisfied in the present suit cannot now get over the effect or consequence of such an indication. The inevitable result is that they are also bound by legal consequences of the demand made in O. S. 618/107 for recovery of the mortgage amount with interest from defendants 1 and 2. As already stated, the legal consequence is that the debt in question comes within the scope of the Debt Relief Act. This means that defendants 1 and 2 are entitled to succeed in their claim in D. R. P. 215/16.

(5) On the merits of the case also, the position taken up by defendants 1 and 2 appears to be well founded. It is only a usufructuary mortgage as defined in Section 3 of the Debt Relief Act that is exempted from the operation of the Debt Relief Act. This definition is as follows:

> "Usufructuary mortgage means a mortgage where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property, or any part of such rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage money or partly in lieu of interest and partly in payment of the mortgage money".

It is clear from this definition that the two essential conditions required to bring the transaction within the definition of usufructuary mortgage are, (1) that the mortgagor must either deliver possession of the property or expressly or by implication

bind himself to deliver possession of the mortgaged property to the mortgagee and authorise him to retain such possession until payment of the mortgage money and (2) that the mortgagee must be in a position to appropriate the rents and profits accruing from the property in lieu of interest due on the mortgage money or partly in lieu of interest and partly in payment of the mortgage money.

These two conditions are not satisfied by Ext. XIII in the present case. From the stipulations contained in the document, it is apparent that the rents and profits accruing from the property were not even sufficient to cover the interest on the mortgage amount. It is expressly stated in the document that such income was sufficient only to cover the interest due on Rs. 680/- representing only a portion of the mortgage amount. For the balance of the mortgage amount of Rs. 300/- the mortgagor was to pay interest out of his own pocket. These facts are sufficient to take Ext. XIII out of the definition of a usufructuary mortgage. It can also be seen that these stipulations embodied in Ex. XIII go a long way in support of the contentions of defendants 1 and 2 that Ex. XIII was really meant to be a hypothecation or a simple mortgage. This inference is further strengthened by Ex. J (lease) executed on the same date by the mortgagor in favour of the mortgagee. If the lease was meant to be a separate and distinct transaction, it could only be for the income that could be obtained out of the property. Such income, as admitted in Ext. XIII mortgage itself, was only to the extent of Rs. 68/- per year. But the rent fixed under Ext. J lease was Rs. 98/- per year.

This is evidently the interest stipulated to be paid by the mortgagors for the amount of Rs. 980/- borrowed by them under Ext. XIII. Exts. V, XIV, XV, XVI and XVIII are receipts obtained by the mortgagors for the payment of the rent due under Ex. J. In all these receipts, the amount received by the mortgagee is described as "Pattompalisavaka". The clear meaning of this expression is that the amount received as pattom was towards the interest due. This is a sure indication of the fact that the parties intended Exts. XIII and J together to form a simple hypothecation and not as distinct and separate transaction of usufructuary mortgage and lease as the documents purport to be: Clause (ii) of Section 5 of the Debt Relief Act enables the parties to a transaction purporting to be a usufructuary mortgage to make out that the transaction was really meant and treated only as hypothecation.

The facts and circumstances already adverted to are sufficient to establish that, even though Ex. XIII purports to be a usufructuary mortgage the entire transaction represented by Exts. XIII and J was really a hypothecation and that it was treated as such. It follows therefore that on this point also the appellants are entitled to succeed. Accordingly, the lower court's finding that Exts. XIII and J are separate and distinct transactions, a usufructuary mortgage and a lease and, as such, not coming within the scope of the Debt Relief Act is reversed. The consequence is that defendants 1 and 2 are bound only to pay the mortgage amount covered by Ex. XIII together with interest legally due from them and that they are entitled to discharge the entire debt thus due from them in accordance with the provisions of the Debt Relief Act. The decree in O. S. 511/12 will be for such amount only since such decree debt is stated to be paid in instalments under sections 8 and 9 of the Debt Relief Act. In D. R. P. 215/16, the debt will be deemed to have been discharged with the payment of the last instalment, and no question of execution of the decree will then arise.

In view of the findings recorded above, no question of recovery of possession of the property from defendants 1 and 2 arises in the suit and there will be no such decree. It is stated on behalf of the appellants that the last instalment due from them has also been deposited on 12-1-1122 and that, as such, they are entitled to a declaration that their liability under Exts. XIII and J has been satisfied and extinguished as prayed for by them in C. M. P. 733 dated 15-1-1122 filed by them in the lower court. That question will be disposed of by the lower Court after verifying whether the instalments have been duly paid by the appellants-petitioners and that the debt has been discharged as contemplated by sections 8 and 9 of the Debt Relief Act. The amounts deposited by these petitioners towards the discharge of the liabilities under Exts. XIII and J will be drawn by defendants 3 and 4 and by the plaintiffs towards the adjustment and satisfaction of their claims in the manner directed in the judgment in A. S. 79/18. Both the appeals are accordingly allowed in the manner indicated above.

The appellant will get his costs of this court and also of the trial court in O. S. 511/18 and in D. R. P. 215/16. The other parties will bear their costs throughout. The records will be sent to the court below for carrying out the directions contained in this judgment.

B/D.H. Appeals allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 393

SANKARAN AND GANGADHARA MENON JJ.

Arumukon Nagamma, Appellant v. Arumukaperumal Nadarajan, Respondent.

C. M. A. No. 250 of 1951, D/- 11-12-1951.

(a) Debt Laws — Travancore Debt Relief Act (II (2) of 1116 M. E.), S. 19 — Court sale — Setting aside of, being vitiated by material irregularities — Civil P. C. (1908), O. 21, R. 90.

Since the sale under the Debt Relief Act is conducted by the Court to whom the debtor has surrendered his properties the Court has a duty to see that the sale is properly conducted without resulting in any loss or injury to the debtor. It follows, therefore, that the Court is bound to set aside the sale when it is satisfied that the sale is vitiated by material irregularities resulting in substantial injury to the debtor. Even though the rules governing the sales of immovable properties, conducted in execution of decree under the provisions of O. 21, Civil P. C., are not strictly applicable to Court sales held in respect of properties surrendered to it under S. 15 of the Debt Relief Act, the general principles governing the former class of sales are to govern the latter class of sales also.

(Paras 3 and 4)

Anno: C. P. C., O. 21, R. 90 N. 2.

(b) Debt Laws — Travancore Debt Relief Act (II (2) of 1116 M. E.), S. 19 — Court sale under — Application to set aside — Period of limitation — Limitation Act (1908), Art. 166.

An application to set aside a sale of property dealt with by the Court under S. 19 is not governed by the period of limitation prescribed for application to set aside court sales held under the provisions of O. 21, Code of Civil Procedure. (Para 4)

Anno: Lim. Act, Art. 166 N. 2, 3.

M. Madhavan Nair, for Appellant; M. Kumaraswami Pillai, for Respondent.

SANKARAN J.: The legal representative of the petitioner in O. P. 2 of 1120 on the file of the Nagercoil District Court is the appellant. The petition was under S. 15, Debt Relief Act. The properties surrendered to the Court by the petitioner-debtor were put into possession of a receiver. When such properties were proclaimed for sale, the petitioner applied to the court that item 5 in the proclaimed schedule together with the building thereon may be allotted to his 1/4th share and that the rest of the property alone be sold and the proceeds distributed among the creditors. That petition was allowed by the lower court and accordingly item 5 was excluded from the sale. Items 4 and 5 together form one plot lying within the same boundaries. The extent of each of these items was specified as 3 cents in the proclamation schedule. Item 5 was allotted to the share of the petitioner. A modification was made in the description of the boundary of item 4 by stating that it is to the west of item 5. After thus specifying item 4 it was sold on 28-12-1123 and it was purchased by the present respondent for Rs. 1225/-. On 28-1-1124, the debtor-petitioner filed C. M. P. 368 praying that the sale may be set aside because it was vitiated by material irregularities and gross undervaluation resulting in substantial injury to the petitioner. After enquiring into these allegations the lower Court dismissed the petition. The present appeal is against that order.

(2) At the instance of the petitioner, a commission was issued to prepare a report and plan showing the extent of items 4 and 5 as also the position of the buildings standing on these items. Ext. A consists the report and plan submitted by the commissioner. Another commission was issued at the instance of the auction-purchaser respondent. Ext. III is that report and Ext. IV is the plan prepared and submitted by the second Commissioner. From Exts. III and IV it is seen that there is a tiled building in item 5 and that the granary or bin attached to it extends to item 5 and is practically situated in that item. The receiver who had taken possession of the properties and had proclaimed the same for sale, has been examined as P. W. 2 and he has stated that he had not taken possession of the granary mentioned above and that he only proclaimed what he had taken possession of. From Exts. III and IV and the evidence of the commissioner as well as that of the receiver, it is abundantly clear that the granary really forms part of the residential building situated in item 5. When the court ordered that item 5 together with the building in it is set apart to the petitioner towards his 1/4th share in the property, the intention could only have been to allot to him the whole building. It is also provided in section 19 of the Debt Relief Act that when making an allotment of a 1/4th share to the debtor petitioner the homestead should wherever possible be allotted to his share. Under such circumstances, it cannot be said that the granary was also sold in auction along with item 4. But when the items 4 and 5 have been separately measured and demarcated with reference to their survey numbers, it is seen that the granary falls within item 4. The auction purchaser maintains that as per the sale in his favour he has become owner of the entire property covered by the survey number of item 4 together with the buildings standing thereon. In the circumstances of this case the disputes between the parties cannot be decided mainly on the basis of the survey numbers of the two items. In the proclamation, the survey number of item 4 was given as 1510 and that of item 5 was given as 1509, but really the survey number of item 4 is 1509 and that of item 5 is 1510. If the auction-purchaser is to get the property covered by the survey number which was proclaimed for sale and was actually sold he is to get the three cents of property covered by item 5. But it is common ground that what he really purchased was 3 cents of item 4 which is to the west of item 5. The proclamation as well as the sale proceeded on the basis that both these items were equal in extent, the extent of each item being 3 cents. When these items were measured and demarcated with reference to their respective survey numbers, it was seen that the property covered by survey number 1509 lying to the west of item 5 is 5 cents in extent while item 5 comprised in survey number 1510 is only 3 cents in extent. The respondent who became the auction-purchaser of the 3 cents of property lying to the west of item 5 now claims 5 cents comprised in survey number 1509 together with the buildings situated therein. Going by the extent as specified in the proclamation schedule and as bid by the respondent at the auction, he is really entitled only to 3 cents of property out of item 4 to the west of item 5. Even though the sale was confirmed in favour of the respondent only for 3 cents of property it is seen that in the deed executed in his favour by the receiver in this case the extent is mentioned as 5 cents. This is clearly an irregularity. In fact the entire sale is vitiated by the fact that the extent of items 4 and 5 was not correctly ascertained and described in the proclamation schedule. The entire property covered by these two items belonged to the family of the debtor-petitioner and to give away 5 cents out of that property on the strength of a sale conducted in respect of 3 cents only is certainly unjustifiable and unwarranted. The surrender to the auction-purchaser of the excess of 2 cents is by itself a material irregularity resulting in substantial injury to the petitioner. The sale has to be set aside on this ground alone. Since the property set apart to the petitioner and the property set apart for sale in auction were both treated as equal in extent the proper procedure to be adopted is to issue a fresh proclamation giving the exact extent of each of these two items on the basis of the total extent as available at the spot. The entire area covered by items 4 and 5 falling within the same boundaries will be taken into account and one-half of the same will be allotted in item 5 and the remaining one-half allotted in item 4. In making such allotments care should be taken that the entire building together with the granary attached to it falls within item 5 to be set apart to the petitioner. A sketch making such a demarcation of items 4 and 5 will be prepared and on the basis of that sketch item 4 falling to the west of item 5 which latter item is to take in one-half of the total extent and also the whole of the residential building inclusive of the granary will alone be proclaimed and sold in auction.

(3) There are other material irregularities also vitiating the sale held by the lower court in respect of item 4. The sale was not held on the date as originally notified. After allotting item 5 to the share of the petitioner and making the necessary correction in the proclamation schedule the sale was held on 28-12-1123. There was no fresh proclamation or notification about the sale held on that date. Even though the parties might have been aware of the adjournment of the sale to that date it is clear that other intending purchasers could not have known of such an adjournment and could not therefore have participated in the auction. The sale held on 28-12-1123 cannot be deemed to have been held after due publicity. It cannot also be held that the property has fetched a proper price

as per the sale held under such circumstances. Since the sale was conducted by the court to whom the debtor had surrendered his properties the court has a duty to see that the sale is properly conducted without resulting in any loss or injury to the debtor. It follows therefore that the court is bound to set aside the sale when it is satisfied that the sale is vitiated by material irregularities resulting in substantial injury to the debtor.

(4) Even though the rules governing the sales of immovable properties conducted in execution of decrees under the provisions of Order 21, Code of Civil Procedure, are not strictly applicable to Court sales held in respect of properties surrendered to it under section 15 of the Debt Relief Act, the general principles governing the former class of sales are to govern the latter class of sales also. An application to set aside a sale of the property dealt with by the Court under section 19 of the Debt Relief Act is not governed by the period of limitation prescribed for application to set aside court sales held under the provisions of Order 21, Code of Civil Procedure. In the present instance, the sale was conducted on 28-12-1123 and the application to set aside the sale was filed on 28-1-1124. The sale had not also been confirmed by that time. The sale deed in favour of the auction-purchaser was executed subject to the result of the petitioner's application to set aside the sale. In view of these facts it is clear that there is no force in the auction purchaser's contention that the petitioner's application is a belated one and should be dismissed on that ground.

(5) In the result this Civil Misc. Appeal is allowed with costs and in reversal of the order of the lower court the auction sale held in respect of item 4 of the proclamation schedule is set aside. The lower court is directed to conduct a fresh sale of item 4 after demarcating it and specifying its extent in the manner indicated above and after a fresh proclamation.

B/G.M.J. Appeal allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 395

SANKARAN AND GANGADHARA MENON JJ.

Varkey Chacko, Appellant v. Thuppan Narayanan Namboodiri, Respondent.

Second Appeal No. 153 of 1951. D/- 3-1-1951.

Debt Laws — Travancore Cochin Holdings (Stay of Execution Proceedings) Act (VIII (8) of 1950), Ss. 4 and 2 — "Holding", essentials of — Lease of mortgaged property by mortgagee — Redemption decree — Lessee cannot claim protection under S. 4 — Lease subsists only so long as mortgagee's right to retain possession subsists — (T. P. Act (1882), S. 76 (e)).

Section 4 will be attracted only if the property sought to be recovered comes within the expression "holding" as defined in section 2 of the Act. In order to constitute a holding, three essential conditions must be satisfied: (1) the landlord must have transferred possession of the property in favour of the tenant, (2) such transfer must have created a leasehold right in favour of the tenant and (3) such leasehold right must have been created under a single transaction. Where the lease was not created by the landlord but by his mortgagee, it cannot be said that the lessee is holding the property under a single transaction by which a leasehold right in the property is created in his favour. In fact such a right is created under a double transaction, viz., the mortgage by the landlord in favour of the mortgagee followed by lease granted by the mortgagee in favour of the lessee. To such a case, S. 4 has no application. The mortgagor-landlord is not bound to recognise and respect the lease arrangement created by the mortgagee to any extent beyond the limits of the obligation under the mortgage transaction itself. Any such lease or sub-tenancy created by the mortgagee can subsist only so long as the mortgagee's right to retain possession of the property under the mortgage in his favour subsists. On the termination of the mortgage, he is bound to surrender possession of the property to the mortgagor. The mortgagor's right to recover possession of the property on redemption of the mortgage is not in any way curtailed by Act VIII of 1950. Those obtaining possession of the property under a mortgagee cannot certainly have any better or larger right than the mortgagee himself to retain possession of the mortgage property. The redemption decree obtained with such persons also on the record, is binding on them in the same manner as it is binding on the mortgagee. As against the mortgagor decree-holder the lessee's possession of the property can be deemed to be only the possession of the mortgagee. Upon redemption of the mortgage therefore, the mortgagor is entitled to possession of the property.

(Paras 2, 4, 5)

Anno: T. P. Act, S. 76 N. 6, 10.

K. P. Abraham, for Appellant; R. Ranganatha Iyer, for Respondent.

SANKARAN J.: The 2nd defendant is the appellant. The question raised in this second appeal is about the liability of the 2nd defendant's eviction from the plaint property as per the decree in this case. The property admittedly belongs to the plaintiff and he had mortgaged it under a deed of the year 1105 in favour of the 1st defendant. The present suit was instituted for recovery of possession of the property on redemption of that mortgage. The 2nd defendant was impleaded in the suit as the person in possession of the property under the 1st defendant-mortgagee.

At the trial stage of the suit the 2nd defendant contended that the period of the lease granted in his favour by the 1st defendant was not over and that therefore no decree for eviction could be passed against him in the present suit. It was after overruling that contention that the plaintiff was given a decree for redemption of the mortgage and for recovery of possession of the property from the defendants. To the execution of the decree, the 2nd defendant raised the present objection that as a lessee he was entitled to retain possession of the property by virtue of the rights conferred by Act XXI of 1124 of Travancore. This Act was superseded by Act VIII of 1950, the Holdings (Stay of Execution Proceedings) Act. By this Act eviction of lessees from their holding in execution of decrees obtained against them has been temporarily stayed. The objection to the execution of the decree in this case raised by the 2nd defendant on the strength of this Act was overruled by the Execution Court. That order was confirmed by the lower appellate court also. Hence this second appeal.

(2) The provision for stay relied on by the appellant is contained in section 4 of Act VIII of

1950. That section lays down that proceedings for execution of a decree in a suit for the recovery of possession of a holding shall, so far as they relate to the delivery of possession of the holding, be stayed. This section will be attracted only if the property sought to be recovered in the present case comes within the expression "holding" as defined in section 2 of the Act. This definition is as follows:

> "'Holding' means any immovable property held under a single transaction by which a leasehold right in the property is created and possession of the property is transferred by one person in favour of another".

Kanapattom has also been included within the expression "holding" as per the Explanation to this section. It is clear from this definition that in order to constitute a holding three essential conditions must be satisfied and they are: (1) the landlord must have transferred possession of the property in favour of the tenant, (2) such transfer must have created a leasehold right in favour of the tenant and (3) such leasehold right must have been created under a single transaction. It has therefore to be seen whether the 2nd defendant-appellant's possession of the suit property satisfies all these conditions as against the plaintiff-decree-holder.

(3) As already stated, the lease arrangement relied on by the 2nd defendant in respect of the suit property was not created in his favour by the plaintiff. On the other hand, it was created by the 1st defendant mortgagee. Hence, it cannot be said that possession of the property was transferred to the 2nd defendant by the plaintiff. To get over this difficulty, it is argued on behalf of the appellant that he was holding that property on lease from the plaintiff's Illom long prior to the execution of the mortgage deed in favour of the 1st defendant and that his present possession is a mere continuation of such possession which must therefore be deemed to be under the original lease arrangement with the plaintiff's illom. This contention cannot hold good in the face of Exhibit 11 compromise decree in O. S. 986 of 1109. That suit was instituted by the present 1st defendant after obtaining a mortgage in respect of the suit property from the plaintiff and the suit was for terminating the prior lease arrangement in favour of the 2nd defendant and for recovery of possession of the property from him. That suit was compromised between the parties and as per that compromise the original lease was terminated and the 1st defendant accepted a fresh lease arrangement in respect of the property from the 1st defendant mortgagee. In the face of such a compromise as embodied in Exhibit 11, it is idle for the appellant to contend that the original lease obtained from the plaintiff's Illom still subsists and that he must be deemed to be holding the property as a lessee under the plaintiff.

(4) It is clear that the appellant is holding the property under the new lease arrangement created in his favour by the 1st defendant. It cannot be said that he is holding the property under a single transaction by which a leasehold right in the property was created in his favour. In fact such a right was created under a double transaction, viz., the mortgage granted by the plaintiff in favour of the 1st defendant followed by the lease granted by the 1st defendant mortgagee in favour of the appellant. The plaintiff has not accepted the lease arrangement created by his mortgagee and the present suit was not based on that lease arrangement. The suit was for redemption of the mortgage granted in favour of the 1st defendant. The plaintiff is not bound to recognise and respect the lease arrangement created by the mortgagee to any extent beyond the limits of the obligation under the mortgage transaction itself. Any such lease or subtenancy created by the mortgagee can subsist only so long as the mortgagee's right to retain possession of the property under the mortgage in his favour subsists. On the termination of the mortgage he is bound to surrender possession of the property to the mortgagor.

(5) The mortgagor's right to recover possession of the property on redemption of the mortgage is not in any way curtailed by Act VIII of 1950. The omission to include mortgage transactions within the expression "holding" as defined in the Act, clearly indicates that the legislature did not want to interfere with the rights and liabilities as between the mortgagor and the mortgagee. Those obtaining possession of the property under a mortgagee cannot certainly have any better or larger right than the mortgagee himself to retain possession of the mortgage property. The redemption decree obtained with such persons also on the record, is binding on them in the same manner as it is binding on the mortgagee. As against the plaintiff decree-holder in this case, the 2nd defendant-appellant's possession of the property can be deemed to be only the possession of the 1st defendant mortgagee.

(6) From the facts already stated, it is clear that the suit property in the possession of the 2nd defendant appellant does not satisfy the conditions required to bring it under the category of "holding" as defined in section 2 of Act VIII of 1950 and as such he cannot invoke the aid of section 4 of the Act in resisting the execution of the present decree by the plaintiff for recovery of possession of the property. The lower courts were therefore right in overruling the 2nd defendant's objection to the execution proceedings and in permitting the plaintiff decree-holder to recover possession of the property.

(7) In the result this second appeal is dismissed with costs.

B/R.G.D. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 396

SANKARAN AND GANGADHARA MENON JJ.

Parameswaran Pillai Madhavan Pillai, Appellant v. Kerala Service Bank Ltd., Changanacherry and others, Respondents.

A. S. No. 260 of 1123, D/- 21-12-1951.

Debt Laws — Travancore Debt Relief Act (II (2) of 1116 M. E.), S. 16 — Debt Relief petition allowed — Court directing debtor to deposit amount for meeting charges for notifying sale — Dismissal of petition on non-compliance — Validity.

Where a debt relief petition is allowed and the petitioner has surrendered the whole of his assets, it is not competent or proper for the Court to dismiss that petition for non-compliance by the debtor with the direction of the Court to deposit certain amount for meeting the charges for notifying the sale. Such sale is to the interests of the creditors and any of them can be made to advance the necessary amount which may be paid off in the first instance on realising the assets and then the balance alone distributed. If no creditor is prepared to advance any such amount, the debtor cannot be penalised for the same and his rights under S. 16 denied to him. (Para 2)

R. Subramanian Nair, for Appellant; N. K. Narayana Pillai and P. Sivarama Iyer, for Respondents.

SANKARAN, J.: The petitioner in a debt relief petition under section 16 of the Debt Relief Act of Travancore is the appellant. There was no dispute about the sustainability of his petition. Accordingly the Court on 13-12-1122 passed an order allowing his petition. The effect of that order was that all the assets of the debtor-petitioner became vested in Court. The court had then to sell those assets and to realise the amount for distribution among the creditors after payment of the 1/4 to the debtor petitioner. The debtor appears to have filed a statement surrendering that 1/4 also to the court to be utilised for distribution among the creditors. Thus the debtor has no asset left with him. His only interest was to get himself absolved from further liability for all the debts mentioned in his petition. The lower court directed him to deposit a certain amount for meeting the charges for notifying the sale of his assets. He could not comply with that order. The court accordingly dismissed the Debt Relief petition. The appeal is against that order.

(2) In view of the facts stated, the lower court was wrong in dismissing the petition. It was not competent or proper for the court to have passed such an order after the petition had already been allowed resulting in a vesting of the petitioner's assets in court. The petitioner who had surrendered the whole of his assets could not be compelled to bring further amounts to court so as to facilitate the sale of the assets. Such sale is to the interests of the creditors. Any of them could be made to advance the necessary amount which may be paid off in the first instance on realising the assets and then the balance alone distributed. If no creditor is prepared to advance any such amount, the debtor cannot be penalised for the same and his rights under section 16 denied to him. If nobody is prepared to advance the required amount the sale may be conducted in open court after the publication in the court house and even if nothing is realised the debtor is entitled to the benefit of the order under section 16.

(3) In the result, this appeal is allowed and in reversal of the order of the lower court the D. R. P. is restored to the file for further proceedings as a consequence of the order dated 13-12-1122, allowing the petition, in accordance with law and in the light of the observations made above. We make no order as to costs.

B/G.M.J.

Appeal allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 397

KUNHI RAMAN C. J. AND
SUBRAMANIA IYER J.

Oommen Itty, Appellant v. Vareethu Lukkose and others, Respondents.

Second Appeal No. 258 of 1951, D/- 16-11-1951.

Travancore Limitation Act, S. 23 — Limitation Act (1908) Ss. 18 and 22 and Art. 166 — Suit to set aside sale on ground of fraud instituted by sons of judgment-debtor within limitation — Addition of judgment-debtor as co-plaintiff after limitation — Effect.

The plaintiffs who were wife and children of A brought a suit to set aside a Court sale of certain properties in execution of a decree against A on the ground of fraud practised by the defendant decree-holder. A on his return from abroad sought to be impleaded as one of the plaintiffs and the Court impleaded him accordingly and the plaint was amended by inclusion of one more relief relating to another item of property which had not been sold in Court auction. The suit was then converted into a proceeding under S. 40, Travancore Civil P.C. (corresponding S. 47, Civil P.C.). The suit was admittedly within limitation under Art. 151, Travancore Limitation Act (corresponding to Art. 166, Lim. Act) as it was brought within thirty days from the date when the fraud became known to the original plaintiffs but it was barred by time when A was impleaded in the suit as plaintiff.

Held that by virtue of S. 23, Travancore Limitation Act (corresponding to S. 22 of the Indian Act) the suit must be deemed to have been instituted by A when the plaint was presented in Court by the original plaintiffs with the result that when the suit was converted into a proceeding under S. 40, Travancore Civil P.C. the proceeding must also be deemed to have been started on the date on which the plaint was presented. Notwithstanding the fact that a new relief was claimed in respect of another item the cause of action for the suit remained the same and therefore S. 23, Travancore Limitation Act, was applicable to the case. Consequently, the suit was not barred by limitation even as regards A.

(Paras 4, 5)

Anno: Lim. Act S. 22 N. 26 Art. 166 N. 18.

P. I. Simon and A. S. Narayanan Assan, for Appellant; M. P. Ramakrishna Pillai, for Respondent No. 1.

SUBRAMANIA IYER J.: The 2nd defendant is the appellant in this second appeal. The suit out of which this second appeal arises was brought by plaintiffs 1 to 5 who are the wife and children of the 6th plaintiff who was impleaded as an additional plaintiff in the course of the suit. The suit was for setting aside the court sale of the properties mentioned in the plaint in execution of the decree in O. S. 611/1111. The ground of the relief was that the 6th plaintiff who was the judgment-debtor had been away in Singapore from the end of the year 1113, that the 2nd defendant the assignee-decree-holder with full knowledge of the absence abroad of the 6th plaintiff suppressed the fact from the court, started execution proceedings on the basis that the 6th plaintiff was still resident within the jurisdiction of the court, got false returns of notices in connection with the execution manoeuvring the whole matter secretly in collusion with the process-servers entrusted with the service of the notices and brought about the sale secretly keeping the proceedings out of the knowledge of persons in the locality as also of plaintiffs 1 to 5. The sale and confirmation was in the year 1115 and item No. 2 which was sold was delivered to the 2nd defendant in the year 1118. Plaintiffs 1 to 5 alleged that they became aware of the sale only in Vrischigam 1120 and filed a suit in Dhanu of that year because the 6th plaintiff was still away in Singapore, which was by that time enemy territory and no correspondence with him was feasible for that reason. Towards the end of Mithunam 1121 the 6th plaintiff returned from Singapore and sought to get himself impleaded as an additional plaintiff in the suit. This prayer was

allowed by the court overruling the objection raised by the 2nd defendant. After the impleading of the 6th plaintiff there was an amendment of the plaint including one more relief relating to another item of property which had not been sold in court auction and which had already been sold by the 6th plaintiff to the 4th defendant reserving a proportionate share of the liability under the decree to be paid to the decree-holder. It was alleged that the vendee had paid that portion of the liability and got a release of the property.

(2) The 2nd defendant who had already filed a written statement filed an additional written statement after the 6th plaintiff was impleaded. In addition to the pleas already raised by him, a fresh plea to the effect that the suit is not maintainable under Section 40 of the Travancore Code of Civil Procedure corresponding to Section 47 of the Indian Code based on the fact that the 6th plaintiff was a judgment-debtor in the decree and the questions raised in the suit relate to the execution thereof. This objection being fatal to the suit a prayer to convert the suit into a proceeding under clause 2 of that Section was made on behalf of the plaintiffs which was allowed by the court subject to any objection as to limitation.

(3) Both the courts below have concurrently found in favour of the plaintiffs that the proceedings in execution of the decree were brought about by the 2nd defendant fraudulently. Mr. Simon, learned counsel for the appellant does not, as he could not, canvass the correctness of this finding. The only point urged by him in this second appeal is that the proceeding is barred by limitation. His contention is that as the 6th plaintiff admits in the plaint that plaintiffs 1 to 5 knew about the fraud in Vrischigam 1120 and that he himself became aware of the fraud on his return from Singapore on 20th Mithunam 1121, the bar of limitation would stand in the way of the relief claimed by him because he got himself impleaded only on the 29th Karkitakom 1121 that is, more than 30 days after knowledge of the fraud because under Article 151 of the Travancore Limitation Act, the period available to set aside the execution sale of the property is only 30 days.

(4) Mr. Ramakrishna Pillai, learned counsel for the first respondent — 6th plaintiff replies by saying that under Section 23 of the Travancore Limitation Act, which, unlike the corresponding Section 22 of the Indian Limitation Act, provides that:

> "23. When, after the institution of a suit, a new plaintiff or defendant is substituted or added for any reason whatever, the suit, provided that the cause of action remains the same, shall, as regards him, be deemed to have been instituted when the plaint in the suit was presented in Court."

the suit has to be deemed to have been instituted by the sixth plaintiff when the plaint was presented in Court by plaintiffs 1 to 5, that is on 9-5-1120 with the result that when such a suit is converted into a proceeding under Section 40, clause 2 of the Travancore Code of Civil Procedure, the proceeding must also be deemed to have been started on the date on which the plaint was presented, that is, on 9-5-1120 which would be within 30 days from the date when the fraud became known to even plaintiffs 1 to 5, not to speak of the fact that the 6th plaintiff was then away, unaware of the fraud of which he knew only on his return subsequent thereto that is, on 20-11-1121. He therefore urges that there could possibly be no bar of limitation for this proceeding. Mr. Simon's rejoinder is that under Section 23 of the Travancore Limitation Act, the cause of action must be the same even after the emergence of the new party on record. He points out that after the 6th plaintiff came on record, he amended the plaint by including a new relief respecting an item of property sold to the 4th defendant. We consider that the cause of action so far as the second defendant is concerned, remains the same notwithstanding the fact that a new relief is asked for in respect of an item of property. We are of the view that Section 23 of the Travancore Limitation Act is clearly applicable to the case and the result is that the proceeding must be deemed to have been started by the 6th plaintiff on 9-5-1120 that is when the suit was filed in court by plaintiffs 1 to 5. There can thus be no scope for the application of any bar of limitation to the proceeding because it was started even before it need have been started.

(5) It having been conclusively found that the court sale impeached was brought about by the fraud of the appellant, the 6th plaintiff had admittedly 30 days' time from the date of the knowledge of the fraud to start proceedings to set the sale aside. The 6th plaintiff's case is that he became aware of the fraud only on his arrival in this country back from Singapore on 20th Mithunam 1121. He could wait for 30 days from that date to start proceedings but fortunately the proceedings started by his wife and children enured to his benefit, he having been allowed to be impleaded therein as an additional party which impleading would have retrospective effect under Section 23 of the Travancore Limitation Act.

(6) There is thus no merit in this second appeal which should be dismissed with costs. The 1st respondent has filed a memorandum of cross objections questioning the order passed by the lower appellate court reserving that question to another suit to bring which liberty is given to the 6th plaintiff. The lower appellate court has given good grounds for the reservation that it has made with which we see no reason to interfere. The memorandum of objections is therefore dismissed, but there will be no order as to costs.

B/K.S. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 398

SUBRAMANIA IYER AND VITHAYATHIL JJ.

Pareed Rowther Syed Muhamed Rowther, Appellant v. Travancore Central Banking Corporation Ltd. and another, Respondents.

A.S. No. 460 of 1123, D/- 22-10-1951.

(a) Debt Laws — Travancore Debt Relief Act (2 (II) of 1116), S. 6 — Banking Company in liquidation on date Act came into force — Applicability of section.

Where the proceedings in liquidation in respect of a banking had not progressed beyond an order for winding up on the date that the Debt Relief Act came into force the banking company must be held to be a

banking company within the meaning of the Act carrying on banking business on the date the Act came into force and therefore the provisions of S. 6. are attracted. (Para 4)

(b) Debt Laws — Travancore Debt Relief Act (2 (II) of 1116) S. 15 — Application under Section — Court errs in not fixing time for payment of amount fixed by it. (Para 5)

T. K. Joseph, for Appellant; N. K. Narayana Pillai, for Respondent No. 1.

SUBRAMANIA IYER J.: The 1st defendant in O. S. 95 of 1116 on the file of the Changanacherry Munsiff's Court is the appellant. The Court below passed a decree against him on foot of a deed of hypothecation, Ext. A, executed by him in favour of the 2nd defendant which was a banking company. The 2nd defendant hypothecated this right along with certain other items of property to the plaintiff who filed O. S. 25/1113 for enforcement of that hypothecation and has filed this suit, to enforce Ext. A by sale of the properties of the 1st defendant.

The contentions urged by the appellant in the Court below were, (1) discharge of interest by agreement to adjust it out of rent payable by the bank and (2) that under the provisions of the Travancore Debt Relief Act, the debt had been satisfied fully by two deposits made by him in the Court below, first a deposit of Rs. 122-4-Ch. on 18-10-1116 and another deposit of Rs. 1444-20 Chs. on 30-1-1118. These deposits would, according to the appellant, discharge the debt in full if his liability was not in favour of the banking company, in which event he is liable to pay only 70 per cent. of the debt in two years. The third contention raised by him was that under section 15 (v) of the Travancore Debt Relief Act, the court should have fixed the amount due as also a time for payment thereof.

(2) The court below found against the appellant upon all the points and he has urged before us every one of those contentions over again. As regards the first, viz., the question of discharge, the matter arises in this fashion: The second defendant was a lessee of certain premises belonging to the 1st defendant wherein the second defendant's banking business was being conducted. The rent agreed to be paid for the premises was Rs. 12 per month and the interest payable upon the loan evidenced by Ext. A which is the hypothecation deed sued on, was also Rs. 12 per month, the principal amount being Rs. 1201 and the interest provided for in the bond being 12 per cent.

The first defendant set up an agreement to the effect that no interest is payable upon the hypothecation bond but that interest that accrued due per month would be set off against the rent payable by the 2nd defendant to the 1st. It appears that as a matter of fact interest every month upon the deed of hypothecation was being adjusted by the 2nd defendant-bank for some time by making credit and debit entries. The appellant attempted to prove the alleged oral agreement by the evidence of himself and two other witnesses who were examined as Dws. 1 to 3. The court below did not find its way to believing these witnesses.

(3) When the appeal was first argued before us, Mr. T. K. Joseph, learned counsel for the appellant made a prayer that the accounts of the 2nd defendant-bank which were alleged to be in the possession of the Official Receiver in connection with the proceedings for liquidation of the 2nd defendant-bank may be called for and that the request made in that behalf in the court below was wrongly turned down. We were inclined to allow the request and the Official Receiver was summoned to produce the accounts. The official Receiver has filed a statement to the effect that the accounts called for have never come to his possession.

Under the circumstances, we are inclined to accept the view taken by the court below that the alleged agreement for setting off the interest per month under Ext. A against the rent of the premises has not been made out. In the absence of such an agreement, the creditor is certainly entitled to interest upon the bond as provided for, notwithstanding the fact that the creditor in his turn was liable to the debtor to pay rent for the premises.

(4) The second point urged on behalf of the appellant was that the 2nd defendant was not a bank carrying on the business of banking on the date on which the Travancore Debt Relief Act came into force, that is on 1-2-1116 and that therefore the provisions of that Act relating to creditor banks will not apply to this case. The Court below decided this point against the appellant on the ground that the deed of hypothecation executed by the 2nd defendant to the plaintiff operated in law as a transfer of the right. Admittedly the plaintiff was a bank actually carrying on banking business on the date the Debt Relief Act came into force. Learned counsel for the appellant contends that assuming that the deed of hypothecation will operate as a transfer of the rights, the question is not as to whether at the time the Act came into force that debt was due to a banking company, but whether it arose out of a transaction with a banking company. The transaction having arisen when the 2nd defendant was admittedly a banking company, it is contended that the provisions of the Travancore Debt Relief Act, Section 6, are attracted.

We do not propose to consider in this case the correctness of the view taken by the lower court that Ext. A stood transferred to the plaintiff before Act 2 (II) of 1116 and that would be sufficient to disentitle the appellant to the benefits of Section 6 of the Act, because in our judgment, the 2nd defendant was a banking company within the meaning of the Act carrying on banking business on the date it came into force notwithstanding the fact that there had been an order for winding up the Company through Court. It is not contended that, the proceedings in liquidation had progressed beyond an order for winding up on the date that the Act came into force. The final orders in these proceedings had not been passed and therefore the 2nd defendant continued to be a banking company within the meaning of the Act. In this view the provisions of Section 6 of the Travancore Debt Relief Act are attracted and the appellant is liable to pay 80 per cent. of the debt due within 2 years.

(5) The third point raised by Mr. Joseph is that the Court below erred in not having fixed the time for payment of the amount under

Section 15 of the Debt Relief Act. We are inclined to accept this contention. The Court below considers that the application made by the appellant was one under Section 15, nevertheless it did not fix a time for payment of the amount fixed by the Court. In this, the lower Court was in error. The two deposits made by the appellant on 13-10-1116 and 30-1-1118, already referred to, would be treated as amounts paid by him under the provisions of the Debt Relief Act. The balance due by the appellant as agreed to by learned counsel appearing for both sides, is Rs. 18-8-0 which we direct shall be sent by the appellant by money order or shall be paid into court to the credit of the plaintiff within one month from the date of receipt of the records by the court below.

(6) In the result the appeal is allowed in the manner and to the extent above indicated. In the peculiar circumstances of this case, we leave the parties to pay themselves their respective costs here and in the court below.

B/V.R.B. Appeal partly allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 400

GANGADHARA MENON & VITHAYATHIL JJ.

Kochu Menon, Appellant v. Achutan Nair and others, Respondents.

Second Appeal No. 156 of 1124(c), D/- 5-10-1951.

(a) Easements Act (1882), S. 13 — Artificial water course running through lands of several owners — Presumption.

Where an artificial water-course passes through the lands of several owners, a strong presumption naturally arises that the water-course was originally constructed under an express or implied agreement between all the owners concerned whereby all the owners consented to exercise similar rights over the water of the water-course. In such cases, unless facts that might destroy such presumption are forthcoming one of the owners cannot claim exclusive right for the entire water flowing through the channel, nor could the water be diverted or lessened in quantity by the owner of the land at its source or by owners of lands through which it passes to the injury of the lower owners down the stream: (1866) 1 Ch A 396, (1909) 1 Ch 427, 4 Cal 633 (PC) Relied on. (Para 4)

Anno: Easements Act S. 13 N. 5.

(b) Easements Act (1882), S. 13 — Water-course flowing through land — Unity of land broken up by transfer of portions — Plaintiff purchasing one portion — Use of water essential for enjoyment of land — Deed of transfer not indicating that plaintiff was not entitled to use of water — Plaintiff acquires quasi-easement to the enjoyment of water flowing from water-course — (Cochin Easements Act (22 (XXII) of 1112), S. 13).

Where the unity of ownership of land is split up and the portions of the land are transferred to different persons rights emerge in favour of the part-owners to enjoy the same conveniences, in respect of the lands in the form of quasi easements which can be claimed permanently and indefeasibly by the grantor and the grantee alike unless expressly excluded in the documents of transfer. It is such rights that are dealt with under Sec. 13 of the Cochin Easements Act.

No doubt acquisition of quasi easement is to be determined with reference to the obvious permanence of the prior arrangement and also with regard to the utility or otherwise of such conveniences of the purpose of the enjoyment of the severed tenements as reasonably as they were enjoyed before.

The water channel in question was one which was put up permanently. The water from the channel was absolutely necessary for the enjoyment of the plaintiff's properties as they were enjoyed before the entire property was split up into different tenements. Even at the time when the plaintiff obtained the properties by the purchase he enjoyed the convenience of the water of the chal for irrigation purposes:

Held that the plaintiff acquired a quasi easement to the use of the water, the right claimed by him to the flow of water from the chal being apparent, and continuous and necessary for enjoying his lands. (Paras 4, 5)

Anno: Easements Act S. 13 N. 3. 5.

K. Rama Iyer, for Appellant; V. Narayana Menon, for 1st Respondent.

REFERENCES : Courtwar/Chronological/ Paras

('79) 4 Cal 633: (6 Ind App 33 PC) 4
(1866) 1 Ch A 396: (35 L.J. Ch. 467) 4
(1909) 1 Ch 427: (78 L.J. Ch. 144) 4

GANGADHARA MENON J.: This is a second appeal by the plaintiff from the judgment and decree of the learned District Judge of Trichur in A. S. No. 293 of 1122 confirming the decree of the learned District Munsiff of Wadakancherry in O. S. 503 of 1118.

(2) S. Nos. 410, 464/1, 464/2, 464/3, 459 and 483 in Enkanad Village are paddy fields lying contiguous. All the above lands except S. No. 459 belonged to Vadavarkot Valia Mana. The properties bearing S. Nos. 410 and 464/1 were purchased by the plaintiff in 1117. S. No. 464/2 and 3 were purchased by the 1st defendant and S. No. 483 devolved on the family of defendants 3 and 5. S. No. 459 belongs to the 2nd defendant. According to the plaintiff there is a permanent water-chal having its origin in S. No. 483 and running westwards along S. Nos. 459, 464/1 and 410 and emptying itself into the fields to the west of S. No. 410. This chal was in existence from time immemorial and water from the chal was being utilised for cultivation in the plaintiff's fields and it is absolutely necessary for agricultural operations there.

The plaintiff alleges that he has a right of easement for an uninterrupted flow of water through the chal into his fields for cultivating his lands comprised in S. Nos. 410 and 464/1. The 1st defendant had wrongfully destroyed a portion of the chal in S. No. 464/3 and has thus interrupted plaintiff's easement right and has occasioned damages to him by making it impossible to cultivate his lands. The plaintiff has therefore sued for a declaration that he is entitled to the use of the water flowing through the chal, for an injunction restraining the defendant from closing up the chal and to compel the 1st defendant to restore the chal to its original condition. Plaintiff also

claims damages alleged to have been sustained by him on account of the action of the 1st defendant. The 1st defendant denied the existence of the chal and the rights claimed by the plaintiff. The second defendant while admitting the existence of the chal in his property S. No. 459 contended that it was constructed for bringing water for agricultural purposes to his lands. He has however no objection in the plaintiff and others taking water through that chal for agricultural operations in his fields. The learned Munsiff on the finding that no easement right is established dismissed the suit and in appeal, the learned District Judge confirmed the decree of the trial court.

(3) That a water-chal as stated by the plaintiff has been in existence in the properties for a very long time past has been amply established by the evidence in the case. Ext. A is a plan prepared by the Commissioner and Ext. D is his report. (After considering the evidence of witnesses and the Commissioner's report the judgment continued). In the light of this very clear evidence we have no hesitation in holding that the water-chal was in existence as stated by the plaintiff that the water flowing through this chal was being used for irrigation of the plaintiff's property and that the 1st defendant destroyed the continuity of this water-course by destroying portions of the chal that runs through his property S. No. 464/3. The courts below do not find against the existence of a water-chal as contended for by the plaintiff. They take the view that the plaintiff has not acquired any right of easement over the water that flows through the channel. Therefore the question whether the plaintiff has acquired any easement right of the water that flows through the chal has next to be considered.

(4) We shall first deal with the contentions of the 2nd defendant. According to him, the chal is put up only for irrigating his own land S. No. 459. From what we have said above regarding the continuity of the chal from the middle portion of S. No. 483 up to the plaintiff's property S. No. 410, it is clear that the channel is an artificial water-course intended to irrigate not only the 2nd defendant's properties, but also all the lands that lie further west of S. No. 459 up to S. No. 410. It is in evidence in this case that originally S. Nos. 483, 464/3, 464/2, 461/1 and 410 belonged to Vadavarkot Valia Mana and S. No. 459 belonged to the 2nd defendant's predecessors-in-interest. The properties belonged to Vadavarkot Valia Mana lay on either side of the 2nd defendant's property S. No. 459. It must be at the time when the properties were owned by the two owners as stated above, that the chal in question was put up some 30 or 35 years ago for irrigating all the above survey numbers including S. Nos. 459, 464/1 to 3, and 410. The facts and circumstances disclosed by the evidence in the case amply establish this. Where an artificial water-course passes through the lands of several owners, a strong presumption naturally arises that the water-course was originally constructed under an express or implied agreement between all the owners concerned whereby all the owners consented to exercise similar rights over the water of the water-course. In such cases unless facts that might destroy such presumption are forthcoming one of the owners cannot claim exclusive right for the entire water flowing through the channel, nor could the water be diverted or lessened in quantity by the owner of the land at its source or by owners of lands through which it passes to the injury of the lower owners down the stream. (Vide 'IRIMEY v. STOCKER', (1866) 1 Ch A 396; 'WHITMORES (EDEN BRIDGE) LIMITED v. STANFORD', (1909) 1 Ch. 427 and 'RAMESHUR PERSHAD NARAIN SINGH v. KOONJ BEHARI PATTUK', 4 Cal 633 (PC). Therefore, in this case, the claim of the 2nd defendant that he is exclusively entitled to the water flowing through the channel cannot stand. As stated already, S. Nos. 483, 464/1 to 3 and 410 belonged to one owner and water chal in question was put up as an artificial irrigation channel for the purpose of irrigating all the lands comprised in all the above survey numbers. Thus all the above survey numbers enjoyed apparent and continuous conveniences which have their origin in the prior arrangement made by the owner.

Where the unity of ownership of such lands is split up and the portions of the lands are transferred to different persons as in the present case, rights emerge in favour of the part-owners to enjoy the same conveniences, in respect of the lands in the form of quasi easements which can be claimed permanently and indefeasibly by the granter and the grantee alike unless expressly excluded in the documents of transfer. It is such rights that are dealt with under Sec. 13 of the Cochin Easements Act (Act XXII of 1112). The defendant have no case that the right to the water that flows through the chal in question has been expressly excluded in the document of transfer in favour of the plaintiff. It is abundantly clear from the facts and circumstances of this case that the plaintiff has obtained a quasi-easement right under Section 13 (b) of Act XXII of 1112 over the water that flows through the channel for the purpose of irrigating his fields comprised in S. Nos. 464/1 and 410. It is contended that the prior arrangement in respect of the land was not of a permanent character.

No doubt acquisition of quasi-easement is to be determined with reference to the obvious permanence of the prior arrangement and also with regard to the utility or otherwise of such conveniences of the purpose of the enjoyment of the severed tenements as reasonably as they were enjoyed before. From the Commissioner's report and from the evidence of the plaintiff's witnesses we are inclined to think that the water channel in question was one which was put up permanently and that the water from the channel is absolutely necessary for the enjoyment of the plaintiff's properties as they were enjoyed before the entire property was split up into different tenements. It is also clear from the evidence in the case that even at the time when the plaintiff obtained the properties under Ext. B they enjoyed the convenience of the water of the chal for irrigation purposes.

(5) After a careful consideration of the evidence in this case we are convinced that the right claimed by the plaintiff in this suit to the flow of water from the chal is apparent and continuous, and necessary for enjoying plaintiff's lands and that the plaintiff has acquired a quasi easement right over the flow of water through the chal. The 1st defendant

was therefore bound not to obstruct the flow of water through the chal that passed through his lands to the fields of the plaintiff. The conduct of the 1st defendant in destroying the continuity of the channel was therefore unjustified.

(6) It follows therefore that the plaintiff is entitled to the reliefs claimed in the prayers A to D of the plaint. There is no reliable evidence in this case for the damages alleged to have been sustained by the plaintiff. We do not therefore see our way to award any damages to the plaintiff as prayed for in prayer E of the plaint. In the result in reversal of the decrees of the lower courts, we allow this appeal and decree the suit as indicated above. The plaintiff will get his costs throughout from the 1st defendant.

B/R. G. D. Appeal allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 402

GANGADHARA MENON, AND VITHAYATHIL, JJ.

Lekshmi Pillai, Kaliyani Pillai and others, Appellants v Narayana Pillai, Velayudhan Pillai and others, Respondents.

A. S. No. 286 of 1123 (T), D/- 7-9-1951.

Travancore Nayar Act (II (2) of 1100), S. 37 — Right of senior anandiravan of collateral thavazhi to demand outright partition of tarwad — Right ceases on his death and goes to next senior anandiravan — His widow and children do not succeed to the right — Suit for partition by senior anandiravan — Death of plaintiff — His wife and children cannot continue suit. (Civil P.C. (1908) 0.22, R. 3).

The right conferred by S. 37 on the senior anandiravan of a collateral thavazhi to claim an outright partition of property over which the tarwad has power of disposal on behalf of that thavazhi is a right conferred on him by virtue of his status as the senior anandiravan of that thavazhi. That right ceases with his death and is not one which will devolve on his wife and children. The statute confers on the senior anandiravan the right to represent the entire thavazhi and claim partition on behalf of the thavazhi. Where the senior anandiravan has instituted a suit for partition there is a severance of joint status, so far as the thavazhi represented by him is concerned, from the common tarwad. But the members of his thavazhi do not become divided inter se. The thavazhi that is divided in interest from the common tarwad will constitute itself as a separate tarwad until there is a partition between the members thereof inter se. Therefore, upon the death of the senior anandiravan, after institution of the suit the estate devolves only on that thavazhi and not on the deceased's wife and children. After his death only the next senior anandiravan in the thavazhi on behalf of the thavazhi or in case he does not come forward to prosecute the suit the other members of the thavazhi on behalf of the thavazhi can continue the suit and not the wife and children of the deceased plaintiff. The latter have no manner of right to represent the thavazhi and proceed with suit. (Para 2)

The wife and children cannot also claim to continue the suit on the ground that plaintiff's suit was filed as an agent of the members of the thavazhi when he was not so authorised by all the members and when the suit was not based on any such authority.

Where the suit is continued by the wife, the suit should not be dismissed but an opportunity should be given to the next senior anandiravan. (Para 3)

Anno: Civil P.C. O. 22, R. 3, N. 6, 9.

N. Varadaraja Iyengar, for Appellants; N. K. Narayana Pillai, for 5th Respondent.

MENON J.: Additional plaintiffs 2 to 4 are the appellants. The suit was for partition. In the tarwad there are 3 main thavazhies traceable to three direct female ascendants Nangeli, Meechi and Madhavi. The deceased 1st plaintiff belonged to Nangeli's thavazhi, defendants 1 to 4 belong to Meechi's thavazhi and defendants 5 to 11 to Madavi's thavazhi. Nangeli's thavazhi consists of two sub-thavazhies, those of Lekshmi and Narayani. The 1st plaintiff belonged to the line of Narayani and was also the senior in age in the thavazhi of Nangeli. The members of Nangeli's thavazhi executed a partition of their properties under which they surrendered their share over the common tarwad properties in favour of Narayani's thavazhi. Subsequently, the members of Narayani's thavazhi divided their properties under Ext. B. It is alleged that under Ext. B the other members of Narayani's thavazhi surrendered their rights over the common tarwad properties in favour of the 1st plaintiff.

The 1st plaintiff as senior in age in Nangeli's thavazhi instituted the suit on behalf of that thavazhi for partition of the common tarwad properties scheduled in the plaint. He claimed 48/59 share of the properties on behalf of the thavazhi. Of the members of the tarwad only the 1st plaintiff and defendants 1 to 11 were in the party array in the suit as it was originally framed. An ex-parte decree was first passed in the case. It was however set aside at the instance of the 6th defendant. By the time of application to set aside the ex-parte decree was filed, the 1st plaintiff died and notice of the application was issued to his wife and children, plaintiffs 2 to 4. The ex-parte decree was set aside and the suit was restored to file. Thereafter the wife and children figure in the suit as additional plaintiffs 2 to 4, though no order impleading them as legal representatives of the 1st plaintiff appears to have been passed in the case. After the suit was restored to file the contesting defendant raised a preliminary objection that the suit as framed is not maintainable. It was contended that the deeds under which the 1st plaintiff had claimed the shares of the other members of Nangeli's thavazhi are void in regard to the properties of the common tarwad included therein since under Section 39 of the Nayar Act until partition no member of the tarwad had any heritable or alienable right in the properties.

The matter came before the Travancore High Court in C. R. P. No 762 of 1119. The High Court upheld the contention based on Section 39 of the Nayar Act. They were however of the view that the frame of the suit being only one by the senior in age in the thavazhi of Nangeli claiming partition on behalf of that thavazhi, the suit was maintainable

under Section 37 of Nayar Act and that the defect if any was only in the non-impleading of the members of Nangeli's thavazhi which could be cured. They therefore directed the impleadment of the above members also as parties to the suit. The fact of the death of 1st plaintiff does not appear to have been specifically brought to the notice of their Lordships and the question whether plaintiffs 2 to 4 can continue the suit for partition filed on behalf of Nangeli's thavazhi was not considered in C. R. P. In pursuance of the order on the C. R. P., all the members of Nangeli's thavazhi were impleaded as defendants 18 to 34 and 42 to 72. The suit was tried with the wife and children as additional plaintiffs. The learned Munsiff dismissed the suit on the ground that plaintiffs 2 to 4 who are strangers to Nangeli's thavazhi are not competent to continue the suit filed by the 1st plaintiff and obtain a partition from the common tarwad on behalf of the thavazhi. The learned Munsiff has also recorded findings on the other issues raised in the case which mainly relate to the properties liable for division. The plaintiffs 2 to 4 have filed this appeal against the decree objecting to all the findings against them.

(2) It is apparent from the plaint in this case that the deceased 1st plaintiff has claimed on behalf of Nangeli's thavazhi the share of that thavazhi in the common tarwad properties. The allegations in the plaint and the prayers therein make it abundantly clear. That this is the frame of the suit is not seriously disputed by the learned advocate for the additional plaintiffs.

Section 37 of the Nayar Act enacts:

"After the death of the lineal ascendant referred to in Section 34 or with her consent,

(i) "the senior anandiravan of any collateral thavazhee or the majority of the other adult members of such thavazhee on behalf of such thavazhee," or

(ii) "each of the male children or female children without issue who are not included in the thavazhee referred to in Sub-clause (i) may claim an outright partition of property over which the tarwad has the power of disposal."

The right conferred on the senior anandiravan of a collateral thavazi to claim an outright partition of property over which the tarwad has power of disposal on behalf of that thavazhi is a right conferred on him by virtue of his status as the senior anandiravan of that thavazhi. That right ceased with his death and is not one which will devolve on his wife and children. The statute confers on the senior anandiravan the right to represent the entire thavazhi and claim partition on behalf of the thavazhi. No doubt as stated by the appellants with the institution of the present suit for partition by the 1st plaintiff there is a severance of the joint status so far as the thavazhi of Nangeli is concerned and that thavazhi has become divided in interest from the rest of the common tarwad. But the members of the thavazhi have not become divided in interest inter se. The thavazhi that is divided in interest from the common tarwad will constitute itself as a separate tarwad until there is a partition between the members thereof inter se. Therefore, the estate has devolved only on Nangeli's thavazhi and not on the deceased 1st plaintiff's wife and children. After the death of the 1st plaintiff only the next senior anandiravan in Nangeli's thavazhi on behalf of the thavazhi or in case he does not come forward to prosecute the suit the other members of the thavazhi on behalf of the thavazhi can continue the suit and not the wife and children of the deceased 1st plaintiff. The latter have no manner of right to represent Nangeli's thavazhi and proceed with suit.

(3) It is however contended that 1st plaintiff has expended money for the prosecution of the suit for which he has a claim on the estate, that the position is one of an agency coupled with an interest and therefore the wife and children as the heirs at law of the 1st plaintiff can continue the action and work out the right and obtain a final decree for partition. In support of this position reliance is placed on Ext. B partition in which the members of Narayani's thavazhi had stated to have authorised the 1st plaintiff to institute the suit. The members of Lekshmi's Thavazhi who are also included in Nangeli's thavazhi are not parties to it. The agency and the interest relied on are not therefore created by all the members of Nangeli's thavazhi. The suit is not based on any authority conferred on the 1st plaintiff by the members of Nangeli's thavazhi to institute the same. Even assuming that an agency to institute the suit was created under Ext. B and that it was sufficient to maintain the action, the suit was not based on any such authority. Nor do we think that the right if any that the 1st plaintiff had to claim from the thavazhi the expenses that he had incurred in prosecuting the suit is sufficient to confer on his wife and children the right to continue the suit for partition on behalf of Nangeli's thavazhi, of which 1st plaintiff was only an undivided member. The 1st plaintiff's suit was sustainable only on the basis of the statutory right he had as the senior anandiravan of Nangeli's thavazhi to claim partition on behalf of that thavazhi and we are clearly of the view that such a right will not in any manner devolve on the additional plaintiffs in the case.

The finding of the learned Munsiff on this question is therefore correct. We do not think that the learned Munsiff was right in dismissing the suit for that reason. He should have given an opportunity to the next senior anandiravan of Nangeli's thavazhi or if he does not come forward the other members of that thavazhi on behalf of the thavazhi to continue the suit and obtain a decree for partition and work out their rights if they chose to do so. No such opportunity appears to have been given.

(4) The conclusions of the learned Munsiff on the other issues raised in the case, are formed without adverting to the several documents produced by the parties in the case. The learned advocates for both sides admitted before us that the findings are faulty inasmuch as all relevant documents produced have not even been adverted to and that those findings have to be set aside and the learned Munsiff directed to record proper findings after consideration of all the evidence produced. Therefore we set aside the findings of the learned Munsiff on the other issues in the case.

(5) In the result we set aside the decree of the lower court and remand the case to the Court below for trial and decision de-novo. Since the additional plaintiffs 2 to 4 are not

entitled to prosecute the suit on behalf of Nangeli's thavazhi, the learned Munsiff will post the case to a specific date for the purpose of enabling the senior anandiravan in Nangeli's thavazhi or if he fails to do so any other member or members of that thavazhi on behalf of the thavazhi to seek to be transposed in the array of plaintiffs for the purpose of prosecuting the suit. If they fail to do so, the suit will be dealt with in due course of law for their default. If however they seek to be transposed as additional plaintiffs as stated above they will be so transposed and the suit will be tried and decided in accordance with law. The appellants will get a refund of the institution fee paid on the appeal memorandum. The parties will suffer the other costs in this court.

S/R.G.D. Case remanded.

A. I. R. 1952 TRAVANCORE-COCHIN 404

SANKARAN & GANGADHARA MENON, JJ.

Kelan Sankara Menon, Appellant v. Cheriathu Theethoose, Respondent.

Second Appeal No 150 of 1125, D/- 17-10-1951.

(a) Limitation Act (1908), S. 19 — Acknowledgment by representative-in-interest of defendant — (Cochin Limitation Act (12 (XII) of 1112), S. 20).

Where the decree-holder's right is against the decree-schedule property, any person getting a transfer of the title to the property from the original defendant would also be deemed to be a party to the decree within the meaning of S. 19 and an acknowledgment of the liability of the property as per the decree made by such transferee will be as good as an acknowledgment made by the transferor defendant himself. (Para 3)

Anno: Lim. Act. S. 19 N. 33.

(b) Limitation Act (1908), Art. 182 (5) — "In accordance with law". — Mortgage decree — Subsequent sale of mortgaged property — Execution application for recovery of amount due by sale of property — Names of original defendants not stated in application — Defect subsequently cured by decree-holder by putting in separate petition for making original defendants also parties to execution application — Application held was one in accordance with law. (Para 3)

Anno: Lim. Act. Art. 182 N. 61.

T. M. Mahalinga Iyer, for Appellant; A. Narayana Menon, for Respondent.

SANKARAN J.: The vendee of the decree schedule properties is the appellant. The plaintiff obtained the decree in this case on 28-10-1113 for recovery of the mortgage amount due to him charged on the decree-schedule properties. Subsequent to the passing of the decree the defendants sold the decree-schedule properties to the present appellant as per sale deed No. 1629 of 1118 with a recital to pay off the decree-debt. On the strength of that sale deed, he filed a petition, M. P. No. 3508 dated 14-8-1120 before the execution Court praying that the amount due under the decree may be settled and that he may be permitted to deposit that amount in Court in satisfaction of the decree-debt. All the same he failed to discharge the entire debt. Hence on 29-9-1123 the decree-holder filed the present execution petition for recovery of the amount due under the decree, by the sale of the decree-schedule properties. The vendee of the properties objected to such execution and contended that execution had become barred by limitation and that the present execution petition is not a valid execution petition. These objections were overruled by both the lower courts. Hence this second appeal.

(2) The earlier execution petn. filed in the case in the year 1119 was dismissed on 26-5-1119. The present execution petition having been filed only on 29-9-1123 would prima facie appear to be out of time. In view of the acknowledgment made by the present appellant in M. P. No. 3508 of 1120 filed by him on 14-6-1120 of the liability under the present decree, it is contended by the decree-holder that there is no bar of limitation for the present execution petition. It is conceded on behalf of the appellant that if such an acknowledgment is valid and is sufficient to give a fresh starting point of limitation, the present execution petition is within time.

The period of three years calculated from 14-8-1120, the date of the acknowledgment, was over on 14-8-1123. But that date happened to fall during the mid-summer recess and hence the execution petition filed on 29-11-1123, the date on which the Court reopened after the summer recess, must be deemed to have been filed in time. Thus real question for decision is whether the acknowledgment contained in M. P. 3508 of 1120 is a valid acknowledgment sufficient to save the decree from the bar of limitation.

(3) The statements contained in M. P. 3508 of 1120 are clear and definite in so far as they relate to the right of the decree-holder to recover the amount due under the decree from the decree-schedule properties. The petition containing these statements is signed by the present appellant as the vendee of the properties. It is argued on behalf of the appellant that he is not a judgment-debtor under the decree in this case and that therefore the statements made by him in M. P. 3508 of 1120 cannot amount to a valid acknowledgment of the liability under the decree. There is no force in this contention. The requirements of a valid acknowledgment are specified in section 20 of the Cochin Limitation Act and there is nothing in the section to indicate that only acknowledgments made by the original defendants in the case would give a fresh starting point of limitation. The expression "an acknowledgment of liability in respect of such property or right..... made in writing, signed by the party against whom such property or right is claimed or by some person through whom he derives title or liability..... ....." used in section 20 is comprehensive enough to cover acknowledgments made by representatives-in-interest of the original defendants. In the present case the decree-holder's right is against the schedule properties and such right is sought to be enforced with the party claiming title to the property on record. Any person getting a transfer of the title to the property from the original defendant would also be deemed to be a party to the decree within the meaning of Section 20 of the Limitation Act. An acknowledgment of the liability of the properties as per the decree in the case, made by such transferee will be as good as an aknowledgment made by the transferor

defendant himself. Thus it is clear that the admissions made by the present appellant in M. P. 3508 of 1120 that the decree-schedule properties continue to be liable for the decree-debt and that he is prepared to clear off such liability under the decree (are enough?) so as to give a fresh starting point of limitation for the purpose of execution of the decree. The lower courts were therefore right in repelling the plea of limitation raised by the present appellant and in holding that the present execution petition is within time.

(3a) The second objection raised by the appellant is that the present execution petition is not one in accordance with law. The defect pointed out is that the names of the original defendants were not stated in the execution petition. But that defect was subsequently cured by the decree-holder by putting in a separate petition, M. P. No. 13 of 1124, for making the original defendants also parties to the present execution petition. Since the execution petition has thus been amended after curing the aforesaid defect, the objection that the execution petition is not a valid execution petition can also no longer hold good.

(4) In the result this appeal fails and it is dismissed with costs.

B/V.R.B. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 405

SANKARAN AND GANGADHARA MENON JJ.

Periyar Valley Rubber Estates Ltd., Appellant v. Ramanathan, Respondent.

A. S. No. 755 of 1951, D/- 17-10-1951.

Part B States (Laws) Act (1951), S. 6 — Retrospective effect — General Clauses Act (1896), S. 6.

The repeal of the Travancore Companies Act by the Central Act of 1951 has not resulted in an ouster of the jurisdiction of the District Court to continue the proceedings already commenced before that Court for winding up the affairs of the Company. Not only is there nothing in the Act of 1951 to indicate that by the repeal of the Travancore Companies Act it was intended to affect the proceedings already commenced under that Act, but by the proviso to Section 6 of Act 1951 all such proceedings have been expressly saved. (Paras 3, 4)

Anno: General Clauses Act, S. 6 N. 3.

V. G. Sankaranarayana Pillai, for Appellant; K. Rama Iyer, for Respondent.

SANKARAN J.: The first counter petitioner in Company Petition No. 11 of 1950 on the file of the Kottayam District Court is the appellant. The petitioner in Company Petition No. 11 is a creditor of the 1st counter-petitioner Company and he filed the petition under the provisions of the Travancore Companies Act for an order to wind up the Company. A similar petition i.e., Company petition No. 6 of 1123 on the file of the same court had been filed by another creditor of the same Company and the Court had already appointed a Liquidator to take charge of the affairs of the Company and to carry out the winding up proceedings under the supervision and direction of the Court. In view of the winding up proceedings already commenced, it was unnecessary to entertain the subsequent petition No. 11 of 1950 for the same relief. It would have been sufficient to permit the petitioner in Company Petition No. 11 of 1950 also to participate in the proceedings in Company Petition No. 6 of 1123. However, the lower court is seen to have entertained the subsequent petition also and to have passed an order appointing the Liquidator in Company Petition No. 6 of 1123 as the Liquidator for the purposes of the subsequent petition also.

(2) While matters had reached this stage, the Indian Companies Act was made applicable to this State also by the passing of the Part B States (Laws) Act, 1951, Act III of 1951 (Central). By section 6 of that Act, the Travancore Companies Act was repealed. Under clause 1 of section 3 of the Indian Companies Act, the Court having jurisdiction under the Act is the High Court within whose jurisdiction the registered office of the company is situated. As per the proviso to this clause, the Central Government by issuing a notification in the Official Gazette could confer this jurisdiction on the District Court within whose jurisdiction the registered office of the Company is situated. Relying on the main clause the Company filed an objection petition C. M. P. No. 3249 dated 11-8-1951 before the lower court contending that that court had ceased to have jurisdiction to proceed with the Company Petition No. 11 of 1950. This objection was overruled by the lower court and hence this appeal.

(3) The only point for decision in this appeal is whether the repeal of the Travancore Companies Act by the Central Act, Act III of 1951, has resulted in an ouster of the jurisdiction of the Lower Court to continue the proceedings already commenced before that Court for winding up the affairs of the appellant Company. As already stated, the winding-up proceedings were initiated when the Travancore Companies Act was in force. Under that Act, the District Court within whose jurisdiction the registered office of the Company is situated, was the proper Court to entertain the petition for winding up the affairs of the Company. The winding-up proceedings thus properly commenced before that Court cannot be affected by the subsequent repeal of that Act unless an intention to that effect is gatherable from the repealing Act.

In dealing with the effect of the repeal of an enactment it is provided in Section 6 of the General Clauses Act that unless a different intention appears from the repealing Act such repeal shall not affect the previous operation of the enactment repealed or anything duly done or suffered thereunder or affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment repealed, or affect any investigation, legal proceeding or remedy in respect of such right, privilege, obligation etc. The section also lays down that any such investigation, legal proceeding or remedy may be instituted, continued or enforced as if the repealing Act had not been passed.

(4) In the present instance, the repeal of the Travancore Companies Act has been effected by Section 6 of Act III of 1951 (Central). Not only is there nothing in this Act to indicate that by the repeal of the Travancore Companies Act it was intended to affect the proceedings already commenced under that Act, but by the

proviso to Section 6 of Act III of 1951 all such proceedings have been expressly saved. In fact the saving clauses in the proviso are practically a reproduction of the several clauses of Section 6 of the General Clauses Act. Clause (d) of Section 6 of Act III of 1951 is to the effect that the repeal of the Travancore Companies Act shall not affect any investigation or legal proceeding already commenced under the repealed Act and that such investigation or legal proceeding may be continued as if the repealing Act had not been passed. In view of such an express saving made by clause (d) of Section 6 of Act III of 1951, it is clear that there is no force in the appellant's contention that with the passing of Act III of 1951 the lower court ceased to have jurisdiction to continue the winding-up proceedings in this case.

It may also be mentioned in this connection that the notification contemplated by the proviso to clause 1 of section 3 of the Indian Companies Act has now been issued so far as this State is concerned, whereby jurisdiction has been conferred on the District Courts to deal with Companies having their registered office within the jurisdiction of such Courts. Thus in any view of the matter, the objection raised on behalf of the appellant Company that the lower court is not competent to carry on the winding-up proceedings in this case, is unsustainable. The lower court's order rejecting the objection to that effect calls for no interference.

(5) This appeal therefore fails and it is accordingly dismissed with costs.

B/D.H. Appeal dismissed.

A.I.R. 1952 TRAVANCORE-COCHIN 406

SANKARAN AND VITHAYATHIL JJ.

Karthiyayani Amma and others, Appellants v. Sreedhararu, Respondent.

Second Appeal No. 328 of 1951, D/- 16-1-1952.

(a) Limitation Act (1908), Arts. 182 and 181 — Application for restitution — Art. 182 and not Art. 181 applies.

An application for restitution is an application in execution and therefore, Art. 182 and not Art. 181 applies to such an application: 30 Trav LJ 306 (FB), Foll.; AIR 1933 Cal 422; AIR 1922 All 223; AIR 1924 Lah 166 and AIR 1931 Lah 504, Not foll. (Para 2)

Anno: Lim. Act, Art. 181 N. 7; Art. 182 N. 18.

(b) Limitation Act (1908), Art. 182 (3) — Application for review rejected — Starting point is date of decree and not date of rejection.

The words 'where there has been a review of judgment' in Art. 182 (3) make it clear that it is only when a review has been allowed by the Court that the clause applies. Hence, where an application for review of judgment is rejected the period of limitation for execution should be calculated from the date of decree sought to be reviewed and not from the date of the rejection of the review application: 29 Trav LJ 1047; AIR 1941 Pat 213 and AIR 1942 All 338, Foll.; AIR 1936 Bom 162, Disting. (Paras 3, 8)

Anno: Lim. Act, Art. 182 N. 48.

M. N. Parameswaran Pillai and N. N. Narayana Pillai, for Appellants; P. Kochukrishna Pillai, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('32) AIR 1932 PC 165: (60 Cal 1)	4
('22) 44 All 407: (AIR 1922 All 223)	2
(42) AIR 1942 All 338: (202 Ind Cas 726)	5, 6
('17) 41 Bom 625: (AIR 1917 Bom 210)	2
('21) 45 Bom 1137: (AIR 1921 Bom 67)	2
('36) AIR 1936 Bom 162: (162 Ind Cas 223)	4, 6
('27) AIR 1927 Cal 904: (54 Cal 1052)	5
('33) AIR 1933 Cal 422: (144 Ind Cas 150)	2
('24) AIR 1924 Lah 166: (76 Ind Cas 501)	2
('31) 32 Pun LR 395: (AIR 1931 Lah 504)	2
('87) 10 Mad 66	5
('16) 39 Mad 1196: (AIR 1916 Mad 883)	5
('17) 40 Mad 780: (AIR 1917 Mad 185)	2
('17) 33 Mad LJ 413: (AIR 1917 Mad 194 (2))	2
('22) 17 Mad LW 623: (AIR 1923 Mad 270)	2
('26) 51 Mad LJ 161: (AIR 1926 Mad 813)	2
('24) 76 Ind Cas 255: (AIR 1923 Nag 101 (1))	2
('26) 92 Ind Cas 23: (AIR 1926 Oudh 199)	2
('31) AIR 1931 Oudh 51: (6 Luck 448)	2
('18) 3 Pat LJ 119: (AIR 1917 Pat 157)	5
('34) 13 Pat 411: (AIR 1934 Pat 246 (2) FB)	2
('37) AIR 1937 Pat 337: (16 Pat 306)	6
('41) AIR 1941 Pat 213: (20 Pat 513)	5, 6
('33) 11 Rang 275: (AIR 1933 Rang 180)	2
('39) 29 Trav LJ 1047	7
('40) 30 Trav LJ 306 (FB)	2

JOSEPH VITHAYATHIL, J.: Defendants 8 to 11 are the appellants in this Second Appeal. The appeal is from an Order rejecting an application for restitution. The suit was filed on behalf of the Thrikkunnapuram Devaswom for recovery of possession of property on the basis of a lease deed of 1077. A prior suit has been filed on behalf of the Devaswom in O. S. No. 132 of 1086 for recovery of possession of the plaint property on the basis of the same lease deed and a decree has been obtained by the Devaswom. But that decree was not executed and it became barred by limitation. In the present suit, the defendants contended that the suit was barred by res judicata by reason of the decree in O. S. No. 132 of 1086. The trial court repelled this contention and decreed the suit on 8-10-1104. The Devaswom obtained delivery of possession of property as per this decree on 16-3-1105. The 5th defendant appealed from the decree and the District Court allowed the Appeal and dismissed the suit on 12-2-1107.

From this decision, the Devaswom filed a second appeal before the erstwhile Travancore High Court. In the meanwhile, the management of the Devaswom was assumed by the Travancore State and the State was impleaded as additional appellant in the case. The 2nd appeal was dismissed by that High Court on 6-11-1114. On 9-3-1115, the State filed a petition for reviewing the judgment of the High Court. That petition was dismissed by the High Court on 30-2-1122. On 8-7-1124 the appellants and their deceased mother applied for redelivery of the property. The trial court allowed the application and ordered redelivery. The appeal filed from that order was allowed by the District Court. That court held that the application for restitution was barred by limitation. This Second Appeal is from that order.

(2) The only question for consideration in this Second Appeal is whether the application for restitution is barred by limitation. It is not disputed that an application for restitution under the Code of Civil Procedure is governed by Article 166 of the Travancore Limitation Act corresponding to Article 182 of the Indian Limitation Act. It was so held by a Full

Bench of the Travancore High Court in 'MATHAN CHACKO v. UZHATHIRARU', 30 Trav L J 306. It is true that there is difference of opinion among the various High Courts in India on this question. The Calcutta, Allahabad and Lahore High Courts have held that it is Article 181 of the Limitation Act that applies to applications for restitution (Vide 'ASHUTOSH v. SMT. KUMED KAMINI DASI', AIR 1933 Cal 422; 'JIVA RAM v. NAND RAM', 44 All 407; 'CHANDA SINGH v. BISHEN SINGH', AIR 1924 Lah 166; 'GUJAR MAL v. NARAYAN SINGH', 32 Pun L R 395. On the other hand, the Bombay, Madras, Patna and Rangoon High Courts and the Chief Courts of Nagpur and Oudh have held that an application for restitution is an application in execution and that therefore Article 182 of the Limitation Act applies to such an application (Vide 'SOMASUNDARAM v. CHOKKALINGA', 40 Mad 780; 'UNNAMALAI AMMAL v. MATHAN', 33 Mad L J 413; 'PANCHAPAKESA AYYAR v. NATESA PATTAR', 51 Mad L J 161; 'SUDALIMUTHA PILLAI v. SUDALIMUTHU PILLAI', 17 Mad L W 623; 'KURGODI-GAUDA v. NINGAN-GAUDA', 41 Bom 625; 'HAMIDALLI v. AHAMADALLI', 45 Bom 1137; 'SONBA v. PARASHRAM', 76 Ind Cas 255 (Nag); 'SHAT SAHUL v. CHAUTALI KUMARI', 92 Ind Cas 23 (Oudh); 'CHANDIKA SINGH v. BITHAL DAS', AIR 1931 Oudh 51; 'MUTHUKARAPPAN CHETTYAR v. ANNAMALAI', 11 Rang 275; 'BHAUNATH SINGH v. KADAR NATH SINGH', 13 Pat 411(FB). The Travancore High Court preferred to adopt the view taken by Bombay, Madras, Patna and Rangoon High Courts and the Chief Courts of Nagpur and Oudh. We also prefer to take that view and hold that an application for restitution is an application in execution and that it is Article 182 of the Indian Limitation Act that applies to such an application.

(3) The further question for consideration is whether the application filed by the defendants on 8-7-24 is barred under Article 182 of the Limitation Act. The High Court decree in the case was passed on 6-11-1114 and if the period of limitation is calculated from that date the application will clearly be barred by limitation and it is argued for the appellants that the period of limitation could be calculated from 30-2-1122 the date of dismissal of the review petition. For this position reliance is placed on sub-clause 3 of Article 182. According to that sub-clause, where there has been a review of judgment, the period of limitation should be calculated from the date of the decision passed on the review. The learned Advocate for the appellants argues that the date of the decision passed on the review is the date on which the review petition is disposed of. According to the learned counsel even if a petition to review the judgment is dismissed the period of limitation for execution of the decree should be calculated from the date of that dismissal and not from the date of the decree.

We do not think that this position is correct. Sub-clause 3 of Article 182 applies only when there has been a review of the judgment. The words used in the sub-clause are: "(where there has been a review of judgment) the date of the decision passed on the review". This evidently means that the sub-clause will apply only when the judgment has been actually reviewed, or in other words when the petition to review the judgment has been allowed. In the case of an appeal, the words used in sub-clause 2 are: ("where there has been an appeal"). It is not necessary that the appeal should be allowed. But in the case of a review under sub-clause 3 it is necessary that the petition to review the judgment is allowed. It cannot be said that when a petition to review the judgment is dismissed the judgment is reviewed. That it is so is clear from the wording of Order 47, Rule 4(1) which reads thus:

> "where it appears to the court that there is not sufficient ground for a review it shall reject the application."

From this, it is clear that when the application is rejected the judgment is not reviewed.

(4) The learned counsel for the appellants relied on a Single Bench decision of the Bombay High Court in 'NARAYAN GANPAT v. RADHA BAI KRISHNAJI', AIR 1936 Bom 162 for the position that sub-clause 3 applies even when the review petition is not allowed. In that case an application for review of the judgment was granted and an appeal was filed from the order granting the review and the appeal was allowed. It was held that the period of limitation should be calculated from the date of the disposal of the appeal. This decision is really based on the interpretation of sub-clause 2 of Art. 182. Following the decision of the Privy Council in 'NAGENDRANATH v. SURESHCHANDRA', AIR 1932 PC 165 it was held that sub-clause 2 would apply when there has been an appeal of any sort and that it is not necessary that the appeal should be from the decree itself. It is true that Barlee J. who decided the case has observed thus in the judgment.

> "My view then is that the words in Article 182(3) 'decision passed on review' mean a decision passed in review proceedings; and whatever such a decision is, it gives a fresh starting point of limitation."

If according to the learned Judge an order rejecting a review petition is a decision passed on review we must say with respect that we cannot accept that view.

(5) This question came up for consideration in 'MOHAMMAD NAZIR v. ALLAUDDIN AHMAD', AIR 1941 Pat 213. In that case, it was held that Article 182(3) can have no application where a petition for review has been rejected. Fazl Ali J. observed thus in that case:

> "Article 182, Cl. 3, provides that where there has been a review of judgment the period of limitation begins to run from the date of the decision passed on the review. This provision has been construed in a number of cases wherein it has been held that it does not apply where the application for review has not been granted but rejected, that is to say, in such cases limitation is not enlarged under this clause: See 'KURUPAM ZAMINDAR v. SADASIVA', 10 Mad 66; 'RAJ BRIJRAJ v. NAURATAN LAL', 3 Pat L J 119; 'VENUGOPAL MUDALI v. VENKATASUBIAH CHETTY', 39 Mad 1196 at p. 1202 and 'FAKIR CHAND v. DAIBA CHARAN', AIR 1927 Cal 904. With this view, I entirely agree. It is contended on behalf of the respondent that the words 'where there has been a review of judgment' mean 'where there has been an application for review of judgment'. In my opinion, however, there is no justification whatever for inserting the word 'application' into this provision. The learned Advocate for the respondent contended that as

there is similarity in the language of clauses 2 and 3, the word ' review' must be construed to mean an application for review. But the answer to this contention is this: the words 'where there has been an appeal' must mean where there has been an appeal by the person who is aggrieved by the judgment appealed from, because only such a person is allowed to prefer an appeal. On the other hand, the words "where there has been a review of judgment" must mean a review by some one who can review the judgment, that is to say, by the court which pronounced the judgment to be reviewed. If that is the meaning to be attached to the words, it is plain that the Article will have no application where an application for review has been rejected, because in that case there has not been a review of judgment. The learned Advocate for the respondents also contended that the words "review of judgment" may be construed to mean proceedings for review of judgment. Such a construction however has never been placed upon these words and I do not see any justification for doing so."

The same view was taken by the Allahabad High Court in 'BENGALI MAL v. BAIJNATH PRASAD', AIR 1942 All 338.

(6) Reference has been also made by the learned Advocate for the appellants to the decision in 'FIRM DEDHRAJ LACHMINARAYAN v. BHAGWAN DAS', AIR 1937 Pat 337. That was a case in which the suit was dismissed by the trial court. The appeal filed by the plaintiff was heard ex parte and was allowed. The defendant made an application for restoration of the appeal which was dismissed. The appeal filed to the High Court from the order of dismissal was also dismissed. It was held that the period of limitation under Article 182 started from the date of the Order of the High Court dismissing the appeal. This decision was considered in 'MAHOMED NAZIR v. ALAUDDIN', AIR 1941 Pat 213, referred to above. This case as well as 'NARAYAN GANPAT v. RADHABAI', AIR 1936 Bom 162 are discussed in BENGALI MAL v. BAIJNATH', AIR 1942 All 338.

(7) The Travancore High Court has considered this question in 'SIRKAR v. ANANTHA NAIKAN A. KRISHNA PATTAR', 29 Trav L J 1047. It was held in that case that where an application for review of judgment is rejected the period of limitation for execution should be calculated from the date of the decree and not from the date of the dismissal of the review petition.

(8) We are clearly of opinion that the period of limitation for the application for restitution in this case should be calculated from the date of the High Court decree, namely, 6-11-1114, and not from the date of the dismissal of the review petition, namely, 30-2-22. The application filed on 8-7-1124 is therefore barred by limitation.

(9) We therefore confirm the order of the lower appellate court and dismiss this second appeal with costs.

B/K.S. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 408

SANKARAN AND GANGADHARA MENON JJ.

Ponnama Pillai Rugmini Pillai, Appellant v. Maria Michael Nadar, Respondent.

Second Appeal No. 9 of 1124, D/- 25-9-1951.

(a) Civil P. C. (1908), O. 1, R. 10 (2) — Mortgage suit — Necessary party left out — Impleading of such party on restoration of suit under O. 9, R. 13.

Where A was a necessary party to a mortgage suit as he had acquired an interest in the mortgaged property subsequent to the mortgage, but he was wrongly left out from the party array:

Held that A could be impleaded as a party to the suit even after the restoration of the suit under O. 9, R. 13, Civil P. C. at the instance of one of the defendants even though he might have colluded with the plaintiffs in the matter; and after such impleading it was not necessary that the suit should be amended. (Para 2)

Anno: C. P. C., O. 1 R. 10 N. 32, Pt. 3.

(b) Limitation Act (1908) S. 22 — Additional party impleaded at subsequent stage — Period of limitation will be calculated on basis of date of plaint — (Civil P. C. (1908), O. 1, R. 10 (2)) — Travancore Limitation Act (6 (VI) of 1100), S. 23). (Para 2)

Anno: Lim. Act, S. 22 N. 5; C. P. C., O. 1 R. 10 N. 41.

M. P. Ramakrishna Pillai, for Appellant; T. R. Subramania Iyer, for Respondent.

SANKARAN J.: Additional 3rd respondent before the lower court is the appellant. The 1st defendant had a mortgage right over the plaint properties and this right had been hypothecated under Ext. A dated 2-7-1097 in favour of the father of the 2nd plaintiff. The present suit was instituted on the basis of that bond. At first, defendants 2 to 6 had been brought on the party array as persons who had acquired rights over the suit properties. The 7th defendant had obtained a portion of the mortgage right in the year 1105. But he had not been made a party to the suit. Subsequent to the first decree in the case, the 5th defendant applied under Order 9, Rule 13 to have the decree set aside in toto and to have the suit restored to file. Plaintiff agreed to that application being allowed. Accordingly it was allowed and the suit was restored to file on 25-10-1115.

Thereafter the plaintiffs applied to bring the 7th defendant also on the party array as a subsequent encumbrancer in respect of the mortgage right which had been hypothecated under Ext. A. That impleading was allowed. The 7th defendant entered appearance and filed a written statement raising several contentions. The trial Court repelled these contentions and decreed the suit in terms of the plaint. At the same time it was directed that the portion of the property in the possession of the 7th defendant by virtue of the assignment in her favour should be proceeded against only in the last instance after exhausting the steps against the 1st defendant and the rest of the properties. Against that decree the 7th defendant preferred an appeal and the lower court allowed that appeal and completely exonerated the portion of the properties in the possession of the 7th defendant from all liabi-

lity under the decree. Hence this Second Appeal.

(2) The lower appellate Court has found that the impleading of the 7th defendant without previous notice to him was improper, that it was fraudulently done, that plaintiffs' rights so far as the 7th defendant's interests were concerned had already become barred by limitation and the decree passed as against him was unsustainable because the suit had not been amended after he was impleaded in the case. The court's power under Order I rule 10 C. P. C. (Travancore) was very wide and a party who was wrongly left out and whose presence was necessary for a proper and final adjudication of the questions involved in the suit could be added at any stage of the suit. In the present instance the 7th defendant was a necessary party as he was one who had acquired an interest in the property subsequent to the plaint bond Ext. A. He was wrongly left out from the party array and so when plaintiffs applied to bring him on record, it was only just and proper that the prayer was allowed. When summons was served on him he had notice of the impleading.

It may be that such a course was made possible by the suit being restored to the file on the application of the 5th defendant and that himself and the plaintiffs might have colluded in that matter. All the same the fact remains that the suit was restored. At that stage the plaintiffs had the right to cure the defect of non-impleading of all the parties. They availed of that opportunity. There is no point in saying that after such impleading, the suit should necessarily have been amended. Plaintiffs' prayer was only for a decree charged on the mortgage right hypothecated to them under Ext. A. That prayer was already there and the plaint schedule was in order. These required no alteration after the impleadment of the 7th defendant. Hence the suit could be proceeded with, even without any amendment.

Then there is the objection that on the date of impleading the 7th defendant the bond Ext. A had become barred by limitation. But Section 23 of the Travancore Limitation Act was there to save the plaintiffs' right based on the plaint bond. Even if any additional party is impleaded at any subsequent stage, the period of limitation will be calculated on the basis of the date of the plaint. Thus it cannot be said that any right that had been acquired by the 7th defendant was taken away by his being impleaded at a late stage. Viewed in all these aspects it is clear that the lower Court was wrong in exonerating the property in the possession of the 7th defendant from liability under the decree. His rights are sufficiently protected by the direction in the trial court's decree to which the plaintiffs have submitted.

(3) In the result this appeal is allowed and in reversal of the decree of the lower appellate Court the first Court's decree is restored. The 7th defendant and the appellant here, will suffer their respective costs in this Court as well as in the lower appellate Court.

B/V.R.B. Appeal allowed.

A.I.R. 1952 TRAVANCORE-COCHIN 409

KUNHI RAMAN C. J. AND
SUBRAMANIA IYER J.

Dr. T. K. Koshy, Petitioner v. State of Travancore-Cochin and the Union of India, Respondents.

O.P. No. 74 of 1951, D/- 29-11-1951.

Constitution of India, Arts. 226, 311 and 320 — Applicant high officer of State — Council of Ministers deciding that applicant must take all available leave and retire — Decision orally conveyed to applicant by Chief Secretary — Chief Secretary giving Order in writing to that effect — Applicant applying for leave which was granted by Council of Ministers — Applicant before expiration of leave applying for writ of certiorari for quashing order of Council of State — Arts. 311 and 320 held did not apply because there was no order made dispensing with services of applicant — In circumstances of case writ of certiorari held could not be issued. (Para 3)

Anno: C.P.C. Appendix III Constitution of India Art. 226 N. 13.

M. K. Nambiar and P. I. Simon, for Petitioner; Advocate General and Government Pleader, for Respondents.

KUNHI RAMAN C. J.: This is an unfortunate case in which a high officer of State employed in Trivandrum complains that an order was passed by the Government of the State of Travancore-Cochin on the 27th of January 1950 which according to him deserves to be quashed by this Court issuing a writ of certiorari or any other appropriate writ. As a consequential relief he wants the first respondent who is the State of Travancore-Cochin represented by the Chief Secretary, to restore him to his previous official position and asks for all other appropriate reliefs that may be necessary. We use the word 'unfortunate' because the petitioner has done certain acts highly detrimental to his interests which have made it impossible for eminent counsel in spite of valiant efforts, to save the situation for him and which have made it impossible for the court to grant the reliefs which he asked for.

The petitioner was employed as the Director of Public Instruction in Travancore. Certain proceedings were started against him with regard to the correctness of the date of birth furnished by him. It was considered that the date was not correct as it did not tally with the date of birth as appears from other documents. He was given notice in the shape of a charge which was dated 26th December 1949 drawing his attention to a Circular, Fl. 96 dated 5th January 1942 which afforded an opportunity to all Government Officers to correct their age in the official records if there happened to be a mistake. It was pointed out that the age of the petitioner did not tally with the date of birth which was furnished by him in his school days and when he was admitted as a student in the Presidency College at Madras. The controversy went on for some time. Ultimately, it culminated in an interview which the petitioner had with the Chief Secretary of the State. According to the petitioner it took place at 7-30 P. M. on 27-1-1950.

At that interview, the petitioner's case is, that he was informed that the Council of Ministers of the State had reached the conclusion that he must take all the available leave

to which he was entitled and retire. On the date of this interview, he had not attained the age of 55 years which is the normal age at which officers have to retire from State service. When he was informed about the decision of the Council of Ministers, he, according to his affidavit, requested that he may be given an order in writing since he was not satisfied with the oral communication made to him by the Chief Secretary. It is his case that in response to this request, the Chief Secretary passed Ext. A, produced with the affidavit of the petitioner, personally into his hands. This is written in the handwriting of the Chief Secretary. It bears his signature and the body of the letter is worded as follows:

"I explained to you the reasons behind the Government decision that you should retire. Since you desire that you want written orders on the subject, I am to say that you should enter on leave you may be eligible for and retire from service."

On the very next day, the petitioner sent a letter addressed to the Chief Secretary applying for all the eligible leave to which he was entitled and asking that that leave may be given to him preparatory to retirement. This is worded as follows:

"In continuation of my conversation with you yesterday evening, I hereby apply for eligible leave preparatory to retirement from service. I request that this may be given to me as and from the 1st of February 1950."

The date of the letter is 28th January 1950. It is addressed to the Chief Secretary. It is significant that in the letter reference is made only to the conversation and not to any decision of the Council of Ministers directing his retirement. This becomes important when it is taken in connection with the wording of Ex. A the letter sent by the Chief Secretary to the petitioner. This letter of the petitioner was placed by the Chief Secretary before the Council of Ministers and the order of the Council of Ministers is endorsed on this letter in the following:

"Granted. Authorised by Council."

Sd/- Chief Secretary to Government,
28-1-1950.

Education Secretary."

This bears date 28-1-1950 i.e., the same date as the application for leave preparatory to retirement. As a result of this order made by the Council of Ministers, the petitioner went on leave and we are told that the period of leave expired on the 1st of August 1951 from which date he was allowed to retire in response to his letter already adverted to. The present application for the issue of a writ of certiorari for quashing the order of the Council of Ministers mentioned by the Chief Secretary in his letter Exhibit A was filed in court before the 1st of August 1951 that is before the date of retirement.

(2) Before we pass on to the real questions for determination in this case we may just advert to the circumstances in which the Council of Ministers arrived at their decision, according to both the parties. The controversy regarding the date of birth of the petitioner centred round the date that was found entered in the registers of school where he studied in the lower classes before he matriculated. According to those entries he was four years older than the age given by him when he entered Government service. Subsequently the petitioner obtained from the office of the Presidency College an extract from the register in which his date of birth was entered when he was admitted as a student of that College. The entry in that register gave the date of birth according to the Malayalam Era and according to the Christian Era, Anno Domini. The explanation is obvious. In the Presidency College, the date of birth is entered usually according to the Christian Era. But students who come from Indian States like Travancore who are accustomed to give their dates of birth according to the Malayalam Era are not prohibited from mentioning their date of birth according to the Malayalam Calendar. The date given by the petitioner to the office of the Presidency College was 12-1-1075 M. E. This according to him is his correct date of birth. But the clerk of the Presidency College who according to the rules prevailing there, has to give the English date entered in brackets immediately after 12-1-1075 the English date as 27-8-1900 A. D. This is admittedly a wrong date. It is stated by both parties and, therefore, we have not verified the correctness of this version, that the English date corresponding to 12-1-1075 M. E. will be 27-8-1899.

The petitioner who hails from the State of Travancore took the M. A. Degree of the Madras University and returned to Travancore and entered service. While entering service, he ignored the Malayalam date 12-1-1075 as the date of his birth and gave the English date as shown in the register of the Presidency College namely 27-8-1900. When it was afterwards discovered that this was not the correct date if he was born on 12-1-1075 M. E. which according to him is the date of his birth he sought to take refuge by saying that this is a bona fide mistake made by the clerk of the Presidency College. This leads to the absurd result that the petitioner got information about the date of his birth from the clerk of the Presidency College who is an absolute stranger and that that was the authority on which he relied in mentioning his date of birth when he entered service in Travancore.

It cannot certainly be contended that he was ignorant of the date of his birth, when he did take the trouble of giving the English date when every one else in the Travancore State gives the date according to the Malayalam Era. This naturally gives rise to the suspicion that he was prompted to give the Englsh date because it makes him a year younger. It would have been open to him to have this mistake corrected when the Government order of 1942 was promulgated. He did not care to do that and therefore, ultimately the question was whether or not he had given an incorrect date of birth. We do not propose to discuss the merits of such conduct.

But, if the authorities in the State of Travancore-Cochin felt that it was not desirable to retain the services of an officer who had done such an act we are not prepared to say that their decision is open to question. However, that is not the point involved in this application. We are only narrating the events that led to the crisis in this case if we may so call it. It was as a result of this controversy that the Chief Secretary to the Travancore-Cochin State sent for the petitioner and communicated to him both orally and in writing

what he had to say about the decision of the Council of Ministers. It is futile for the petitioner to contend that this is a decision which is opposed to the provisions of the Constitution of India. It is a decision to enforce which there was no occasion.

When the Chief Secretary informed the petitioner that such a decision was taken by the Council of Ministers he hastened the termination of the whole controversy by presenting his application for leave on the day following namely on the 28th of January 1950, expressly mentioning that he may be given all the leave to which he was entitled preparatory to retirement from service. It was on the strength of this letter presented by the petitioner that the subsequent orders were made by the Council of Ministers. They promptly granted him the leave applied for and they also permitted him to retire on the termination of that leave. It will thus be seen that the legality or validity of the decision which the Council of Ministers had reached and which is adverted to in the letter of the Chief Secretary marked as Exhibit A does not arise for consideration in this case because that was a decision that was never pursued to the end.

If action had been taken on that decision it may be open to the petitioner to attack the legality of that decision, to contend that that decision calls for interference and that the decision deserves to be quashed by a writ of certiorari. But the final orders granting the petitioner leave preparatory to retirement were passed not in pursuance of this decision which the Council of Ministers are alleged to have taken, but on the strength of the application made by the petitioner for leave. It is then said that the petitioner had no other alternative. We fail, to see the reason for this contention. The petitioner was informed that the Council of Ministers had taken a certain decision. He could have waited for that decision to be announced in the normal manner, in the name of His Highness the Raj Pramukh and published in the official gazette, and then it might have been open to him to come with an application of this description for quashing such an order made by the Ministers of the State.

But he cannot now say that he was frightened at the information transmitted to him by the Chief Secretary that the Council of Ministers had taken a certain decision and that was why he applied for leave preparatory to retirement. In the present case, the decision taken by the Council of Ministers had nothing to do with the final orders granting leave preparatory to retirement to the petitioner. That order was passed on the application made by the petitioner for leave and pension. In the circumstances, we see no substance in the prayer that the decision of the Council of Ministers should be quashed.

Nor does the question arise as to whether that decision was properly taken in compliance with the provisions of the Constitution of India or in contravention of the provisions of Articles 154, 163 (2), 166, 311 and 320 of the Constitution. The provisions of Articles 311 and 320 do not apply to the present case because there was no order made dispensing with the services of the petitioner and all that happened was that his request for leave preparatory to retirement was granted. In these circumstances no case has been made out for issuing a writ of certiorari for quashing the order of the Council of Ministers dated 27-1-1950 and this petition must accordingly be dismissed with costs including advocate's fee which we fix at Rs. 250/- discharging the rules granted on 19-7-1951.

(3) After the judgment is pronounced Mr. Nambiar for the petitioner applies orally for a certificate for leave to appeal to the Supreme Court. We are not satisfied that this is a fit case for granting such a certificate and, therefore, this request cannot be granted.

B/V.R.B. Petition dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 411

SANKARAN AND GANGADHARA MENON JJ.

Narayanan Sankaran Nair, Appellant v. Narayanan Madhavan Nair, Respondent.

A. S. No. 270 of 1950, D/- 12-11-1951.

Civil P. C. (1908), O. 20, R. 12 — Suit for redemption — Preliminary decree for possession.

The substantive law governing redemption of mortgages cannot be said to have been abrogated by O. 20, Rule 12 of the Travancore Civil Procedure Code. Where in a suit for redemption of the properties in the possession of the mortgagee defendant, he contends that the mortgage amount deposited by the plaintiff is not sufficient and that certain amounts by way of jenmikaran and arrears of pattom paid by him on behalf of the mortgagor has also to be paid along with the mortgage amount, and claims value of improvements alleged to have been effected by him on the property as a mortgagee, the defendant is entitled to retain possession of the property until all the amounts due to him under the several items mentioned above are settled and paid to him. To pass a decree for possession in favour of the mortgagor and to put him in possession of the property even before deciding all these matters would be a serious violation of the law governing redemption suits. (Para 1)

Anno: C. P. C., O. 20 R. 12 N. 2.

N. Padmanabha Panicker, for Appellant; R. Neelakanta Kartha, for Respondent.

SANKARAN, J.: Defendant has preferred this appeal against the preliminary decree for possession passed by the lower court in favour of the plaintiff. The provision of Order XX, Rule 12 of the Travancore Civil Procedure Code has been invoked by the lower court in passing such a decree. That provision applies to suits for possession of the properties. The section does not expressly say that it is applicable to redemption suits also. Further, it is only an enabling provision which is not to be indiscriminately invoked in all suits for possession. The present suit is for redemption of the properties in the possession of the mortgagee defendant. He has contended that the mortgage amount deposited by the plaintiff is not sufficient and that certain amounts by way of Jenmikaran and arrears of pattom paid by him on behalf of the mortgagor have also to be paid along with the mortgage amount. He has claimed one thousand rupees by way of value of improvements alleged to have been effected by him on the property. Issues have

been raised about all these questions. As a mortgagee the defendant is entitled to retain possession of the property until all the amounts due to him under the several items mentioned above are settled and paid to him. The substantive law governing redemption of mortgages cannot be said to have been abrogated by Order XX, Rule 12 of the Travancore Civil Procedure Code.

To pass a decree for possession in favour of the mortgagor and to put him in possession of the property even before deciding all these matters would be a serious violation of the law governing redemption suits. The preliminary judgment passed by the lower court would in a way indicate that it has prejudged against the defendant the several contentions raised by him. Such a judgment appears to have been passed at a stage when the plaintiff's chief examination was partly over and before even completing such examination. The procedure adopted by the lower Court has been highly irregular. In the nature of the contentions and issues in the case, there is no warrant or justification for giving the plaintiff a preliminary decree for possession.

(2) In the result this appeal is allowed with costs and the preliminary decree passed by the lower court is set aside. The trial and disposal of the suit will be expedited.

B/D.H. Appeal allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 412

KOSHI AND GOVINDA PILLAI JJ.

Parvathi Amma Devaki Amma and others, Appellants v. Narayani Amma Kunjikutty Amma and others, Respondents.

A. S. Nos. 825 of 1120 and 251 of 1121 (T), D/- 15-3-1951.

Malabar Law — Tarwad — Allottees for maintenance — Claim for value of improvements.

Allottees for maintenance in a Marumakkattayam tarwad are not entitled to the value of improvements effected by them on the properties allotted to them. The properties of the tarwad under such circumstance are in the possession of the several members of the respective branches on behalf of the tarwad and are enjoyed by them as properties belonging to the tarwad. The improvements are effected on the tarwad property, and while it is possible that equitable considerations may prevail when a rearrangement or re-adjustment is brought about, no claim can be legally enforced against the tarwad to recover the value of improvements effected on the property in the course of such enjoyment, unless there is an express understanding to the effect that such improvements will be compensated for in the event of any disturbance of possession or enjoyment.

(Para 5)

K. Parameswaran Pillai and M. Krishnan Nair, for Appellants; N. K. Narayana Pillai and M. Ramanatha Pillai, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('38) 29 Trav LJ 220 5

('39) 30 Trav LJ 754 5

('40) 30 Trav LJ 737 5

A. S. No. 664 of 1120 (T) (Trav-C) 5

GOVINDA PILLAI J.—Both these appeals are against the final decree passed in O. S. 112 of 1114 of the District Court, Quilon. Plaintiffs 9 to 17 are the appellants in A. S. 825 of 1120, and defendants 26, 28, 29, 31 to 40, 77, 78 and 81 to 83 are the appellants in A. S. 251 of 1121. The suit in the lower Court was for partition. The parties are governed by the Travancore Nair Act. A preliminary decree had been passed in the case and that had been confirmed in appeal. There was also another suit O. S. 592 of 1101 filed in the Munsiff's Court, Quilon, by defendants 71 to 74 of the present case. That suit also was for partition, and there the preliminary decree and the final decree had been passed. The final decree was passed in 1112. But there was a direction in that final decree by the trial Court that those defendants who wanted their shares might pay the court-fees and apply for the same. Present defendants 1 and 3 had already paid the court-fees and the final decree allowed them also their shares. While the matter was pending, on the motion of some of the parties, the High Court transferred that suit also to the District Court. In the District Court it was numbered as O. S. 77 of 1116. The reliefs claimed by some of the defendants in that case were considered in the present suit O. S. 112 of 1114 and a judgment passed.

(2) The matters that arise for consideration in this appeal (A. S. 825/1120) are of a limited character. There was an Udampady in the tarwad of the parties in 1077, Ext. A. The several members of the tarwad were thus in possession of the tarwad properties. The sub-branch of plaintiffs 9 to 17 were in possession of items 20, 21, 23 to 27 and a portion of item 75 in A schedule. They stated that these properties when allotted to their branch were paddy lands, that they converted some of them into garden lands and planted them with cocoanut trees, that the value of these properties was thereby considerably increased, and that they were therefore entitled to the value of improvements effected on these properties. The respondents opposed these claims put forward by the plaintiffs. Another objection of the plaintiffs was that while item 54 in A schedule was really two acres and 35 cents in extent, the commissioners divided only one acre and 60 cents out of the same so that 75 cents had been left out. They stated that this should also be divided, and if no other member was anxious to get a share the excess area might be allotted to them. A third objection related to item 34 in A schedule. Its extent shown in the plaint was 25 cents. The appellants would say that its extent was really 55 cents and that the whole area should be taken into account. They also filed a petition C. M. P. 1177 of 1123 urging certain other reliefs as well. They had been allotted 65.9 cents in A schedule item 75. They said that they should be allowed access to the public road from this property. There was also a prayer that properties which still remained unallotted under the final decree should also be allotted to all the parties. By this they meant that the branch of defendants 69 and 70 had become extinct and that the shares which they would have got had they been alive should be distributed among the remaining members of the tarwad. These were the only objections which were argued before us at the time of argument.

(3) In A. S. 251 of 1121, the appellants objected to the final decree only on one point.

A schedule item 89 is 37 cents in extent. It lies immediately on the eastern side of the road from Quilon to Alleppey. Five cents out of this property had been allotted by the lower Court to the 76th defendant who was a stranger to the tarwad and who had purchased the share of the 65th defendant. The lower Court had allotted the said five cents in the western portion of the property running from north to south. When these five cents are demarcated from north to south the whole road frontage would be lost to the allottees of the 32 cents so that the same would become practically useless and valueless. This allotment was stated to be highly inequitable and was done without consulting the parties or ascertaining their views in the matter. The commissioners had allotted other properties for defendant 65's share and the present allotment was made on some suggestion made by defendant 76's Advocate to the Court. The appellants therefore urged for a modification of these directions either by allotting other properties equal in value to defendant 76 out of the properties set apart for these appellants or to allow them to pay defendant 76 the value of the said five cents as fixed by the commissioner.

(4) We shall take up A. S. 825 of 1120 first. The main argument related to the appellants' claim to value of improvements. It is true, in the plaint filed in the case these items are shown as paddy lands, though they are now really garden lands with bearing cocoanut trees. According to these appellants, the conversion had been made long before the suit, and the trees had begun to bear even at the time of the suit. That being the case, the duty was on the plaintiffs to put forward the definite case that they had spent money for improving the property and that they should be allowed the value thereof. There is not even a suggestion anywhere in the plaint filed by the parties in this case to indicate any such case. It is true that in 1077 the properties of the tarwad had been allotted to the several branches for maintenance. Like the appellants, the several members of the tarwad might have also improved the properties at considerable cost. The lower Court had referred to this and pointed out that item 86 in A schedule had been one such property. The report Ex. F of the commissioners would also indicate that after the allotment for maintenance in 1077, improvements had been effected in several of the properties. It would appear that the plaintiffs in this case had given up their claims to the value of improvements when they filed the suit. There was a previous suit by some of the members for partition. That was O. S. 592 of 1101 of the Quilon Munsiff's Court. Among plaintiffs 9 to 17, all those who had been born at that time were parties to that suit. The present plaintiffs 9 to 13 were defendants 65 to 68 and 71 respectively. The pleadings in that case would not show that any claim for improvements had been put forward by these appellants in that case. The preliminary judgment in that case would show that some other defendants had put forward such claims, and issues 10 and 13 had been raised, but they were left for consideration at the time of the final judgment. None of the parties cared to substantiate their plea, as could be seen from Ex. I order, and ultimately, this claim was found against. It would appear that the plaintiffs in this case did not think it proper to advance any claim for value of improvements as they had not put forward such a case in the connected suit. These appellants who claimed their special right to the value of improvements had neither valued the same nor paid the necessary court-fees on that. The learned Advocate, when the non-payment of the court-fees had been brought to his notice, stated that he did not want the value of improvements to be paid by the other parties, and that his prayer was that these properties might be valued as if they were paddy lands, ignoring the improvements effected by them, and that they might be allotted to their shares. They are not entitled to this.

(5) The question whether allottees for maintenance in a Marumakkattayam tarwad were entitled to the value of improvements effected by them on the properties allotted to them had come up for consideration in 'NARAYANA PILLAI v. RAMAN PILLAI', 29 Trav. L. J. 220; 'NARAYANI AMMA v. LEKSHMI AMMA', 30 Trav. L. J. 754 and in A. S. 664 of 1120 (T). There was also another case, 'RAMAN PILLAI v. RAGHAVAN PILLAI', 30 Trav. L. J. 737, where the principle adopted in 29 Trav. L. J. 220 had been followed. In 29 Trav. L. J. 220 and A. S. 664 of 1120 (T), the claims of the allottees for maintenance, for value of improvements effected by them on the properties allotted to them had been negatived. G. Parameswaran Pillai J., who had written the leading judgment in that case had stated that the properties of the tarwad under such circumstances were in the possession of the several members of the respective branches on behalf of the tarwad and were enjoyed by them as properties belonging to the tarwad. The improvements were effected on the tarwad property, and while it is possible that equitable considerations may prevail when a re-arrangement or re-adjustment is brought about, no claim can be legally enforced against the tarwad to recover the value of improvements effected on the property in the course of such enjoyment, unless there is an express understanding to the effect that such improvements will be compensated for in the event of any disturbance of possession or enjoyment. This principle had been adopted in 30 Trav. L. J. 737 and A. S. 664 of 1120 (T). Sankarasubba Aiyar J. who was a party to the judgment in 29 Trav. L. J. 220 and 30 Trav. L. J. 737 had expressed a contrary view in 30 Trav. L. J. 754. 30 Trav. L. J. 754 does not make any reference to 29 Trav. L. J. 220. Though the decision in 30 Trav. L. J. 737 was after that of 30 Trav. L. J. 754, no reference was made to 30 Trav. L. J. 754 in 30 Trav. L. J. 737. A Division Bench of this Court had considered these rulings in A S. 664 of 1120 (T) and had adopted the principle laid down in 29 Trav. L. J. 220. Thus, on the question of law also, the appellants are not entitled to succeed. There is also the absence of pleadings on this question. So we do not allow the plaintiffs any compensation for the improvements said to have been effected by them.

(6) A schedule item 54, as seen from the Settlement Register, has an extent of 2 acres and 35 cents. The Commissioners stated that only 1 acre and 60 cents out of this had been in the possession of the tarwad. Of this, 13½ cents had been allotted to the plaintiffs for their share in the connected case. So the remaining

one acre and 46½ cents alone had been divided in this case. The other parties who had entered appearance before us had stated that the present area was only one acre and 46½ cents, and that they did not lay any claim to the remaining area. Of the one acre and 46½ cents, one acre and 19½ cents had been allotted to defendants 61 to 64, and 27 cents to defendant 66. They are to get this much, and if there is any excess, the appellants are allowed the same without any right to claim compensation, in case they do not get it. As regards the contentions relating to A schedule item 34, the plaintiffs had shown the area for division to the 25 cents in the original as well as in the amended plaint. They cannot now come forward and say that there is an excess area here also. This plea is overruled.

(7) As regards the matters raised in C.M.P. 1177 of 1123, the appellants are not entitled to get any direction from us in this appeal. Defendants 69 and 70 are dead, and they died after the preliminary decree. They belonged to a branch different from that of the plaintiffs. On the date of the suit, the plaintiffs became divided from the remaining members of the tarwad. It had not been shown that these appellants are the preferential heirs to those deceased defendants. They could not therefore claim any share in the properties that might have gone to defendants 69 and 70. It was suggested that by this prayer in the petition what was meant was that those properties might be allotted to the appellants in lieu of the improvements effected by them in the tarwad properties. Since their claim to improvements has been negatived they are not entitled to advance this plea. No other points were urged in appeal except in the matter of direction relating to the excess area said to exist in A schedule item 54. The appeal fails and is dismissed with costs except as regards the direction relating to item 54 of A schedule.

(8) A. S. 251 of 1121:— Ex. F is the Commissioner's report allotting the properties to the several members of the tarwad. While the suit was pending, it was seen that defendant 76 had purchased the share of defendant 65 and got himself impleaded in the case. In the allotment the commissioners had proposed certain properties for the share of defendant 65. The learned Judge without accepting the same had allotted him five cents in item 89 and 9½ cents in item 93 of A schedule. No one raised any objection to the allotment of a portion of item 93 to defendant 76. The objection was taken to the allotment of five cents in item 89. Defendant 76 came into possession of items 89 and 90 in A schedule by taking a lease of the same from a junior member who was in possession under the maintenance arrangement. Then he began to put up buildings there, and at any rate obtained compensation for all the buildings put up by him before the preliminary decree. After the preliminary decree also, he put up a car shed and an office in a portion of item 89. He was not entitled to any compensation on this account and that was admitted by him also. He was prepared to remove these buildings. But a representation was made by the Advocate on behalf of defendant 76 that the portion where the office and shed were constructed might be given to defendant 76. This found favour with the Judge and he gave defendant 76 five cents on the western side of the property north to south. The public road touches the property north to south, so that when five cents are marked out north to south the whole road frontage will be obtained by defendant 76. This is a very inequitable and unjust direction which requires modification. We therefore suggested both sides to supply us with sketches of item 89 showing the location of the buildings, office and the car shed. The sketches were produced by both sides. If the portion where the office and the car-shed are constructed is separated from the remaining portion of the land, the utility of that portion will be considerably decreased. Besides, there would also be inconvenience in occupying the main building which is only four feet away from the office building. We mentioned this to the learned Advocates on both sides and it was agreed by both sides that if the appellants would pay Rs. 1000 and the value of the office and car shed to defendant 76 the latter would forego his right over item 89. We accept this agreement arrived at by both sides and order that the whole of item 89 would be allotted to the appellants' share. The appellants will pay Rs. 1000 and the value of the office and the car-shed in item 89 to defendant 76. Defendant 76 is to take out a commission to assess the value of these constructions. Defendant 76 is also allowed to take out execution to realise these amounts from the appellants and their properties. We make no order as to the costs of this appeal.

D.H.Z. Order accordingly.

*** A. I. R. 1952 TRAVANCORE-COCHIN 414**

FULL BENCH.

KOSHI C. J., GOVINDA PILLAI AND VITHAYATHIL JJ.

Thampi Muhammad Abdulkhadhir, Petitioner v. Padmanabha Pillai Parameswaran Pillai, Counter-Petitioner.

C. R. Ps. Nos. 429 and 562 of 1124, D/- 20-3-1952.

† * **(a) Civil P. C. (1908), O. 38, R. 9 — Suit dismissed — Subsequent reversal and decree in favour of plaintiff — Attachment before judgment is revived.**

An attachment before judgment which ceased to be in force with the dismissal of the suit will revive when the decree dismissing the suit is subsequently reversed and a decree in the plaintiff's favour is passed, even by the same Court or by a superior Court and this revival will be in force from the date on which the attachment before judgment is effected as provided for in the Code. Case law reviewed. (Para 12)

Anno. C. P. C., O. 38 R. 9 N. 1

† * **(b) Civil P. C. (1908), O. 22, R. 55 (c)—Decree reversed or set aside — Attachment effected in execution is deemed withdrawn and does not revive when suit is subsequently decreed — (Travancore Civil P. C., O. 22, R. 53).**

An attachment effected in execution of a decree which is subsequently reversed or set aside, shall be deemed to be withdrawn, and there will be no revival of this attachment when the suit is subsequently decreed by the same Court, or a superior Court. Case Law reviewed. (Para 17)

Anno: Civil P. C. O. 22, R. 55 N. 3, 4.

† **(c) Civil P. C. (1908), O. 21, R. 57 — Execution dismissed for default of decree-holder —**

Attachment before judgment ceases to be operative — (Civil P. C. (1908), O. 38, R. 9.)

An attachment before judgment shall cease to be operative when the execution application seeking to execute the decree pursuant to such attachment is dismissed for reasons stated in O. 21, R. 57. Case Law discussed. (Para 29)

Anno: Civil P. C. O. 21, R. 57 N. 8; O. 38 R. 9 N. 1, 2.

R. Subramania Nair (in No. 429) and T. R. Atchutha Warrier (in No. 562) — for Petitioner. P. Govindan Nair (in No. 429) and T. S. Krishnamoorthi Iyer (in No. 562) — for Counter Petitioner.

REFERENCES: Courtwar/ Chronological/Paras

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('24) AIR 1924 Mad 494: 47 Mad 483 FB 16, 21, 24, 28
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('30) 53 Mad 334: AIR 1930 Mad 514 FB 6, 8, 10,
('35) AIR 1935 Mad 365: (58 Mad 721 FB) 9, 10
('39) AIR 1939 Mad 167: (180 Ind. Cas 126) 8
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('25) AIR 1925 Oudh 592: (89 Ind. Cas. 17) 10
('37) AIR 1937 Pat. 626: (16 Pat 589) 26
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19 Cochin LR 316 9
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33 Cochin LR 279 9
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21 Trav LJ 841 10
('33) 23 Trav LJ 753 26
24 Trav LJ 587 26, 27
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('38) 28 Trav. LJ 1218 15
('41) 32 Trav. LJ 121 26
35 Trav LJ 627 23
35 Trav LJ 310: 1945 Trav LR 289 23
36 Trav LJ 499 23
('45) 1945 Trav LR 289 14, 15

GOVINDA PILLAI J.: These petitions are for revising the orders passed in execution in O. S. 300 of 1097 of the Munsiff's Court, Attingal, and in O. S. 242 of 1116 of the Munsiff's Court, Alleppey, respectively. The revision petitions raise certain important questions of law, and both of them were referred for decision by a Full Bench. Since the questions raised in both the cases were to some extent inter-related, they were heard together. The questions raised will also be considered and decided together.

(2) In the case dealt with in C. R. P. 429/1124, the suit was dismissed on 3-6-1100. It was restored to file and again dismissed on 29-10-1107. In appeal, the trial court decree was reversed and the suit decreed on 24-11-1113. In execution of that decree, certain properties attached before judgment were proclaimed for sale when the revision petitioner intervened and objected to the sale of item 2 in the proclamation schedule. He stated that the proclamation was issued on the assumption that the property had been attached before judgment, that there was no such attachment, that even if there was such an attachment, it was not in force, that the same should be deemed to have been raised when the suit was dismissed twice by the trial court, and that for these and other reasons the execution was to be stopped as regards item 2. The execution court held that though the trial court dismissed the suit, it was decreed by the High Court and hence the attachment before judgment had revived, and that there is no substance in the objection that the attachment ceased with the dismissal of a prior execution application. The claim petition was dismissed and the claimant has filed this revision petition.

(3) In C. R. P. 562 of 1124, the plaintiff had obtained an ex parte decree on 11-6-1116. In execution of that decree certain properties were attached and the Amin filed his report of attachment on 20-2-1117. The ex parte decree was set aside on 5-6-1118 and the suit restored to file. The suit was then decreed in plaintiff's favour on 28-6-1120. In the meanwhile, i.e., on 11-2-1119, the revision petitioner had obtained a sale of the attached property from the defendant. The decree-holder, on 10-4-1122, applied for sale of the property without a fresh attachment. He relied on the attachment of 1117. The claimant objected to the liability of the property as he had become the owner of the same at a time when there was no attachment on the property. The execution court dismissed the claim petition and this petition is to revise that order.

(4) The argument of the learned Advocates appearing in both the cases were heard The questions that arise for consideration are: (1) whether an attachment before judgment, which ceases to be in force with the dismissal of the suit, will revive when the decree dismissing the suit is subsequently reversed and a decree in the plaintiff's favour passed: (2) whether an attachment which had been effected in execution of a decree, and which should be deemed to have been raised with the setting aside of that decree would revive when a decree was subsequently passed in favour of the plaintiff; and (3) whether an attachment before judgment shall cease to be operative, when the execution application seeking to execute the decree pursuant to that attachment is dismissed for default of the decree-holder as contemplated in Order 21, Rule 57, C.P.C.

(5) FIRST QUESTION: The relevant rule that has to be considered in this connection is rule 9 of Order 38, C.P.C. (Indian). It reads as follows:

"Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed."

There is difference of opinion as to the revival of the attachment before judgment if

the suit dismissed by the trial court is decreed by the appellate court in reversal of the decision of the trial court.

(6) A Full Bench of the Madras High Court in 'BALARAJU v. MASILAMANI', 53 Mad. 334: (AIR 1930 Mad. 514) had held that upon the dismissal of a suit, the attachment before judgment necessarily ceased under O. 38, R. 9, even though the Court did not pass an order withdrawing it. The attachment before judgment itself is allowed to be effected so that the defendant may not alienate his properties with intent to obstruct or delay the execution of any decree that might be passed in the suit against him. So the attachment is to enure for the benefit of a decree that has to be passed thereafter and if no decree is passed and the suit is dismissed without much argument it can be held that the attachment will go or die with the dismissal of the suit. It has been found necessary to stress this point here because of certain observations in some other cases indicating that even if the suit is dismissed, the attachment before judgment will survive if there is no order withdrawing the same. Walsh, J. who wrote the leading judgment in the case reported in A. I. R. 1930 Mad 514 referred at page 515 of the report to the rulings of all the Indian Courts and came to the conclusion that the consensus of authority therefore was very much in favour of the view that an attachment before judgment ceased automatically when the suit was dismissed. Later on, His Lordship proceeded to consider whether the attachment before judgment that ceased with the dismissal of the suit would revive if the decree of the trial court was set aside and the suit was decreed by the appellate court. At page 518 of the same report, the learned Judge states thus:

> "To say that on a suit being decreed in appeal all the interlocutory orders passed in the course of the suit are at once revived appears to be going too far and might lead to serious difficulties."

At page 519, he continues thus:

> "The object therefore of the attachment is to satisfy any decree which may be passed in the suit, and if this is read with R. 9, it seems clear that so far as this attachment is concerned, the decree passed in the suit is the decree passed by the trial court and not the appellate decree."

(7) With great respect to the opinion of the learned Judge, referred to above, it has to be mentioned that this position, if accepted as correct, would lead to difficulties. In case the suit was decreed by the trial court and dismissed by the first appellate court, rule 9 allowing withdrawal of the attachment could not be made applicable. It must be far from the intention of the Legislature to pass an enactment that will lead to such obvious difficulties, and so it is the duty of the court to interpret the provisions in the statute in such a way as to give them a reasonable and practical meaning. It is now a concluded theory that proceedings in appeals are only continuation of the proceedings in the suit and that the decree of the appellate court must be taken as the decree in the suit. So it will be more proper to interpret the words "when the suit is dismissed" to mean when the suit is dismissed by the final court.

(8) In the Madras case cited above, His Lordship Walsh, J. apprehends that serious difficulties will arise if it is held that all interim proceedings are revived when a suit dismissed by the trial court is decreed by the appellate court. In support he quotes the following instance at page 518 of the report:

> "A temporary injunction might be granted against the defendant, say, prohibiting the manufacture and sale of certain goods pending the disposal of the suit. If the suit were to be dismissed and on appeal it were decreed, would the defendant be liable to be proceeded against if he had continued to manufacture the articles after the suit had been dismissed by the first court."

It can be said, that on the plea of bona fides, the defendant cannot be punished for contempt of court; but other legal consequence for disobeying the order of injunction may follow in case the order of injunction like an order for attachment before judgment revives after the suit is decreed by the appellate court. If the injunction against the defendant was to restrain him from alienating his properties or from executing documents, that would also revive if under similar circumstances the attachment before judgment would revive. But such difficulties, as apprehended by His Lordship in this case, seldom crop up, particularly in cases of attachment before judgment. The principle laid down in the above case is seen to have been accepted in two single bench decisions of the Allahabad High Court, in 'DULAR SINGH v. RAM CHANDER', AIR 1934 All 165 and 'GHULAM DASTGIR v. MOHAMAD AMIN', AIR 1937 All 682. In the following decisions, 'PINDI v. U. THAW MA', AIR 1931 Rang 281 (2); 'BASAPPA v. RUDRAPPA', AIR 1939 Mad 167; 'JYOTISH CHANDRA v. HAR CHANDRA', AIR 1928 Cal 234; and 'PARMA NAND v. THARU LAL', AIR 1937 Lah 169 also the principle enunciated in 'BALARAJU v. MASILAMANI', AIR 1930 Mad 514 is adopted.

(9) In 'ATAMELU AMMAL v. KRISHNA AYYAR', 19 Cochin L R 316, it was held that the attachment before judgment taken out in a case ceases with the dismissal of the suit and that the filing of an appeal has not the effect of automatically restoring it. In this case, their Lordships have not considered what the effect would be if the trial court decree was reversed and the suit decreed by the appellate court. There was a decision reported at page 159 of the Select Decisions Vol. III, Cochin, taking a contrary view; but this was not followed. It was mentioned that they were not following the previous ruling because it was against the ruling in 'SASIRAMA KUMARI v. MEHERBAN KHAN', 13 Cal L J 243; 'ABDUL RAHMAN v. AMIN SHARIF', 45 Cal 780 and 'RAM CHAND v. PITAM MAL', 10 All 506 which according to them correctly interpreted the provisions of the C. P. C. on the subject. This ruling was distinguished in 'GOPALAKRISHNAN EMBRANTHIRI v. PADMANABHAN UNNI', 30 Cochin L R 510. It was held, following the ruling in 'VEERASAMI v. RAMANNA', AIR 1935 Mad 365, that where an order dismissing the suit for default was set aside on an application for that purpose, the suit remained as it was on the day when it was dismissed, and all proceedings taken up to that date must be deemed to be in force, and that, when the dismissal was set aside, all the interlocutory orders would be revived including an

order for attachment of the property. But the learned Judges who decided this case were not prepared to apply the rule when the suit was dismissed by the trial Court & decreed by the appellate court as can be seen from the decision in 'NARASIMHA PADIYAR v. AUGUSTI', 33 Cochin L R 279.

(10) The rigour of the principle enunciated in 'BALARAJU v. MASILAMANI', AIR 1930 Mad 514 (FB), had been considerably slackened later on. The Full Bench decision of the Madras High Court in 'VEERASAMI v. RAMANNA' AIR 1935 Mad 365 referred to in 30 Cochin L R 510 and 'NAYUDAMMA v. SIVERAJU', AIR 1943 Mad 515 are instances for this. In the first case, when on an application, a suit dismissed for default was restored to file, it was held that the suit remained as it was on the day when it was dismissed, and that all interim orders passed till the disposal of the suit would revive. In the latter case, AIR 1943 Mad 515 the suit was restored to file on review and it was held that the attachment before judgment effected before the suit was dismissed revived. In this, the decision in 'AIR 1930 Mad 514' was distinguished, and that in 'AIR 1935 Mad 365' followed. In 'CHHOTEY LAL v. SOHRAB ALI KHAN', AIR 1925 Oudh 592, it has been held that a surety who had executed a bond to get an attachment before judgment raised would be liable under the surety bond even if the suit was dismissed in the first instance and then restored to file. If the words " the suit is dismissed" in R. 9 of Order 38 were not intended to control the attachment if the suit was dismissed for default, it could be interpreted to mean that the dismissal was to be by the highest court where an appeal against the decree had been filed.

The ruling in 'MUTHAYYA PILLAI v. D'CRUZ', 21 Trav L J 841 is also in support of this view. The whole case lay till then, including the ruling in AIR 1930 Mad 514, had been considered in that case. It was held that, where an attachment before judgment (under sec. 467 of the Code of Civil Procedure of 1065) had been granted in favour of the plaintiff, and the suit was dismissed for default, but subsequently restored on the application of the plaintiff, and there was no special order of court withdrawing the attachment at the time of dismissal of suit, the attachment subsisted and could be availed of by the plaintiff in execution. Mr. Justice Joseph Thaliath who wrote the leading judgment in that case was further of opinion that there was no reason why there should be any difference in the effect of attachment when a claim petition was allowed, but reversed in suit, and when a suit was dismissed but restored to the file and decreed. As shown already, it is unnecessary to have a special order withdrawing the attachment at the time of the dismissal of the suit. One of the reasons given in the rulings holding against the revival of the attachment in cases of attachment effected before judgment, is because of the absence of a provision in O. 38 similar to the one in O. 21, R. 63, C. P. C., which lays down that

"where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of suit, if any, the order shall be conclusive."

This problem has been solved by a Full Bench ruling of the Madras High Court in 'ARUNACHALAM v. PERIASAMI SERVAI', 44 Mad 902. In this case, pursuant to the attachment before judgment the decree-holder applied in execution to sell the property and an order for sale was obtained, and a claim to the property was preferred and allowed by the court. On a suit to contest the order on the claim, being filed more than a year after such order, it was held that the property must be deemed to have been attached in execution of a decree by virtue of O. 38, R. 11, C. P. C., and so a claim put in objecting to that attachment, after the order for sale, may properly be regarded as a claim petition filed in execution of the decree, so that a suit to set aside the order on the claim thus preferred could be filed within one year of that order. Thus an attachment before judgment was placed on the same footing as an attachment in execution of the decree when the decree-holder applied to enforce the attachment before judgment in execution. The findings of Thaliath, J. 'in 21 Trav L J 841', that no distinction need be drawn between the effect of attachment when a claim petition was allowed but reversed in a suit, and when a suit was dismissed but restored to file and decreed, would make the position stronger that the attachment before judgment which ceased to be in force when the suit was dismissed would revive when the suit was decreed. When a claim petition was allowed and the attachment raised, the order of attachment would be held to be in suspense, if ultimately the claim order was set aside in a suit for the purpose. The attachment would therefore be in a state of suspense, and when that is revived, it is to have effect from the date on which the original attachment was put into force.

This dictum was followed in 'MEERASAYU v. NARAYANAN', 25 Trav L J 320, and it was held that no hardship would result to the owner of a property attached before judgment, being told that the attachment would be terminated only by the final disposal of the dispute involved in the suit. It has to be mentioned that apart from strict legal aspects of the question, considerations of equity also prevailed with their Lordships in coming to the above conclusion.

(11) Reference had also been made in that case to the non-withdrawal of the attachment when the suit was dismissed. But though some importance had been given to this aspect of the case, it would be clear that for the other reasonings given there the conclusion arrived at in that case could be supported. The question is therefore answered in the following terms:

(12) An attachment before judgment which ceased to be in force with the dismissal of the suit will revive when the decree dismissing the suit is subsequently reversed and a decree in the plaintiff's favour is passed, even by the same court or by a superior court and this revival will be in force from the date on which the attachment before judgment is effected as provided for in the Civil Procedure Code.

(13) SECOND QUESTION: An answer to this will depend on the construction to be put on O. 21, R. 55 (c) C. P. C. (Indian): O. 21, R. 53, C. P. C. (Travancore). This Rule lays down that, where in execution of a decree the

attachment has been effected, such attachment shall be deemed to be withdrawn if the decree is set aside or reversed. The attachment is a process in execution and it depends on the subsistence of the decree in execution of which the attachment is effected. So, when this decree goes, the attachment also ceases. If the suit is again decreed by the same court which set aside the decree, or by a superior court which reversed the decree, it is this latter decree with a fresh starting point of limitation that has to be executed subsequently, and so the previous attachment under a decree which no longer existed cannot revive.

(14) As observed by Mitter, J., in 'SRI RAMWANIK v. TINCOWRI RAI', 4 Beng LR 63 an attachment prior to a decree is not an attachment for the enforcement of the decree, but is a step taken merely for the purpose of preventing the debtor from delaying or obstructing such enforcement when the decree subsequently passed shall be sought to be executed. An attachment after the decree is, on the other hand, an attachment made for the immediate purpose of carrying the decree into execution, and it presupposes an application on the part of the decree-holder to have his decree executed. This distinction is also explained in 'BASIRAM MALO v. KATTYAYANI DEBI', 38 Cal 448. According to this ruling an attachment before judgment does not for all purposes stand on the same footing as an attachment in execution proceedings. This, indeed, is obvious from first principles. The attachment does not of necessity ensure the property to the person who attaches it. He becomes entitled to proceed against it only if he eventually gets a decree. The plaintiff must not only wait until he has obtained a decree; it is not competent for him to proceed against the property attached until he has also taken the primary steps which the law requires for its enforcement; in other words, he must apply for execution, just like any other creditor.

This distinction also came up for consideration in a recent decision of this court in 'KUNCHERIA KOCHOUSEPH v. OUSEPH CHANDY', 1952 Ker L T 144 wherein the decisions mentioned above were quoted with approval. Thus, an attachment in execution is a process in execution, and such process can be in force only so long as the decree pursuant to which the attachment is effected is alive. When that decree is set aside or reversed the attachment must go. This principle had been accepted in 'NARAYANA PILLAI v. CHANDRASEKHARA PILLAI', 1945 Trav L R 289. It was held there, in the first instance, that an attachment in execution of a decree would terminate with the reversal of that decree. However this ruling added a rider that though the attachment, would cease with the reversal of the decree and, if that decree were reversed on appeal or annulled on review, this later decree did not revive the attachment so as to affect alienation made before the date of such reversal, and that subject to this qualification the attachment would revive. With due respect to the learned Judges who decided that case, it has to be mentioned that this qualification cannot find support on a strict and grammatical interpretation of O. 21, R. 55 (c), Civil Procedure Code.

(15) There is another ruling of the Travancore High Court reported in 'KRISHNA IYEN v. PARVATHINATH PILLAI', 28 Trav L J 1218 which had been referred to in 'NARAYANA PILLAI v. CHANDRASEKHARA', 1945 Trav LR 289 mentioned above. In the '28 Trav L J' case relying on the principles enunciated by Sections 108 and 115 of the Travancore Civil Procedure Code, corresponding to Sections 144 and 151 of the Indian Civil Procedure Code, it had been held that an attachment effected in execution of an ex parte decree which was subsequently set aside resulting in the restoration of the suit to file, would revive if the suit was again decreed in plaintiff's favour. It is doubtful whether S. 144 of the Indian C. P. C. could be made applicable to execution proceedings, for, the procedure prescribed under this section is made applicable only to original proceedings. At any rate, the provisions in S. 144 can be attracted only on the satisfaction of three conditions, namely, (I) the restitution sought must be in respect of the decree which had been varied or reversed; (II) the party applying for restitution must be entitled to a benefit under a reversing decree and (III) the relief claimed must be properly consequential on the reversal or variation of the decree. The court can make an order for restitution only if these conditions are satisfied. In order to get a revival of an attachment which had terminated, none of these conditions could be applied, and so section 144 would have no application. It is always open to the party who thinks that his rights are deferred to satisfy the court that he is entitled to a particular relief and obtain the necessary orders to protect his interests. If in execution of a decree an attachment had been effected, and if the decree was reversed or set aside, the aggrieved party could move the court which was then seized of the case to effect an attachment of the property, which should be deemed to have been terminated by the reversal of the decree. When the party has the right to claim such a relief it is seldom that the provisions of S. 151, C. P. C. are invoked to help them. It does not therefore appear that the basis of the decision in '28 Trav L J 1218' is correct.

(16) The ruling in 'PARMA NAND v. THARU LAL', AIR 1937 Lah 169 is also in support of the position that when a decree is reversed the attachment shall be deemed to have been withdrawn and that a subsequent reversal of this decree will not revive the attachment. No doubt, an attachment which is raised by an order on a claim petition will revive if the claim order is subsequently set aside in a suit. But this is by virtue of the provision in O. 21, R. 63, C. P. C. An attachment raised by an order in a pending application because of the dispute between the parties to the decree will also revive if that order is reversed in appeal, because the proceedings in execution are continued in the appellate court if the appeal is filed against that order. But this analogy will not apply when the attachment is deemed to be withdrawn under clause (c) of O. 21, R. 55.

(17) The answer to question two is therefore, that an attachment effected in execution of a decree which is subsequently reversed or set aside, shall be deemed to be withdrawn, and that there will be no revival of this attachment when the suit is decreed by the same court, or a superior court.

(18) THIRD QUESTION: There is considerable difference of opinion between the

several Indian High Courts in treating the attachment before judgment as an attachment in execution within the meaning of O. 21, R. 57, C. P. C. The Madras, Bombay, Sind, Cochin and Nagpur High Courts, and the Travancore High Court in its two later rulings, have taken the view that an attachment before judgment would cease to be in force if an application for execution in furtherance of the attachment before judgment was dismissed for default. The earlier rulings of the Travancore High Court, and the Allahabad, Calcutta and Patna High Courts take the opposite view. O. 38, R. 11, C. P. C. reads thus:

"Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property."

Order 21, R. 57, is as follows:

"Where any property has been attached in execution of a decree but by reason of the decree-holder's default, the court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease."

Order 21, R. 55 is the corresponding provision in the Travancore C. P. C. There, after the words "the attachment shall cease", the words "unless the court expressly directs that it shall continue in force" are added. Apart from this, there is no difference in this provision in the two statutes.

(19) The question to be considered is whether the attachment before judgment would cease on the dismissal of an execution application for default, where a decree-holder had in execution of the decree obtained by him applied to enforce the decree pursuant to the attachment before judgment. One of the arguments advanced to hold that the attachment would not cease was, that while a suit to set aside an order on a claim petition had been provided for in the case of attachment in execution of a decree, there was no corresponding provision in the case of attachment before judgment. It was therefore urged that it was the intention of the Legislature to treat these two categories of attachments as separate. As already mentioned, this question had come up for consideration before a Full Bench of the Madras High Court, reported in 'ARUNACHALAM CHETTI v. PERIYASAMI SERVAI', 44 Mad 902. A reference to this had also been made while dealing with the first question. Accepting the conclusions arrived at there, it will be seen that there is no scope for the distinction sought to be drawn because of the absence of such a provision in O. 38.

(20) Section 51 of the Civil Procedure Code prescribes the procedure in execution. One of the procedures prescribed is that the court, may, on the application of the decree-holder, order execution of the decree by attachment and sale or by sale without attachment of any property. Where the decree itself directs the sale of properties, as in the case of mortgage decrees, it is clear that no attachment is necessary for bringing the property to sale in execution of that decree. Order 21, R. 30, C. P. C. provides that a money decree may be executed by the detention in the civil prison of the judgment-debtor or by the attachment and sale of his property, or by both; and this provision read along with O. 21, R. 64, which provides that any court executing a decree may order that any property attached by it shall be sold, will clarify the position that in execution of money decrees, an attachment is necessary before ordering sale. Thus an attachment of the judgment-debtor's property in such circumstances is necessary. S. 51 Cl. (b) therefore empowers the court in general terms to attach and sell in execution any property and this has to be interpreted to mean that the court has jurisdiction to attach and sell in execution any property which the decree-holder puts forward as the property of the judgment-debtor. Thus an attachment of the debtor's property is necessary though in some cases it has been held that a sale without an attachment might be only an irregularity and not an illegality. At any rate, ordinarily there must be an attachment of the property before sale of the same can be ordered by the court.

(21) Order 38, R. 11 provided that in case there was an attachment before judgment there was no necessity for a reattachment of the property in execution. This could be taken to mean that when the property attached before judgment was sought to be proceeded against in execution, the attachment before judgment would be deemed to be an attachment in execution of the decree. Order 21, R. 57 does not say that the attachment mentioned there is pursuant to an application for execution which is subsequently dismissed for default. If the execution application was filed only to enforce such attachment, viz., an attachment before judgment, then it has to be taken that the attachment shall cease with the dismissal of that application. According to the Travancore decisions, it was clear that the attachment subsisting need not have been pursuant to an application for execution; for, even while dismissing the application it was open to the court to keep in force the attachment effected pursuant thereto. As already mentioned, when the decree-holder applies to enforce an attachment before judgment in execution, such attachment becomes an attachment in execution, and there is no reason why it has to be treated otherwise. So, if the execution application which wanted to enforce the attachment is dismissed for default of the decree-holder then by force of the order in O. 21, R. 57 the attachment will cease.

This identical question has been elaborately considered by a Full Bench of five Judges in 'MEYYAPPA CHETTIAR v. CHIDAMBARAM CHETTIAR', AIR 1924 Mad 494: 47 Mad 483 (FB). Three of the learned Judges took the view that the attachment before judgment becomes an attachment in execution when an application for execution of the decree is admitted and that such attachments are governed by the provisions of O. 21, R. 57. Two of the learned Judges took a different view.

(22) The reasoning given at pages 499 and 500 of the report by Coutts-Trotter, J., who wrote the leading judgment in support of the majority view can be quoted with advantage. It runs thus:

"The whole point here is whether Order 21, Rule 57 operates on an attachment which

had been obtained before judgment or is to be confined to an attachment first sought and obtained after decree and in execution of that decree. It is well settled that attachment creates no title in the decree-holder or the prospective decree-holder as the case may be. It is merely a process whereby the court puts its hand on the property attached and keeps it in custodia legis until something else happens. It appears to me that Order 38, Rule 11, provides that, when property has been attached before judgment, it remains attached when in due course after judgment, the decree-holder applies for execution of his decree. It has resolved doubts alluded to in 'RAMKRISHNA DAS v. SURFUNNISSA BEGUM', 6 Cal 129 PC, as to whether after decree it might not be necessary for the attaching creditor to re-attach the property and it provides in terms that the property shall remain attached upon an application for execution of the decree. I am unable to see that there is any difference in 'rerum natura' between an attachment before judgment and an attachment in execution of decree except that the one is prospective and, after the condition is fulfilled which brings it into active operation, namely the obtaining of a decree confers a priority in time. But an attachment before judgment is not a remedy of a kind higher than, or different from, an attachment applied for and obtained for the first time in execution of a decree already passed. Language is used in some of the cases which might suggest that the mere passing of a decree converts an attachment before judgment into an attachment in execution. I do not adopt that view for the reasons pointed out by Wallis, C. J., in 'ARUNACHALAM CHETTY v. PERIYASAMI SERVAI', 44 Mad 902 FB. The reasoning appears to be this—& I respectfully regard it as perfectly sound—that a decree-holder need not proceed in execution unless he chooses to do so, and it would therefore be absurd to say that an attachment is an attachment in execution when there is no execution. The turning point comes in my opinion when the decree-holder by filing an execution petition has shown that he means to execute his decree and I am myself unable to escape from that which seems to me the logical conclusion that, when he has elected to proceed in execution, an attachment which he has obtained and on which he must necessarily base his petition and demand for sale, becomes automatically an attachment in execution. That seems to me to underlie the reasoning of the judges in the Full Bench case to which I have referred, particularly of Spencer, J., with whom I find myself in complete accord. I think it is also implied in the reasoning of the judgment in 'BAVUDDIN SAHIB v. ARUNACHALA MUDALI', 26 Mad L J 215. I confess I am not impressed by the argument that Order 21, Rule 57 is a penal enactment which takes away rights which would otherwise exist and must therefore be construed 'verbatim et literatim'. No common law rights are here involved. The whole position of the decree-holder and all his rights are alike the creatures of a bundle of statute-made provisions. The statute punished lack of diligence on the part of the decree-holder. I am unable to see any logical reason why his lack of diligence should be punished only if he has attached the property after decree but excused if he attached it before decree. Nor do I think that the grammatical construction of Order 21, Rule 57, can really bear the construction sought to be put on it. The words are "where any property has been attached in execution of a decree." That I construe as meaning "where any property has been in a state of attachment in execution of a decree" and not confined to cases where the first act of attachment was made subsequently to the decree. To put it in the technical language of grammar, I regard "has been attached", as a perfect and not as aorist tense. In my opinion, when a decree-holder having obtained his decree takes out an execution petition, he has, in effect, elected to take the benefit of Order 38, Rule 11, and asks the court to treat his attachment henceforth as an attachment in execution of the decree which he is seeking to execute. When he has made that election, it seems to me that his attachment thereupon becomes subject to those requirements of diligence laid down by Order 21, Rule 57. I cannot assent to the view that attachment before judgment and attachment in execution are two such wholly different things as to make any provision applicable in express terms to the one in no event applicable to the other, because, in my view, as soon as a decree-holder applies for execution on the strength of the attachment that he has obtained before judgment and which he seeks after judgment to use as validating the sale for whish he is applying, he thereby by his own act asks the Court to treat his attachment as being an attachment in execution. I would, therefore, answer the question propounded in the negative."

(23) Ramesam, J. who had agreed with Coutts-Trotter, J., had also elaborately considered the question and the view expressed by His Lordship can be adopted. The same view is also adopted in the following decisions. 'HARI v. SHRINIVAS', 55 Bom 693: AIR 1931 Bom 550; 'PRIBHOMAL v. KISHNOMAL', AIR 1941 Sind 13 and 'GANAPATI v. MAHADEO', AIR 1921 Nag 57. In 'TRAVANCORE NATIONAL AND QUILON BANK v. OUSEPH THOMAS', 35 Trav L J 627, a Division Bench of the Travancore High Court, held that there is no difference 'n 'rerum natura' between attachment before judgment and attachment in execution except that the former is prospective and confers a priority in time, and that when a decree is passed, an attachment before judgment becomes as much an attachment in execution by virtue of the provision of O. 36, R. 11 (Travancore) corresponding to O. 38, R. 11 of the Indian Civil Procedure Code. The same principle was followed by the same learned Judges in 'PALPU v. NARAYANAN', 36 Trav L J 499 at 501. It was held that the life of the attachment before judgment appeared to be bound up with the decree that if the decree was reversed in appeal, the attachment would end but if in second appeal, the first decree was restored the attachment would revive, and if the decree be dead for want of any application for execution, attachment must be deemed to have died with it. They also referred to 'NARAYANA PILLAI v. CHANDRASEKHARA PILLAI', 35 Trav L J 310 corresponding to (1945 Trav L R 289) which held that the revival did not re-

late back so as to affect alienation effected before the date of such reversal. As already shown while dealing with the first question of this reference, this is not a view that can be accepted.

(24) The Cochin High Court has followed 'MEYAPPA CHETTIAR v. CHIDAMBERAM', AIR 1924 Mad 494 and held that the only privilege the decree-holder in such a case enjoys is that there is no necessity for him to reattach the property. But it does not exempt him from the penalties that await negligence on the part of the attaching decree-holders in general as provided in O. 21, R. 57, C. P. C.: O. 21, R. 55, Cochin C. P. C. (Vide the Full Bench ruling 'KRISHNAN NAMBOORI v. MADHAVAN NAMBOORI', 30 Cochin L R 258).

(25) The opposite view is taken in 'SHIBNATH SINGH v. SABERUDDIN AHMED', 56 Cal 416. It was mentioned there that O. 21, R. 57, C. P. C. was intended to provide a remedy for the grievance or inconvenience which is apt to arise, where, after an attachment in execution, the application for execution cannot further be proceeded with by reason of the decree-holder's default; and that it was no part of the intention of this rule to say that an attachment before judgment which existed before any application could be made in execution and which prima facie continue to have effect if no application for execution had been made, should fall to the ground merely because a subsequent application for execution has come to nothing.

(26) If the provision in R. 57 of O. 21 C. P. C., is to avoid the grievance or inconvenience of the judgment-debtor, it is necessary to apply the rule in regard to all attachments of his properties. After decree, an attachment before judgment cannot have an independent existence apart from its association with the decree, and when the decree is sought to be enforced in furtherance of the attachment already effected the attachment becomes an attachment in execution. The other rulings that hold the same view are 'ANJANEYULU v. SUBBIAH', AIR 1924 Mad 860; 'MOTIJHA v. JOWALA PRASAD', AIR 1937 Pat 626 and 'AYEZALI MIR v. MAHANANDBARUI', AIR 1949 Cal 320. The Travancore rulings which take the opposite view are 'EAPEN THOMAS v. ITTY KURIEN', 6 Trav L J 252; 'USSAN KANNU v. SAHUL AMEETHU', 20 Trav L J 898; 'YAKOB KATHANAR v. C. NAINAN', 23 Trav L J 753; 'PARVATHI BAI v. KANTHIMATHI AMMAL', 24 Trav L J 587 and 'NILAKANTA PILLAI v. PADMANABHA PILLAI', 32 Trav L J 121.

(27) The decision in 'EAPEN THOMAS v. ITTY KURIEN', 6 Trav. L. J. 252 case was under the Civil Procedure Code of 1065 (Travancore) in which there was no provision corresponding to O. 21, Rule 57 of the Indian C. P. C. in 'PARVATHI BAI v. KAUTHIMATHI AMMAL', 24 Trav. L. J. 587, their Lordships did not fully consider this question. They had mentioned that it was noticeable, however, that all the British Indian Courts did not speak with one voice on the matter, and that it would therefore require careful consideration before disturbing the course of the authorities in Travancore and starting a new current. Their Lordships therefore did not go particularly into that question as it was possible for them to decide that case on another point.

(28) In 28 Trav. L. J. 753 (Sic), though it was unnecessary to consider this question for the disposal of the case, their Lordships had expressed their view on the matter. This is what their Lordships say, at page 755 of the report, particularly referring to 'MEYAPPACHETTIAR v. CHIDAMBARAM', 47 Mad. 483 "Even according to the British Indian decisions, in order that an attachment before judgment should come to an end under O. 21, R. 57, it is necessary that the decree-holder should have applied for execution by sale of the attached property and his application been dismissed for default." This has not happened in the present case. Hence it is manifest that O. 21, R. 55: O. 21, R. 57 (Indian) has no applicability. Thus, the question now before us, did not directly arise for consideration any where in the above cases.

(29) 'USSAN KANNU v. SAHUL AMEETHU', 20 Trav. L. J. 898 definitely held that the provisions in O. 21, R. 57 (O. 21, R. 55 Travancore) would apply in terms only to attachment in execution. Since a simple money decree can be executed against the judgment-debtor's properties only after attachment of his properties, when properties are proceeded against, an attachment is a necessary act to be done before execution can be enforced. When the attachment before judgment is relied and enforcement of the attachment before judgment depended upon the decree itself, it will be expedient and proper to treat an attachment before judgment as an attachment in execution when further steps to proceed against the properties attached are applied for, and to apply the provisions of Or. 21, Rule 57 C. P. C. in case of dismissal of execution application for the decree-holder's default. It is therefore held that an attachment before judgment shall cease to be operative when the execution application seeking to execute the decree pursuant to such attachment is dismissed for reasons stated in Or. 21, Rule 57 C. P. C. (Indian).

(30) The orders passed by the courts below in the two revision petitions require re-consideration in view of the decisions on the points mentioned above. These orders are therefore set aside, and the cases sent back for fresh disposal of the matters involved in these revision petitions.

A/R.G.D.

Orders set aside.

A. I. R. 1952 TRAVANCORE-COCHIN 421

KOSHI AND GOVINDA PILLAI JJ.

P. V. Pathrose, Appellant v. Sirkar.

A. S. No. 23 of 1124 (c), D/- 20-12-1951.

(a) Municipalities — Cochin Municipal Act (18 (XVIII) of 1113), S. 106 — Right to collect tolls — Farming out of right — Right to receive unpaid tolls after farming out.

Once a local body farms out the right to collect tolls or other fees due to it the responsibility to take the steps necessary to realise them is that of the farmer and not that of the local body concerned. No doubt sometimes the assistance of a Municipal Council or a Local Board might be found necessary when the contractor seeks to realise them by seizure or distraint. The relevant Act or Rules may also provide for such assistance, but it is entirely a different proposition to hold that the right

to receive unpaid tolls or fees would continue to vest in the Municipal Council or other local body notwithstanding the farming out of the right: AIR 1936 Mad 547 and AIR 1943 Mad 122, Rel. on. (Para 3)

(b) Municipalities — Cochin Municipal Act (18 (XVIII) of 1113), S. 106 (1) — Unpaid tolls — Suit for.

The remedy provided by S. 106 is by no means full or adequate and therefore a municipality or its contractor has a right of suit for realising the unpaid tolls. (Paras 4 and 7)

(c) Municipalities — Cochin Municipal Act (18 (XVIII) of 1113), S. 104 Proviso, Cl. (b) — Notification under — Government's power to make notification retrospective.

Normally statute laws and all rules and notifications issued thereunder are prospective in their operation and when the Legislature delegates a power to Government to issue a notification or promulgate a rule, in the absence of express authority to make the operation of such rules or notifications retrospective, Government on their own cannot make the operation of such rules and notifications retrospective. It will be opposed to reason and commonsense to hold that such a power is implied in clause (b) of the proviso to S. 104. (Para 10)

K. Achuta Menon and P. Divakara Menon, for Appellant: M. N. Parameswara Pillai, Govt. Pleader, for Sirkar.

REFERENCES: Courtwar/Chronological/ Paras
('36) AIR 1936 Mad 547: (59 Mad 887) 3, 6
('43) AIR 1943 Mad 122: (207 Ind Cas 292) 3
(1859) 141 ER 486: (6 CB (NS) 335) 6

KOSHI J.: This is a plaintiff's appeal. During the years 1119 and 1120, the Trichur Municipality farmed out to him by public auction the right to levy tolls on vehicles and animals entering the Municipality. The suit giving rise to this appeal was brought to realise from the Government unpaid tolls in respect of certain motor lorries used by them during that period. That was a period of acute shortage in fire-wood and the Government through their Forest Department took upon themselves the task of selling that essential article at fair prices at depots run by or under the control of the Forest Department. For the purpose of the said venture fire-wood had to be brought to Trichur Municipal area from the Government Reserve forests. A few Government-owned motor lorries and some hired lorries were used for that purpose.

The plaintiff's case was that in spite of demand the tolls due on account of those vehicles entering the municipality were not paid by Government. In his plaint he claimed Rs. 8500/- or such other sum as may be adjudged due on scrutiny of the log-books maintained by the Forest Department. In the course of the suit the sum total of the unpaid tolls was ascertained to be Rs. 2362. Of this sum Rs. 1228 represented the amount due in respect of the vehicles owned by the Government and the balance Rs. 1134 the amount due for hired lorries. The Government contested the suit on various grounds and ultimately the learned Additional District Judge, Trichur, who tried it dismissed it with costs. The plaintiff has hence brought this appeal claiming a decree for the aforesaid sum of Rs. 2362 together with future interest and costs in both the courts.

(2) The written statement the Government filed in the suit makes queer reading. It raises several defences which could better have been left unsaid. We shall however confine ourselves to the consideration of such defences as found favour with the learned Judge in the Court below and another ground of defence raised before us. The lower Court dismissed the suit mainly on two grounds. With respect to the claim for unpaid tolls on account of the hired lorries the learned Judge held that a notification issued by the Government on 6-11-1120 exempting those vehicles from payment of municipal tolls in the State furnished a complete answer to repel it.

As for the claim relating to Government-owned vehicles the reason the learned Judge mentions is that the plaintiff as the toll contractor or the rent farmer had by himself no right to maintain the suit. According to the learned Judge, the toll contractor or the rent farmer was only an agent of the Municipal Council and a suit instituted otherwise than in the name of the principal was not maintainable. This reason, if good, was sufficient to entail the dismissal of the entire suit and no independent ground need have been found to repel the claim relating to the hired lorries.

Besides repeating these two grounds a third ground urged before us on behalf of the Government, the respondent herein, was that as the right to levy tolls was a statutory right and as the statute creating the right had provided a remedy for its realisation, that remedy was the sole or the exclusive remedy open to the person entitled to claim the tolls and that the common law right of recovering the dues by means of a suit was not available to him.

(3) We shall now proceed to consider these grounds one by one, but in so doing it is convenient to take up the second ground that the plaintiff by himself had no right of suit first. Though this ground had found favour with the lower court it was only a half-hearted support which the learned Government Pleader was able to give to it. The effect of farming out the right to levy tolls or to collect the fees for the use of a cart or bus stand belonging to a local authority is that such farmer becomes the sole person entitled to collect those dues. The local authority is only entitled to get the lump sum fixed by the contract from the rent farmer. There is no provision in the Municipal Act which would go to show that after the farming out any further right to the tolls or other fees will inhere in the municipality.

This position has been given judicial recognition by the Madras High Court in 'KARUPPANNA v. F. W. HAUGHTON', AIR 1936 Mad 547. That case was the off-shoot of a prosecution which the Chairman of the Coonoor Municipality launched against a Councillor of that Municipality for persistent refusal by the latter to pay the prescribed fee for the use of the municipal cart-stand. The prosecution failed as the dues were really payable to the contractor to whom the right of collecting cart-stand fees had been granted by the Municipal Council. The Councillor afterwards brought a suit for damages for malicious prosecution against the Chairman and the High Court in restoring the decree the Subordinate Judge passed awarding damages to the plaintiff which the District Judge had reversed observed that the amounts due to the contractor cannot be said to be amounts due to the Municipality and that the prosecution launched by the Chairman was rightly thrown out.

In 'UNITED MOTORS (COIMBATORE) LTD. v. PALGHAT MUNICIPAL COUNCIL',

AIR 1943 Mad 122 this decision came up for consideration and it was explained (page 126) that its implication was that the person to whom a municipality had sold the right to collect certain fees and not the Chairman of the municipality had to take the necessary steps to collect those fees whether by litigation or otherwise. These two cases fully support the view we expressed earlier that once a local body farms out the right to collect tolls or other fees due to it the responsibility to take the steps necessary to realise it is that of the farmer and not that of the local body concerned. No doubt sometimes the assistance of a Municipal Council or a Local Board might be found necessary when the contractor seeks to realise it by seizure or distraint. The relevant Act or Rules may also provide for such assistance, but it is entirely a different proposition to hold that the right to receive unpaid tolls or fees would continue to vest in the Municipal Council or other local body notwithstanding the farming out of the right. It is therefore difficult to sustain the lower court's decision on this ground.

(4) Next we shall take up for consideration the third ground referred to viz., that in respect of a claim like the present the aggrieved party had no right of suit at all and that his remedy was confined to what is prescribed by the statute creating the right. Section 106 (1) of the Cochin Municipal Act, XVIII (18) of 1113 enacts as follows:

> "If the toll leviable on a vehicle or animal is not paid on demand, the person appointed to collect it may seize and detain such portion of the appurtenances or load of such vehicle or animal as will, in his opinion suffice to defray the amount due; in the absence of any such appurtenances or load or in the event of their value being insufficient to defray the amount due, he may seize and detain the vehicle or animal."

Sub-sections (2), (3) and (4) of the section relate to the procedure to be followed after seizure. It was argued that the word "may" occurring in sub-section (1) has a compulsory force and that though the statute in terms has only conferred a power it really creates a duty. We regret we cannot accede to this argument. In the first place as pointed out from the Bench when the case was argued there may occur cases where it might prove physically impossible for the contractor or the toll keeper, as the case may be, to seize the concerned vehicle or the animal. Further, Section 110 of the Municipal Act (as it stood before it was amended by Section 18 of the Cochin Vehicles Taxation Act, XIII (13) of 1121) itself shows that the Legislature did not intend the procedure prescribed by section 106 (1) to be the sole or the exclusive remedy open to a municipality or their contractor for non-payment of tolls. Section 110 is in these terms:

> "If in the opinion of the Municipal Council any tax or toll, fee or other amount whatsoever due to it, whether under a contract or otherwise, is irrecoverable the Council may write off the same together with any sum payable in connection therewith."

If the right does not survive the failure to seize the vehicle or the animal that enters the municipality the question of writing off the same as irrecoverable would never arise. This section would also show that there is no force or substance in the argument that the mere failure to seize, if we may say so, the offending animal or vehicle, will serve as a waiver of the right to claim the toll.

(5) The two Madras cases cited earlier assume that under the Madras District Municipalities Act a person in the position of the present plaintiff has a right of suit to recover unpaid tolls or fees. In fact one of the arguments raised in the second case on behalf of the defendant Municipality in that suit was that to recover the unpaid dues resort ought to have been made to a regular suit and not to the seizure of the vehicle owned by the plaintiffs. Though the argument was not accepted nobody concerned with the case would seem to have entertained any doubts that a suit was permissible under the circumstances of the case. The position under the Cochin Municipal Act is not and cannot be different as the provisions are similar.

(6) This position will also be borne out by the following extract from Duraiswami Aiyangar's Law of Municipal Corporations in British India. At page 360 of the second edition (1924) of the book it is stated as follows:

> "The remedy by distress is incident to every legal toll, and in general an action will lie for tolls unpaid unless some such special and exclusive remedy is given by statute."

Except for section 106 of the Cochin Municipal Act we have not been referred to any provision in the Act or the rules framed thereunder prescribing any special remedy to collect unpaid tolls or other fees. A prosecution for non-payment under Section 321 will not enable the contractor to realise the unpaid tolls. Again Rule 31 of the Taxation and Finance Rules, even if applicable to tolls, would only apply to tolls realisable by the Municipality itself. That appears to be the true inference to be drawn from the decision in 'KARUPPANNA v. F. W. HAUGHTON', AIR 1936 Mad 547 referred to earlier. In this context another passage from Duraiswami Aiyengar's book may usefully be quoted here. In dealing with the collection of taxes Chapter XVI opens with the following:

> "The procedure to be adopted for the collection of taxes due to municipal corporations is prescribed by the various statutes in detail and they should be strictly followed. The specific statutory mode of collection must be pursued. If the statute gives to a municipal corporation a specific and complete remedy for the collection of taxes, as by distress and sale of property or by making them a lien upon real estate and providing for sale thereof in default of payment, this will ordinarily be regarded as excluding by implication the right to resort to any other mode of enforcing a tax and an action against the tax-payer to recover a personal judgment as for a debt will not lie. But where the power to tax is plainly given, a right to collect by suit or action should not be taken to be impliedly denied, unless another reasonably adequate means of collection is provided, and the intention of the Legislature that the special mode prescribed should be the only mode appears with a reasonable certainty. If the specific remedy is full and adequate, such an intent on the part of the law-maker would be more readily deduced than it would under other circumstances. If the statute is silent as to the mode of collection, a suit may be brought to recover the same; but recourse cannot be had to distress and sale of property without express statutory provision."

What has been stated earlier is more than sufficient to indicate that the remedy provided

by section 106 is by no means full or adequate. In this view it is unnecessary to refer to the cases brought to our notice by the learned Government Pleader to show that where the liability is statutory as opposed to liability under the common law, the party must adopt the remedy given to him by the statute. We do not obtain from those cases (including IN RE ALLEN (1859) 141 E.R. 486) or from passages occurring at pp. 459 and 460 of Cooley's Municipal Corporations more light than what we get from the above extract quoted from Duraiswami Aiyangar's book. In short the argument that the Cooley's Municipal Act provides a special and exclusive remedy hardly commends itself to us. On the provisions of the Act and the rules framed thereunder the argument is thoroughly unwarranted.

(7) Notwithstanding the medley of defences raised in the written statement barring the two above grounds no other point was urged before us to resist the claim for the unpaid tolls in respect of Government-owned lorries amounting to Rs. 1228. Section 104 which authorises a Municipal Council to decide by a resolution that tolls shall be levied on vehicles and animals entering the municipality provides certain exceptions. The only exception relevant for the purpose of this case is that contained in Cl. (b) of the proviso which when written out in full would read that no toll shall be levied on any vehicle, or animal belonging to the Government and used for military purposes or belonging to Municipal Councils or by special notification exempted by Government. Clauses (a), (c) and (d) of the proviso have no relevance at all in this case and no plea founded on them was raised either.

The Government-owned lorries were not used for military purposes nor have they been exempted by any special notification. In the view we have taken on the two grounds urged to repel the claim falling under both heads there is no valid defence to the claim for the aforesaid sum of Rs. 1228, relating to Government-owned lorries. A defence that a suit for torts committed by Government will not lie is obviously not open here as the wrong committed was in connection with a private undertaking or an undertaking unconnected with the exercise of sovereign power. No such plea was raised either.

(8) In modification of the lower court's decision we therefore pass a decree in favour of the plaintiff for the aforesaid sum with interest thereon from the date the lower court gave its judgment in the case. (5-7-1123/20-7-1948).

(9) The next point is whether the claim in respect of hired lorries can be sustained. Reference has been made earlier to a notification issued by Government on 6-11-1120. That notification is in the following terms:

"Under clause (b) of the proviso to Section 104 of the Cochin Municipal Act, XVIII(18) of 1113, Government are pleased to exempt the vehicles described in column 2 of the Schedule below, which are hired by the Forest Department for the transport of fuel, from payment of Municipal tolls in the State. The exemption in respect of each vehicle shall take effect from the dates noted against each in column 3 thereof."

(10) The schedule contains particulars of the vehicles and the respective dates of the commencement of the exemption. A statement which the Government Pleader filed in this Court on 2-3-1125 shows that out of the amount of Rs. 1134 falling under this head of claim a sum of Rs. 86 represents tolls that fell due after the date of the said notification. The appellant's learned Counsel conceded that in view of the notification he cannot seek to sustain the claim to the extent of the said sum of Rs. 86. The point for decision is whether notwithstanding the retrospective operation given to the notification by express terms the plaintiff can contend that the notification furnishes no valid defence to the claim.

The particulars contained in the schedule annexed to the notification were meant to cover i.e., to exempt the whole claim falling under this head. The lower court found that this notification successfully served that purpose. The Legislature may have power to make 'ex post facto' laws. That was more true before the republican era. We do not however find such authority conferred on Government under clause (b) of the proviso to Section 104 under which provision Government purported to issue the notification. Normally statute laws and all rules and notifications issued thereunder are prospective in their operation and when the Legislature delegates a power to Government to issue a notification or promulgate a rule, in the absence of express authority to make the operation of such rules or notifications retrospective, we cannot assume that Government on their own can make the operation of such rules and notifications retrospective. It will be opposed to reason and commonsense to hold that such a power is implied in clause (b) of the proviso to Section 104 referred to above. Whether power can be delegated to make rules or issue notifications with retrospective effect is a different question. Furthermore in this case it is Government who incurred the obligation to pay tolls. It cannot be held that by unilateral Act, an obligor can get rid of an obligation incurred by him. The claim under this head to the extent of Rs. 1048 (Rs. 1134 — Rs. 86) has therefore to be upheld and we further modify the lower court's decision accordingly. The said amount also shall bear interest from the date mentioned supra, that is, the date of the lower court's judgment.

(11) In the result the appeal is allowed except for the sum of Rs. 86 noticed above. On the aggregate sum of Rs. 2276 decreed to the plaintiff besides interest at six per cent per annum from 20-7-1948 the plaintiff will also get costs in both the courts from Government, the respondent in the appeal. The lower court's decision as to costs before it will stand modified accordingly. Government will bear their costs in the appeal.

B/V.R.B. Order accordingly.

A. I. R. 1952 TRAVANCORE-COCHIN 424

SUBRAMANIA IYER AND VITHAYATHIL JJ.

Anna W/o Varkey, Plaintiff-Appellant v. Varkey and others, Defendants-Respondents.

C.M.A. No. 151 of 1951 D/- 29-6-1951.

Civil P.C. (1908) O. 39, R. 1 — Injunction, when cannot be granted — Plaintiff's claim to property doubtful — Grant of injunction — Status quo at time of suit — Maintenance of.

In an application for injunction made in a suit if the Court finds that the plaintiff had no title at all, even prima facie, no injunction can be granted; but if there

seems to be a fair question to raise regarding the legal right claimed by the plaintiff then the application for injunction has to be considered upon the grounds of balance of convenience, injury to the parties, and so forth. The fact that the Court considers that the plaintiff's claim to the property in suit is doubtful is no reason to dismiss the application. Further one consideration that should guide courts is that as far as possible the status quo at the time of the suit should be maintained. (Para 6)

Anno: C.P.C. O. 39 R. 1 N. 3 Pts. 6 to 13.

K. P. Abraham, for Appellant; T. S. Venkiteswara Iyer, P. Narayana Pillai and K. C. Chacko, for Respondents.

SUBRAMANIA IYER J.: This appeal arises out of a very unfortunate split between a husband and wife. The plaintiff is the wife of the 1st defendant. The 2nd defendant is the 1st defendant's brother. Defendants 3 and 4 are the children of the 1st defendant and the plaintiff.

(2) Both the plaintiff and the 1st defendant had separate properties. In respect of these properties they, in the year 1123 executed a joint Will. Afterwards on 26-8-1124 they executed Ext. A cancelling the Will and settling the properties in the present by a deed by Ext. A. There are 4 schedules attached to this document. The document is executed in the names of defendants 3 and 4 who are executees Nos. 1 and 3 respectively in the document. The properties in Schedule A are given to the 3rd defendant, those in Schedule B to the 4th defendant and those in Schedule C to the 2nd defendant. Properties in Schedule D are reserved for the plaintiff and the 1st defendant setting out thus regarding them. (Portions in Malayalam omitted.—Ed.). Soon after this deed the couple would appear to have quarrelled with the result that on 4-12-1950 the 1st defendant assigned two of the items comprised in the D schedule to the 2nd defendant and the remaining 4 items in favour of the 3rd defendant.

(3) It is stated that by these dispositions, the entire items in the D Schedule are exhausted. The suit is filed by the plaintiff soon after these transfers for a partition and delivery to her of one-half of the properties comprised in the D Schedule. She contends that the transfers executed by the 1st defendant in favour of the defendants 2 and 3 are vitiated for various reasons. It is alleged in the plaint that the properties comprised in the D Schedule continue to be in the possession of the plaintiff and the 1st defendant as they were before. In other words the transferees had not got possession pursuant to the transfers. In the written statements filed by defendants 2 and 3 it is admitted that the properties were in the joint enjoyment of the plaintiff and the 1st defendant previously and that the title continues to vest in the party to whom it belonged originally notwithstanding the deed of settlement, Ext. A.

The allegation in the plaint regarding possession to the effect that the properties continue to be in the joint possession of the plaintiff and the 1st defendant is not controverted. A similar allegation is made by the plaintiff in her affidavit filed by her in support of the application for injunction. In the counter-affidavit filed by defendants 2 and 3 they follow the same strain as their written statement. The joint possession alleged is not denied. The 1st defendant also filed a written statement. So far as the title to the properties comprised in the schedule to the plaint is concerned, the written statements say that all the properties belonged originally to the 1st defendant and they continue so to belong notwithstanding the deed of settlement, Ext. A.

(4) Along with the suit the plaintiff applied for an injunction for restraining the alienees, defendants 2 and 3 from entering into the properties scheduled in the plaint pursuant to the transfers in their favour. It is the order passed by the Court below dismissing the said application that has led up to this appeal.

(5) The Court below considered Ext. A and came to the conclusion that there has been no creation of any interest in favour of the plaintiff as a result of that document and on that view finding that 'It is very doubtful whether the plaintiff can claim ½ of the properties on the strength of ownership alleged by her' and then concluded the order by saying that "the injunction prayed for cannot therefore be granted."

(6) We are constrained to remark that this mode of approach to the question made by the court below and the disposal of the matter is highly irregular. In an application for injunction made in a suit if the court finds that the plaintiff had no title at all even prima facie, then there is no question about it; no injunction can be granted; but if there seems to be a fair question to raise regarding the legal right claimed by the plaintiff then the application for injunction has to be considered upon the grounds of balance of convenience, injury to the parties, and so forth. In this case even the court below only says that "It is very doubtful whether the plaintiff can claim ½ the properties". That is no reason to dismiss an application for injunction, because the court is not able to say that the plaintiff has a case at all prima facie.

From the circumstances that all the properties shown in the D Schedule, which are the properties shown in the schedule to the plaint, are, as appears from the written statements filed in the case, those which originally belonged to the 1st defendant one may not be very wrong in prima facie supposing that Ext. A does create some interest in favour of the plaintiff. Whether any such interest is created and if so what exactly is the nature of the interest, whether it is a title to the extent of half the properties as claimed by the plaintiff are all matters for consideration and decision in the suit.

So far as this interlocutory application is concerned, it would be enough to say that it cannot be said prima facie that the plaintiff has no right at all. One consideration that should guide courts is that as far as possible the status quo at the time of the suit should be maintained. Now so far as the status quo is concerned, as already mentioned it is clear from the plaint and the affidavit that the plaintiff and the 1st defendant are and continue to be in joint possession of the properties; in other words defendants 2 and 3 had not obtained possession of those properties.

(7) Under the circumstances it is only proper and just that the state of things existing at the time of the suit does continue until the determination of the rights of parties in the suit. There is no circumstance pointed out on behalf of the defendants 2 and 3 as to any inconvenience they would be subjected to,

should the court decide to direct the continuance of the joint possession by the plaintiff and the 1st defendant during the pendency of the suit. In the absence of any such circumstance being brought to our notice we consider that it is a fit case in which defendants 2 and 3 should be restrained by an injunction from entering into or otherwise interfering with the possession of the properties scheduled to the plaint being enjoyed by the plaintiff and the 1st defendant during the pendency of the suit.

We say this because defendants 2 and 3, the transferees of these properties, are claiming exclusive title to the properties assigned in their favour. They are also attempting to secure exclusive possession of these properties for themselves. The restraint that is now directed became necessary because they claim to be in exclusive possession of all the properties. If however they desire to be in joint possession with the plaintiff and the 1st defendant of the properties pursuant to the assignment in their favour they are free to move the court below for appropriate orders because the plaintiff claims only title to and delivery to her of one half of the properties though the plaint contains allegations against the validity of the transfers.

(8) With these directions we reverse the order passed by the court below and restrain the defendants 2 and 3 by an injunction from entering into or otherwise interfering with the possession and enjoyment of the properties by the plaintiff jointly with the 1st defendant. We do hope that this order will serve to bring together the plaintiff and the 1st defendant as they ought to be, as wife and husband. Under the circumstances we make no order as to costs.

B/V.R.B. Order accordingly.

A. I. R. 1952 TRAVANCORE-COCHIN 426

KUNHI RAMAN C. J. AND
SUBRAMANIA IYER J.

Kutty Raman, Appellant v. Muthu Pankajakshi, Respondent.

Second Appeal No. 228 of 1125, D/- 17-9-1951.

Benami — Test — Intention of husband — (husband and wife).

The fact that purchases were made by the husband who paid the price out of his own funds is not itself a conclusive test for determining whether the transaction was benami or not. This depends upon the intention of the parties. Thus where the intention of the husband when he made the purchases in favour of his wife was to benefit the wife who, he expected would continue to live with him as his wife throughout his natural life the transactions cannot be held to be benami. (Paras 4, 7)

N. Varadaraja Iyengar, for Appellant.

REFERENCES: Courtwar/Chronological/ Paras
('26) 4 Rang 518: (AIR 1926 PC 77) 6
('28) 55 Ind App 235: (AIR 1928 PC 172) 7

KUNHI RAMAN C. J.: The plaintiff is the appellant. He had purchased four items of immoveable property in the name of his wife and the suit in the court of the District Munsiff was for establishing his right to these properties on the basis that the purchases were made by him benami for his own benefit. The learned District Munsiff granted a decree to the plaintiff. On appeal however, the temporary Second Judge of Trivandrum reversed this decision holding that the plaintiff had not established his case that the purchases were made benami in the name of his wife for his own benefit. From the decision the second appeal is brought on behalf of the plaintiff.

(2) We may state at the outset that we are not prepared to say that the view taken by the lower appellate court which is based upon appreciation of the evidence and which is also based upon the intention of the parties which it was able to gather from the evidence is erroneous.

(3) The parties to this second appeal were married in 1104. In 1110 there was a divorce through a court of law, the petitioner for divorce being the wife. The properties were purchased by the husband in the name of his wife during the period that the wife was living with him as such. The suit for a declaration that these purchases were all benami was filed in 1118, eight years after the divorce.

(4) The learned Second Judge of Trivandrum has correctly appreciated the legal position. There are concurrent findings of fact in the judgments of both the courts below that the purchases were made by the husband who paid the price out of his own funds. That by itself is not a conclusive test as pointed out in the judgments of the courts below for determining whether the transaction was benami or not. This depends upon the intention of the parties. The lower appellate court has applied its mind to this aspect of the case and from the evidence, the learned Judge has reached the conclusion that the intention was to benefit the wife. It is on that basis that the conclusion was reached by the learned Judge who found that the transaction is not benami and that the purchase was made by the husband in the name of the wife for her benefit.

It is not necessary to reiterate the reasons given by the learned Judge in his judgment in support of the conclusion arrived at by him. There are however two other features of the case one of which was brought to our notice by the learned counsel for the respondent, which we shall briefly advert to. These support the decision of the lower appellate court. When the four items of properties were acquired, in the name of the wife by the husband who is the appellant, he happened to be the karnavan of a sub-tarwad. He gave as a reason for acquiring the properties in the name of the wife that he was afraid that the other members of the sub-tarwad might allege that the acquisition was made for the benefit of the tarwad if he bought in his own name. It is pointed out by the learned counsel for the respondent that during the relevant period, the husband had acquired other properties in his own name of the value of about three to four thousand fanams. When he was confronted with this fact in cross-examination, he was not able to give a satisfactory answer.

(5) Another feature which we notice and which supports the conclusion arrived at by the lower appellate court is that when the wife filed her petition for divorce, the husband had filed a written statement which has been marked in this litigation as Ext. 1. In paragraph 4 of that written statement, far from alleging that these purchases were made by him in the name of his wife benami for himself, he goes to the length of stating that he purchased these properties in the name of his wife in the hope

that she would continue to remain with him as his wife during the whole period of his lifetime. Although there is no presumption of advancement in a case of this description, where property is acquired by a husband in the name of his wife, this circumstance which is disclosed in the written statement of the husband, constitutes evidence to show that his intention was to benefit the wife. He did not either in paragraph 4 or in paragraph 8 of Ext. 1 where he makes reference to this acquisition in the name of his wife, say a word about the purchase having been made benami for his own benefit.

(6) It would be convenient at this stage to refer to two passages in Mayne's Hindu Law. 11th Edition, dealing with benami transactions. The first proposition which we would advert to is contained in the opening words of paragraph 820 of this book. There it is stressed that the onus is on the person who alleges the transaction to be benami to make it out:

"The assertion that a transaction is not really what it professes to be will be regarded by the courts with caution and must be strictly made out by evidence."

The authority cited in support of this proposition is the decision of the Privy Council in 'MAUNG PO KIN v. MAUNG PO SHEIN', 4 Rang 518.

(7) Regarding the theory of advancement the learned author states in the second part of paragraph 817 at p. 954 as follows:

"But this presumption of advancement or gift in favour of the child or wife has not been extended to Hindus and Muhammadans in India. The ground of distinction is stated to be the widespread practice in India to make grants and transfers benami for no obvious reason or apparent purpose and without the slightest intention of vesting in the donee any beneficial interest therein."

The learned author then refers to the decision of the Privy Council in 'GURUN DITTA v. RAM DITTA', 55 Ind App 235 where a husband had invested money as deposit in a bank in the joint names of himself and his wife payable to either or survivor and the Judicial Committee of the Privy Council took the view that the amount did not on his death constitute gift by him to his wife, but there was a resulting trust in his favour in the absence of evidence of a contrary intention. Then the learned author goes on to observe:

"Though there may be no presumption of advancement in Indian law, very little evidence of intention is sufficient to turn the scale."

That observation is based upon the judgment of Sir George Lowndes in the Privy Council decision in 'MOHD. SADIQ v. FAKIR JAHAN', (59 I A 1). In the present case, as we have already indicated there is ample evidence of intention in the written statement Ext. 1 which was filed by the appellant husband in divorce proceedings started by the wife in 1110. There he had impliedly admitted that his intention when he made the purchase was to benefit the wife who he expected, would continue to live with him as his wife throughout his natural life.

(8) In the view that we take of the legal position in this case, it is not necessary for us to discuss the proposition set out in the judgment of the lower appellate court that there is a difference between persons governed by the Hindu Law and parties governed by the Marumakkattayam Law with regard to the presumption in cases of this kind where funds are provided by a husband and properties acquired in name of the wife. It is enough to say that we are not prepared to accept this proposition without fuller scrutiny. In the view we take of the circumstances indicating the intention of the parties when the four items of properties which form the subject-matter of this litigation were acquired by the husband, this second appeal fails and must be dismissed with costs.

B/V.R.B. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 427

SANKARAN AND GANGADHARA MENON JJ.

Adhimakunhi, Appellant v. B. J. Kona and others, Respondents.

A. S. No. 93 of 1124, D/- 25-12-1951.

Workmen's Compensation Act (1923), S. 10(1) and Proviso 3 — Sufficient cause — Necessity to explain delay — (Cochin Workmen's Compensation Act (5 of 1111), S. 10 (1).

When once the workman has shown sufficient cause for not instituting the claim within one year there is nothing in the Act or any other law which debars the Commissioner from entertaining the claim for compensation. It is not necessary that the workman must also give satisfactory explanation for the delay that has occasioned after the period of one year in preferring the claim: AIR 1950 Trav-C 103, Foll. (Para 3)

Anno: Workmen's Compensation Act, S. 10 N. 3.

P. V. Jacob, for Appellant K. Rama Iyer, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('42) AIR 1942 Mad 116: (201 Ind Cas 94) 5
('50) AIR 1950 Trav-C 103: (1950 Ker LT 196) 3

GANGADHARA MENON, J: This is an appeal by a workman under Section 32 of the Cochin Workmen's Compensation Act from the order of the Commissioner rejecting his claim for compensation in respect of personal injury caused to him by an accident that arose out of and in the course of his employment. The accident which resulted in the injury took place on 8th February 1944. According to the appellant, on that day in the course of his work under the first respondent while he was arranging the loaded bags in the steamship known as 'S. S. Kalmarsund' the sling on the crane carrying the bags broke and the bags fell on the ankle of his left leg breaking the bones. The 1st respondent is the agent of the Shipping Company. Respondents 2 to 5 are the legal representatives of one Abdulla Ummer deceased, who was the contractor under the first respondent at the time of the accident. The appellant preferred a claim before the Commissioner for compensation under the Workmen's Compensation Act. The application was filed only on 12-11-1122. On 14-12-1122 the Commissioner examined the claimant and passed an order that "in the circumstances the delay in filing the application for compensation is condoned".

Thereafter notice of the application was issued to the respondents. They pleaded that the application was time-barred and also denied their liability to pay compensation. The learned Commissioner who decided the case was the successor in office to the Commissioner that passed the order condoning the delay in preferring the claim. He was of the view that the question whether the failure to institute the

claim in due time as provided in Sub-section (1) of Section 10 of the Act was to be determined only at the time of deciding the case after notice to the counter-petitioners. Therefore he reconsidered that question in spite of the prior order in the case and held that the claim was time-barred and dismissed the petition on that ground, after recording the findings that the amount awardable as compensation is Rs. 1890/- and the person liable therefor is the 1st respondent.

(2) It is seen that from the date of the accident, for 63 days the appellant was treated as an in-patient in the Maharaja's Hospital at Palluruthy. Thereafter he appears to have been removed to the 8th respondent's house. It is clear from the evidence that at the time of the discharge of the workman from the hospital his fractured bones had not properly set in and the wounds had not been healed. It was not at all possible for him to walk. He could only crawl about. It was in this condition that he was removed from the hospital to the house of the 8th respondent. Evidently the respondents thought that some other line of treatment could be tried. The petitioner swears that for nearly 2½ years he was in the house of the 8th respondent undergoing treatment under some native physicians with hardly any appreciable improvement.

According to him the 8th counter-petitioner and others held out hopes that proper compensation would be paid to him and that disabled as he was from moving about, he remained patiently placing implicit faith in their words. He also states that he was virtually under wrongful confinement and that for this reason also he was prevented from preferring his claim before the Commissioner in time. Though this latter story appears to be an exaggeration the evidence in the case especially that of P. Ws. 2, 3 and 4 amply bears out the fact that for over two years from the date of his discharge from the hospital, the appellant was undergoing treatment in the house of the 8th respondent and that during that period he was not in a position even to move about.

This is sufficient to establish that the appellant had sufficient cause in not preferring the claim within one year of the date of the accident as enjoined under Section 10(1) of the Act. It is also clear from the evidence that the 8th defendant under whose care the petitioner was, instead of helping him to prefer a claim before the proper authority was holding out hopes to him that he will see that proper compensation is paid to him by the 1st respondent. In fact it has come out in the evidence that the 1st respondent actually paid Rs. 540/- to the deceased Abdulla Ummer the father of the 8th respondent on 18-8-1945.

(3) The learned Commissioner has failed to take into consideration any of the above facts in deciding the question of sufficient cause for filing the claim out of time. The only fact that weighed with him was Ext. 1 filed by the appellant before the 1st respondent on 18th July 1946 and the delay thereafter in preferring the claim. It appears to us that the learned Commissioner was labouring under an erroneous view that the appellant should not only show that there was a reasonable cause for not filing the claim within one year but must also give satisfactory explanation for the delay that has occasioned thereafter in preferring it. The provisions of Section 10(1) of the Cochin Workmen's Compensation Act as amended are similar to those contained in Section 10(1) of the Travancore Workmen's Compensation Act. In a case under the Travancore Workmen's Compensation Act reported in 'MUNICIPAL COUNCIL ALLEPPEY v. MANAGER BOMBAY CO. LTD., ALLEPPEY', AIR 1950 Trav-C 103, the identical question came up for consideration and this court has held that

> "If there was sufficient cause for not filing the application before the Commissioner within one year then the bar created under the statute is altogether removed and that the question of any further delay does not arise."

When once the workman has shown sufficient cause for not instituting the claim within one year then there is nothing in the Workmen's Compensation Act or any other law which debars the Commissioner from entertaining the claim for compensation.

(4) We are therefore clearly of the view that the workman has shown sufficient cause for not preferring the claim within the period of one year as provided for in Section 10(1). Therefore the claim preferred by the appellant before the Commissioner was not time-barred.

(5) In view of our finding as indicated above it is unnecessary for us to consider in this case the question that was argued by the learned advocate for the appellant with some force on the authority of the ruling reported in 'ALAGAPPA v. VEERAPPAN', AIR 1942 Madras 116 that when once the Commissioner was satisfied that the failure to prefer the claim was due to sufficient cause and he has passed an order to that effect that order was final so far as that court was concerned and could no longer have been reopened in the subsequent stages of the proceedings before that court. We do not therefore propose to consider the question here.

(6) It follows that the appellant is entitled to get from the 1st respondent a compensation of Rs. 1890-/ as fixed by the Commissioner. The claim has therefore to be allowed. Accordingly in reversal of the order of the Commissioner we allow this appeal with costs and order the 1st counter-petitioner to pay to the appellant Rs. 1890/- towards compensation for the personal injury sustained by him. We make it clear that the Commissioner's finding on issue No. 8 is left undisturbed.

B/V.R.B. Appeal allowed

A. I. R. 1952 TRAVANCORE-COCHIN 428

SANKARAN AND GANGADHARA MENON, JJ.

Madhava Menon, Appellant v. Esthapanose and another, Respondents.

Second Appeal No. 295 of 1125, D/- 23-11-1951.

(a) Civil P. C. (1908), S. 2 (2) and O. 20, R. 18 — Preliminary and final decree — Partition suit — Decree declaring shares to which several parties are entitled — Nature of decree — Final decree for partition.

The question whether a particular decree is a preliminary decree or a final decree has to be decided on a reference to the decree itself. If the decree has finally adjudicated upon all questions raised in the case, it will be a final decree. If, on the other hand, there has been an adjudication only of some of those questions leaving the other questions to be adjudicated upon at a later stage, the decree can only be a preliminary decree. In a suit for partition of immovable properties, the mere declaration

of the extent of the shares which the several parties are entitled to get out of the estate found to be divisible among them, is only the first step towards partition of such estate and a decree merely declaring such shares can only be deemed to be a preliminary decree. (Para 3)

A suit cannot be deemed to have been finally disposed of on the passing of such a decree except in cases where the prayer in the suit was merely for a declaration of the extent of the share to which the plaintiff is entitled to in the suit properties. Where the suit is for recovery of the specific portion of the properties falling to the share of the plaintiff, the suit can be deemed to have been finally disposed of only on such a specific plot being allotted to the plaintiff after a division of the properties by metes and bounds. All the proceedings leading to the allotment of specific plots towards the shares of the respective parties are only proceedings in the suit. Partition of the properties by metes and bounds for the purpose of making final allotments towards the shares of the respective parties may be got done through the revenue authorities or through Commissioners authorised by the Court in that behalf. But the proposals made by them are only tentative and are subject to scrutiny and final approval by the Court. When such proposals are finalised by the Court with or without modifications, a decree will follow on the basis of the allotments approved by the Court. That alone will be the final decree in the case and only on the basis of such a decree execution proceedings can commence for the recovery of the shares allotted to the several parties: 15 Cochin LR 237 (FB); 20 Cochin LR 397 (FB) and 37 Cochin LR 275 (FB), foll. (Para 4)

Anno: C. P. C., S. 2 (2) N. 10 Pts 1 and 2; O. 20 R. 18 Notes 5 and 7.

† **(b) Civil P. C. (1908), O. 20, R. 18 — Decree-holder mistakenly treating preliminary decree as final decree — Decree-holder is not estopped from moving for passing of final decree — (Evidence Act (1872), S. 115).**

Where a decree-holder mistakenly treats the preliminary decree in a case as a final decree, he will not be estopped from moving for the passing of a final decree at any subsequent stage. No such estoppel can arise in a matter like that. The nature of the decree is to be determined not with reference to the conduct of the parties to it or on a consideration as to how they construe it. If the decree is really a preliminary decree, it will continue to be so until a final decree capable of being put in execution is passed in spite of the fact that in the meanwhile the decree-holder may have taken a wrong step under the mistaken impression that the first decree itself is the final decree in the case: 31 Cochin LR 352 (FB), Disting. (Para 6)

Anno: C. P. C., O. 20 R. 18 N. 7; Evidence Act, S. 115 N. 38.

M. K. Narayana Menon, for Appellant; T. S. Venkiteswara Iyer, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
15 Cochin LR 237 (FB) 4
20 Cochin LR 397 (FB) 4
31 Cochin LR 352 (FB) 6
37 Cochin LR 275 (FB) 4

SANKARAN J.: The 5th defendant in O.S. No. 721 of 1095 on the file of the District Munsif's Court at Ernakulam is the appellant. The suit was for partition and recovery of the plaintiff's share in the plaint properties. On 4-9-1100 a decree was passed declaring the shares of the respective parties i.e., of the plaintiff and defendants 1 and 2. The plaint properties consisted of 1 acre and 41 cents of garden land comprised in Sy. No. 86/5. The 1st defendant had even prior to the institution of the present suit transferred his share out of these properties to the mother of defendants 3 to 7. It was the southern portion covering an extent of 24 cents out of the suit properties that was conveyed by the 1st defendant. For this plot of 24 cents, a new sub-division number 86/7 was given in the revenue records.

In order to safeguard the interests of the transferee of the 24 cents, it was directed in the judgment in the case that the shares of the plaintiff and the 2nd defendant should as far as possible be allotted from the northern portion of the plaint properties. This direction was however left out from the decree as it was drafted at first. The plaintiff filed E.P. No. 173 of 1101 praying for a division of the properties by metes and bounds and for allotting the specific plot due to him towards the share declared in his favour and also for recovery of that plot from the defendants in possession of the same. The revenue authorities to whom the work of making such allotments was entrusted, treated the decree properties as the 24 cents which had been in the possession of defendants 3 to 7 and allotted 20 cents out of it to the share of the plaintiff. Such an allotment was accepted by the court and the plaintiff was accordingly put in possession of the 20 cents of properties.

By this time, the 5th defendant noticed the mistake that had been committed in the decree in the case and filed M.P. No. 6770 of 1112 praying for a correction of the decree so as to bring it in conformity with the decretal portion of the judgment. That petition was allowed and the decree was amended on 20-6-1113, virtually resulting in a cancellation of the allotment and delivery made on the basis of the incorrect decree. On 6-7-1113, the 5th defendant applied for getting redelivery of the 20 cents of properties already referred to. That application was allowed on 8-3-1114. Redelivery was effected on 25-2-1116. The order for redelivery was ultimately confirmed by the High Court on 29-12-1117 as per the decision in S.A. No. 93 of 1116. Subsequently the plaintiff put in the present petition E.P. No. 3385 on 15-11-1119 praying that the suit properties may be divided by metes and bounds and that a specific plot allotted to his share as declared by the decree passed on 4-9-1100 and as amended by the order dated 20-6-1113 and for redelivery to him of such plot.

The 5th defendant opposed the prayers contained in this petition and contended that the decree passed in the case on 4-9-1100 is a final decree and as such the present petition filed on 15-11-1119 for execution of that decree was barred by limitation. Both the lower courts overruled this objection holding that the decree passed on 4-9-1100 is only a preliminary decree in the suit which is one for partition and that the proceedings contemplated by the plaintiff's application dated 15-11-1119 were only proceedings in a pending suit in furtherance of the passing of a final decree. This

view is challenged as incorrect by the 5th defendant in this second appeal.

(2) The contention put forward by the 5th defendant appellant is that the decree passed in this case on 4-9-1100 is a final decree. In support of this contention it is argued that this decree was passed at a time when the old Civil Procedure Code (Act I (1) of 1079 of Cochin) was in force, that there was no provision in that Code requiring the court to pass first a preliminary decree and then a final decrée in suits for partition of immovable properties and that such a provision was introduced only when the Code was amended by Act XXIX (29) of 1111. No doubt there is a special provision in Rule 18 of Order XX of the Civil Procedure Code as amended by Act XXIX (29) of 1111 enabling the Court to pass a preliminary decree declaring the rights of the several parties in a suit for partition of immovable properties.

But the mere absence of a similar provision in the old Code cannot be construed to mean that while that Code was in force the Court was bound to pass only one decree, i.e., the final decree, in all suits for partition of immovable properties. There was nothing in that Code prohibiting the Court from passing a preliminary decree in appropriate cases and postponing the passing of the final decree to a subsequent stage after the further enquiries contemplated by the preliminary decree are over. In fact even under the old Code the court had ample discretion to decide whether the circumstances of a particular case warranted the passing of a preliminary decree to be later on followed by a final decree and to act accordingly.

(3) The question whether a particular decree is a preliminary decree or a final decree has to be decided on a reference to the decree itself. If the decree has finally adjudicated upon all questions raised in the case, it will be a final decree. If, on the other hand, there has been an adjudication only of some of those questions leaving the other questions to be adjudicated upon at a later stage, the decree can only be a preliminary decree. In a suit for partition of immovable properties, the two essential questions for determination are, (1) what is the extent of the share to which each of the parties having an interest in the properties sought to be partitioned, is entitled to? and (2) which is the specific plot to be allotted to the share of each of those parties? Only when both these questions are decided by the court can it be said that a final decree has been passed in the case. The mere declaration of the extent of the shares which the several parties are entitled to get out of the estate found to be divisible among them, is only the first step towards partition of such estate. A decree merely declaring such shares can only be deemed to be a preliminary decree, no matter whether the decree was passed under the old Code or under the new Code.

(4) A suit cannot be deemed to have been finally disposed of on the passing of such a decree except in cases where the prayer in the suit was merely for a declaration of the extent of the share to which the plaintiff is entitled to in the suit properties. Where the suit is for recovery of the specific portion of the properties falling to the share of the plaintiff, the suit can be deemed to have been finally disposed of only on such a specific plot being allotted to the plaintiff after a division of the properties by metes and bounds. All the proceedings leading to the allotment of specific plots towards the shares of the respective parties are only proceedings in the suit. Partition of the properties by metes and bounds for the purpose of making final allotments towards the shares of the respective parties may be got done through the revenue authorities or through Commissioners authorised by the Court in that behalf. But the proposals made by them are only tenative and are subject to scrutiny and final approval by the Court.

When such proposals are finalised by the Court with or without modifications, a decree will follow on the basis of the allotments approved by the court. That alone will be the final decree in the case and only on the basis of such a decree execution proceedings can commence for the recovery of the shares allotted to the several parties. These principles have been consistently approved by the Cochin High Court as is evident from the three Full Bench decisions in 'ANANTHARAMA IYER v. RAMANATHA IYER', 15 Cochin L.R. 237, 'KRISHNA MENON v NARAYANA MENON', 20 Cochin L.R. 397 and 'RANGA NAICKEN v. KESAVA NAICKEN', 37 Cochin L.R. 275. The decrees which had to be construed in the first two of these cases were decrees passed under the old Code and on construing them in the light of the principles explained above, it was found that the decrees were only preliminary decrees.

(5) On a perusal of the decree passed in the present case on 4-9-1100, it is seen that it has merely declared the extent of the shares to which the plaintiff and defendants 1 and 2 were found to be entitled in the plaint properties. It is therefore only a preliminary decree and as such the suit must be deemed to be pending for the purpose of passing the final decree. The proceedings contemplated by E.P. No. 3385 of 1119 put in by the plaintiff, are only proceedings towards the passing of such a final decree allotting a specific plot to the share of the plaintiff. Since such proceedings are only proceedings in the suit itself, there can be no bar of limitation as against that application. The finding of the lower court to that effect does not therefore call for any interference.

(6) Another point urged on behalf of the appellant is that in view of the plaintiff's conduct in this suit it is not open to him to treat the decree dated 4-9-1100 as a preliminary decree. The ruling in 'VISALAKSHI AMMA v. GOPALA MENON', 31 Cochin L.R. 352 is relied on by the appellant as an authority in support of this position. That was a suit for partition and recovery of the plaintiff's share in the suit properties and as per the first decree passed in the case, the division of the properties by metes and bounds was actually effected on the application of the decree-holder and he was also put in possession of the specific plot allotted to his share. Subsequently he applied for passing a final decree in the case declaring the mesne profits due to him as a charge on the share of the defendants. In view of the fact that every step required for the enforcement of the decree as it had originally been passed had been completed, it was held that it was not open to the plaintiff to contend that the decree continued to be a preliminary decree and thus to move for the passing of a final decree declaring the charge as prayed for by him.

The ruling to that effect was obviously confined to the particular circumstances of that

case, and we do not think that the court intended to lay down as a general proposition that even where a decree-holder mistakenly treats the preliminary decree in a case as a final decree, he will be estopped from moving for the passing of a final decree at any subsequent stage. No such estoppel can arise in a matter like that. The nature of the decree is to be determined not with reference to the conduct of the parties to it or on a consideration as to how they construe it. If the decree is really a preliminary decree, it will continue to be so until a final decree capable of being put in execution is passed in spite of the fact that in the meanwhile the decree-holder may have taken a wrong step under the mistaken impression that the first decree itself is the final decree in the case.

So far as the present case is concerned, there is nothing to show that the plaintiff treated the decree dated 4-9-1100 as the final decree in the case. In the applications put in by him subsequent to the passing of that decree he had asked for an allotment of a specific plot to his share after a partition of the properties by metes and bounds and also for recovery of such plot. The prayer for the allotment of a specific plot to his share is in effect a prayer for passing a final decree in the case. No doubt his applications were in the nature of applications for execution. That circumstance by itself cannot be taken to mean that he treated the decree in the case as a final decree. There is the further fact that as matters stand at present the allotment contemplated by the decree as amended on 30-6-1113, remains yet to be made. Under these circumstances, it cannot be said that the plaintiff is in any way estopped from applying for such an allotment being made by the passing of a final decree in the case. Thus, in any view of the matter, the objections raised by the 5th defendant-appellant to the plaintiff's application dated 15-11-1119 are clearly unsustainable.

(7) In the result the order of the lower court is confirmed and this appeal is dismissed with costs.

B/V.R.B. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 431

SANKARAN AND GANGADHARA MENON JJ.

Mariyamma, Appellant v. Purushamangalam Devaswom by Narayanan Mithran Namboori and another, Respondents.

Second Appeal No. 163 of 1124 (T), D/- 16-11-1951.

Travancore Royal Proclamation (1042), Cl. 8 — Applicability — (Travancore Jenmi and Kudiyan Act (5(v) of 1071), S. 3).

Cl. 8 was intended to apply to jenmom lands held subject to the payment of renewal fees and other customary dues. Travancore Jenmi and Kudiyan Act, 1071, which superseded the Proclamation also dealt with such demises. (Para 4)

K. P. Abraham, for Appellant; N. Varadaraja Iyengar, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('39) 30 Trav LJ 161 (FB) 4
39 Trav LR 279 4

JUDGMENT: The defendant is the appellant. The plaintiffs are the trustees of Sri Purushamanagalam Devaswom. The plaint properties belong to the Devaswom. The defendant is in possession of the properties under Ext. A dated 20-9-1059 executed by the Ooralers of the Devaswom in favour of Varki Varki the deceased father of the defendant. According to the plaintiffs Ext. A is a redeemable mortgage. They have therefore sued for redemption of properties on payment of the mortgage money due. The defendant contended that Ext. A evidences an irredeemable kanom and that consequently the properties are irredeemable. The courts below repelled the plea and allowed redemption as prayed for. The defendant has therefore come in appeal.

(2) It is seen from Exhibit A that it is executed in renewal of a prior document. That document is not produced in the case. We are therefore not in a position to know when it was executed and what the terms thereof were. Ext. A is styled as a 'Panayola Kanom'. Admittedly the properties comprised in Exhibit A are lands (other than 'Pandaravakai', Sreepandaravakai', 'Kandukrishi' or 'Sirkar Devaswom' land, recognised as such in the Sirkar accounts) which in assessment to Public Revenue are subject to the Rajabhogam only. There is however no provision in Ext. A for payment of renewal fees.

(3) An attempt was made by the defendant to establish that renewal fees had been paid under two receipts Exts. III and IV. The courts below have found that these documents are not genuine, and we do not see any reason to interfere with the concurrent findings in respect of this matter. Since Ext. A does not contain any provision for payment of renewal fees and since there is no evidence regarding payment of renewal fees either, Ext. A cannot be taken to be a kanom document as contemplated in the Jenmi and Kudiyan Act (Act V (5) of 1071).

(4) Reliance is placed on Section 8 of the Royal Proclamation of 1042 and it is contended that by virtue of the provisions of the Royal Edicts of 1005 and of 1007 and Section 8 of the Royal Proclamation of 1042, a permanent occupancy right is conferred in favour of the Kudiyans in respect of demises like the one under consideration. It is argued that even if there is no provision in Ext. A for payment of renewal fees nor evidence for payment of the same, still by virtue of Section 8 of the Royal Proclamation of 1042, the defendant's father obtained an irredeemable right over Ext. A properties and that this right could not be deemed to have been taken away by virtue of the jenmi and Kudiyan Act of 1071. This argument is based on an erroneous view that the scope of the Royal Edicts 1005 and 1007 and the Proclamation of 1042 was wider and demises of jenmis' lands not subject to payment of renewal fees also came within the purview of those enactments.

A careful reading of the Proclamation of 1042 which purports to emphasise and elucidate the Royal Edicts of 1005 and 1007 will make it obvious that the Proclamation of 1042 and the previous Edicts dealt with only demises of jenmi's lands in respect of which renewal fees and customary fees were payable. Section 8 of the Royal Proclamation of 1042 has therefore application only to such demises. The Jenmi and Kudiyan Act which was enacted in supersession of the Royal Proclamation of 1042 also dealt with only such demises. This is abundantly clear from the definition of the term

"Jenmon lands" in Section 3 (1) and of the term "Kanapattom" in Section 3 (4) of the Act.

The identical question that is agitated before us has been considered by the Travancore High Court in the Full Bench decision in 'NARAYANAN PARAMESWARAN v. NILACANTAN NAMBOORI', 39 Trav LR 279. Their Lordships after an elucidating discussion regarding the correct import of the provisions of the Royal Proclamation of 1042 and the previous Royal Edicts and also on a consideration of the judicial pronouncements bearing on the question have come to the conclusion that Section 8 of the Royal Proclamation of 1042 had no reference to lands other than jenmom lands held on payment of renewal fees and customary dues to the jenmi. They were also of the view that the decisions which struck a different note ought not to be allowed to shake the authority of a series of rulings which insist on the payment of renewal fees as the distinguishing feature of a Kanapattom. The correctness of the decision in 39 Trav LR 279 was questioned in some of the subsequent decisions and therefore the question was again referred to a Full Bench for an authoritative decision in 'LUKA v. ITTY IYPE', 30 Trav LJ 161.

After a detailed discussion of all the aspects of the question, the learned Judges that constituted the Full Bench confirmed the decision in 39 Trav LR 279 and came to the conclusion that Clause 8 of the Proclamation of 1042 was intended to apply only to jenmom lands held subject to the payment of renewal fees and other customary dues. They were clearly of the view that

> "if a demise after 1042 has to be contended to be irrevocable on account of clause 8 either the deed must have a provision for payment of renewal fees or there must be evidence to show that renewal fees have been paid by the tenant."

We are of the view that the above Full Bench decisions have laid down the correct bearing on the question.

(5) The learned advocate for the appellant contends that in any view of the case his client is entitled to a presumption in his favour that the demise in question is irredeemable. We do not think that there is any foundation for this argument. Those demises which come within the ambit of the Royal Proclamation of 1042 and the Jenmi and Kudiyan Act of 1071 have become irredeemable by operation of law. In respect of other demises, there is no presumption whatsoever that they are irredeemable. It is for those who set up contentions in derogation of the normal incidents of ownership to establish them. There is no provision in Ext. A conferring a permanent right of occupancy. We have carefully read Ext. A and we are clearly of the view that it is a redeemable mortgage.

(6) Therefore, in confirmation of the decree of the court below, we dismiss the appeal with costs.

B/V.R.B. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 432

KOSHI AND GOVINDA PILLAI JJ.

Podiyan Nadar Arulappan Nadar, Appellant v. Kumaran Palpan and another, Respondents.

A.S. No. 776 of 1950, D/- 30-8-1951.

Civil P.C. (1908), O. 34, R. 1 — Suit by puisne mortgagee — Prior mortgagee made party — Priority not challenged — Priority need not be set up.

A prior mortgagee who is made a party to the puisne mortgagee's suit, he is not bound to set up his prior claim unless it is challenged and hence he does not lose his priority on account of such omission. The auction-purchaser in execution of the prior mortgagee's decree can, in such a case, validly resist the delivery of possession, in execution of the puisne mortgagee's decree: AIR 1920 PC 81(2) Rel. on.; 1948 Trav. L.R. 473 Dist. (Para 2)

N. Varadaraja Iyengar, for Appellant; T. K. Narayana Pillai, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('20) 47 Cal 662: (AIR 1920 PC 81 (2)) 1, 2
('48) 1948 Trav LR 473 2

KOSHI, J.: This is an appeal by an assignee-decree-holder-auction purchaser against an order upholding obstruction to the delivery of property purchased by him. The mortgage put in suit was a second mortgage, and defendant 3 was on the date of the suit the holder of a decree obtained on the first mortgage. For aught we know, his priority was not sought to be displaced in the puisne mortgagee's suit. The obstruction is one caused by a purchaser in execution of the prior mortgage decree and when the sale in execution of the puisne mortgagee's decree took place the purchaser at the prior mortgagee's sale was already in possession. So long as the prior claim of defendant 3 was not impugned in the puisne mortgagee's suit we cannot bring ourselves to hold that the lower court's order upholding the obstruction is wrong. The contention that defendant 3 ought to have set up his prior claim when the puisne mortgagee had made him a party is clearly opposed to the view the Judicial Committee took in 'RADHA KISHUN v. KHURSHED HOSSEIN', 47 Cal. 662. He had no such duty unless his priority was challenged.

(2) The appellant's learned counsel invited our attention to a division Bench Ruling of the Travancore High Court reported in 'THOMMAN v. OUSEPH', 1948 Trav. L.R. 473 in support of his contention that defendant 3 ought to have set up his prior claim in the puisne mortgagee's suit and not having chosen to do so his priority was lost with the result the purchaser in execution of his decree cannot resist delivery. In that case the learned Judges found that the puisne mortgagee had impliedly denied the prior mortgagee's rights and if that were true the decision does not run counter to the Privy Council decision referred to above. At the same time we desire to state we cannot see eye to eye with the observations occurring in paragraph 4 of the judgment in that case to the effect that if a prior mortgagee who is made a party to the puisne mortgagee's suit omits to set up his prior lien he loses his priority on that account alone. The decision in 'RADHA KISHUN v. KHURSHED HOSSEIN', 47 Cal. 662 is clear authority for the position that the priority will not be displaced unless it was impugned.

(3) Mr. Varadaraja Iyengar, the learned counsel for the appellant contended that in any view of the matter respondent 2 who caused the obstruction had no locus standi inasmuch as he had released all his rights in favour of defendant 3. We do not think that for the purpose of the present appeal we should take serious notice of the frequent change of hands

of the rights of the prior mortgagee. The appellant's definite case is that respondent 2 is only a benamidar for defendant 3 who is respondent 1 in this appeal. Suffice it to say for the present that it is a prior mortgagee-auction purchaser or the person standing in his shoes that resists delivery. In the circumstances of the case the lower court rightly upheld the obstruction. We therefore dismiss the appeal with costs.

C/D.R.R. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 433

KOSHI C. J. AND GOVINDA PILLAI J.

Govindan Nair Balakrishnan Nair, Petitioner v. State.

O. P. No. 101 of 1951, D/- 21-3-1952.

Criminal P. C. (1898), Ss. 112, 118 and 120 — Preliminary order not specifying date from which period mentioned in order is to commence — Expiry of period — Magistrate has still jurisdiction to pass final order.

Where a Magistrate initiates proceedings under S. 107 by drawing up a preliminary order directing the party concerned to show cause why he should not be bound down to keep the peace for a specified period but neither the preliminary order nor the notice issued to the party specifies the date from which the specified period is to commence, and the enquiry becomes protracted for some reason or other with the result that the period specified in the preliminary order expires, the Magistrate would, nevertheless, have jurisdiction to proceed with the enquiry and pass the final order. S. 120 (2) makes it clear that the period for which security is to be given shall commence from the date of final order under S. 118 and not from the date of the preliminary order under S. 112 unless the Magistrate otherwise directs. If the preliminary order is silent as to the date of commencement of the period the Court is bound to give effect to this statutory provision: AIR 1927 Mad 542 and 24 Coch LR 717, Rel. on; AIR 1949 All 21, Disting. (Paras 3, 5)

Anno: Cr. P. C., S. 118 N. 2; S. 120 N. 5.

T. K. Narayana Pillai, for Petitioner; Government Pleader, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('49) AIR 1949 All 21: (50 Cri LJ 78) 4

('28) 51 Mad 515: (AIR 1927 Mad 542: 29 Cri LJ 77) 3, 4

('34) 24 Cochin LR 717 3

KOSHI C. J.: The short point for decision in this Original Petition is whether a proceeding initiated under the preventive sections of the Criminal Procedure Code cannot be proceeded with after the expiration of the period mentioned in the preliminary order. On 25-8-1124, the First Class Magistrate of Meenachil initiated proceedings under Section 103 of the Travancore Criminal Procedure Code (Section 107 of the Criminal Procedure Code Act V of 1898) against the petitioner and 12 others to show cause why they should not be bound down to maintain the peace for a period of one year. The notice of the preliminary order was issued on 23-10-1124 and 4-11-1124 was the date fixed for the appearance of the parties. The preliminary order or the notice did not specify when the period of one year was to commence. It would appear that in a revision filed against an interim order for security passed under Section 117 (Section 113 in Travancore Code) the proceedings remained stayed from Mithunam 1124 till Meenam 1126 and when the enquiry was re-started after the interim order was vacated in revision the petitioner filed this original petition to quash the proceedings before the Magistrate on the ground that by reason of the expiry of 'one year' the Magistrate had ceased to have competence or jurisdiction to proceed with the matter.

(2) We are afraid there is no substance in this petition. Though decided cases on the point are few, Section 120 (Travancore Section 116) is decisive of the point. That section enacts as follows:

"1. If any person in respect of whom an order requiring security is made under Section 106 or Section 118, is, at the time such order is made, sentenced to, or undergoing a sentence of, imprisonment the period for which such security is required shall commence on the expiration of such sentence.
2. In other cases such period shall commence on the date of such order, unless the Magistrate, for sufficient reason, fixes a later date."

(3) As mentioned already, the preliminary order did not say when the one year period was to commence and when that happens to be so Courts are bound to give effect to the above statutory provision. The opposite view that the period should run from the date of the preliminary order or the notice is frought with mischievous consequences. A decision of Wallace, J. reported in re: 'TARANAGOWD', 51 Mad. 515 has if we say so with respect, clearly explained the true position. In that case, the final order was passed within the period mentioned in the preliminary order and called upon the counter-petitioners therein to furnish security for the period specified in the preliminary order commencing with the final order. It was contended in revision that the court had no jurisdiction to pass such an order. The preliminary order was passed on 4th January 1926 and that called upon the counter-petitioners to show cause against giving security to keep the peace for one year. The contention raised in revision before the High Court was that it was not open to the trial court to order security for more than one year from the date of the preliminary order, that is, at the farthest, up to the 4th January 1927. The learned Judge repelled the contention in the following words:

"I am not prepared to accept this argument, which would entail that in a case of this kind the time occupied by the trial would have to be subtracted from the period for which a security should be given. Such an interpretation of the law is bound to encourage accused persons in prolonging the trial as long as possible, since the longer they prolong it, the shorter will be the time for which they will give security; in fact, were they successful in prolonging the trial for one year, they will escape having to give security at all, and render the whole proceedings something of a farce. I am clear that this was not the intention of the Code. Section 120, sub-s. (2) lays down clearly that the period for which security shall be

given shall commence on the date of the order under section 118, that is, the date of the final order."

This decision was followed by a Division Bench of the Cochin Chief Court in 'THOMMAN THOMMAN v. ITTEERA ITTOOP', (1934) 24 Cochin L. R. 717. There the preliminary order fixed a period of one year. As here no mention was made when that period was to commence, the enquiry was a protracted one and lasted for over 14 months. The court found that it was a fit case to order the counter-petitioners to execute a bond to keep the peace, but no such order was passed as the Magistrate thought that as one year had elapsed from the date of preliminary order he had no jurisdiction to pass a final order in terms of his finding; instead the counter-petitioners were discharged. The Division Bench set aside the order in revision and directed re-enquiry.

(4) The petitioner's learned counsel invited our attention to a decision of a Single Judge of the Allahabad High Court reported as 'BABU RAM v. REX', A.I.R. 1949 All. 21 in support of the contention that trial court would lose jurisdiction to proceed with the enquiry or pass the final order after the expiration of the period mentioned in the preliminary order. That case is however clearly distinguishable in that the preliminary order called upon the counter-petitioners to show cause why they should not be bound down to maintain the peace for a period of three months commencing from a specified date, namely 18th August 1947. In 'In re TARANNAGOUD' 51 Mad. 515 Wallace J. has given sufficient indication that his decision would have been different had the preliminary order specified that the period should commence from its date or from the date of the notice.

(5) In the light of the statutory provision adverted to and the authorities cited above we have to dismiss the petition as groundless and it is so ordered.

B/K.S. Petition dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 434

KUNHI RAMAN C. J.
AND SUBRAMANIA IYER J.

Mathew Varghese, Appellant v. State of Travancore-Cochin and others, Respondents.

A. S. No. 62 of 1123, D/- 19-11-1951.

Limitation Act (1908), Art. 47 — "Person bound by an order" — (Travancore Limitation Act (6 (VI) of 1100), Art. 35).

Where the plaintiff fought the proceedings under S. 145, Criminal P. C. in his own individual capacity as the manager of a school and filed the suit for possession of the site and building which housed the school in the identical capacity as the owner of the property;

Held that as there was only one capacity in which the plaintiff functioned, Art. 47 applied to the suit: 28 Bom 215, Disting. (Para 3)

Anno: Lim. Act, Art. 47, N. 3.

P. I. Simon, for Appellant; K. C. Chacko, Govt. Pleader, for the State; T. N. Subramonia Iyer, Advocate General and M. U. Issac, for Respondents.

REFERENCE..... Para.
('04) 28 Bom 215: (5 Bom LR 932) 3

JUDGMENT: This is a plaintiff's appeal filed against the decree dismissing his suit for recovery of immovable property which was the subject-matter of proceedings before the First Class Magistrate under Section 143 of the Travancore Code of Criminal Procedure corresponding to Section 145 of the Indian Code. The proceedings ended adversely to the plaintiff in the Magistrate's Court who, therefore, applied to the erstwhile Travancore High Court in revision to set aside the order. But the High Court confirmed the order of the Magistrate on 10th Chingom 1113. This suit is consequent on that order and has been filed on 20th Kanni 1116, i.e., more than three years after the final order aforesaid.

(2) The site and building sought to be recovered in this suit house is a school of which the plaintiff was and claims to be the manager in the place of the third defendant who was substituted for the plaintiff by the Department in the year 1109. Orders passed appointng the third defendant as manager, as also orders passed by the Department subsequent to the final order in the proceedings before the Magistrate's court are sought to be set aside in this suit and for that reason the Diwan of Travancore and the Director of Public Instruction, Travancore, are impleaded as defendants 1 and 2. The 4th defendant is said to be the person appointed as manager in the place of the third defendant.

(3) Issue No. 5 framed by the court below relates to limitation. The court below finds that the suit is barred by limitation under Article 35 of the Travancore Limitation Act, corresponding to Art. 47 of the Indian Act. Learned counsel for the appellant urges before us that that Article is inapplicable because the capacity in which the proceedings before the Magistrate's court were fought by the plaintiff is different from that in which the present suit is brought and cites 'BABAIRAO v. LUXMANDAS', 28 Bom. 215 in support of his position.

It is not necessary for this case to decide the question as to whether, when the same individual fights a proceeding under Section 145 of the Criminal Procedure Code in his capacity, say, as the head of a Mutt and seeks recovery of property not in that capacity but in his own individual capacity as owner, that Article applies or not because, in this case it is clear, that the capacity in which the plaintiff filed the suit is the only capacity in which he fought the proceedings in the Magistrate's Court. Ext. I, which is the order passed by the Magistrate and Ext. II, the order passed by the erstwhile Travancore High Court, make the matter clear.

In paragraph 9 of the plaint, the plaintiff refers to the proceedings in the Magistrate's court and the order passed by the Magistrate is stated to have been adverse to the plaintiff. There is no indication anywhere in the plaint that the plaintiff fought the proceedings in the Magistrate's court and filed this suit in two different capacities. He in his own individual capacity is the manager of the school. In that identical capacity he is the owner of the property. There is thus only one capacity in which the plaintiff can and did function. Therefore, the distinction sought to be introduced on the

face of which limitation is attempted to be got over is not applicable to this case. We are unable to accede to the contention of the learned counsel for the appellant. The view taken by the lower court on the question of limitation is therefore correct and the appeal must, therefore, be dismissed with costs.

B/V.R.B. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 435

SANKARAN AND GANGADHARA MENON JJ.

T. K. Narayanan and others, Appellants v. Alleppey Chamber of Commerce, Respondent.

C. M. A. No. 344 of 1951, D/- 21-12-1951.

(a) Contract Act (1872), S. 30—Speculation and forward contracts, when wagering contracts —Tests indicated—Formation of company with object of controlling Vaida dealings of its members — Vaida contracts as envisaged by bye-laws held not wagering contracts — Company held could not be wound up — (Companies Act (1913), S. 162 (6)).

The mere fact that contracts are highly speculative is not sufficient in itself to render them void as wagering contracts; to produce that result there must be proof that the contracts were entered into upon the terms that performance of the contracts should not be demanded but that differences only should become payable. The real test, therefore, is the intention of parties at the time of the contract i.e., whether the intention is actual delivery of goods or it is only to pay a difference on or after the due date. AIR 1928 PC 30 and 16 Bom 441, Rel. on. (Paras 7, 8)

Where according to the rules and bye-laws of a commercial company formed to carry on, regulate and supervise 'vaida' contracts carried on by its members, all 'vaida' business was to be settled by the 25th of every month and on that date the goods were to be delivered or taken delivery of and if there were no stock the difference in price between the contract rate and ready rate as on the 25th was to be paid and delivered and the matter closed:

Held that it could not be inferred that the Vaida contracts were not genuine commercial contracts under which delivery of the goods was contemplated and that the intention behind all these contracts was only to gamble in the rise and fall in prices of the commodities; though it might be in some stray cases that the parties might never intend to deliver goods at all but contemplated only to pay or take difference in prices only, that in itself was not sufficient to conclude that the entire purpose behind the bye-laws and rules of the company was a mere gamble in the rise and fall of the prices of the commodities and that the company was privy to this sort of wager so as to justify the extreme step of winding up of the Company under Section 162 (6) of the Companies Act. (Para 8)

Anno: Contract Act, S. 30 N. 2; Companies Act. S. 162 N. 7.

(b) Companies Act (1913), S. 162 — Petition for winding up not made in good faith but with a view to bring pressure on company — Court has discretion to dismiss it: AIR 1914 Bom 190 and (1894) 2 Ch D 349, Relied on. (Para 10)

Anno: Comp. Act, S. 162 N. 1.

M. Madhavan Nair, for Appellants; T. K. Joseph and Advocate-General, T. N. Subramania Iyer, for Respondent.

REFERENCES: Courtwar/Chronological Paras
('28) AIR 1928 PC 30: (51 Mad 96) 7
('92) 16 Bom 441 7
('15) 39 Bom 16: (AIR 1914 Bom 190) 10
(1894) 2 Ch D 349 10

GANGADHARA MENON J.: The appellants who are members of the Alleppey Chamber of Commerce, a Company incorporated in 1930 under the Travancore Companies Act on license under Section 28 of the Act, applied before the District Court of Alleppey in Company Petition No. 7 of 1951 to wind up the Company under Section 162 (6) of the Indian Companies Act. The learned District Judge by his order dated 7-11-1951 dismissed their application. They have therefore come in appeal.

(2) The objects of the Company as could be gathered from its Memorandum and Articles of Association are mainly to promote and protect the trade, commerce, agriculture and industries of Travancore by collecting and circulating information bearing on the subjects, to watch and protect the well-being of such interests, to adjust controversies between the members of the Association with the help of a court of arbitration to be formed and to do such other things as may be conducive to the extension of trade and commerce. It is also provided that the income and property of the association shall be applied solely towards the promotion of the objects of the association and no portion thereof shall be paid or transferred directly or indirectly to the past or present members.

(3) In 1947 the Company under Article 37 (c) of its Articles of Association opened a department called the 'Produce Section' under its aegis and a set of bye-laws and rules were framed and a committee, duly elected under those bye-laws and rules, was constituted for the working of that department. The objects of the Produce Section as stated in the bye-laws are the following:

"(A) The Produce Section is formed under the aegis of the Alleppey Chamber of Commerce, subject to the objects of the Chamber as defined in its Memorandum, the main objects of the Produce Section are to promote, support and protect the character, status and interests of the merchants in general, and those engaged in Produce Trade in Particular, to define the customs and usages of such trade, and to make rules and regulations conducive to just and honourable practices therein, and to consider all questions affecting the interests of Produce Trade."

"(b). To adjust controversies, to arbitrate upon and settle disputes of all kinds, to appoint arbitrators, umpires and experts, to make awards and decisions and generally to encourage and stimulate fair and honourable trading."

"(c). To collect, print, publish and circulate satistics and other information relating to the Produce Trade, and to do all such things necessary or conducive to the promotion of Produce Trade."

(4) One of the main functions undertaken by the Produce Section was to regulate, supervise and control what are known as Vaida contracts entered into by the members of the Chamber and to arbitrate in cases of disputes

between the contracting parties in regard to the fulfilment of the terms of the contract and to give award and decisions which according to the bye-laws and rules are binding on the parties. These Vaida contracts usually related to cocoanut oil and pepper and they were known as "Satha" contracts in ordinary parlance.

The petitioner's case is that the conduct of these Vaida contract business through its Produce Section is now the main, if not the sole activity of the company, that these contracts are not genuine commercial contracts but are only dealings in differences in prices and therefore purely wagering contracts void under Section 30 of the Contract Act and further illegal in the town of Alleppey by virtue of the provisions of Travancore Public Gambling Act III of 1071. Thus according to the petitioners the business of the Travancore Chamber of Commerce is illegal, immoral and opposed to public policy and the company has virtually deteriorated into a house for mere gambling in prices. They therefore sought for winding up the Company under the Companies Act or in the alternative for winding up the Produce Section if it could be separated from the other departments of the Company. The Company to whom notice was given contended that there is nothing illegal, immoral or opposed to public policy in the activities of the company or that of its Produce Section, that the Produce Section is not carrying on any trade as such but only regulates the transactions between the members in relation to Vaida contracts, that the Vaida contracts are legal and valid that deliveries are intended to be made and are actually made in pursuance of such contracts and that it is only in cases of failure to deliver the goods as agreed upon or in cases of other disputes between the contracting parties that the committee gives awards and decisions which according to the rules the contracting parties are bound to obey.

(5) It is seen from the bye-laws that the business of the Produce Section is managed by a committee with the President of the Alleppey Chamber of Commerce as its Chairman. The other members of the committee are elected annually from among the members of the Produce Section. Members of the Alleppey Chamber of Commerce who desire to join as members of the Produce Section are admitted to membership on payment of an admission fee of Rs. 25/- and an annual subscription of Rs. 5/-. These members enter into what are known as Vaida contracts for the purchase and sale of goods generally of copra, cocoanut oil and pepper. All such transactions are entered into on a party to party basis and the default or failure of other parties under no circumstances affects the rights of the contracting parties. It is stipulated that no more than two Vaidas could be transacted at any time by a member. All such contracts that are entered into between members are to be duly entered in the books of the brokers specifying the particulars of the produce, quality, time of delivery and the rate and the contracting parties in confirmation thereof execute documents evidencing the contract in approved contract forms and exchange the same. Such transactions are to be properly recorded in the prescribed Sotha sheets and filed in the office of the Produce Section. All the transactions are to be for minimum of ten candies or multiples of ten and the members who are entering into contracts have to make specified deposits which are called coupon deposits. Generally, these coupon deposits are refunded only after the expiry of the period for which the coupons are issued. It is stipulated that the delivery in respect of transactions for a Vaida is to be effected before the fifth day of the month succeeding the Vaida month. It is further stipulated that the delivery in all cases is ex-godown of the sellers. The Committee fixes the rate of settlement for clearance every Friday after the close of the business of that day. The rates fixed by the Committee and all the decisions made by the Committee in that behalf are binding on the contracting parties. The Vaida month begins from the first day of every month and ends with 25th day of the succeeding month and delivery is to be effected within five days thereafter at the last clearance rate fixed and for this purpose the seller has to tender delivery by sending the delivery order to the purchaser on the 26th itself. In the event of any dispute between the contracting parties in respect of the contracts or to the quality of goods or with regard to other matters relating to clearance, settlement etc., the committee has the power to decide the issues raised and the decision of the committee is final and binding on all the parties.

(6) The above lines in which Vaida contracts are entered into and fulfilled by the parties indicate that these contracts are only forward contracts and that the Produce Section of the Chamber of Commerce is only regulating the business between its members by fixing the clearance rates and settling the disputes between the parties through a committee which functions as a domestic forum in respect of such matters.

(7) It is however contended that the scheme as envisaged in the bye-laws and rules is only a camouflage that under cover of these bye-laws and rules which are apparently harmless the business that is carried on is a mere gamble in the rise and fall of prices. As stated by Farran J. in the case reported in 'J. H. TOD v. LAKHMIDAS PURUSHOTAMDAS', 16 Bom 441

> "there is no law against speculation as there is against gambling. Contracts are not wagering contracts, unless it be the intention of both contracting parties, at the time of entering into contracts, under no circumstances to call for, or give delivery, from, or to, each other."

In the case reported in 'SUKHDEVDAS RAMPRASAD v. GOVINDOSS CHATHURBHUJADASS & CO.', AIR 1928 PC 30 the law is stated as follows:

> "The mere fact that contracts are highly speculative is not sufficient in itself to render them void as wagering contracts; to produce that result there must be proof that the contracts were entered into upon the terms that performance of the contracts should not be demanded but that differences only should become payable."

(8) The real test therefore is the intention of partes at the time of the contract i.e., whether the intention is actual delivery of goods or it is only to pay a difference on or after the due date. The several documents produced by the counter-petitioners the genuineness of which was not questioned by the petitioners and which are referred to in detail by the learn-

ed Judge in paragraph 4 of his order show beyond doubt that actual delivery of goods was intended by the parties to the Vaida contracts and a large volume of genuine commercial business is being transacted through these forward contracts and whenever delivery was not effected complaints reached the committee regarding failure to deliver the goods in time and the committee interfered and settled the disputes between the parties. Moreover, it is admitted by one of the petitioners that actual delivery is contemplated as per these Vaida contracts. In paragraph 2 of the plaint in O. S. 949 of 1951 filed by the present 4th petitioner and others it is stated as follows: (His Lordship quoted the original Malayalam extract: The Malayalam extract may be translated thus)

> "As per the bye-law all Vaida business will have to be settled by the 25th of every month and on that day itself oil delivered or taken delivery of. If there is no stock of oil on hand the difference in price between the contract rate and ready rate as on the 25th should be paid or received and the matter closed in that month itself."

In these circumstances it is not possible to infer that the Vaida contracts are not genuine commercial contracts under which delivery of the goods is contemplated and that the intention behind all these contracts is only to gamble in the rise and fall in prices of the commodities. It may be in some stray cases that the parties may never intend to deliver goods at all but contemplate only to pay or take difference in prices only. This will be but a misuse of the scheme relating to the Vaida contracts envisaged in the bye-laws and rules of the Produce Section. But that in itself is not sufficient to conclude that the entire purpose behind the bye-laws and rules of the Produce Section is a mere gamble in the rise and fall of the prices of the commodities and that the company is privy to this sort of wager so as to justify the extreme step of winding up of the Company under Section 162 (6) of the Companies Act.

(9) Further from the admitted facts in this case we are inclined to think that the application to wind up the company is not actuated by any good faith. The Produce Section was started in 1947 and till September 1951 Vaida contracts have been entered into by different members and were treated as valid transaction by the contracting parties including the petitioners. The decision given by the committee in all matters relating thereto has also been accepted as binding. The trouble for the first time appears to have arisen on 24-9-1951 when the Secretary of the Produce Section in the exercise of the powers delegated to him closed the market for the day at 2-45 p.m. fixing the clearance rate for oil at Rs. 707/- per candy. Protest was made by some members with regard to this decision. The committee met thereafter and finding that there was some artificiality in regard to the Vaida contracts entered on the 24th September 1951 declared those contracts void and also revised and fixed the clearance rate at Rs. 696/-.But even before the decision of the committee the petitioners Nos. 1, 3, 5 and another filed a suit on 25-9-1951 in O. S. 920 of 1951 in the Alleppey Additional Munsiff's Court questioning the clearance rate that was fixed by the Secretary as arbitrary and claiming damages from the Alleppey Chamber of Commerce. Along with the plaint they filed an application for injunction to restrain the company from functioning. The court after hearing the parties rejected the petition on 27-9-1951 and allowed the Chamber to function as usual. It however gave a direction that the coupon deposits standing in the name of the plaintiffs should be kept intact. Thereafter petitioners Nos 2 and 4 and some others as plaintiffs filed another suit on 27-9-1951 in O. S. 932 of 1951 and moved for an injunction to restrain the Alleppey Chamber of Commerce from dealing with the coupon deposits standing to the credit of the members having dealings with the plaintiffs in respect of certain Vaida contracts. This petition was also dismissed by the court. Then on 29-9-1951 petitioners Nos. 1, 2 and 3 along with two others moved an original petition in this court in O. P. 100 of 1951 to restrain the company from distributing or otherwise dealing with the coupon deposits remaining with them. After issue of notice to the company and after hearing the parties this Court dismissed the petition. Thereafter on 1-10-1951 petitioners Nos. 2 & 3 along with another filed O. S. 941 of 1951 in the Alleppey Munsiff's Court and moved for an injunction to restrain the Banks in which the money under the coupon deposits was deposited by the company from honouring the cheques issued from the Produce Section as well as the Alleppey Chamber of Commerce. Though the court granted a temporary injunction, on hearing the counter-petitioners vacated the injunction order placing some restriction on the Banks in the disbursement of a specified sum including the amounts under the coupon deposits by the plaintiffs in that case. Not being satisfied with that result, the petitioners have now come forward with the present petition for winding up the Alleppey Chamber of Commerce.

(10) It is worthwhile to remember that in all the above proceedings the petitioners proceeded on the basis that Vaida contracts are genuine commercial contracts valid in law and their complaint appears to have been that the clearance rate fixed by the Secretary and thereafter by the committee was arbitrary. Not a whisper was made in these proceedings that in pursuance of these Vaida contracts delivery of goods is not intended by the parties. On the other hand as stated already in the plaint in O. S. 949 of 1951 the 4th petitioner expressly stated that delivery was actually intended.

Having been frustrated in their efforts to bring pressure on the company to yield to their wishes the petitioners have now come forward on an altogether new ground quite inconsistent with the stand taken by them in prior proceedings that the Vaida contracts are wagering contracts and therefore the company is carrying on a business which is illegal, immoral and opposed to public policy. The motive behind this move is quite apparent. We are constrained to think that the petition absolutely lacks in good faith and that the petitioners are actuated by malice in their present attempt to have the company wound up.

As was observed in the ruling reported in 'PIONEER BANK LTD., IN RE', 39 Bom 16:

> "There is no obligation on the Court to admit a petition merely because it is presented. Not only must a petition allege facts which, if proved, would justify an order for winding up a company but even if it alleges such

facts the Judge has a discretion to consider whether it is really bona fide."

For otherwise it will lead to irreparable injury to the company concerned. It may also leave the door open to unlimited opportunity for blackmail. The following observation in the case reported in 'IN RE A COMPANY', (1894) 2 Ch D 349 is relevant in this connection:

"When a petition against a company is presented ostensibly for winding-up order, but really for another purpose, such as putting pressure on a company, the Court has an inherent jurisdiction to prevent such an abuse of process, and will do so, without requiring an action to be commenced, by restraining the advertisement of the petition, and staying all proceedings upon it."

(11) We are therefore of the view that this is a fit case in which the petition has to be dismissed on this sole ground that it is not really bona fide. In the view that we take of the application before us, we do not think that there is any justification for remanding it to the lower court for further enquiry as prayed for by the appellants. We are convinced that the conclusions of the learned Judge are substantially correct and that his order calls for no interference. The appeal is therefore dismissed with costs. Advocates's fee Rs. 150/-.

B/R.G.D. Petition dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 438

SANKARAN AND GANGADHARA MENON JJ.

Purushamangalam Devaswom represented by its Uranmakaran, Parameswaran, Vasudevan Namboori and another, Appellants v. Pyli and others, Respondents.

Second Appeal No. 112 of 1124, D/- 16-11-1951.

(a) Tenancy Laws — Travancore Jenmi and Kudiyan Act (V (5) of 1071), S. 3 — Kanapattom — To constitute kanapattom, land should be subject to payment of renewal fees. (Para 2)

(b) Evidence Act (1872), S. 90 — Proper custody — Authenticity of document — Rule of presumption — Applicability.

The custody, before it can be said to be proper, should afford reasonable assurance of authenticity of the document. The rule of presumption must be applied with exceeding caution and where circumstances throw suspicion on genuineness of document no presumption under S. 90 can be drawn. (Para 2)

(c) Tenancy Laws — Travancore Jenmi and Kudiyan Act (V (5) of 1071), S. 3 — Grant of Patta — No inference that properties are being enjoyed under Kanom tenure can be drawn from such patta. (Para 5)

N. Varadaraja Iyengar, for Appellants; P. I. Simon, for Respondents.

REFERENCE: Para

(30) AIR 1930 Bom 39: (123 Ind Cas 492) 4

GANGADHARA MENON J.: Sri Purushamangalam Devaswom represented by the 2nd plaintiff and another as Ooranmakars is the appellant. The plaint properties belong to the Devaswom. They were demised under Ext. A dated 15-9-1059 in favour of the father of defendants 1 to 3. According to the plaintiffs Ext. A is a redeemable mortgage. The 1st defendant contended that it is an irredeemable 'kanom'. The trial court upheld the plea, and disallowed the prayer to redeem the properties and allowed the plaintiffs only to recover arrears of 'michavaram' and the 'jenmikaram' due. In appeal by the 1st plaintiff the lower appellate court confirmed the decree of the trial court.

(2) The question for decision in this case is whether Ext. A is a 'kanapattom' coming within the purview of the Jenmi and Kudiyan Act. It is seen from Ext. A that it was executed in renewal of a previous document. But the evidence in the case does not throw any light on the terms of the prior deed. The parties admit that the properties comprised in Ext. A are lands (other than Pandaravakai, Sreepandaravakai, Kandukrishi or Sirkar Devaswom land, recognised as such in the Sirkar accounts) which in assessment to public revenue were subject to Rajabhogam only. But in order to constitute a Kanapattom as contemplated in the Jenmi and Kudiyan Act (Act V (5) of 1071) the lands should also be subject to payment of renewal fees, or in other words there should be a provision in the document itself for payment of renewal fees or there should be evidence of such payment.

This is clear from the definition of the terms "Kanapattom" and "Jenmom land" in the Act itself and is also well-established by judicial pronouncements. The question whether demises executed by jenmis before Act V (5) of 1071 came into force are irredeemable by virtue of S. 8 of the Royal Proclamation of 1042 even in the absence of any provision for payment of renewal fees in the document or of evidence regarding payment of renewal fees has been considered by us in S. A. 163 of 1124 which was heard along with this appeal and we have come to the conclusion that such demises do not come within the purview of Section 8 of the Royal Proclamation of 1042. Exhibit A can therefore be regarded as irredeemable only if there is reliable evidence in the case to show that renewal fees had been paid.

(3) The 1st defendant relied on three receipts written on Kadjan leaves for payment of renewal fees. These are Ext. XIX dated 15-9-1059; Exhibit XX dated 10-12-1073 and Ext. XXI dated 6-11-1095. Of these the courts below have found that Exhibit XXI is not genuine. Though the 1st defendant has taken objection to the findings of the Courts below we see no grounds for any interference. We are clearly of the view that Ext. XXI is not genuine. There is no evidence in the case to prove the genuineness of Ext. XIX and Ext. XX. But in respect of these documents which purport to be more than 30 years old, the courts below drew a presumption under Section 90 of the Evidence Act that they are genuine and acted on them as affording evidence of payment of renewal fees. (His Lordship considered the evidence as to genuineness of the documents and proceeded:)

(4) In the above circumstances, we do not see our way to place any reliance on the evidence of the 1st defendant to conclude that the documents came from proper custody. The custody before it could be said to be proper should be one which affords reasonable assurance of the authenticity of the documents. The courts below seem to think that in every case where documents purporting to be more than 30 years old are produced by a person

with whom they would naturally be, the courts are bound to draw a presumption of genuineness under Section 90 of the Evidence Act. That it is not so is clear from the section itself, for, the words used are that the court 'may' presume' and not 'shall presume'. The presumption under this section is only permissive and it is a matter of judicial discretion whether the court will make the presumption. This rule of presumption must be applied with exceeding caution and where circumstances are such as to lead to the suspicion that the documents are fabricated no presumption under Section 90 of the Evidence Act can be drawn in respect of them. As was observed in the decision reported in 'MANSUKHA v. TRIKAMBHAI', AIR 1930 Bom 39.

"In the case of documents more than 30 years old the genuineness of which is disputed, it is necessary for the courts to consider the evidence external and internal of the document in order to enable them to decide whether in any particular case they should or should not presume proper signature and execution."

If the circumstances are such which throw great doubts as to the genuineness of the documents courts will refuse to draw any presumption. The courts below have misunderstood the real import of section 90 of the Evidence Act and have failed to exercise proper judicial discretion in deciding the question whether any presumption under Section 90 of the Evidence Act could be applied or not. The suspicious appearance of Exts. XIX and XX, the absence of any signature of one of the alleged executants in Ext. XIX, the striking dissimilarity in the signature in Ext. XIX with that in the admitted document Ext. X and the belated production of the documents in spite of the orders of the court throw very great doubt upon the genuineness of these documents and tend to the inference that in all probability they are mere fabrications. In the circumstances we are unable to draw any presumption in favour of the genuineness of these documents under Section 90 of the Evidence Act. As stated already there is absolutely no evidence to prove these documents. We have therefore to reject Exts. XIX and XX.

(5) It is also argued that patta was granted in favour of the 1st defendant's father and that the grant of patta leads to the inference that the properties are being enjoyed under a kanom tenure. We do not think that the grant of patta in favour of the 1st defendant's father is in itself sufficient to establish that the tenure under which he was holding the properties is an irredeemable one.

(6) In the absence of any provision in Ext. A for payment of renewal fees or of any reliable evidence regarding payment of renewal fees Ext. A cannot be taken to create an irredeemable kanom tenure. Ext. A is therefore only a redeemable mortgage and the plaintiffs are entitled to redeem the property as prayed for in the plaint.

(7) Therefore in reversal of the decrees of the Courts below we allow this appeal with costs in all the Courts and decree the suit in terms of the plaint. The memorandum of objections filed by the 1st defendant is dismissed. Interest for michavaram and other dues from date of suit to date of decree and thereafter is allowed at 6 per cent only.

B/V.R.B. Appeal allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 439

SANKARAN AND GANGADHARA MENON JJ.

Mytheen Kunju Pathummal, Appellant v. Vasudevan Kandaru Krishnaru, Respondent.

Second Appeal No. 253 of 1950, D/- 7-12-1951.

Tenancy Laws — Travancore Jenmi and Kudiyan Act (V(5) of 1071), S. 33 — Entertainment of claims under as original suits — (Travancore Civil Courts Act (II (2) of 1084), S. 12).

Section 33 only prescribes a summary procedure for recovery of claim on account of the jenmikarams not exceeding Rs. 100 and does not expressly prohibit the entertaining of such claims as original suits. The exercise of ordinary jurisdiction in respect of such claims is only an irregularity which can be set right by directing a retrial in an appeal or revision against the decree passed. But where there has been no such appeal or revision and the decree has become final the executing court cannot ignore that decree as a nullity since it cannot be said that there was a total absence of jurisdiction for the Court to pass the decree. (Para 2)

M. Madhavan Nair, for Appellant; M. P. Ramakrishna Pillai, for Respondent.

REFERENCES: Courtwar/ Chronological/Paras
('30) AIR 1930 Bom 80: (124 Ind Cas 112) 3
('43) AIR 1943 Oudh 449: (208 Ind Cas 144) 3
('38) AIR 1938 Rang 35: (1937 Rang LR 234) 3
6 Trav LJ 101 3

SANKARAN, J.: In this Second Appeal preferred by the defendant in the case he has questioned the correctness of the view taken by the lower court that his objection to the executability of the decree is unsustainable. The suit was for recovery of arrears of jenmikaram due in respect of the plaint property for the period from 1110 to 1115. The amount claimed by way of such arrears came to a little less than Rs. 100/-. The District Munsiff of Attingal entertained the suit as an original suit and passed a decree in favour of the plaintiff. According to the defendant, that Court had no jurisdiction to entertain the suit and hence the decree in the case is a nullity and cannot be enforced against him. This contention is based on the provisions contained in Section 33 of the Travancore Jenmi and Kudiyan Act, which prescribe a summary procedure for the recovery of arrears of jenmikara falling within certain specified limits. These provisions are as follows:

"Claims by jenmies for recovery of arrears of jenmikaram shall when the amount or value of such claims does not exceed Rs. 100 be taken cognizance of and disposed of summarily by the Courts hereinafter mentioned:

(1). District Munsiffs shall have jurisdiction in respect of such claims where the amount or value of the claim does not exceed Rs. 30/-;

(2). The Zilla Judges shall have similar jurisdiction when the amount or value of the claim exceeds Rs. 30/-, but does not exceed Rs. 100/-."

In the present case the claim exceeds Rs. 30, but was below Rs. 100/-. Hence the claim could be entertained and disposed of summarily only by the District Court having jurisdiction over the subject-matter of the suit. Since the claim exceeded Rs. 30/-, the Munsiff's Court could not

deal with it in a summary manner. What that Court did was that it entertained the claim as an original suit and passed a decree in the exercise of its Original jurisdiction. The decree could be deemed to be a nullity only if it is found that there was a total absence of jurisdiction for the Munsiff's Court to entertain the claim even as an original suit. The District Munsiff had jurisdiction to entertain all original suits subject to the limitations imposed by Section 12 of the Travancore Civil Courts Act (Act II of 1084). That section lays down that:

"the jurisdiction of a Munsiff extends, subject to the rules contained in the Code of Civil Procedure, to all original suits and proceedings of which the amount or value of the subject-matter does not exceed Rs. 2000/-..."

(2) The claim in the present case was within the limit prescribed by the Section and hence the Munsiff's Court could normally have entertained the claim as an original suit but for the provision contained in Section 33 of the Jenmi and Kudiyan Act. It is clear from a reading of that section that it only prescribes a summary procedure for recovery of claim on account of the jenmikarams not exceeding Rs. 100. The section does not expressly prohibit the entertaining of such claims as original suits. In fact there is nothing in Section 33 of the Jenmi and Kudiyan Act to indicate even by way of implication that by virtue of that section there has been an ouster of the ordinary jurisdiction of the Courts. The exercise of such jurisdiction in respect of a claim for which a summary procedure was prescribed by Section 33 of the Jenmi and Kudiyan Act could only be an irregularity. In an appeal or revision against the decree passed in violation of the summary procedure prescribed by Section 33, the irregularity could be set right by directing a retrial strictly in accordance with the procedure prescribed by the section. But where there has been no such appeal or revision and the decree has become final the executing court cannot ignore that decree as a nullity since it cannot be said that there was a total absence of jurisdiction for the Court to pass the decree in question.

(3) A similar question arose for consideration in 'RAMAN KUMARAN v. PADMANABHAN MALLAN', 6 Trav L J 101. That was a case where the subject-matter of the suit had to be dealt with by the Munsiff's Court as a small cause suit in the manner prescribed by Section 13 of the Civil Courts Act (Act II of 1084). But as a matter of fact the Munsiff had entertained the claim as an original suit and had passed a decree. In considering the question of the enforceability of that decree, it was ruled that Section 13 of the Civil Courts Act merely regulated the procedure to be adopted in the adjudication of certain classes of suits, and did not take away the jurisdiction of the Munsiffs to try them as original causes, and that therefore the decision of the suit by the Munsiff as an original cause was valid and operative. The effect of a decision passed in similar circumstances has been considered by other High Courts also. In considering the result of the failure to comply with the mandatory provision contained in Section 16 of the Provincial Small Cause Courts Act (1887) it was ruled by the Bombay High Court in 'JODHA v. MAGANLAL', AIR 1930 Bom 80 that the failure to comply with Section 16 is merely a defect in procedure in proceeding in a court other than the Small Cause Court having jurisdition to try the case, but that does not mean that the Court had no jurisdiction to try the suit. Unlike the directive provision contained in Section 33 of the Travancore Jenmi and Kudiyan Act, the provision contained in Section 16 of the Provincial Small Cause Courts Act is prohibitive in its character and it is as follows:

"Save as expressly provided by this Act or by any other enactment for the time being in force a suit cognizable by a Court of Small Causes shall not be tried in other Courts having jurisdiction within the local limit of the jurisdiction of the Court of Small Causes by which the suit is triable."

In spite of such a provision that it was ruled in the above mentioned case that the failure to comply with the provision is merely a defect in procedure. In 'U. K. SEAL v. ARUMUGAM CHETTIAR', AIR 1938 Rang 35 it was ruled that

"the effect of the provisions of Section 16 is not to deprive the Regular Court altogether of jurisdiction in suits cognizable by a Court of Small Causes, but merely to prevent the exercise of that jurisdiction by the Regular Court so long as there is a Court of Small Causes having jurisdiction within the same local limits. But if a Court by error tries a suit which is of a small cause nature and is cognizable by a Small Cause Court exercising jurisdiction within the same local limits, then the proceedings of the Court are not entirely without jurisdiction, and therefore are not a nullity."

To the same effect is the ruling in 'AFZAL HUSSAIN v. MAHOMOOD HUSSAIN', AIR 1943 Oudh 449. Applying these principles to the facts of the present case, it is clear that the decree in this case cannot be deemed to have been passed by a Court having no jurisdiction at all to entertain the claim and that therefore the decree cannot be ignored as a nullity.

(4) The lower courts are therefore right in holding that the decree is an effective decree and it could be enforced by way of execution.

(5) In the result this Second Appeal fails and it is accordingly dismissed with costs.

B/G.M.J. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 440

SANKARAN AND GANGADHARA MENON JJ.

Narayanan Nair Raman Nair, Appellant v. Govindan Nair Raman Nair and another, Respondents.

Second Appeal No. 60 of 1125, D/- 12-10-1951.

Civil P. C. (1908), S. 148 — Time fixed by decree for discharging obligation — Extension of time — Executing court's jurisdiction.

When a particular period is fixed by the decree for the discharge of a certain obligation by the defendant so as to entitle him to the benefit contemplated by the decree, he can get such benefit only on his discharging that obligation within the prescribed time. He is not entitled to get an extension of such time. The executing court has no jurisdiction to extend the time as fixed in the decree because it will be altering or modifying the terms of the decree. The general power conferred on the court by

S. 148 is not intended to cover such cases. (Para 3)

Where, therefore, a final decree passed in a suit for partition provided that in the case of the failure of the defendant to pay to the plaintiff or to deposit in court a certain sum of money the plaintiff would be entitled to recover possession of certain items of the property in suit and there was such failure on the part of the defendant:

Held that the time was of the essence of the condition imposed by the decree and therefore the conditional clause in favour of the plaintiff automatically came into effect at the end of the stipulated period. (Para 3)

Held further that the provision was not penal in its nature and therefore the defendant could not be relieved of the forfeiture resulting from the provision AIR 1949 Bom 97 (FB), Ref. to. (Para 3)
Anno: C. P. C., S. 148 N. 2. Pt. 6.

C. K. Sivasankara Panicker, for Appellant; V. G. Sankaranarayana Pillai, for Respondents.

REFERENCE..... Para.
('49) AIR 1949 Bom 97: (ILR (1948) Bom 654 FB) 3

SANKARAN J.: The plaintiff decree-holder is the appellant. The question raised in this second appeal is one of construction of the final decree in the case. The plaintiff's suit was for partition and recovery through court of his share in the family properties after setting aside a partition deed executed by some of the members of the family. The suit was allowed and a final decree was passed on 5-6-1118 allotting certain specified items to the share of the plaintiff. In respect of some of these items an equitable direction was made in the decree enabling defendants 2 to 4, who were found to be in possession of those items, to retain possession in case they deposited in court for payment to the plaintiff certain specified amounts for the purpose of equalising the shares of the respective parties.

A period of one month from the date of the decree was fixed for the deposit of such amounts and it was further directed that in case of failure to make the deposit within the time fixed the plaintiff will be entitled to recover those items from the respective defendants. The amount which the 2nd defendant was to deposit within the period of one month was Rs. 294-10-0 to enable him to retain possession of item No. 7. Similarly the 3rd defendant had to deposit Rs. 120-4-0 within the same period to enable him to retain possession of items Nos. 8, 9 and 10 and the 4th defendant had to deposit Rs. 70-7-0 within the same period to enable her to retain possession of item No. 11.

Defendants 3 and 4 submitted to this decree and hence it became final and conclusive as against them. But the 2nd defendant filed A. S. No. 106 of 1119 before the Kottayam District Court against the trial court's decree as against him. By the decision in that appeal the amount which he had to deposit was reduced to Rs. 144-10-0. The appellate court decree did not specify any time limit within which this amount had to be deposited by the 2nd defendant. However the decree-holder construed that decree as having left the time limit fixed by the trial court undisturbed. Defendants 2 to 4 failed to deposit the respective amounts specified in the decree within the period of one month from the date of the decree and accordingly the decree-holder applied on 6-8-1120 for recovery of possession of items 7 to 11 from those defendants.

On getting notice of that application, the 2nd defendant deposited in court Rs. 144-10-0 on 9-10-1120 and prayed for an order entering satisfaction of the decree so far as he was concerned. The execution court disallowed that prayer. But on appeal the District Court held that the 2nd defendant had substantially complied with the direction in the appellate court decree in A. S. 104 of 1119 and accordingly entered satisfaction of the decree as against the 2nd defendant. That order was confirmed by the erstwhile Travancore High Court by the judgment in S. A. No. 526 of 1121. By this time, the 4th defendant died and defendants 2 and 3 were recorded as her legal representatives.

On 6-12-1122 the 3rd defendant deposited in court the amounts due from defendants 3 and 4 as per the terms of the decree and applied for an order entering satisfaction of the decree as against them. The decree-holder opposed that petition on the ground that since the deposit was not made within the prescribed time, the alternative provision in the decree has to be enforced and that he should be allowed to recover possession of items 8 to 11 from these defendants. The execution court overruled the decree-holder's objection and allowed the 3rd defendant's petition for entering satisfaction of the claim under the decree. That order was confirmed by the lower appellate court also. The decree-holder has therefore come up in second appeal.

(2) So far as defendants 3 and 4 are concerned, the decree in force is the final decree passed by the trial court on 5-6-1118. As against them the direction in the decree is clear and specific and it is to the effect that on their failure to deposit the specified amounts in court within a period of one month from the date of the decree, the decree-holder will be entitled to recover possession of items 8 to 11 from them. However the lower courts have now held that the time limit fixed in the decree was not an essential condition of the terms of the decree and that the period fixed in the decree could be extended by the executing court and the defendants allowed to make the deposit at any subsequent time when the decree-holder sought to enforce the decree against them.

In thus construing the decree in the case, the lower courts have been guided by certain observations contained in the judgment in S. A. No. 526 of 1121. In fact both the lower courts have taken the view that they are bound by these observations which, according to them, amount to a construction of the decree in this case. This view is certainly erroneous. There is no warrant for the assumption that the final decree in this case passed on 5-6-1118 and which had become conclusive as against defendants 3 and 4, had come up for construction in S. A. No. 526 of 1121. It is clear from the judgment in S. A. No. 526 of 1121 that the decree in A. S. No. 104 of 1119 of the Kottayam District Court, which had modified the trial court's decree so far as it related to the 2nd defendant in the case, was the only matter involved in S. A. No. 526 of 1121. Defendants 3 and 4 were not parties to A. S. No. 104 of 1119 or to S. A. No. 526/1121.

Under these circumstances the general observations contained in the judgment in S. A. 526 of 1121 relating to the nature of the decree of the trial court as a whole can only be treated as obiter dicta. It is also seen that such observations happened to be made only incidentally in the course of construing the appellate decree in A. S. No. 104 of 1119. The following extract from the judgment in S. A. No. 526 of 1121 makes it clear beyond any room for doubt that the High Court was only construing the appellate decree in A. S. 104 of 1119:

> "As we read the appellate decree we are not inclined to think that the omission to fix a period for payment or deposit was not an accidental omission, but a deliberate modification of the whole scheme of reliefs against the 2nd defendant—enabling the plaintiff to take out execution in time without waiting for a month, and the 2nd defendant to comply with the direction when notice of execution is issued against him. This is the proper and reasonable construction of the appellate decree as it stands."

It is obvious that such a construction put upon the appellate decree in A. S. 104 of 1119 cannot hold good in respect of the trial court's decree as it stood against defendants 3 and 4 and in which it was expressly provided that the amounts directed to be paid by defendants 3 and 4 had to be paid to the plaintiff or deposited in court within one month from the date of the decree. The effect of such a time limit fixed by the decree did not arise for consideration and was also not considered or decided in S. A. 526 of 1121. This again is made clear by the following extract in the judgment in S. A. No. 526 of 1121:

> "There was no time fixed by the appellate court and therefore even the question of condition does not arise. Even if there was a time impliedly fixed, we cannot regard it in the circumstances as a condition."

Thus it cannot be said that the question of construction of the trial court's decree as against defendants 3 and 4 and which has fixed a specific period within which they had to deposit certain amounts to enable them to retain possession of items 8 to 11 is concluded by the decision in S. A. 526 of 1121. The question has to be independently considered on its own merits.

(3) The terms of the final decree passed on 5-6-1118 are clear and definite and there is no ambiguity about those terms. It is provided that in case of the failure of the 3rd defendant to pay to the plaintiff or to deposit in court the sum of Rs. 120-4-0 the plaintiff will be entitled to recover possession of items 8 to 10. There is a similar provision as against the 4th defendant in respect of item 11. The conditional clause in favour of the plaintiff automatically came into effect at the end of the stipulated period because these defendants failed to make the deposit as per the direction in the decree.

In the nature of the provision it is clear that time was of the essence of the condition imposed by the decree. It cannot be said that the provision in the decree is penal in its nature and that therefore the defendants should be relieved of the forfeiture resulting from such a penal provision. The suit itself was for partition and recovery of the plaintiff's share out of the plaint properties and as such the normal relief to be granted to the plaintiff in the event of his success was to allot certain specific items of properties to his share. Items 8 to 11 have thus been allotted to his share as per the final decree in the case. But as an equitable arrangement defendants 3 and 4 who were to surrender possession of these items were permitted to retain possession of these items on condition of their paying to the plaintiff or depositing in court the amounts as specified in the decree. This was undoubtedly a concession allowed in favour of these defendants.

But on their failure to take advantage of such a concession within the prescribed time the primary and essential relief granted in favour of the plaintiff was to come into operation i.e., the plaintiff became entitled to recover possession of items 8 to 11 from these defendants. Such a conditional clause in the decree cannot in any sense be said to be penal. The executing court cannot relieve defendants 3 and 4 from the effect of such a provision in the decree. The court is bound to give effect to the provision as it stands.

The construction of a decree containing a similar provision came up for consideration before the Bombay High Court in 'WAMAN VISHWANATH v. YESHWANT TUKARAM', A.I.R. 1949 Bom. 97 F.B. wherein the judgment-debtor had claimed to be relieved against the consequences of a breach of the condition to pay up the debt in instalments within certain periods specified in the decree. It was ruled in that case that the obligation undertaken by the judgment-debtor was the result of a concession granted to him and that therefore he was not entitled to be relieved against the breach committed by him of the condition imposed by the decree and that the consequences following from such breach were not in the nature of a penalty or forfeiture.

When a particular period is fixed by the decree for the discharge of a certain obligation by the defendant so as to entitle him to the benefit contemplated by the decree, he can get such benefit only on his discharging that obligation within the prescribed time. He is not entitled to get an extension of such time. The executing court has no jurisdiction to extend the time as fixed in the decree because it will be altering or modifying the terms of the decree. The general power conferred on the court by Section 148 of the Civil Procedure Code is not intended to cover such cases. That section lays down that where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Code, the court may in its discretion from time to time enlarge such period.

The power conferred by this Section can be invoked only by the court which has fixed or granted a certain time for the doing of a certain act prescribed or allowed by the Code. So far as the time limit prescribed in a final decree is concerned it is clear that such time limit was fixed by the court which passed the decree. Hence that court alone can enlarge the time in the exercise of its power under section 148 of the Civil Procedure Code. That section cannot be invoked by the executing court whose function is only to execute the decree as it stands. Viewed in all these aspects, it is clear that on account of the failure

of defendants 3 and 4 to deposit in court the amounts specified in the final decree dated 5-6-1118 within the prescribed period of one month from the date of the decree, they have forfeited the concession allowed to them for retaining possession of items 8 to 11 and that the decree-holder has become entitled to recover possession of these items. The belated petition filed by the 3rd defendant for entering satisfaction of the claim under the decree as against defendants 3 and 4 has only to be dismissed.

(4) In the result this second appeal is allowed and in reversal of the order of the lower court the 3rd defendant's petition C. M. P. No. 13460 dated 6-12-1120 is dismissed and the decree-holder is allowed to proceed with the execution of the decree for recovery of possession of items 8 to 11. The appellant will get his costs throughout from the respondents.

B/V.R.B. Appeal allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 443

VITHAYATHIL J.

Mrs. Kamala Bhaskara Menon, Petitioner v. K. G. Menon and others, Counter-Petitioners.

O.P. No. 1 of 1952, D/- 7-3-1952.

(a) Travancore Motor Vehicles Act (1 of 1117), S. 60 — Transport Authority publishing notification in Gazette — Notification to effect that no further applications would be entertained for permits for running buses along certain routes until otherwise notified — Thereafter A applying for route — Major portion of route covered by route mentioned in notification — Application rejected by Transport Authority — On appeal Government ordering issue of permit — Notification held was not statutory notification having force of law — Decision of Government held was not ultra vires — (Travancore Motor Vehicles Rules, R. 138) — (Motor Vehicles Act (1939), S. 64). (Para 8)

(b) Travancore Motor Vehicles Act (1 of 1117), Ss. 54(4) and 60(e) — Aggrieved person — Person making no representation — Right to apply for writ of mandamus — (Constitution of India, Art. 226(1)) — (Motor Vehicles Act (1939), Ss. 54(4) and 64(f)).

A person who does not make a representation as required by S. 54(4) cannot be said to be a person aggrieved by the decision of Government in appeal against the order of the Transport Authority and is not entitled to apply for a writ of mandamus. (Para 10)

Anno: C.P. C. Appendix III, Constitution of India, Art. 226, N. 11.

V. Sankara Menon, for Petitioner; Advocate General and T. R. Balakrishna Iyer (for Nos. 1 and 2), P. Govinda Menon (for No. 3) and N. K. Narayana Pillai (for No. 4), for Counter-Petitioners.

REFERENCE:

('52) AIR 1952 SC 12: (ILR 1951 Cut 637) /Para 10

ORDER: This is a petition under Section 226 of the Constitution of India for a writ of mandamus. The allegations in the petition are the following: The petitioner is the proprietrix of a public transport Company running buses in various routes. One of such routes is Edacochi-Kodanad 'via' Ernakulam, Alwaye and Perumbavoor. The first counter-petitioner represents the State of Travancore-Cochin. The 2nd counter-petnr. represents the Transport Authority of Travancore-Cochin. The 3rd counter-petner. is the proprietor of a public transport concern known as Jai Hind Motor Service. The 4th counter petitioner is the Managing Director of another public transport concern, namely, The Swaraj Motors Ltd., Kottayam.

(2) The petitioner is running two buses in the Edacochi-Kodanad route more than two years past. On the 16th May 1950 the Transport Authority published in the Government Gazette a Notification to the effect that no further applications would be entertained for permits for running buses along certain routes until otherwise notified. Two such routes are Edacochi-Kodanad and Palai-Alwaye.

(3) On 3-7-1950 the 3rd counter petitioner applied for a route between Bharananganam and Ernakulam via Perumbavoor and Alwaye. The major portion of the route is covered by Edacochi-Kodanad route & Palai-Alwaye route mentioned in the Notification of 16th May 1950. The Transport Authority rejected that application. The 3rd counter petitioner preferred an appeal to Government from the order of the Transport Authority and Government allowed the appeal and ordered the Transport Authority to issue a permit to the 3rd counter petitioner. It is alleged that this order of Government is ultra vires of the powers of Government under the Motor Vehicles Act, and the prayer in the petition is for quashing the order and for issuing a writ of mandamus restraining the 2nd counter petitioner from issuing the permit to the 3rd counter petitioner.

(4) Counter petitioners 1, 2 and 3 oppose the petition. The petitioner has filed an affidavit in support of his petition. The Assistant Secretary to Government has filed a counter affidavit on behalf of counter petitioners Nos. 1 and 2 and the 3rd counter-petitioner also has filed a counter affidavit.

(5) The question for consideration is whether the order of Government setting aside the decision of the Transport Authority is ultra vires of the powers of Government under the Motor Vehicles Act.

(6) Section 45 of the Act confers on the Transport Authority the power to issue a stage carriage permit. Section 44 provides what all matters should be considered by the Transport Authority in the matter of granting or refusing the grant a stage carriage permit. Section 54 prescribes the procedure that should be followed when an application for a stage carriage permit is made by any person. Under sub-section 3 of that section the application has to be published in the prescribed manner together with a notice of the date when the application and any representation in connection therewith would be considered. Sub-section 4 provides that no representation in connection with the application would be considered by the Transport Authority unless it is made in writing before the appointed date and a copy is furnished to the applicant. It is admitted that the petitioner did not make any representation in connection with this application. The 4th counter-petitioner made a representation and the Transport Authority re-

jected the application as it was of opinion that there was no necessity for a bus service on the route mentioned in the application.

(7) Section 60 provides for an appeal to Government from the order of the Transport Authority granting or refusing to grant a permit. Government thought that a through service between Bharananganam and Ernakulam was desirable, both places being important from the point of view of the travelling public. The 3rd counter petitioner's appeal was therefore allowed and the Transport Authority was directed to issue a permit.

(8) The main argument advanced on behalf of the petitioner is that under Rule 138 of the rules passed under the Motor Vehicles Act, the Transport Authority has got the power to limit the number of permits which may be granted for a specified route or area, that the Notification issued by the Transport Authority on 16th May 1950 was in exercise of that power, that it has the force of law, and that since that Notification has not been cancelled or withdrawn Government have no power to act in contravention of that Notification. Rule 138 reads thus:

"When the Transport Authority has, in the exercise of its powers under the Act, imposed a limit upon the number or permits of any class which may be granted for a specified route of a specified area and has already granted such number of permits of that class the Authority may decline to receive further application for such permits in respect of any such route or area."

This rule only gives the Transport Authority an option to decline to receive applications for permits in respect of any specified route or area. The Notification issued by the Transport Authority only amounts to an intimation given to the public that it has decided not to receive further applications for permits in respect of certain specified routes until otherwise notified. This Notification which is in fact only a notice given to the public has in no sense the force of law. It is not a rule made under the Act. The Transport Authority has no power under the Act to make rules which will have the force of law. Under Rule 137 it can make bye-laws subject to certain conditions for the conduct of its business. It is thus clear that the Notification issued by the Transport Authority is not a statutory Notification having the force of law.

Moreover, the words used in Rule 138 are "the Authority may decline". There is nothing to prevent the Transport Authority from receiving applications for permits even though it has by notification imposed a limit upon the number of permits that may be granted for a specified route or area. Such a Notification cannot affect the power of Government to reverse or modify the decision of the Transport Authority. So long as an appeal from the decision of the Transport Authority to Government is provided in the Act it is only the decision of Government that can be said to be the final decision. In this particular case, Government thought that a through service between Ernakulam and Bharananganam was desirable in the interests of the travelling public. It is difficult to see how this decision is ultra vires of the powers of Government.

(9) It has also to be noted that the Notification dated 16th May 1950 related to certain specified routes. The Bharananganam-Ernakulam route is not one of the routes mentioned in the Notification. It is true that this route will overlap two of the routes mentioned in the Notification. But the Notification as such does not apply to extended or curtailed routes unlike a later Notification issued by the Transport Authority on 13th April 1950. The Transport Authority itself did not regard the Bharananganam-Ernakulam route as one of the routes mentioned in the Notification of 16th May 1950.

Notwithstanding that Notification the Transport Authority received the third counter-petitioner's application and published it in the Gazette as required by the provisions of the Act. The reason why the Transport Authority rejected the application was that in its view there was no necessity for a bus service in that route. Thus, in any view of the case, the petitioner cannot rely on the Notification dated 16th May 1950 as a bar to Government exercising its appellate jurisdiction in respect of the decision of the Transport Authority.

(10) It has also to be stated that the petitioner cannot be said to be an aggrieved person so far as the decision of Government is concerned. He did not make any representation in connection with the application of the third counter-petitioner when notice of the application was published in the Gazette under sub-section 3 of Section 54 of the Motor Vehicles Act. Sub-section 4 of that section provides that

"No representation in connection with an application referred to in sub-section (3) shall be considered by the Transport Authority unless it is made in writing before the appointed date and unless a copy thereof is furnished simultaneously to the applicant by the person making such representation."

Under section 60(c) only a person "who, having opposed the grant of a permit, is aggrieved by the grant thereof" can appeal to Government from the decision of the Transport Authority. In the circumstances the petitioner cannot be said to be a person aggrieved by the decision of Government and entitled to apply for a writ of mandamus under Article 226 of the Constitution of India. Article 226 of the Constitution reads thus:

"226. (1) Notwithstanding anything in article 32, every High Court shall have power throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority including in appropriate cases any Government, within those territories, directions, orders or writs, including writs in the nature of 'habeas corpus', 'mandamus', 'prohibition', 'quo warranto' and 'certiorari', or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2). The power conferred on a High Court by clause (1) shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32."

In 'STATE OF ORISSA v. MADAN GOPAL', AIR 1952 S C 12, Kania C. J. observed thus:

"The language of the article shows that the issuing of writs or directions by the court is founded only on its decision that a right of the aggrieved party under Part III of the Constitution (Fundamental Rights) has been infringed. It can also issue writs or give similar directions for any other purposes. The concluding words of article 226 have to be read in the context of what precedes the

same. Therefore the existence of the right is the foundation of the exercise of jurisdiction of the court under this article."

It is however not necessary to decide in this case whether the right of the petitioner to move this court for relief under Article 226 of the Constitution is affected by his omission to make a representation before the Transport Authority opposing the grant of permit to the third counter-petitioner. I have found that there is no reason to hold that the decision of Government is in anyway ultra vires of the powers conferred on Govt. under the Motor Vehicles Act. The petitioner is therefore not entitled to the writ prayed for in the petition. The petition is dismissed with costs including advocate's fee Rs. 50/- for counter-petitioners 1 and 2 and Rs. 50/- for the third counter-petitioner.

B/V.R.B. Petition dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 445

KUNHI RAMAN C. J. AND SANKARAN J.

Kuruvilla Cheriyan, Appellant v. Kuruvilla Chandy, Respondent.

A. S. Nos. 22 and 23 of 1124 and O. S. No. 114 of 1122, D/- 29-6-1951.

(a) Civil P. C. (1908), S. 107 — Interference with finding of fact.

There are circumstances which would compel a Court of appeal to interfere with a finding of fact based upon the testimony of the witnesses whom the trial Judge had the advantage of seeing when they were giving their evidence in the witness box. (Those circumstances are where the trial judge has misappreciated the facts and the evidence). (Para 2)

Anno: Civil P. C., S. 107 N. 14 and 15.

(b) Civil P. C. (1908), O. 7, Rr. 14, 18 — Document relied upon by plaintiff in suit, and in his possession at time of filing plaint neither included in list of documents nor casually referred — Genuineness of document itself in question — Veracity of plaintiff's statement regarding his possession of document at date of plaint held doubtful specially when two judges who tried case on two different occasions came to conflicting decisions on the point—Document held could not be relied upon by the plaintiffs. (Para 3)

Anno: Civil P. C., O. 7 R. 14 N. 1; O. 7 R. 18 N. 1.

M. T. Paikeday, for Appellant; T. N. Subramania Iyer, Advocate General, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras
('49) AIR 1949 PC 32: (ILR (1949) Mad 487) 2
('51) AIR 1951 SC 120: (1950 SCR 781) 2

KUNHI RAMAN C. J.: These two are connected appeals arising from the decisions in two connected cases in the District Court at Kottayam. The Second defendant in O. S. No. 178 of 1118 of the Kottayam District Court is the appellant in A. S. No. 22 of 1124. He had purchased a piece of garden land with a tenement from the first defendant who is his brother-in-law (sister's husband). Subsequent to the purchase, the plaintiff who is also related to the wife of the first defendant as a distant cousin, filed the suit from which this appeal arises for specific performance of an alleged agreement to sell the identical property to him which, according to him, was entered into by the first defendant on or about the 15th of Medom 1117. There is also an alternative prayer for damages. The case was tried in the Kottayam District Court and the learned Judge, who heard the case had dismissed it. From that decision, the plaintiff filed an appeal in the erstwhile Travancore High Court and two learned Judges of that Court pronounced judgment remanding the case to the trial court for disposal in the light of the observations contained in their judgment. We are afraid that those observations were couched in fairly strong and rather ambiguous language, with the result that there was an apparent trepidation in the mind of the District Judge as to whether there was a directive emanating from the High Court that the case should be decided in a particular manner. This is apparent from what both the learned counsel appearing in this Court described as the halting terms in which the judgment of the learned Judge who has reheard the case appears to be composed. The case when it went back was heard by a different Judge, as during the interval there was a change in the personnel. But the learned Advocate General who appears for the plaintiff-respondent tells us that it was the Judge who disposed of the case at the second hearing that had recorded all the evidence when the case was tried for the first time. It was after the evidence was recorded that the Judge happened to be transferred from Kottayam and another Judge came in his place.

(2) In the judgment of the learned trial Judge, he has reached the conclusion that there was an agreement for the sale of the property which was entered into between the plaintiff and the first defendant and that the plaintiff was entitled to specific performance of that agreement. We should have attached importance to the opinion formed by the learned trial Judge on the evidence of the witness whom he had the advantage of seeing and observing when they were giving evidence in the witness box but for certain material defects in the judgment. As contended on behalf of the plaintiff respondent by the learned Advocate General, the decision of a trial Judge arrived at on questions of fact in such circumstances should not be lightly interfered with in appeal. This has been recognised both by the Judicial Committee of the Privy Council 'VEERASWAMI v. NARAYYA', A. I. R. 1949 P. C. 32 and by our Supreme Court in the decision reported in 'SARJU PERSHAD v. JWALESHVARI PRATAP', A. I. R. 1951 S. C. 120. But it is not an unqualified rule that is recognised in these decisions. There are circumstances which would compel a court of appeal to interfere with a finding of fact based upon the testimony of the witnesses whom the trial Judge had the advantage of seeing when they were giving their evidence in the witness box. In our judgment, those circumstances are present in the case which has come up on appeal before us and we are, therefore, constrained to interfere with the decision arrived at by the learned trial Judge.

(3) Learned Counsel for the plaintiff-respondent relies very strongly upon Ext. A which is a letter admittedly signed by the first defendant. This bears date 19-7-1118. In this letter the opening words are to the effect that he (1st defendant) had stated that he would give the property to his brother-in-law. The contention urged in the court below on behalf of the first defendant was that the reference is to the

second defendant who is the brother-in-law of the first defendant and not to the plaintiff who is a distant cousin of the first defendant's wife. This letter, according to the learned counsel for the plaintiff-respondent, strongly supports the version given by the plaintiff that there was an agreement to sell. The first defendant stated that he had written this letter but that it was meant to be delivered to the second defendant who is his brother-in-law and not to the plaintiff. The plaintiff, on the other hand, swears that this letter was received by him from the first defendant in answer to a letter which he had written, copy of which is not produced. Ext. A does not contain any reference to the addressee on its face. There is no suggestion that it was enclosed in a cover. On the reverse of the letter there is no address written of the person for whom it was meant. It is a small piece of paper on which the first defendant has scribbled a few lines and the addressee is referred to in the opening words of the letter as 'my dearest brother-in-law'. It is possible as contended by the learned Advocate General, that when the first defendant is writing a letter to the plaintiff he may refer to him as his brother-in-law. But there is no evidence in the present case that he was in habit of doing it or that he had done it on any previous occasion. This letter was produced in the trial court nearly seven months after the date on which the plaint was filed. The date of the plaint is 11-11-1118. Issues were framed on 7-4-1119. The affidavit of documents was filed by the plaintiff on 26-6-1119 in which reference was for the first time made to this letter. According to the Travancore Code of Civil Procedure Order 7, R. 14 where a plaintiff sues upon a document which is in his possession or power he shall produce it in court when the plaint is presented and at the same time deliver the document or a copy thereof to be filed with the plaint. It may be said that Ext. A is not a document upon which the suit is based and, therefore, that clause may not be attracted. But clause 2 says as follows:

> "Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint."

Not only was there no such list in which this document was mentioned annexed to the plaint or included in it but even a casual reference to this document is conspicuous by its absence in the plaint. If, as the plaintiff says, he had this document in his possession when the plaint was filed and it was a reply which he received from the first defendant there is no reason why he should not have at least incidentally or casually referred to it in the plaint when he stated the terms of the contract between him and the first defendant about the sale of the land. On the other hand, the version given by both the defendants is that the first defendant had written this letter to the second defendant and that somehow the plaintiff had succeeded in obtaining it. When there is this doubt cast upon the circumstance in which the plaintiff came into possession of this document, we cannot lightly brush aside the provisions of Order 7, Rule 14, and say that it was not incumbent upon the plaintiff to have complied with the provisions of sub-rule (2). The learned Advocate General states that there are decisions of the erstwhile Travancore High Court to the effect that this sub-rule need not be strictly observed when there is no dispute about the genuineness of a document. But here there is an equally important point involved with regard to the party for whom Ext. A was meant. The genuineness of Ext. A is not doubted. Of course, the writer of the document, the first defendant, admits that he sent it. But the question as to whether it was addressed to the plaintiff and delivered to him or whether it was addressed to the second defendant and delivered to him is a vital point for consideration. It is as important as if the genuineness of the document was in question. The consequences are equally serious. In the circumstances, we are of the view that the non-observance of the provisions of sub-rule (2) of R. 14 raises a strong suspicion about the veracity of the statement made by the plaintiff that he had this letter all the time with him and that it was a letter written to him and delivered to him at the instance of the first defendant. We have already adverted to the fact that the case was tried on a prior occasion by the predecessor-in-office of the District Judge from whose judgment the present appeal is brought. That other Judge had found in his judgment that this letter was addressed by the first defendant to the second defendant and the plaintiff must have by some sinister tactics managed to obtain possession of this letter, in order that he may use it to implement his case. Therefore, it will be seen that this is a matter on which two Judges who on different occasions tried the case arrived at two conflicting conclusions and the circumstances already narrated raise a strong suspicion as to whether the plaintiff did have this letter as he says when he filed the plaint or whether he succeeded in obtaining it long after the plaint was filed but just in time to make use of it at the trial of the case.

(4) Another circumstance which we consider necessary to advert to in the course of this judgment is this. The property which is the subject-matter of this appeal originally belonged to the second defendant's brother, i.e., another brother-in-law of the first defendant. The first defendant purchased it from the owner in 1113. It was in 1117, according to the plaintiff, that the first defendant entered into a contract to sell this property to him. The plaintiff himself had reasonable suspicion as to whether the second defendant or the members of his family would try to get back this property which had originally passed from their family to the hands of the first defendant. In the evidence of the plaintiff, he admits that he went and asked the second defendant whether he had any intention of purchasing this property. If there was an unconditional contract between the plaintiff and the first defendant it does not seem to us to be a very probable circumstance that the plaintiff would have contacted the second defendant or after contacting him if his doubts were cleared whether the plaintiff would not have insisted upon something in writing from the first defendant in order that he may be sure that the property will not be attempted to be got back into the family by the second defendant or his brother.

(5) Stronger than all these circumstances is the fact that on 16-9-1117 the plaintiff took a lease of this identical property for a period of one year. According to the plaintiff, the agreement to sell the property to him was entered into prior to the date of this lease deed. Not

a word is found in this lease deed about any such agreement to sell. On the other hand, the express terms of the lease deed are to the effect that on the expiry of the period fixed in the lease deed, without giving any trouble, the plaintiff will surrender possession of the property to the first defendant. It is hardly likely that the plaintiff would have consented to the incorporation of such a term in the lease deed, if prior to the execution of that document there was concluded a contract between him and the first defendant that the property should be sold to him. The wording of this document leads to a suspicion that the first defendant did not have faith in the bona fides of the plaintiff. He was afraid that the plaintiff may give trouble even when the period of the lease expired and the time came for delivering back possession of the property. If he wanted to sell the property to the plaintiff, there was no necessity for such a stringent condition to have been incorporated in the lease. This is another circumstance against the case of the plaintiff.

(5a) We have referred to the manner in which the learned trial Judge has disposed of the case. It is enough to cite two instances of a variation between the case set up by the plaintiff and the facts found by the learned trial Judge. The case for the plaintiff was that the agreement to sell was entered into before the date of the lease deed, Ext. C. In the judgment of the learned trial Judge, he seems to be inclined to take the view that it must be after the date of Ext. C. Again, the plaintiff came forward with a specific case that the agreement was to sell the property to him for Rs. 1500. This has not been accepted by the learned trial Judge. All that we can gather from the judgment is that he was not inclined to believe the version of the plaintiff when he said that Rs. 1500 was the price fixed for the sale. The conclusion reached by the trial court is that the agreement was to sell the property for a fair price and the amount fixed on that basis by the learned Judge is Rs. 2000 which is the price for which the first defendant sold the property to the second defendant on 9-8-1118.

(6) It is thus clear from the judgment of the learned trial Judge that he was not prepared to believe the plaintiff's case as set forth in the plaint and in spite of that, he has accepted a part of the plaintiff's case relating to the agreement to sell the property. On the evidence which we have carefully scrutinised and after hearing the arguments of the learned Advocate General who has contested this case ably and very strenuously, we are taking the view without any hesitation that the decision of the learned trial Judge cannot be supported. The decree for specific performance must be set aside. A. S. No. 22 of 1124 is therefore allowed with costs. All the incidental consequences of the suit for specific performance being dismissed must follow and must be provided for in the decree of this Court, with special reference to the directions contained in the judgment of the erstwhile Travancore High Court with regard to the costs of the appeal that was presented on a previous occasion from the judgment that was pronounced after the case was first tried by the District Judge of Kottayam.

(7) A. S. NO. 23 OF 1124: As we have already stated, this appeal is connected with A. S. No. 22 of 1124. The plaintiff in O. S. No. 114 of 1122, Kottayam District Court, is the appellant. He is the second defendant in the connected suit, O. S. No. 178 of 1118 from which A. S. No. 22 of 1124 was brought to this Court. On the strength of the purchase made by him from the first defendant in the connected case, he brought O. S. No. 114 of 1122 against the plaintiff in the connected case for recovering possession of the suit property after the termination of the lease in favour of that person and for mesne profits and consequential reliefs. Since the learned trial Judge had decreed the suit for specific performance (O. S. No. 178 of 1118) he did not try the issues that were framed in O. S. No. 114 of 1122 but merely dismissed the suit. Since we have dismissed the suit for specific performance, it has become necessary that O. S. No. 114 of 1122 must be tried. There was no trial when the case was disposed of. The decision was based entirely upon the decree for specific performance granted by the learned trial Judge in O. S. No. 178 of 1118. But it is common ground that issues 1 and 2 framed in the suit need not be tried in view of the decision of this Court in A. S. No. 22 of 1124. All the other issues, namely, issues 3 to 7, must be tried by the court below. With this direction the decree of the court below is set aside and the suit remanded for disposal.

C/R.G.D.

Orders accordingly.

A. I. R. 1952 TRAVANCORE-COCHIN 447

GANGADHARA MENON AND VITHAYATHIL JJ.

Ittyathi Govindan, Appellant v. Narayanan Balkrishna Panicker and others, Respondents.

A. S .No. 319 of 1124, D/- 3-7-1951.

(a) Travancore Jenmi and Kudiyan Act (V (5) of 1071), S. 5 — Does not apply where express provision for surrender is made.

Section 5 applies only to kudiyans who hold lands under kanom tenure, namely tenure which provides for periodical renewal. The section only affirms the right of permanent occupancy conferred on kanom tenants under the Royal Proclamation of 1042. It does not apply to cases in which express provision for surrender is contained in the document. (Para 3)

(b) Travancore Jenmi and Kudiyan Act (V (5) of 1071), S. 42 — Applies to Kanapattoms and not to mortgages: 23 Trav LR 162. Distinguished. (Para 4)

(c) Civil P. C. (1908), O. 34, R. 10 — Suit for redemption — Defendants raising untenable contentions — Misconduct on their part — Order that parties to bear their own costs held not improper. (Para 4)

Anno: C. P. C., O. 34, R. 10, N. 3.

T. S. Krishnamoorthy Iyer, for Appellant; P. Govindan Nair, for Respondent No. 1.

REFERENCE..... Para.

23 Trav LR 162 4

JUDGMENT: The 2nd defendant in O. S. No. 671 of 1116 of the District Munsiff's court of Sherthallai is the appellant in this case. The suit is for redemption of Ext. A mortgage dated 10-6-1083 executed in favour of the tarwad of defendants 1 to 27 by the plaintiff's tarwad. It was a renewal of Ext. B mortgage of 26-10-1060. Defendants 28 and 29 are

subsequent encumbrancers of the property. Defts. 2, 5 and 9 contested the suit, the principal contesting defendant being the 2nd defendant. The main contention is that the property was demised on an irredeemable tenure. The defendants also claimed value of improvements and pleaded discharge of michavaram. The lower court held that the property was held under a redeemable mortgage and gave the plaintiff a decree for redemption. A sum of Rs. 1166-15-11 was awarded as value of improvements to the defendants. The plea of discharge of michavaram was found against. An amount of Fs. 304 was awarded to the plaintiff as damages on account of the diminution of pattom. Both parties were ordered to bear their costs. Only two points were argued by the appellant in this appeal, namely, the redeemability of the property and the order relating to costs.

(2) With regard to the first point the learned advocate for the appellant argued that the defendants are entitled to the right of permanent occupancy in the plaint property as enjoined by Sections 5 and 42 of the Travancore Jenmi and Kudiyan Act (V of 1071). Under Section 5 of the Act, if the kudiyan of a non-malayali Brahmin jenmi or his predecessor-in-interest or both have uninterruptedly held a holding for a period of not less than 25 years he will be entitled to right of permanent occupancy in the holding. Section 42 provides that the Act will not apply to any kanapattom executed since the 25th day of Karkadagom 1042 which expressly provides for redemption. This implies, according to the learned advocate for the appellant that in the case of kanapattoms executed before 25th Karkadagom 1042, even if they provide for redemption, the tenant will be entitled to the right of permanent occupancy. It will be seen that Ext. B mortgage of 26-10-1060 is a renewal of Ext. 11 mortgage of 5-11-1048. Ext. 11 shows that the property had been in the possession of the tenant even before the date of the document, one of the items of consideration recited in the document being the value of improvements due to the tenant. It is therefore argued that the tenant was in possession of the property even before 1042.

(3) For the applicability of Section 5 of the Act it is necessary to establish that the holder of the property is a 'Kudiyan' coming within the definition of the Act. 'Kudiyan' is defined in the Act as a person who holds lands on kanapattom tenure. 'Kanapattom' is defined as a demise of jenmom land made or renewed by the jenmi by whatever name such demise is designated. 'Jenmom land' is defined as land (other than Pandaravagai, Sreepandaravagai, Kandukrishi or Sirkar Devaswom land recognised as such in the sirkar accounts) which is either entirely exempt from Government tax or, if assessed to public revenue, is subject to Rajabhogam only, and the occupancy right in which is created for a money consideration (kanom) and is also subject to the payment of michavaram or customary dues and the periodical renewal of the right on payment of renewal fees. From these definitions it can be seen that Section 5 of the Act applies only to Kudiyans who hold lands under kanom tenure, namely, tenure which provides for periodical renewal. The section only affirms the right of permanent occupancy conferred on kanom tenants under the Royal Proclamation of 1042. It does not apply to cases in which express provision for surrender is contained in the document. In the present case there is express provision for surrender in Exts. 11, B and A, and in no sense can these documents be said to have created a kanom tenure, the principal characteristic of which being irredeemability.

(4) Section 42 also applies only to kanapattoms and not to mortgages. The learned advocate for the appellant referred to a ruling reported in 23 Trav. L.R. 162 in support of his position. In that case it was the applicability of Section 44 and not Section 42 of the Act that was considered by the Travancore High Court. That ruling does not apply to the present case.

(5) We are therefore of opinion that (neither?) section 5 nor section 42 of the Jenmi and Kudiyan Act applies to the present case. The parties are bound by the terms of the document. Ext. A expressly provides for surrender of the property after the expiry of 12 years from the date of the document. We have no doubt that the mortgagee is bound to surrender possession of the property as stipulated in Ext. A.

(6) With regard to costs we do not find any reason to interfere with the order of the lower court. The defendants raised untenable contentions in the suit and it cannot be said that there was no misconduct on their part. In the circumstances the order directing the parties to bear their respective costs does not appear to be improper.

(7) No other point was argued by the learned Advocate for the appellant.

(8) An objection memorandum was filed on behalf of the 1st respondent claiming more amount as damages on account of diminution of pattom. This was not pressed by the learned advocate for the 1st respondent and we do not find any reason to enhance the damages awarded by the lower court on this account.

(9) For the reasons mentioned above we confirm the decree of the lower court and dismiss this appeal and objection memorandum with costs.

C/R.G.D. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 448

SUBRAMANIA IYER J.

Kochappi Ammal, Petitioner v. Ammu Ponnammal, Counter-Petitioner.

C. R. P. No. 91 of 1951, D/- 15-6-1951.

Civil P. C. (1908), S. 115 and O. 40, R. 1 — Order directing disposal of income — Revision against.

An order giving a direction to the receiver regarding the disposal of the income collected by him, is one subject to an appeal and hence no revision can be entertained against it. (Para 1)

Anno: C.P.C., O. 115 N. 8; O. 40 R. 1 N. 51 Pt. 21.

T. K. Narayana Pillai, for Petitioner; S. Boothalingam Iyer and R. Mrithunjayan, for Counter-Petitioner.

ORDER: Defendant 1 in a suit for maintenance seeks revision of an order passed by the Court below in effect directing the Receiver appointed by that Court to give from out of his collections, maintenance at the rate of Rs. 5 per mensem for all the 4 plaintiffs together upon indemnity to be given by them. The complaint is that the properties, to collect whose income the Receiver was appointed, are sub-tarwad properties in which the plaintiffs have no interest. In connection with the application for

the appointment of a Receiver filed on behalf of the plaintiffs, it appears it has been admitted that the properties are tarwad properties and Defendant 1 who was in management, was directed to deposit a certain sum by way of income from these properties before the appointment of the receiver. Being a direction given to the receiver regarding the disposal of the income collected by him, the order is one subject to an appeal and this revision is not fit to be entertained. The revision petition, is, therefore, dismissed but in the circumstances without costs.

C/D.R.R. Revision dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 449

KUNHI RAMAN C. J.
AND SUBRAMANIA IYER J.

State v. Govinda Pillai Gopala Pillai, Respondent.

Criminal Appeal No. 175 of 1950, D/- 30-7-1951.

(a) Penal Code (1860), S. 100 — Quarrel between D and A while playing cards—D hitting A on face with wood plank — About 20 days after incident D going out with lighted torch — A accosting him on way — D inflicting injury on A with torch — Burn more than skin deep, on right side of chest — A in consequence inflicting injury on abdomen by sharp instrument by giving a deep thrust—Injury fatal—Held that there was apprehension in mind of A that D would cause grievous hurt — A held was justified in causing death. (Para 4)

Anno: Penal Code, S. 100 N. 1.

(b) Evidence Act (1872), S. 32 — Dying declaration — There must be statement by deceased about cause of his death — Dying declaration not making mention of instrument used by deceased against accused — Dying declaration held could not be ruled out in entirety. (Para 5)

Anno: Evidence Act, S. 32 N. 9.

(c) Evidence Act (1872), S. 24 — Retracted confession — Evidentiary value is not appreciable in absence of corroboration. (Para 5)

Anno: Evidence Act, S. 24 N. 9.

K. C. Chacko, Public Prosecutor, for the State; K. N. Narayanan Nair, for Respondent.

JUDGMENT: This appeal is brought on behalf of the State from the order of acquittal made by the learned Sessions Judge of Quilon in Sessions Case No. 14/50. The accused was charged with murder under Section 301 of the Travancore Penal Code. The learned trial Judge on hearing the evidence reached the conclusion that death was caused in the lawful exercise of the right of private defence and that consequently the accused has not committed the offence of murder. He has passed an order of acquittal.

(2) The facts will have to be stated briefly in order to appreciate the contentions of the parties. The accused was not on good terms with the deceased. About 19 days prior to the date of occurrence, that is to say on 26-7-1124, while they were engaged in playing cards in the house of a mutual friend, they quarrelled. This was followed by the deceased taking a plank of wood that was nearby and hitting the accused severely on the right side of his face as a result of which the accused seems to have fainted. The date of occurrence was 17-8-1124, as already stated 20 days after the first quarrel between the parties. At about 9 P.M. on 17-8-1124, the deceased was going from his own house to the house of his wife. He had a lighted cadjan torch in his hand. After travelling a short distance from house, while he was walking along a paddy field the accused accosted him. There were no eye-witnesses to speak about the sequence of events that followed. There is a dying declaration recorded in the Mavelikara Hospital where the deceased was removed soon after he had sustained the fatal injury and there is also a confession of the accused recorded by a competent Magistrate about three hours after he was arrested on 22-8-1124. According to both these versions, the accused used a sharp instrument, which has been produced as M.O. VI at the trial and with that sharp instrument he dealt a blow in the region of the abdomen of the deceased which pierced the abdominal cavity and a part of the intestines protruded through that wound. In the course of the trial, the Police seem to have tried to improve the case by introducing another weapon which has been marked as M.O. III. This is a sharp dagger. M.O. VI can be equally effective in causing the death of the victim.

(3) In the confession made by the accused he stated that when he was face to face with the deceased at the scene of occurrence, the deceased hit him with the lighted torch on the right side of his chest. It was really a thrust with the lighted torch and the injury cannot be described as light. The doctor, Pw. 11 who examined the body of the accused has spoken to the effect that it was not merely a light burn but according to the language used by him it can be described as a burn of the second degree which means it is more than skin-deep. Then, according to the accused he used M.O. VI for preventing further attacks by the deceased. In the dying declaration the deceased does not refer to the attack made by him with this lighted torch. He only refers to the stab injury inflicted on his body by the accused. There cannot be any doubt that at the time of the encounter, the lighted torch was used by the deceased. This is evident from the injury that was noticed on the body of the accused and from the evidence of the doctor Pw. 11.

(4) In the absence of eye-witnesses, one has got to consider the probabilities of the case. There is only circumstantial evidence to indicate the probabilities. When the deceased found the accused in front of him on what was evidently a dark night, he could not have anticipated any friendly overture on the part of the accused in view of the fact that about 19 days previously he had dealt a severe blow with a plank of wood on the side of the face of the accused. Therefore it is consistent with the probabilities of the case that the deceased used his torch first. If this incident had happened, then there is justification for the injury inflicted by the accused on the body of the deceased. The lighted torch was used on the chest of the accused. If the deceased conceived the idea of causing more serious injuries to the accused he could have thrust it next on the face of the accused. That was an apprehension that the accused might have reasonably had. If the deceased had used the torch on the face of the accused that might have had the effect of putting out the sight of at least one of the eyes. Such an injury would definitely come within the definition of 'grievous hurt' in Section 20 of the Travancore Penal Code. When there is reasonable apprehension

of grievous hurt, the person labouring under the apprehension would be justified in voluntarily causing death. Therefore, if it is regarded as a case in which the accused voluntarily caused the death of the victim by stabbing him with M.O. VI there was sufficient justification for such an act.

(5) There are certain parts of the judgment of the learned trial Judge which cannot be supported. For example in dealing with the nature of a confession and in dealing with the nature of a dying declaration the learned Judge has committed serious mistakes. He has recorded his opinion that a dying declaration cannot be acted upon unless it is exhaustive and discloses all the surrounding circumstances. This is inconsistent with the provisions of Section 32 of the Indian Evidence Act which at the relevant period was applicable in the Travancore State. All that that section requires is that there must be a statement made by a person about the cause of his death. Merely because in the dying declaration there is no reference made to the use of the torch in causing an injury on the body of the accused, it cannot be said that the dying declaration should be ruled out entirely in dealing with the case.

Similarly, with regard to the confession, the learned Judge has made a mistake in imagining that the words were put into the mouth of the accused when he made the confession. We are not able to accept this view. The evidence has been read out to us. There is nothing to indicate that there was any influence exercised over the accused before he made the confession. No doubt, since the confession was retracted the evidentiary value to be attached to the confession is not appreciable in the absence of corroboration. Apart from that the confession cannot be attacked as it has been attacked in the judgment of the learned trial Judge.

(6) Without accepting the view expressed by the learned Judge on these points, we are satisfied that the conclusion reached by him that the attack made by the accused was in the legitimate exercise of the right of private defence is correct. The order of acquittal which has followed this appreciation of the evidence does not, therefore, call for interference by this Court. The appeal filed by the State must be dismissed.

C/R.G.D. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 450

KOSHI AND GOVINDA PILLAI JJ.

Kanakku Neelacanta Pillai and another, Appellants v. State and others, Respondents.

A. S. No. 477 of 1124(T), D/- 26-10-1951.

Travancore Revenue Recovery Act (1(I) of 1068), S. 39 — Sale of property for land revenue due from other property — Setting aside of.

A property which belongs to A, but which is included in the 'thandaper' of B cannot be sold free of all encumbrances for arrears of state land revenue due, not from the property sold, but from other properties belonging to B. The sale is not binding on A and is liable to be set aside: 28 Trav. L.J. 226 (F.B.) Foll. (Para 7)

M. Madhavan Nair, for Appellants; K. C. Chacko, Government Pleader, for the State.

REFERENCES: Courtwar/Chronological/ Paras
A. S. No. 263 of 1123 (Trav) 6
('37) 28 Trav LJ 226 (FB) 5, 6, 7
('42) 32 Trav LJ 325 6
('50) 1950 Ker LT 322 6

GOVINDA PILLAI J.: The plaintiff is the appellant. His suit was to set aside a revenue sale relating to the plaint property which is Survey No. 2036. The property stands in the 'thandaper' of the 3rd defendant, and for arrears of tax due from the 3rd defendant from his other properties the plaint property was sold in revenue auction on 30-12-1122. The plaintiff stated that these proceedings were initiated by the 3rd defendant collusively with the Pakuthy Officials and that the property was purchased in the name of his Kariasthan the 2nd defendant in the case. This sale was said to be vitiated by material irregularities. The plaintiff's case was that the property in question originally belonged to the 3rd defendant's Illom, that the same had been demised on Kanom to one Plavannarackal house people, that his tarwad obtained a mortgage of this property before 1030 from the Kanomdar's tarwad, that by lapse of time his tarwad had obtained the full right to the property, that in a partition deed in his tarwad this property was included and allotted to his share and that he had therefore the right to get a declaration of his title to the property and to see that the revenue sale was set aside.

The State is the 1st defendant. Their contentions were that the 'thandaper' for the suit property, 'thandaper' No. 21 stood in the name of the 3rd defendant, that the property in question was sold in revenue auction on 30-12-1122 for realisation of tax due under the said 'thandaper' No. 21, that demand notices were issued to the thandaper-holder, that the auction came to be conducted as the tax due was not paid by the 3rd defendant, that the plaintiff was not entitled to any notice as regards the steps taken in the revenue proceedings, that the sale was valid, that the suit was barred by limitation and that the plaintiff was not entitled to any relief. The 2nd defendant maintained that the revenue sale and the proceedings which led to the same were valid and binding on the plaint property and that the plaintiff was not entitled to the decree prayed for.

(2) The lower court found that the plaintiff was the full owner of the plaint property, that the plaintiff though he might be the Kudiyan who had obtained an absolute right to the property by non-payment of the Jenmikaram to the Jenmi for a long time was not entitled to notice, that though there had been collusion between the revenue subordinates and the 3rd defendant, with the object of getting at the property there were not sufficient materials enabling it to set aside the revenue sale, that the suit was not barred by limitation and that in view of the revenue sale the suit had to be dismissed, but without costs because of the collusion between the revenue subordinates and defendants 2 and 3.

(3) The plaintiff attacked the decree. The State has filed a cross-appeal claiming the costs disallowed in the lower court. The 2nd defendant has filed objections to the findings that the property belonged absolutely to the plaintiff, that there was collusion between the revenue authorities and the 3rd defendant, that there was some irregularity in the proceedings that led to the revenue sale, and that the suit was not barred by limitation. He also objected to the direction relating to costs.

(4) The 2nd defendant, auction-purchaser, had filed objections to the findings but he himself and his Advocate were not present to press the same or to argue the appeal. Mr. Chacko, appearing for the State admitted that the revenue sale in question was not for arrears of tax due on the land sold, but for tax due on other lands included in the Patta for the plaint property. The State had also not objected to the finding that the plaintiff had become the absolute owner of the property. The contention raised by the learned Government Pleader was that though the sale of the plaint property was not for arrears of tax due from it, the sale would be valid and binding on the property sold. According to him, the only defect would be, that the sale would not free the property of all its encumbrances as laid down in Section 39 of the Travancore Revenue Recovery Act. He would say that the plaintiff had not put forward any case that he was a charge-holder. Since the plaintiff's case was that he was the full owner of the property he could not get the immunity which he would have had, had he been a charge-holder.

There appears to be some fallacy in this argument of the learned Government Pleader. He was not able to bring to our notice any decided case which held that if a property being included in a 'thandaper' had been sold in revenue auction for tax not due from the property but due from other properties in that 'thandaper', such a sale would be binding on the property sold even though the thandaper-holder had lost all his rights over the property or had parted with the same long before the date of the revenue sale. It would be proper to examine here the cases decided by the Travancore High Court.

There is some difference between the provisions in Section 39 of the Travancore Revenue Recovery Act and the Revenue Recovery Acts elsewhere. Section 39 of the Travancore Act would say that when a revenue sale was held for arrears of revenue due on the land sold, it would be free of all encumbrances on the property. It had been interpreted to mean that this provision would also be governing the revenue sales if the same was for tax due on the property sold as well as for properties belonging to the defaulter. This principle has not been further expanded to any extent and it does not appear that it is also possible to do so. The provisions in Section 39 of the Travancore Revenue Recovery Act are different from those in the Indian Dominion so that the decisions elsewhere on this matter may not be of any help.

(5) In 'NARAYANAN v. NAYINA MUHAMMATHU', 28 Trav. L. J. 226 (F.B.) the relevant decided cases were considered and the following rules deduced:

"(i) When an item of immovable property is sold for arrears of revenue due on such land the sale is free of all encumbrances.

(ii) When an item of immovable property is sold for arrears of revenue due not on the property but on other lands belonging to the defaulter the sale will not affect prior encumbrances, if any, on the land sold."

A third question would then necessarily arise for answer. If the property was sold for arrears of tax due thereon, and for tax due from the defaulter as regards his other properties, then what would be the position of prior encumbrances on that property. This was answered thus at page '234 of 28 Trav L J.'

"It follows therefore that under Section 39 the sale will extinguish the prior encumbrances even though it was held for the recovery of arrears due on the land sold as well as on other lands belonging to the defaulter."

(6) We had also given our reasons to support this conclusion in our judgment in 'SUBRAMONIA ARUMUGHAM v. SAVARIMUTHU NADAR', A. S. No. 263 of 1123 (Trav.). The ruling in 'NARAYANAN v. NAYINA MUHAMMATHU', 28 Trav L J 226 had been followed subsequently in 'VARKI v. DEWAN OF TRAVANCORE', 32 Trav L J 325 and 'KRISHNAN KARTHAVU v. KUMARASWAMI NAMBUDRIPAD', 1950 Ker L T 322.

(7) For the purpose of the present case, the important question for consideration is whether the plaint property which belonged to the plaintiff, but which was included in the 'thandaper' of the 3rd defendant, could be sold free of all encumbrances for arrears of State revenue due, not from the property sold, but from other properties, admittedly belonging to the 3rd defendant. The second question decided in 'NARAYANAN v. NAYINA MUHAMMATHU', 28 Trav L J 226 would answer this, i.e., that the sale would not affect any prior encumbrances, if any, on the property sold.

In other words this would mean that the rights of third parties would not be affected by the sale. The sale would be like any other voluntary or involuntary sale, transferring only the defaulter's right, title and interest in the property. If he had no right, title or interest in the property, then the auction-purchaser does not get anything by the sale. There were no arrears of State revenue due from the plaint property. The third defendant had lost this right in this property. Under these circumstances, the sale of this property for arrears of tax due on other lands and payable by the 3rd defendant could not be binding on the plaintiff or the plaint property. The sale has therefore to be set aside.

(8) The lower court had in clear and unambiguous terms held thus:

"So it is clear that there has been collusion between the revenue subordinate and the 3rd defendant and in order to get at the property the latter influenced the revenue subordinates to bring it to sale and purchased it in the name of his Kariasthan, the 2nd defendant."

The plaint property is paddy land 24 cents in extent, and it had been sold for Rs. 43. The sale itself was brought about under suspicious circumstances. The lower court was not quite sure whether these circumstances would be sufficient to set aside the sale. Whatever that might be, the plaintiff is entitled to succeed on the point mentioned by us in the previous paragraph. We set aside the decree of the lower court and declare the plaintiff's title to the plaint property. The revenue sale held on 30-12-1122 is set aside and it is declared to be not binding on the plaint property. The plaintiff will get his costs in both the courts from the contesting defendants 1 and 2. The objection memorandum filed by defendants 1 and 2 are dismissed with costs.

B/V.R.B. Sale set aside.

A. I. R. 1952 TRAVANCORE-COCHIN 452

KOSHI AND GOVINDA PILLAI JJ.

Neelakanta Pillai Mathevan Pillai and others, Appellants v. Neelamma Pillai Thankachy Bagavathi Pillai Thankachy, Respondent.

Second Appeal No. 213 of 1950, D/- 20-8-1951.

(a) Malabar Law — Thavazhi — Formation by agreement of parties.

It is an impossible position that a thavazhi or a sub-tarwad as such can be formed by mere agreement of parties. Marumakkathayam Law does not countenance the formation of such a unit capable of holding properties with the incidents attaching to marumakkathayam properties. 1950 Trav-C LR 88 FB, Rel. on. (Para 3)

(b) Civil P. C. (1908), S. 11 — Plea of res judicata.

A plea founded upon the rule or principle of res judicata is a plea that can be waived by a party. A party is not entitled to go into the question of res judicata when it has not been properly raised by the pleadings: AIR 1929 Cal 163 and AIR 1936 PC 258. Rel. on. (Para 8)

Ordinarily, it is not permissible to allow a plea of res judicata to be raised for the first time in appeal: AIR 1941 Mad 815, Rel. on; AIR 1938 Bom 23, Ref. (Para 8)

Anno: C. P. C., S. 11 N. 6.

N. Varadaraja Iyengar, for Appellants; K. P. Abraham and K. T. Ninan, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('36) AIR 1936 PC 258: (164 Ind Cas 17) 8
('38) AIR 1938 Bom 23: (173 Ind Cas 113) 8
('29) AIR 1929 Cal 163: (114 Ind Cas 129) 8
('41) AIR 1941 Mad 815: (197 Ind Cas 448) 8
('50) 1950 Ker LT 705: (1950 Trav-C LR 88 FB) 3

JUDGMENT: This second appeal is directed against an appellate order of the Nagercoil District Court raising an attachment effected in execution of a decree of the Padmanabhapuram Munsiff's Court over two items of immoveable properties. The execution court overruled the objection of the legal representative of the deceased defendant that the properties were not liable to attachment; but her appeal before the District Court was successful. The legal heirs of the assignee-decree-holder at whose instance the attachment was effected have brought this second appeal against the learned District Judge's order.

(2) The relevant facts of the case are as follows: The decree directed the realisation of the amounts due thereunder by sale of the hypotheca and personally from the defendant. The defendant who was a junior member of a Nair tarwad, had while the tarwad remained undivided acquired two mortgage rights over the attached properties and under the tarwad partition evidenced by Ext. 1 dated 20-3-1102 these rights together with other properties were set apart to a group composed of himself and the respondent, a grand niece of his. After the division a further mortgage right over the same properties was acquired in the name of the defendant. The defendant died before the decree was satisfied and it was after some abortive attempts to realise the amounts due as per the decree by execution that the attachment in question was effected.

The partition deed provides that the properties mentioned in B Schedule thereof shall be jointly enjoyed by the defendant and his grand niece and that on the death of the defendant the latter will become the absolute owner of all the B Schedule items. The partition deed does not specifically refer to the three mortgage rights; but it is the properties comprised in the mortgages that are mentioned instead in the B Schedule as items 4 and 5. The respondent's mother had other children besides the respondent. In Ext. 1 while the defendant and the respondent took for themselves B Schedule properties jointly the mother and some of her other children took the G Schedule properties and the remaining children were allotted H and I Schedule properties.

(3) The objection the respondent raised before the execution court was that the properties in B schedule belonged to a sub-tarwad composed of the defendant and the respondent and that as the former had no alienable or heritable interest in the properties they were not during his lifetime or thereafter liable to be proceeded against for his personal or separate debts. Both the lower courts overruled this claim, it is an impossible position that a thavazhi or a sub-tarwad as such can be formed by mere agreement of parties. It was freely conceded by the respondent's learned Counsel that Marumakkathayam law does not countenance the formation of such a unit capable of holding properties with the incidents attaching to marumakkathayam properties.

Also it was so held recently by a Full Bench of this Court in 'KALLIANIKUTTY AMMA v. DEVAKI AMMA', 1950 Ker L T 705 (FB). On this identical ground it was that the lower courts repelled the objection that the attached properties formed sub-tarwad properties. The execution court however thought that as the original acquisitions viz., the three mortgage rights stood in the name of the defendant whatever interest the respondent derived in the properties under the partition arrangement or by the death of the defendant was subject to the liability of those properties for the debts of the defendant. This view as pointed out by the lower appellate court is to ignore the effect of the rights attached having been brought into the hotchpot at the time of the partition.

Whether the two mortgages that were in existence when the partition arrangement was come to really belonged to the defendant alone, or they were tarwad assets which happened to stand in his name the effect of the arrangement was to admit the respondent to equal ownership with the defendant in those two rights as in all the other items included in the B schedule. The defendant renounced his rights in his separate properties to the extent of an half share in them in favour of the respondent. The terms of the partition deed are clear and unequivocal that during their life time both the defendant and the respondent shall have equal rights in the B Schedule properties and that after the defendant died the respondent shall be the absolute owner of the entire B Schedule items.

It is therefore clear that on the true construction of the partition deed the defendant and the respondent took the B Schedule properties as tenants-in-common and that by no stretch of imagination can the respondent's half share in them be held to be liable to be proceeded against for the defendant's personal or separate debts. The lower appellate court had so construed the partition deed but its decision went differently for a different reason

(4) Before we deal with the ground of the lower appellate court's decision there are two or three other matters to be mentioned. One is that the appellant's learned Counsel conceded that though the attachment purported to be of items 4 and 5 of the B Schedule as described there viz., the immoveable properties covered by the mortgage what right the defendant or the respondent had over items 4 and 5 was only the mortgage interests and not the property as such. The attachment can therefore take effect only over the defendant's half share in the mortgage rights. It may also be mentioned here that the respondent's learned counsel did not contend that the third mortgage acquired after the partition should be treated differently from the two earlier mortgages. It is really an accretion to the original mortgage and one-half share in it necessarily goes to the respondent in her own right.

(5) Yet another point to be disposed of before we come to the governing part of the lower appellate court's decision is that to counter the above view of the true construction or the implications of the partition deed the appellant's counsel raised an argument founded on clause 6 of the partition deed that the rights in all the pre-existing mortgages were kept intact in their respective owners and that under the partition deed the owners of those mortgages had not renounced their special rights in favour of the tarwad or any individual member thereof.

This we are afraid is a misreading of clause 6. The tarwad had given mortgages of some of its properties and individual members had redeemed a few among such mortgages and those members were in separate enjoyment of those rights. It is only those special rights that were left untouched by the said clause and not mortgage rights pure and simple acquired by individual members. Here the first mortgage of 1078 was originally acquired by a member of the tarwad and she assigned it to a stranger. Defendant 1 brought that right. It cannot be brought under Cl. 6 which has application only to mortgages granted with respect to tarwad properties and not to mortgage rights individual members owned over properties belonging to strangers. The lower appellate court had turned down this argument when it was raised before it.

(6) We have next to deal with the ground of the lower appellate court's decision that the properties are not liable to attachment. Before the present attachment was taken out the appellants or their predecessor-in-interest had caused item 1 of the B schedule in the partition deed to be attached in execution of this decree. The respondent raised a similar objection to that attachment that the property attached was sub-tarwad property. That objection was upheld by the execution court by an order dated 20-2-1121 and the decree-holders allowed that order to become final by leaving it unchallenged by an appeal. The learned Judge in the court below has held that the said order precluded the appellants from agitating the question over again. He bases it on the principle underlying the rule of res judicata. In fact that was the only ground the respondent's learned counsel pressed before us to sustain the order under appeal. It is clear that the view the Munsiff took in his order dated 30-2-1121 is clearly wrong, but that by itself is no ground to hold that the order will not bind the parties. It was no doubt argued for the appellant that a patently wrong order in execution on a question of law cannot operate as res judicata with respect to a different subject-matter. In the view we take as to the availability of the plea of res judicata to the respondent here we do not think it necessary to attempt to resolve that moot question in this second appeal.

(7) The learned Judge in the court below has pointed out in his order that the appellant before him (respondent here) did not raise the plea of res judicata before the execution court and that on behalf of the respondents there it was strenuously urged that that plea should not be allowed to be permitted to be raised for the first time in the appellate court. The learned Judge did not accede to that argument as it appeared to him that being a question of law it could be raised at any time. We are afraid this is a wrong exercise of the discretion vested in the appellate court. This is a case where the respondent filed her written objections to the attachment after it was effected and no reference whatever was made in it to the prior order. On the other hand what it shows is that she courted a fresh trial of the question as to the sub-tarwad character of the properties. When the decision went against her she cannot be allowed to turn round and fall back upon the prior order.

(8) A plea founded upon the rule or principle of res judicata is a plea that can be waived by a party: 'RAJANI KUMAR v. AJMADDIN BHUIYA', AIR 1929 Cal 163. A party is not entitled to go into the question of res judicata when it has not been properly raised by the pleadings: 'JAGADISH CHANDRA v. GOUR HARI MAHATO', AIR 1936 PC 258. Decided cases even hold that a party who fails to plead res judicata as a defence is not entitled to take advantage of an evidence which happens to be on the records for a different purpose to establish such a claim: 'RAMPRASADGIRI v. KRISHNANARDGIRI', AIR 1938 Bom 23 at p. 30. Ordinarily it is not permissible to allow a plea of res judicata to be raised for the first time in appeal: 'RANGAYYA v. VALLABHANENI RAMAYYA', AIR 1941 Mad 815.

We have already said that the objection petition did not contain any reference to this plea nor does the order show that it was taken before the execution court. Before the lower appellate court it was objected that the plea should not be allowed to be raised. In the circumstances of the case and on the authorities referred to we hold that the respondent should not have been allowed to raise this plea for the first time in appeal. Accordingly we set aside the lower appellate court's decision founded on it. No doubt, we are calling to aid a technical argument but where interests of justice demand it courts have to use such arguments to defeat equally or more technical contentions. Here it is common ground that the Munsiff's prior order was manifestly wrong.

(9) In the result we modify the decision of the lower appellate court and hold the attachment to be good as against one-half share in whatever rights the defendant and the respondent jointly held over items 4 and 5 of the B Schedule of Ext. 1 as explained earlier in this judgment. The lower appellate court's decision releasing those items from the attachment will remain good to the extent of the respon-

dent's original half share in them; the other half share which devolved on her consequent on the death of the defendant will be available to the appellants to be proceeded against in execution pursuant to the attachment effected. In the circumstances of the case parties will bear their respective costs in this proceeding throughout in all the three courts.

C/V.B.B. Order accordingly.

A.I.R. 1952 **TRAVANCORE-COCHIN 454**

KUNHI RAMAN C. J. AND SUBRAMANIA IYER J.

Narayanan Nair Krishnan Nair, Appellant v. Mani Mariam and another, Respondents.

Second Appeal No. 331 of 1125, D/- 23-10-1951.

Travancore Registration Act (2(II) of 1087), S. 15 — Claim to have charge created over property by decree — Extinguishment of right over immovable property.

It is only a thing that exists that can be extinguished. When the plaintiff claims to have a charge created over a property by the decree or where the suit is one to enforce an alleged charge, but the Court decides that no charge existed, in either case it can hardly be said that there is extinguishment of any right over immovable property. (Para 5)

N. K. Narayana Pillai, for Appellant; K. T. Ninan, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('37) 28 Trav LJ 235 (FB) 4
('46) 1946 Trav LR 409 4

SUBRAMANIA IYER, J.: The decree-holder in O. S. 527 of 1115 on the file of the Kanjirapally Munsiff's Court is the appellant in this Second Appeal. The only question raised is whether the execution petition filed by him is barred by limitation as found by both the courts below.

(2) The 2nd respondent assigned certain immovable properties to the first, who for a part of the consideration therefor, executed a promissory note in favour of the vendor, the 2nd respondent. The suit was brought by the plaintiff as indorsee of the promissory note from the payee. In the plaint, the plaintiff claimed recovery of the amounts from the maker primarily and in default, from the indorser. He also claimed to have a charge declared on the properties whose sale occasioned the aforesaid promissory note.

(3) The trial court passed the personal decree as claimed but denied the charge that was asked for. In an appeal filed by the plaintiff, the learned District Judge confirmed the decree of the Munsiff. The Munsiff's decree was dated 29-3-1116 and that of the District Judge, 26-11-1116. The plaintiff applied for execution on 15-1-1121, that is, more than three years but before six years from the date of the decrees. The question was whether the period of limitation applicable to the execution petition was three, or six years. The relevant Article of the Travancore Limitation Act (VI(6) of 1100) is 166 which provides that :—

Description of application.	Period of limitation.	Time for which period of begins to run.
166 For the execution of a decree or order of any Civil Court not provided for by S. 41 of the Code of C. P.	3 years ; or where a certified copy of the decree or order has been registered or a memorandum of the decree or order relating to immovable property is entered or filed as required by S. 15 of Regulation II/1087 six years.	1. The date of the decree or order, or 2. (Where there has been an appeal the date of the final decree or order of the appellate Court or the withdrawal of the appeal, or 3. (Where there has been a review or judgment) the date of the decision passed on the review.).

Section 15 of Regulation II(2) of 1087 (The Travancore Registration Regulation) reads as follows :

"S. 15. When any Civil Court shall by a decree or order create, declare, transfer, limit or extinguish any right, title or interest of any person to or in any immovable property situate in any part of Travancore, such Court shall cause a memorandum of the said decree or order to be sent to the Sub-Registrar or to every Sub-Registrar within whose Sub-District the whole or any portion of the property is situate and such memorandum shall so far as may be practicable, describe the property in the manner required by Section 14, and the Memorandum so received shall be filed in Book 1."

There has been no registration effected of a certified copy of the decree nor has there been an entry made of a memorandum of the decree relating to the immovable properties under Section 15 within the meaning of Article 166 of Act VI(6) of 1100. Nevertheless the appellant contends that he is entitled to have the benefit of the period of six years because, according to him, the decree having been passed in a suit claiming a charge over immovable property, it came within the ambit of Section 15 of the Registration Regulation and that the plaintiff has paid registration fee as provided by Rule 557 of the Travancore Civil Court's Guide for preparation of the memorandum of the decree and transmission thereof to the Sub-Registrar and that the preparation and transmission of the memorandum of the decree to the Sub-Registrar and its registry by him as contemplated in that section must be deemed to have been made because he was not at fault in the matter and that no mistake or omission of the court should prejudice him. He relied upon the maxim : Actus curiae neminem gravabit (An Act of the Court shall prejudice no one).

(4) Learned counsel for the appellant relies upon the decision of the erstwhile Travancore High Court in 1946 Trav. L.R. 409, which is a decision of a Bench of three judges presided over by the learned Chief Justice of that Court who was of the opinion that in a case where the plaintiff seeks declaration of a charge over immovable property but the declaration is refused, the decree would still be one coming within Section 15 of the Travancore Registration Act, as the refusal of the declaration to the plaintiff amounts to a decree in favour of the defendant declaring the non-existence of a charge. There was an earlier decision of a Full Bench of three Judges of the same High Court reported in 'KASIAN PILLAI v. MADASWAMI NAIDU', 28 Trav. L.J. 235 regarding

which the learned Chief Justice said at page 424 :

"The decision in 'KASIAN PILLAI v. MADASWAMI NAIDU', (28 Trav. L.J. 235) must be and is overruled."

Of the two other learned Judges who sat with the learned Chief Justice in the latter case Abraham J. was for following the earlier Full Bench decision and Sathianesan J. was content with observing "for these reasons I am unable to follow the decision in 28 Trav. L.J. 235." The question arises as to what is the result of this conflict. A decision of a Full Bench cannot be overruled by a Full Bench of equal strength in a court where a Fuller Bench can be constituted. The decision in 28 Trav. L.J. 235 therefore stands good law so far as the erstwhile Travancore High Court is concerned. That pronouncement however is not binding authority so far as this Court is concerned and the question has therefore to be considered by us regarding the pronouncement referred to as pursuasive precedent.

(5) To the question by the Court as to how the case is sought to be brought within the ambit of Section 15 of the Travancore Registration Act, learned counsel for the appellant stated that the case comes within the term "extinguish any right ..... in any immovable property" in Section 15. We have no hesitation in repelling this contention. Extinguishment, has, and can have, no meaning in the absence of existence. It is only a thing that exists that can be extinguished. In the present case the appellant as already stated, claimed a charge over the property, that is to say, to have a charge created over the property by the decree. That is what the records show. On what basis he claimed this relief does not appear nor is it necessary to discover.

Suffice it to say that what was asked for was not the enforcement of an alleged pre-existing charge, but a claim to have a charge created for the first time by the decree. Whether it is the one thing or the other may not really matter because even if the suit be regarded as one to enforce an alleged existing charge, if the court decides that no charge existed, then it can hardly be said that there is extinguishment of any right over immovable property. The decree only amounts to a declaration that the charge whose existence was averred by the plaintiff which is sought to be enforced never in fact existed. In our judgment, the present case does not come within the ambit of the provisions of Section 15 of the Travancore Registration Act.

It is only in a case which comes within Section 15 that the question as to whether an entry of a memorandum of the decree by the Sub-Registrar and the further question whether even if there has not been such an entry made, if the omission is on account of a default of the Court or of any officer thereof, the party having done all that he should have done in the matter, the entry should be deemed to have been made and limitation for execution calculated under Article 166, at six years as if the entry has really been made, will arise. Those questions do not arise in the present case in the view that we take.

(6) The courts below are therefore right in the conclusion that they reached and the Second Appeal should be dismissed with costs.

B/V.R.B. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 455

KUNHI RAMAN C. J. AND SANKARAN J.

Aiyappan Cheerappan and others, Petitioners v. Grains Purchase Tahsildar, Cochin Kanayannoor Taluk and another, Counter-Petitioners.

O. P. No. 60 of 1950, D/- 29-8-1951.

(a) (Travancore-Cochin) Paddy (Acquisition and Movement) Control Order (1950), Cl. 7 — Purchasers of standing crops — Rights of.

If the petitioners are not the lessees of the land but only persons who had become entitled by purchase at an auction to the right to reap the crops on the land they cannot urge that they should be furnished with the seed for the next year's cultivation on the basis of their being stock-holders. (Para 9)

(b) Essential Supplies (Temporary Powers) Act (1946) (as amended by Act LII (52) of 1950), S. 17 (4) — Effect.

It is not correct to say that Section 17 (4) will not save the Paddy (Acquisition and Movement) Control Order (1950) but it will only save executive orders passed by the State. (Para 12)

(c) (Travancore-Cochin) Paddy (Acquisition and Movement) Control Order (1950) — Nature of.

The Order cannot come under the category of exproprietary legislation. (Para 14)

(d) Constitution of India, Art. 246 — Delegation of legislative powers to executive.

The power conferred upon the executive for regulating the acquisition of paddy and payment of compensation for, under Paddy (Acquisition and Movement) Control Order (1950) it cannot amount to delegation of legislative powers which confers upon the executive, arbitrary powers of action in view of the well-known rules that have to be observed by the executive in carrying out the responsible duties imposed upon them with regard to the acquisition of paddy and the payment of compensation for it. (Para 17)

K. S. Sebastian, for Petitioners; T. N. Subramania Iyer, Advocate General, for Counter-Petitioners.

ORDER: This petition is presented under Article 226 of the Indian Constitution and under Section 18 of the Travancore-Cochin High Court Act. The petitioners who are cultivators are 39 in number. The Counter-Petitioners are (1) the Grain Purchase Tahsildar, Cochin Kanayannur Taluk, and (2) the Deputy Commissioner of Civil Supplies, Ernakulam. Both the counter-petitioners were represented by the Advocate-General of the State at the hearing. On behalf of the petitioners, the case was argued by their counsel Mr. K. S. Sebastian.

(2) The prayers in the petition are for the issue of writs in the nature of certiorari and mandamus for quashing the order made by the Deputy Commissioner of Civil Supplies on 28-11-1950 and for a direction that the petitioners' paddy which, according to them was illegally detained by the counter-petitioners may be released and returned to them.

(3) It is stated in the affidavit filed in support of this application that the petitioners are lessees of blocks of paddy lands which belong to two joint owners and that they have been cultivating these blocks now for several years as lessees under the present owners as well as

their predecessors-in-title. The present owners purchased the paddy fields in question consisting of 79 acres in 1949. In that year the owners cultivated 4 acres under their personal supervision and leased out the remaining 75 acres. In 1950 the owners took over more than four acres and gave to the petitioners only 59 acres to cultivate. This transaction was brought about at an auction conducted by the owners at which the petitioners say they were the successful bidders. The relationship between the owners and each of the petitioners is evidenced by an agreement described as a karar patharam one of which was marked at the hearing as Ex. A by consent of both sides.

(4) Before the 29th of September 1950 the petitioners informed the Grain Purchase Officer that they were going to reap the crops from the land. They also submitted a statement prescribed under Rule 3 of the Paddy (Acquisition and Movement) Control Order 1950, to the Grain Purchase Pravarthikar of the Village. After this statement was received, the Grain Purchase Tahsildar of Ernakulam sent notices to the petitioners on the 29th September 1950 informing them that the harvest should be gathered under departmental supervision. This notice was marked as Ex. B at the trial. The harvest was accordingly gathered from 12-2-1126 (M. E.) under the supervision of the Grain Purchase Parvarthikar. It is alleged in the affidavit of the first petitioner that the officer brought with him a party of about a dozen policemen. After reaping the harvest, the paddy is according to the affidavits, stocked in separate places in the "Kalam" where grains are generally stored and is being guarded by the police.

There is another allegation in the affidavit that for a period of two months and odd during which the party of policemen was camping in the farm for guarding the paddy, the petitioners were compelled to meet their boarding charges. On 23-2-1951, when this was noticed by the court before which it was posted for hearing orders were made for sending a copy of the affidavit to the Inspector General of Police for necessary action with reference to this averment in the affidavit. The result has not yet been communicated to this Court.

(5) In the order made by the Supreme Court with regard to this petition, this High Court has been directed to give precedence to this application and to have the matter heard by a Division Bench of two Judges. This has accordingly been done.

(6) To appreciate the contentions of the parties, it is necessary to advert to the circumstances in which the petitioners who, as already stated, are 39 in number obtained the right of reaping the crops on the land. On this subject, there are two different versions given, one on behalf of the State by the respondents and the other on behalf of the petitioners. The version given by the respondents is consistent with the documents that are available and with the contents of the order dated 28-11-1950 which is sought to be quashed.

(7) The present owners of the paddy flats who are two in number (Achankunhi John and Peter Pius) purchased the land consisting of 79 acres in 1949 from one Karim Sahib. In the year of purchase, the owners cultivated 4 acres personally and gave the rest of the lands for cultivation to third parties. In 1950, the owners cultivated more than 4 acres and the petitioners were allotted 59¼ acres. This was done at an auction at which they became the successful bidders. The documents produced evidence the auction (sic) and the agreement described by the parties as 'Kararpathram' indicates that what was sold to the petitioners was the right to reap the harvest in the paddy flats in the month of September 1950. If the wording of this document is taken as a correct indication of the relationship created between the owners of the land and the petitioners, there would be no doubt that the respondents' contentions are entitled to be upheld.

The petitioners put forward a case that they have been lessees of the land even under the previous owner and that they will be entitled to cultivate the land in 1951 also. But these facts are not apparent from the documents which conferred upon the petitioners the right to cut the crops. The petitioners say that before the end of September 1950, they gave intimation to the Grain Purchasing Officer that they were going to reap the crops. They got the Tahsildar's notice dated 29-9-1950 which has been produced as Ex. B. There was a second notice also received which is mentioned in the affidavits filed in this original petition. Early in October the harvest was reaped under departmental supervision. It was at that time, according to the petitioners that 12 police officers were brought to supervise the reaping of the crops.

(8) In the second notice served on the petitioners dated 3rd October 1950, the Tahsildar who was in charge of grain purchasing, stated that the petitioners were only purchasers of standing crops and that they had contravened the provisions of clause 7 of the Paddy Acquisition and Movement Control Order. They responded by sending a petition dated 24-10-1950 to the Deputy Commissioner of Civil supplies refuting the allegations containing in the Tahsildar's notice and objecting to the steps that the Tahsildar was taking. On 11-11-1950 the petitioners say they got another notice from the Tahsildar calling upon them to surrender the entire stock of paddy to the State. They then preferred another petition to the Deputy Commissioner of Civil Supplies on 16-11-1950 praying for cancellation of the Tahsildar's proceedings and for release of the paddy alleged to be due to them under the rules. But they state that the Commissioner dismissed the petition by his order dated 28-11-1950 and has directed the acquisition of the entire paddy without giving the petitioners the quota for their ration.

(9) On a perusal of the petition and the grounds for the same, the first impression created is that there is a great deal of confusion of thought. The petitioners are claiming privileges and rights under the Paddy Control Order while at the same time they are challenging the validity of the order. If the conclusion reached by the respondents is correct that the petitioners are not the lessees of the land but only persons who had become entitled by purchase at an auction to the right to reap the crops on the land, then the order made by the respondents cannot be successfully challenged. If they are only entitled to reap the crops, there is no point in their urging that they should be furnished with the seed for the next years' cultivation on the basis of their being stock-holders.

The owners of the land perhaps with the idea of avoiding the difficulties that are likely to be

put in their way in view of the rules relating to land tenures in this State if the petitioners are proved to be lessees of the land, had resorted to the method of auctioning the right to reap the crops. Since, the petitioners agreed to bid at such an auction and became entitled to cut the crops as a result of their purchase at the auction, it will not be open to them to claim to be lessees as well who had been cultivating the land in the past and who are going to cultivate the land in the future. The two positions are inconsistent with each other. Therefore, on the material available in the shape of documents that have passed between the parties the position taken by the respondents does not seem to us to be open to objection.

(10) It would be convenient at this stage to advert briefly to the terms of the order made by the Deputy Commissioner of Civil Supplies at Ernakulam on 28-11-1950 which is attacked in this application and with regard to which a writ of certiorari is prayed for. On a perusal of the order, it will be seen that the officer concerned had applied his mind to all the relevant aspects of the question. He had clearly investigated the exact nature of the right which the petitioners have in respect of the paddy. He has considered whether they can be regarded under the rules as 'stock-holders' for the purpose of being granted seed and cultivation expenses, and after considering all these matters he has recorded his conclusion that they are not entitled to seed and cultivation expenses because they are, according to the documents admittedly executed by them entitled only to reap the standing crops on the land.

In the course of the order, the officer says that he had enquired into the details of the rights claimed by the petitioners. He also gave a hearing to the advocate who appeared for the petitioners before him. He records his conclusion that from the materials placed before him, it is clear that the petitioners were not cultivating the lands in question under any lease in the previous years. During the year 1950 when the petitioners claimed the special rights which were denied to them, there was no evidence to show that there was transfer of possession of these lands in favour of the petitioners. There was no intimation given of the transfer of possession, if any, to the petitioners as required under clause 14 of the Paddy (Acquisition and Movement) Control Order, 1950. He called upon the petitioners to produce all the documents on which they relied for establishing the rights claimed by them.

When they produced all their documents it was apparent from the terms of those documents that the petitioners could not possibly have had possession of the land prior to the time when the crops were ready for harvesting. The contracts relied upon by the petitioners were entered into by them with the owners of the land after the crops were raised and the officer records his conclusion that this was apparently done with the intention of defeating the procurement scheme. The contract of sale, according to him, was in contravention of clause 7 of the Paddy (Acquisition and Movement) Control Order, 1950. These documents gave the petitioners the right of taking the crop during the harvest season in 1126. They were not given any right for raising the crops during the following year.

He observes that seed and cultivation expenses in the shape of paddy can be allotted to them only if the lands are to be cultivated by the petitioners during the coming year also. This they did not establish to his satisfaction. Therefore since they had no claim for raising the next crop he held that they are not entitled to get any paddy from the yield for the purpose of seed and cultivation expenses. From the documents produced by the petitioners the officer was satisfied that the lands were in the possession of the owners and, therefore, paddy for seed and cultivation expenses in kind was allowable according to the scale adopted for the locality only to the land-owners on condition that they would not utilise the same without the sanction of the grain purchasing officer and that they would be made available for raising the next crop on the land.

If the owners proposed to cultivate the land during the following season, then they could utilise the paddy given to them for this purpose. But if the lands are let on varam or on lease, the quantity of paddy for cultivation expenses in kind should be surrendered to the Government which would then become liable to make an allowance in favour of the new cultivators. By way of abundant caution, the officer has directed in his order the Tahsildar to scrutinise all other documents which the petitioners may produce before him subsequently for the purpose of ascertaining whether they are entitled to be treated as stock-holders for the purpose of releasing the paddy. He has also made a statement in the order that if the petitioners are given the right of cultivating the next crop in these lands, the paddy with the landowners may be permitted to be given to the petitioners along with the lands. There cannot be a more satisfactory order made by an officer of his position. He had given a very patient hearing to the petitioners and their advocate. He had considered every aspect of their contentions and passed an order which is supported by reason and commonsense. Therefore on the face of it there cannot be any reason for quashing the order by the issue of a writ of certiorari.

(11) The petitioners' learned counsel then challenges the validity of the enactments and orders under which the respondents have professed to act.

(12) The learned Advocate General appearing for the respondents urges the following contentions to meet those of the petitioners' learned counsel. He points out that the Paddy (Acquisition and Movement) Control Order became law on the 12th of April 1950. It was passed under the Public Safety Measures Act, V of 1950, by the Government of this State. This was repealed by the Essential Supplies (Temporary Powers) Act, XXIV of 1946 as amended by Act 52 of 1950. This was extended to this State on 17-8-50. But there is a saving clause in the proviso to section 17 (4) of this enactment according to which

> "any order made and in force immediately before that day in the said State shall continue in force and be deemed to be an order made under this Act."

This, according to the learned Advocate General, will save the Paddy (Acquisition and Movement) Control Order from being repealed.

The petitioners' learned counsel, on the other hand, contends that section 17 (4) will not save the Paddy (Acquisition and Movement) Control Order, but it will only save executive orders passed by this State. There is no valid reason for accepting this interpretation. If the Paddy Control Order was in force when the respondents took proceedings against the petitioners, then there is provision in that order for supporting the steps taken by the respondents.

Under Sections 7 and 13 of the order, the petitioners will come under the category of fugitive cultivators who are not entitled to the privileges which are now claimed by the petitioners. As already stated, they cannot, in view of the terms of their contract with the owners claim seed for cultivation. This and similar privileges were accorded by the respondents to the landlord. The contention of the learned Advocate General is that the interpretation of the rules relating to this subject by the authorities concerned is the correct interpretation and that the petitioners are set up by the owners of the land for the purpose of depriving the Government of their legitimate rights to insist upon the crops being made available to the Government for State purposes.

(13) In view of the argument based upon Section 17 (4) it may not be necessary to deal with another objection raised on behalf of the petitioners by their learned counsel which is based upon Art. 31 of the Constitution, the contention being that the Public Safety Measures Act which was passed by the local Government is not valid because the Hon'ble President had not given his assent to it. The Advocate General's contention is that Art. 246 (2) of the Constitution gives authority to the State to legislate in respect of the subject-matter of this enactment. It was therefore, not necessary to reserve at all the enactment for the opinion of the President. The learned Advocate General also points out that the Essential Supplies (Temporary Powers) Act, XXIV of 1946, was extended on the 17th of August 1950 by Act 52 of 1950 to Part B States. He invites the attention of the Court to Entry No. 33 in List 1, Entry No. 36 in List 2 and Entry No. 42 in List 3 which support his contentions.

(14) It is next contended on behalf of the petitioners that the Paddy Control Order under which steps were taken by the respondents will come under the category of exproprietary legislation and in such cases the previous assent of the President is necessary to make it valid. By way of analogy, reference was made to Articles 286 (3), 288 (2) and 254 (2) of the Constitution. We cannot accept the contention that this is exproprietary legislation. The provision made in this order enables the State to purchase paddy reaped from paddy fields at fair prices that are fixed taking into consideration the conditions prevailing in the locality. The price fixed cannot be attacked on the ground that it is inequitable. No doubt, the quantity allotted for seed and cultivation expenses varied in different places in the two States of Travancore-Cochin. This was because conditions prevailing in different localities varied. The fertility of the soil, the return in the shape of crops, the facility of irrigation, availability of labour, all these had to be taken into consideration in fixing the allotment of paddy for seed and cultivation expenses. Therefore, this contention urged on behalf of the petitioners cannot be accepted.

(15) Another argument is sought to be based upon the difference in the rates fixed by the Government for different localities. It is attempted to be argued that there is arbitrary discrimination made in fixing the prices. This contention is based solely upon the variation in the rates. In view of the principles on which the rates are fixed such a contention cannot easily be accepted without proper material to support it and there is no such material in the present case.

(16) It is then said that the price fixed by the Government for paddy acquired in this compulsory manner is only Re. 1-12-0 per 'para' whereas paddy that is rationed costs Rs. 2-12-0 per 'para'. The Government is alleged to be making a profit of Re. 1 per para according to these rates. But in urging such a contention, the fact that costly administrative machinery consisting of officers of different grades has to be maintained by the Government in the exercise of the right of food control is completely lost sight of. The State has also got to pay high rates for paddy imported from outside areas and supplied to the State by the Centre. Therefore far from making any profit, the State is incurring a heavy deficit in paying for rice for the consumption of the local inhabitants. The petitioners' complaint seems to be that if they are given the paddy reaped by them for their ration, then they will be getting it at a cheaper rate. But when rules are framed it would amount to arbitrary discrimination if the petitioners, who do not come under the category of cultivators who are entitled to claim special ration from Government, are given such ration out of the paddy reaped by them. The whole question again turns upon the legal status of the petitioners with reference to the owners of the paddy-lands which has already been dealt with.

(17) It is then said that the power conferred upon the executive for regulating the acquisition of paddy and payment of compensation for, it would amount to delegation of legislative powers which confers upon the executive, arbitrary powers of action. This contention also we are not prepared to accept in view of the well-known rules that have to be observed by the executive in carrying out the responsible duties imposed upon them with regard to the acquisition of paddy and the payment of compensation for it.

(18) The learned counsel for the petitioners places reliance upon the passage in paragraph 19 in Willoughby's Constitution of the United States, Vol. I, (2nd edition) at page 30. The learned author states as follows:

> "It is a principle adopted by all courts and with regard to all kinds of law that it does not fall within the judicial function to control the exercise of the discretionary powers which, by the Constitution or Statutes, are vested in public officials.
>
> Though, in general, the courts will not attempt to control the exercise by executive or administrative officials of the discretionary powers vested in them by the constitution or laws passed in pursuance thereof, nevertheless if that discretion is exercised in such an arbitrary or unjust and discriminating manner as clearly to deny to individuals their rights to the equal protection of the laws, or to due process of law, or any other constitution right, the courts will intervene. Furthermore, the courts will hold unconstitutional any attempt upon the part of the legislature to vest in administrative officials a discretion that is essentially arbitrary in character".

We have already stated that the powers conferred upon the executive officers of Government are not arbitrary nor is there anything to show that in the present case they were exercised in an arbitrary manner. They have exercised the discretion in strict conformity with the rules relating to the subject and there

is no material to support the contention that the discretion was not properly exercised by the officers concerned.

(19) In the present case we are therefore satisfied that there has been no violation of any fundamental right and that the treatment accorded to the petitioners is in conformity with their legal status as evidenced by their own contracts with the owners of the land. They cannot claim any higher privileges by attempting to repudiate those contracts and set up a status different from that they have themselves accepted with their eyes open. To concede their request based upon such fallacies will only lead to inequitable discrimination which they themselves are condemning.

(20) In the result, therefore, the petition must be dismissed with costs and advocate's fee which we fix at Rs. 250/-.

C/D.H. Petition dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 459

KUNHI RAMAN C. J.
AND SUBRAMANIA IYER J.

Kandan Narayanan and others, Appellants v. State.

Ref. Trial No. 15 of 1951 and Criminal Appeals Nos. 72 to 86, 89 and 97 of 1951, D/- 28-9-1951.

(a) Evidence Act (1872), S. 167 — Admissibility of unnecessary evidence — Prejudice.

Originally the intention of the prosecution was to charge the accused who belonged to communist party not only for the offence for which they were tried, but also for the offence of waging war against the State. This was ultimately abandoned:

Held that seeing that the contemplated charge of waging war against the State was abandoned, there was really no necessity for calling witnesses to prove the earlier incidents that took place in the locality where the offences were committed for the purpose of elucidating the political views of the accused persons. But such evidence could not have prejudiced the accused, since the trial Court was concerned only with the criminal acts done by the accused on the date of occurrence which resulted in a breach of the peace and injury to the victims and not with the political views of the accused. (Para 5)

Anno: Evidence Act, S. 167 N. 3.

(b) Criminal P. C. (1898), S. 75 — Warrant — Requisites of — Seal.

After issuing the warrant, there was a direction endorsed on the warrant requiring the Policeman who was entrusted with it to arrest and produce the accused by the date to which the case stood adjourned. The arrest could not be effected by that date. The case was consequently adjourned to a later date and a similar endorsement for the production of the accused on the adjourned date was again made on the warrant. Owing to the inability of the Police Officer to execute the warrant according to these directions, a series of subsequent endorsements had to be made on the warrant and on a piece of paper annexed to the warrant fixing the date by which it should be executed. It was only the warrant that bore the seal. These subsequent endorsements did not bear the seal of the Court:

Held that the warrant did not in terms specify that it was to remain in force only for a particular period. It bore the seal of the Court that issued it. The directions endorsed on the warrant and in the paper annexed to it were merely directions given to the Policeman to whom the warrant was addressed and absence of the seal on these endorsements could not invalidate the warrant itself especially in view of the second part of section 75. The period during which the warrant remained in force did not expire prior to the date on which it was executed by the arrest of the accused. (Para 11)

Anno: Cr. P. C., S. 75 N. 3, 9, 10.

(c) Penal Code (1860), Ss. 149, 300 — Murder — Constructive liability.

The other members of the mob were not aware of the fact that the 1st accused did have a sharp weapon like a knife or dagger in his possession and that he was going to use it to stab the victim:

Held that there was no constructive liability in the circumstances incurred by the other members of the mob for the act of stabbing done by the 1st accused. It was only the 1st accused that was liable for offence of murder committed by him. (Para 12)

Anno: Penal Code, S. 149, N. 4, 6, 13, S. 300 N. 40.

(d) Penal Code (1860), S. 146 — Person in arrest of police — Rescuing — Conviction for rioting.

The unlawful assembly gathered and developed into a mob of rioters with the object of rescuing the 2nd accused from the custody of the Police officers who had effected his arrest. His cry for assistance led to the formation of the unlawful assembly which subsequently developed into a riot:

Held that the 2nd accused was not a member of that assembly and consequently merely because their object was to rescue the 2nd accused from the custody of the Police Officer who had arrested him, he could not be made liable for rioting. (Para 13)

Anno: Penal Code, S. 146 N. 1, 4.

(e) Criminal P. C. (1898), S. 342 — Compliance with — What constitutes.

Where the defence of the accused persons is a total denial of their presence on the occasion and denial that they committed any of the acts mentioned by the prosecution it cannot, from the fact that elaborate questions were not put to the accused drawing the attention of each one of them to all that was disclosed in the evidence of the prosecution, be said that there is a material disregard of the provisions of Section 342 and it can certainly not be said that there was gross disregard which was likely to occasion prejudice: AIR 1951 SC 441; AIR 1933 PC 124, Disting. (Para 15)

Anno: Cr. P. C., S. 342 N. 14, 15.

(f) Penal Code (1860), S. 71 — Member of unlawful assembly — Constructive liability — Separate sentence.

Where a member of an unlawful assembly or of an assembly guilty of rioting incurs constructive liability for a distinct offence committed by one of the members of the assembly it will not be proper to pass separate sentences for rioting and for the offence for which constructive liability was incurred by the accused. If, on the other hand,

it is not a case of constructive liability but is a case where a person has been convicted of rioting and also of a distinct offence committed by him there can be separate convictions under section 149, Penal Code, and the distinct offence committed by the accused concerned and separate sentences also can be passed: Case law discussed. (Para 15)

Anno: Penal Code, S. 71 N. 2.

K. G. Kunjukrishna Pillai and Miss P. Janaki Amma, for Appellants; M. N. Parameswara Pillai, Public Prosecutor, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('24) 52 Ind App 40: (AIR 1925 PC 1: 26 Cri LJ 431) 15
('33) 64 Mad LJ 466: AIR 1933 PC 124 : (34 Cri LJ 322) 15
('51) 1951-2 Mad LJ 291: (AIR 1951 SC 441: 52 Cri LJ 1491) 15
('84) 6 All 121: (1883 All WN 241) 15
('85) 7 All 757: (1885 All WN 195 FB) 15
('87) 9 All 645: (1887 All WN 149) 15
('88) 10 All 58: (1887 All WN 274) 15
('16) 14 All LJ 738: (AIR 1916 All 49: 17 Cri LJ 418) 15
('93) 17 Bom 260 (FB) 15
('69) 16 Cal 442 (FB) 15
('18) 1918 Mad WN 526: AIR 1919 Mad 353: (20 Cri LJ 145) 15
('40) AIR 1940 Nag 120: (41 Cri LJ 360) 15
('18) 3 Pat LJ 641: AIR 1918 Pat 227: (20 Cri LJ 37) 15
('24) AIR 1924 Rang 291: (25 Cri LJ 1305) 15

KUNHI RAMAN, C. J.: This batch of criminal appeals is brought on behalf of the accused persons who were convicted by the learned Sessions Judge of Parur in S. C. No. 1 of 1951. The 1st accused was convicted of the offence of murder under Section 301 of the Travancore Penal Code and sentenced to rigorous imprisonment for life. The records are submitted for confirmation of this conviction and sentence in Referred Trial No. 15 of 1951. Since these appeals arise out of the judgment pronounced by the Court below in S. C. 1 of 1951 they were all posted together, the contentions urged on behalf of the appellants being practically the same, except in the case of the 6th accused appellant on whose behalf it is contended that there is an additional point to be considered by this Court regarding evidence about his identity.

(2) The court below tried 21 persons who were charged with various offences and acquitted four of them. The remaining 17 were convicted. After filing his appeal, accused No. 10 died, but since the sentence passed upon this accused includes a fine the appeal does not necessarily abate. The learned Public Prosecutor who appears on behalf of the State asks for time to ascertain whether the conviction in respect of the sentence of fine should be supported in appeal. Appeal No. 78/1951 was accordingly adjourned for one week to enable the Public Prosecutor to make a report. The remaining 16 appeals were heard and this judgment deals with these 16 appeals.

The following is a tabular statement of the 16 appeals showing the number of the accused persons who are the appellants therein:

	Cri. App. No. 97/51 & Ref. Trial 15 of 1951.
1st accused	
2nd accused	.. 89/51
3rd accused	.. 72/51
4th accused	.. 73/51
6th accused	.. 74/51
7th accused	.. 75/51
8th accused	.. 76/51
9th accused	.. 77/51
11th accused	.. 79/51
12th accused	.. 80/51
13th accused	.. 81/51
14th accused	.. 82/51
16th accused	.. 83/51
18th accused	.. 84/51
19th accused	.. 85/51
20th accused	.. 86/51

(3) The court below has acquitted accused Nos. 5, 15, 17 and 21 and there is no appeal brought on behalf of the State from these orders of acquittal.

(4) The case for the prosecution was that a mob of 26 persons who are alleged to be members of the Communist group of politicians attacked a small body of policemen consisting of one Head Constable and 5 constables in the course of which a constable was stabbed to death. The remaining five persons sustained bodily injuries as a result of the attack made upon them by the accused. Of these 28 persons, seven absconded and they were not traced by the Police before the trial commenced in the court below and that is why at the trial there were only 21 accused who were prosecuted.

(5) The incidents mentioned by the witnesses for the prosecution took place in the Malayalam year 1123 i.e., nearly four years ago, at a place in the erstwhile Travancore State known as Koothattukulam within the jurisdiction of the Sessions Court of Parur. The accused persons are reported to be prominent members of the Communist group which predominated in the place of occurrence. There was evidence called by the prosecution to describe the propensities of these accused persons. This, however, was not necessary for the purpose of the case because the court is not concerned with the shade of political opinion of persons charged with offences. The learned counsel for the appellants commented adversely upon this type of evidence called at the trial and argued that it was irrelevant and unnecessary for the purpose of this case and that it has prejudiced the mind of the trial court against the accused persons.

The learned Public Prosecutor in answer to this argument has stated that originally the intention of the prosecution was to charge the accused not only for the offence for which they were tried, but also for the offence of waging war against the State. This was ultimately abandoned on the strength of the advice tendered by the learned counsel who now appears for the appellants before this Court and who was then the Advocate General of the erstwhile State of Travancore. Seeing that the contemplated charge of waging war against the State was abandoned, there was really no necessity for calling witnesses to prove the earlier incidents that took place in the locality where the offences were committed for the purpose of elucidating the political views of the accused persons. But such evidence in our judgment could not have prejudiced the accused, since the trial court was concerned only with the criminal acts done by the accused on the date of occurrence which resulted in a breach of the peace and injury to the victims and not with the political views of the accused.

(6) At the trial, the main charge against the accused was that they were members of an unlawful assembly which resorted to rioting armed with deadly weapons and that some of the members of this assembly committed specific acts of violence for which the remaining members of the assembly also have incurred constructive liability being offences committed in prosecution of the common object of the assembly.

(7) As already stated, the case for the prosecution is that Koothattukulam is a Communist stronghold as mentioned in the judgment of the

court below. There were certain other criminal proceedings started against some members of the Communist party in that locality. While the prosecution for such prior incidents was going on in the criminal courts, some of the accused persons absconded, prominent among them being the second accused in the present case while some others were reported to be evading arrest. To effect the arrest of these persons the Head Constable who was examined as P. W. 1 at the trial of this case and three constables (P. Ws. 5 and 6 and Oommen, who was alleged to have been killed by the 1st accused in the course of the incidents narrated by the witnesses in this case) were specially deputed to go to the locality. P. W. 2 is described as a Police Constable belonging to the Intelligence Section of the Police Department. He was also sent to the locality to watch over the activities of the accused persons and their followers.

While these Police officers were engaged in tracing the persons they were deputed to arrest, they came to know that a meeting of the communists of the locality was fixed to be held at 5 P. M. on 14-12-1123 in the premises of a school in Koothattukulam Pakuthy. According to the evidence for the prosecution, about 30 communists attended that meeting which was held in the afternoon of the relevant date and it terminated at about 6-30 P. M. The meeting seems to have been attended by the 2nd accused who was one of the persons wanted by the Police. P. Ws. 1, 5 and 6 and the deceased constable Oommen were observing what was happening at the meeting and observing also the presence of the persons who were wanted by the Police. Two other constables, P. Ws. 2 and 3 attached to the Koothattukulam Police Station also attended the meeting with the object of making a report of its proceedings. They informed P. W. 1 the Head Constable and his party that the 2nd accused was seen by them at the meeting and that after the meeting terminated, he was proceeding towards the west along the Thodupuzha Koothattukulam Road.

The party of these six Policemen, therefore proceeded along that direction with the object of arresting the 2nd accused. They sighted the 2nd accused at a place about 100 feet to the east of a toddy shop in the vicinity. Ext. A, is a warrant issued by the First Class Magistrate of Moovattupuzha to arrest the 2nd accused who was wanted in C. C. 252/1121. This warrant had been endorsed to P. W. 1 the Head Constable, and he had this document in his possession. When the Police party accosted the 2nd accused, P. W. 1 duly produced this warrant and informed the 2nd accused Narasimha Iyer that he was effecting his arrest under this warrant. Narasimha Iyer, the 2nd accused offered resistance. Thereupon, the party of Policemen had to prevent his escape from lawful custody by taking hold of him. When he found that arrest was inevitable, he is alleged to have shouted out loudly calling a communist comrade of his by name Varkki to come to his aid since he was being arrested by the Police.

This person Varkki is one of the accused whose arrest has not been effected and therefore he was not tried in the court below. On hearing the cry for help of the 2nd accused, the prosecution witnesses say, 27 persons who evidently had just left the meeting, appeared on the scene armed with deadly weapons consisting mainly of sticks and rushed at the party of Policemen. This group of individuals was led by the 1st accused and Varkki who were in front of the mob. The 1st accused happened to be having a dagger in his possession and Varkki is alleged to have had a heavy club in his hands. Of the remaining 25 persons, the 7th and the 14th accused did not have any weapons in their hands. All the others were also armed with dangerous sticks. When they were making a rush towards the Police party, they are alleged to have shouted what is described as their habitual war cry 'Inquilab Zindabad'. This mob contacted the Police party in front of the toddy shop already mentioned. Varkki is alleged to have begun the affray by striking a blow with the stick in his hand on the head of Police Constable Oommen and then striking another blow on the head of P. W. 1.

The 1st accused then used the dagger or knife in his possession for stabbing Oommen on his back. This stab punctured the left lung of the victim and he collapsed as a result of the wound sustained by him. The remaining accused who had come up by that time, are alleged to have dealt a number of blows with sticks on the other police officers. The two accused persons who were not armed are alleged to have struck the Policemen with their bare hands and fists. The object of this attack, as already indicated, was to rescue the 2nd accused from the custody of the Police. The 2nd accused also exerted his utmost to extricate himself from the hold of the persons who had effected his arrest. He was ultimately extricated from their grip and ran away.

Since this was the main object of the assailants, as soon as the object was attained they left the scene, again shouting their slogan 'Inquilab Zindabad'. The surviving Policemen then naturally devoted their attention to their colleague who had fallen as a result of the stab wound inflicted by the 1st accused. They found that he was dead and they had his body removed to the Koothattukulam Police station where an inquest was held.

(8) This was followed by a Police investigation and 28 of the accused persons were charged by them. Out of these 28, they succeeded in arresting only 22. Out of the 22, one escaped while he was in custody from the Central Prison at Trivandrum. The remaining 21 persons were tried in the court below.

(9) All these 21 persons were not, however, arrested at the same time. In the beginning the Police were able to effect the arrest of only 16 out of the 21. Thereupon, a preliminary enquiry was started against these 16 persons in P. E. 33 of 1123. Subsequently, seven more persons were apprehended and then another preliminary enquiry — P. E. 34 of 1950 — was started. As a result of both these preliminary enquiries, 22 accused persons were committed for trial to the Sessions Court at Parur. It was after the order of commitment was passed, that one of the 22 persons escaped. The learned Judge started the trial of the remaining 21 accused persons.

(10) P. Ws. 1 to 12 are the eye-witnesses who actually saw the incident and the rescuing of the arrested second accused from the custody of the Police Officers, especially P. W. 1 who had the warrant of arrest with him. There is no doubt from the evidence of these witnesses that in response to the cry for help which emanated from the 2nd accused when he was arrested and held by the Policemen to prevent his escaping from their custody, the remaining accused persons rushed up with the object of rescuing the 2nd accused Narasimha Iyer from Police custody. That was certainly their common object as found by the learned trial Judge. The evidence of the important eye-witnesses was read out to us and we entertain no doubt about the correctness of the finding recorded by the learned trial Judge on this point.

In our judgment, however, the assembly became unlawful when they reached the vicinity of the toddy shop in front of which the 2nd accused was being held by the Policemen who had effected his arrest. It was then that they conceived the idea

of liberating their comrade from the custody of the Policemen and resorted to violent action including the use of force and 1st accused perpetrated the murder of Oommen, one of the Police constables. We are not prepared to subscribe to the view which we find expressed in the judgment of the learned trial Judge that even when the communist meeting was convened at 5-30 in the vicinity of the place where the arrest was effected, the 2nd accused and his companions had entertained the idea of enticing the small band of Policemen in the locality to a fight under the impression that by force of their numbers they could easily overcome the activities of the Police. Nor are we satisfied that they had any idea of humiliating the Police force as a whole by defeating half a dozen Policemen in a fight.

On the other hand, in view of the evidence called at the trial, we are inclined to hold that there was nothing unlawful or illegal about the meeting that was held prior to the occurrence, because at that time, there was no prohibition imposed by the Government on communists or any members of other political parties in the State holding a meeting. Whether in the speeches that were delivered at the meeting, views were expressed which might bring the speakers within the purview of the criminal law of the State, is not elucidated by the evidence of the witnesses at the trial. The object of the prosecution was to establish that at the time that the Police party who had arrested the 2nd accused was attacked by the mob, they constituted themselves into an unlawful assembly with the object of rescuing the 2nd accused from custody. This has been established and it is also evident from the fact that after the rescue was effected, the mob disappeared from the scene without continuing their attack on the Policemen.

Therefore, there is no doubt that there was an unlawful assembly. There is evidence to show that some of the members of the unlawful assembly were armed with dangerous weapons. The 1st accused had a sharp instrument like a dagger or knife in his possession. The weapon that was used in stabbing Oommen does not seem to have been recovered. The dagger which is produced as M. O. II in court was alleged to be in the possession of the 1st accused when he was arrested a few days subsequent to the occurrence. It does not really matter whether it was M. O. 2, the dagger, that was used by the 1st accused in stabbing Oommen. There is no doubt that a sharp weapon was used for stabbing the victim and that as a result of the stab, he died, thereby making the person who inflicted the injury liable for murder. The possession of these dangerous weapons by the members of the mob and the force that they used for the purpose of rescuing the 2nd accused from the custody of the Policemen made the persons who participated in the unlawful assembly liable for rioting armed with deadly weapons.

(11) The learned counsel for the appellants has raised a contention that the 2nd accused was not lawfully arrested by P. W. 1 under the warrant Ext. A and that he was, therefore not in lawful custody when he was rescued by the accused persons who participated in the riot. This contention is based upon the wording of S. 63 of the Travancore Criminal Procedure Code. This section corresponds to Section 75 of the Indian Code of Criminal Procedure, the wording of both provisions being similar. According to this section, every warrant of arrest issued by a court shall be in writing signed by the Presiding Officer.....and shall bear the seal of the court. Sub-section (2) lays down that every such warrant shall remain in force until it is cancelled by the court which issued it or until it is executed. The warrant in the present case which has been marked as Ext. A does bear the seal of the court of the Magistrate who issued it. After issuing the warrant, since the 2nd accused was wanted in connection with the trial of C. C. No. 252 of 1121 in the Court of the First Class Magistrate of Muvattupuzha there was a direction endorsed on the warrant requiring the Policeman who was entrusted with it to arrest and produce the accused by the date to which the case stood adjourned.

The arrest could not be effected by that date. The case was consequently adjourned to a later date and a similar endorsement for the production of the accused on the adjourned date was again made on the warrant. We find that owing to the inability of the Police officer to execute the warrant according to these directions, a series of subsequent endorsements had to be made on the warrant and on a piece of paper annexed to the warrant fixing the date by which it should be executed. It is only the warrant that bears the seal. These subsequent endorsements do not bear the seal of the court. This is made the ground for attacking the validity and legality of the warrant by saying that these endorsements which are really extensions of the period for which the warrant was issued are not valid or legal, because one of the essential conditions prescribed by the relevant section of the Criminal Procedure Code has not been complied with inasmuch as no seal was affixed to these endorsements.

The learned Public Prosecutor contends that the warrant does not in terms specify that it is to remain in force only for a particular period. It bears the seal of the court that issued it. The directions endorsed on the warrant and in the paper annexed to it are merely directions given to the Policemen to whom the warrant was addressed and absence of the seal on these endorsements cannot invalidate the warrant itself. This contention in our judgment is well founded, especially in view of the second part of Section 63 of the Travancore Code of Criminal Procedure (sub-section 2 of Section 75 of the Indian Criminal Procedure Code) according to which the warrant shall remain in force until it is cancelled by the court which issued it or until it is executed. In the present case until the arrest was actually effected by P. W. 1, the warrant was not cancelled by the court which issued it. Therefore, the period during which the warrant remained in force did not expire prior to the date on which it was executed by the arrest of the 2nd accused. There is, therefore no substance in the contention of the learned counsel for the accused appellants.

(12) The next question for consideration is as to the nature of the offences that were committed by the accused persons who have been convicted by the trial court. Taking the case against the 1st accused, the view taken by the learned trial Judge is that he caused the death of Police constable Oommen and thereby became liable for the consequences of his conduct individually and that criminal liability for this incident is not shared by the other members of the mob. According to the learned trial Judge, it was not the common intention of the mob to commit murder. There is nothing to show that the other members of the mob were aware of the fact that the 1st accused did have a sharp weapon like a knife or dagger in his possession and that he was going to use it to stab Oommen. We are entirely in agreement with this view taken by the learned trial Judge. There is no constructive liability in the circumstances incurred by the other members of the mob for this act of stabbing done by the 1st accused. It is only the 1st accused that is liable for this offence committed by him.

There cannot be any doubt that it was the 1st accused who stabbed and killed Oommen, because

it is spoken to by all the eye-witnesses, P. Ws. 1 to 12. We have also scrutinised the evidence of these witnesses. There is nothing which detracts from the credit of these witnesses and their evidence regarding the brutal act committed by the 1st accused has not been shaken in cross-examination. The finding that the 1st accused is guilty of murder inasmuch as he caused the death of constable Oommen by stabbing him with a sharp weapon and puncturing his lung is, in our opinion, correct. We accordingly confirm the conviction under Section 301 of the Travancore Penal Code and the sentence of rigorous imprisonment for life passed by the learned Sessions Judge on the 1st accused.

The learned trial Judge has also found him guilty under Section 140 and has found that he has incurred constructive liability for offences under Ss. 222 and 332 read with S. 141 of the Travancore Penal Code. That also is fully supported by the evidence in this case and although it is immaterial whether these convictions for less serious offences are confirmed or not in view of the fact that the shorter terms of imprisonment passed upon the 1st accused in respect of these offences are directed to run concurrently with the sentence of rigorous imprisonment for life, we must say that in our judgment these convictions are also correct. Therefore, the conviction under Section 301 and the sentence of rigorous imprisonment for life passed on the 1st accused are confirmed in Referred Trial No. 15 of 1951, and his appeal No. 97/1951 is dismissed.

(13) The next person whose case has to be dealt with is the 2nd accused who has brought criminal appeal No. 89/1951. This was the accused whose arrest was effected by P. W. 1 assisted by his comrade and it was with the common object of rescuing the 2nd accused from the custody of the Police that the rioters attacked the Police. There is no doubt that the 2nd accused was arrested by the Policemen under the leadership of P. W. 1. P. Ws. 1 to 12 speak about this incident. There is also no doubt that the 2nd accused attempted to run away from their custody. Nor can there be any doubt in view of the evidence of P. Ws. 1 to 12 that he was forcibly rescued from the custody of the Police officers mainly at the instance of the rioters and also by the efforts of the 2nd accused. The learned Judge in the court below has however convicted the 2nd accused under Section 139 of the Travancore Penal Code also.

It is strange that no objection was raised to this part of the judgment of the learned trial Judge by the advocate appearing for the appellants. It was really the learned Public Prosecutor who invited our attention to the fact that the conviction of the 2nd accused under Section 139 cannot stand. This was very fair on the part of the learned Public Prosecutor. What he points out is that the unlawful assembly gathered and developed into a mob of rioters with the object of rescuing the 2nd accused from the custody of the Police officers who had effected his arrest. It was the right of the 2nd accused in the hands of the Police and his cry for assistance that led to the formation of the unlawful assembly which subsequently developed into a riot. The 2nd accused was not a member of that assembly and consequently merely because their object was to rescue the 2nd accused from the custody of the Police Officer who had arrested him, he cannot be made liable for rioting. The conviction of the 2nd accused under Section 139 of the Travancore Penal Code is therefore not correct.

The conviction under Section 139 of the Travancore Penal Code and the punishment of one year's rigorous imprisonment awarded therefor are set aside. But there is ample evidence to support the convictions and sentences under Ss. 221 and 332 of the Travancore Penal Code, although the liability under the latter section cannot be said to be constructive liability since he was not a member of the unlawful assembly. It is direct liability that was incurred by him. The convictions and sentences under these sections are confirmed. This appeal is allowed to this extent.

(14) It would be convenient at this stage to deal with certain other questions of law raised in the arguments of the appellants' learned counsel before disposing of the remaining appeals. One of the points raised in the supplementary grounds of appeal is that the charge is defective. We have gone through the charge. The only defect in it is that it is verbose and too elaborate. But it cannot be said that any of the allegations made against the accused persons is not disclosed in the charge or that the accused persons are likely to have been misled by any defect in the charge. All the necessary particulars that are required for putting the accused on notice of the case against them are to be found in the charge. Therefore, there is no substance in this contention.

(15) The next point urged is with reference to the requirement of Sec. 342 of the Criminal Procedure Code according to which after the evidence for the prosecution was closed it is incumbent upon the court to ask questions to the accused to enable him to explain away the circumstances appearing in evidence against him. There is no doubt that elaborate questions were not put to the accused drawing the attention of each one of them to all that was disclosed in the evidence for the prosecution. But one has got to remember that the defence of the accused persons is a total denial of their presence on the occasion and denial that they committed any of the acts mentioned by the prosecution. In view of these circumstances we are not prepared to say that the questions that were put to the accused under Section 342 of the Indian Code of Criminal Procedure are defective or are not sufficient.

Learned counsel for the appellants bases his arguments on the recent decision of the Supreme Court reported in 'TARA SINGH v. THE STATE', (1951) 2 Mad L. J. 291. There were material errors in the case which their Lordships were dealing with and that was the reason why a retrial was ordered. In the leading judgment in the case it is stated as follows with regard to the failure to comply with the provisions of Section 342:

> "I do not suggest that every error or omission in this behalf would necessarily vitiate a trial because I am of opinion that errors of this type fall within the category of curable irregularities. Therefore, the question in each case depends upon the decree of the error and upon whether prejudice has been occasioned or is likely to have been occasioned. In my opinion, disregard of the provisions of section 342, Criminal Procedure Code, is so gross in this case that I feel there is great likelihood of prejudice."

The learned Judges go on to state that this was not the only error in the case in question and the other mistakes are narrated subsequently.

It will be seen that reference was made in the judgment to an earlier Privy Council case which was regarded as authority on the point. That is the case of 'DWARAKANATH VARMA v. EMPEROR', reported in 1933, 64 Mad L. J. 466: A. I. R. 1933 P C 124 at 130. There the defect consisted in an omission to put an important question relating to the medical certificate that was granted by a witness who was charged with perjury. Without giving the accused an opportunity of explaining certain scientific facts observed in the body of the victim, the court told the jury that the "absence of blood in the body cavity was a vital point". Their Lordships say

that if this was the position it was incumbent upon the court to call the accused's attention to this point and ask for explanation under Section 342 of the Code of Criminal Procedure. There again it was not laid down that any defect in observing the provisions of Section 342 would vitiate the trial.

Our attention has been drawn to the questions put in the present case and we are not satisfied that there is any material error or omission in putting these questions or that prejudice has been occasioned or is likely to have been occasioned by any omission. In the first place there is no material disregard of the provisions of Section 342 and it can certainly not be said that there was gross disregard which is likely to occasion prejudice. There is therefore no substance in this contention either.

The next point urged is connected with the provisions of S. 71 of the Indian Penal Code. This section prescribes the limit of punishment for offences made up of several parts which by themselves also are offences under the Code. The contention of the learned counsel for the appellants is that where there is a conviction for being a member of an unlawful assembly some members of which have committed offences in the prosecution of the common object of the assembly, the person who is made constructively liable for such offences cannot be punished for rioting as well for committing such offences constructively. On this point there has been a divergence of opinion in India. The High Courts of Calcutta, Patna and Madras have taken one view while the High Court of Bombay, Allahabad and Rangoon have taken a contrary view. The difference of opinion relates only to cases in which a person is sought to be made liable constructively for an offence committed by a member of an unlawful assembly in prosecution of the common object of that assembly.

The view taken by the High Courts mentioned in the first category is that separate sentences passed upon persons for rioting and grievous hurt are not legal where it is found that such persons did not commit these offences individually but were guilty under Section 149 of the Penal Code'. See 'NILMONY PODDAR v. QUEEN EMPRESS', 16 Cal 442. In that case a Full Bench of the Calcutta High Court took the view that separate sentences passed upon persons for the offences of rioting and grievous hurt are not legal where it is found that such persons individually did not commit any act which amounted to voluntarily causing hurt but were guilty of that offence under Section 149 of the Indian Penal Code. The earlier decision in 'EMPRESS v. RAM PARTAB', 6 All 121 was approved. It will be seen that the decision refers only to cases where constructive liability for grievous hurt is attributed to a person who is a member of an unlawful assembly which has been found to be guilty of rioting. If it is a case of grievous hurt caused individually by the accused concerned, then the decision will not apply and separate sentences can be passed.

The Judicial Committee of the Privy Council in 'BARENDRA KUMAR GHOSH v. EMPEROR', 52 Ind App 40 (PC) took the view that Section 149 creates a specific offence but at the same time agreed with the view expressed by the Calcutta High Court in 'Nilmony Poddar's' case mentioned above. The Madras High Court has adopted the same view as the Calcutta High Court in the case of 'KRISHNA AYYAR v. EMPEROR', 1918 Mad W N 526: A. I. R. 1919 Mad 353. After considering the divergent views expressed by the Calcutta and Bombay High Courts, the Madras High Court held that separate sentences under Section 149 or any other sentence passed for constructive liability incurred by the accused is illegal under the first paragraph of Section 71 even though the sentences are directed to run concurrently. The Patna High Court in the case of 'PALTU SINGH v. EMPEROR', (1918) 3 Pat L J 641: A. I. R. 1918 Pat 227 has adopted the view of the Calcutta High Court.

The Nagpur High Court in the case reported in 'BALDEOSINGH v. EMPEROR', A. I. R. 1940 Nag. 120 held that under Section 71 of the Indian Penal Code separate sentences for offences under sections 148 and 325 read with Section 149 cannot be passed against the members of an unlawful assembly except against a particular member who actually caused grievous hurt. The Bombay High Court on the other hand has taken a different view in the Full Bench decision reported in 'QUEEN-EMPRESS v. BANA PUNJA', 17 Bom 260. It was held that where an accused is convicted of rioting and constructive liability for hurt it is not illegal to pass two sentences for the two offences of rioting and for causing hurt provided the total punishment does not exceed the maximum punishment which the court might award for any one of the offences. It will be seen that this decision of the Bombay High Court was prior to the decision of the Privy Council in 'BARENDRA KUMAR GOSH'S CASE', in which their Lordships adopted the view that Section 149 creates a specific offence.

The decisions of the Allahabad High Court on this question do not seem to be uniform. (See, 6 All 121 the Full Bench decision in 'QUEEN EMPRESS v. RAM SARUP', 7 All 757, 'QUEEN-EMPRESS v. BISHESHAR', 9 All 645, 'QUEEN EMPRESS v. WAZIR JAN', 10 All. 58 and 'DHARAMDEO SINGH v. EMPEROR', 14 All. L J 738. The Rangoon High Court had adopted the view expressed by the Bombay High Court in 'NGA SON MIN v. EMPEROR', AIR 1924 Rang 291. On a consideration of those divergent views we are inclined to follow the view adopted by the Calcutta and Madras High Courts.

In our judgment where a member of an unlawful assembly or of an assembly guilty of rioting incurs constructive liability for a distinct offence committed by one of the members of the assembly it will not be proper to pass separate sentences for rioting and for the offence for which constructive liability was incurred by the accused. If, on the other hand, it is not a case of constructive liability but is a case where a person has been convicted of rioting and also of a distinct offence committed by him there can be separate convictions under Section 149 and the distinct offence committed by the accused concerned and separate sentences also can be passed. In taking this view, we are following the decision of the Judicial Committee of the Privy Council in 'BARENDRA KUMAR GHOSH'S CASE', that Section 149 creates a specific offence.

(16) Having dealt with the questions of law raised on behalf of the appellants which are relevant in dealing with the cases of the remaining accused we shall proceed to deal in the first instance with the cases of three of the accused persons whose convictions we are not able to uphold. The first of these is accused No. 6 who is the appellant in Crl. Appl. No. 74 of 1951. His name is George. But in the first information report his name is shown as Palakkulangarayil P. Varkey. There is no direct act of aggression alleged to have been committed by this man. He has been convicted on the ground that he has incurred constructive liability by remaining in the assembly after it has become unlawful and after it had developed into a riotous mob. There seems to be a reasonable doubt as to

the identity of this accused especially in view of the fact that P. W. 23 mentions this accused person's name as George and not as Varkey. On considering the evidence which has been accepted by the learned trial Judge, we are inclined to hold that there is a reasonable doubt as to whether this accused person really was a member of that unlawful assembly. Giving him the benefit of the doubt, we allow Crl. App. No. 74 1951, set aside his conviction and sentence and acquit him. Cancel bail bond.

(17) There are two other accused persons whose convictions also we are not inclined to uphold. These are accused No. 7, Eathose, who is the appellant in Crl. App. No. 75/1951 and accused No. 14 who is the appellant in Crl. App. No. 82/1951. The evidence of the witnesses called for the prosecution is to the effect that these two accused persons were not armed when they were seen as members of the assembly. P. Ws. 1 to 4 and 7 to 12 depose against the 7th accused and P. Ws. 1 to 4, and 7, 9, 11 and 12 speak about the 14th accused. There is a reasonabe doubt as to whether they were not mere spectators who were watching the exciting events that took place on the date of occurrence. We are not prepared to accept the evidence of P. W. 2 that the 7th accused beat him with his bare hand.

It is not possible in a big crowd to watch one of the accused persons using his bare hand for beating the witness in question. In these circumstances we hold that it has not been satisfactorily established that these two accused persons (A. 7 and A. 14) were actually members of the unlawful assembly and not mere spectators. Giving them also the benefit of the doubt, we allow Crl. App. No. 75/1951 and Crl. App. No 82/51 and set aside the convictions and sentences passed upon the 7th and the 14th accused. Cancel their bail bonds.

(18) The case against the remaining accused will now be dealt with seriatim: Accused No. 3 is the appellant in Crl. App. No. 72/1951. P. Ws. 1 to 5 and 7 to 12 speak about the criminal acts done by this accused person. There is no reason why their evidence should be discarded or disbelieved. The incidents took place in the month of Karkatakom (July-August) at about 6-45 P. M. There is evidence to show that there was a slight drizzle at the time of the occurrence. It cannot be a heavy shower because if there was a heavy shower, the meeting called by the communist party would not have been held. The witnesses who are dependable refer to a slight shower and according to them there was sufficient light to see what was happening. There is no reason why the evidence of all these witnesses who have definitely deposed against the 3rd accused should be brushed aside. We see therefore no reason to interfere with the conviction of this accused person.

With regard to the sentence, however in the view that we have taken about passing sentence for offence for which liability is incurred constructively by an accused person who is already convicted under Section 140 for taking part in the riot, the punishments awarded separately by the court below for such offences cannot be upheld. The separate sentences passed under Ss. 222 and 332 are, therefore, set aside and the sentence of one year's rigorous imprisonment passed in respect of the offences under Section 140 of the Travancore Penal Code is confirmed. The appeal is allowed to this extent.

(19) The 4th accused is the appellant in Crl. App. No. 73 of 1951. The case against him has been spoken to by P. Ws. 1, 2, 4 and 8 to 12. Their evidence has been accepted by the learned trial Judge. We see no reason to disagree with him. There is, therefore no ground for interfering with the conviction of the 4th accused. For reasons already given in the case against the 3rd accused, the separate sentence passed under Sections 222 and 332 of the Travancore Penal Code are set aside and the sentence under Section 140 confirmed.

(20) The 8th accused is the appellant in Crl. App. No. 76/1951. Pws. 1, 2, 8, 9, 10 and 12 have deposed against him. Their evidence was accepted by the learned trial Judge. We see no reason to disagree with the conclusion reached by the trial court. For reasons already given in the case against the 3rd accused the separate sentences passed under Ss. 222 and 332 of the Travancore Penal Code are set aside. Crl. App. No. 76 of 1951 is allowed to this extent alone.

(21) The 9th accused is the appellant in Crl. App. No. 77/51. P. Ws. 1 to 4 and 7 to 12 have given evidence against him. The evidence of these witnesses has been accepted by the trial Court. We see no reason to disagree with the decision of the trial court. But for the reasons already given in the case against the 3rd accused, the separate sentences passed under Sections 222 and 332 of the Travancore Penal Code are set aside and to this extent this appeal is allowed.

(22) Crl. App. No. 78/1951: Regarding the 10th accused appellant in Crl. App. No. 78/1951 the learned Public Prosecutor reports when this judgment is being pronounced that the court may act under the provisions of Section 350 of the Travancore Code of Criminal Procedure and dispose of the appeal in view of the evidence recorded at the trial and the findings of the learned Judge. We are satisfied that there was sufficient material for convicting the 10th accused. His appeal must accordingly be dismissed. Cancel all bail bonds.

(23) The 11th accused is the appellant in Crl. App. No. 29/51. P. Ws. 1, 2, 4 and 6 to 12 are the witnesses who speak against this accused person. We see no reason to brush aside their evidence to disagree with the conclusion reached by the trial court. But for the reasons already given in the case against the 3rd accused the separate sentences passed under Sections 222 and 332 of the Travancore Penal Code are set aside and to this extent this appeal is allowed.

(24) The 12th accused is the appellant in Crl. App. No. 80/51. P. Ws. 1, 2, 4 and 10 to 12 have deposed against this accused person. There is no ground for discrediting their testimony. We therefore, accept their evidence and dismiss this appeal except with regard to the separate sentences passed under Sections 222 and 332 of the Travancore Penal Code which we set aside for the reasons already given in the case against the 3rd accused.

(25) The 13th accused is the appellant in Crl. App. No. 81/1951. P. Ws. 1, 2, 4 and 8 to 11 are the witnesses who have deposed against him. There is no reason why their evidence should not be accepted. We, therefore, see no ground for interference with the judgment of the learned trial Judge except with regard to the separate sentences passed under Sections 222 and 332 of the Travancore Penal Code which we set aside for the reasons already given in the case against the 3rd accused. To this extent the appeal is allowed.

(26) The 16th accused is the appellant in Crl. App. No. 83/1951. P. Ws. 1, 2, 5 and 11 and 12 are the prosecution witnesses who have deposed against him. P. W. 52 (sic) was beaten by this accused person. We therefore, see no reason to disbelieve the evidence of these witnesses. But for the reasons already given in the case against the 3rd accused the separate sentences passed under Sections 222 and 332 of the Travancore Penal Code are set aside and to this extent this appeal is allowed.

(27) The 18th accused is the appellant in Cri. Appeal No. 84/51. P. Ws. 1, 2, 4 and 8 to 12 are the witnesses who have deposed against this accused person. There is no reason for discrediting their testimony. We, therefore, dismiss this appeal except with regard to the separate sentences passed under Sections 222 and 332 of the Travancore Penal Code which we set aside for the reasons already given in the case against the 3rd accused.

(28) The 19th accused is the appellant in Criminal appeal No. 85/1951. P. Ws. 1, 2, 4 and 8 to 12 have deposed against him. Their testimony there is no reason to discredit. We therefore confirm the conviction and sentence passed upon this accused except with regard to the separate sentences awarded under Sections 222 and 332 of the Travancore Penal Code which we set aside for the reasons already given in the case against the third accused.

(29) The 20th accused is the appellant in Criminal Appeal No. 86/1951. P. Ws. 1 to 4, 7, 9 and 10 have deposed against him and there is also the evidence of P. W. 15 who says that he saw him running away after the occurrence. Believing the evidence of these witnesses we refuse to interfere with the conviction of this accused. But the separate sentences passed under Sections 222 and 332 of the Travancore Penal Code are set aside for the reasons already given in the case against the third accused. The appeal is allowed to this extent.

B/D.H. Orders accordingly.

A. I. R. 1952 TRAVANCORE-COCHIN 466

SANKARAN AND GANGADHARA MENON JJ.

Harihara Iyer Ramaswamy Iyer, Appellant v. Augusthy Devasia and another, Respondents.

A. S. No. 425 of 1123, D/- 23-11-1951.

Limitation Act (1908), Preamble, Arts. 83, 111 and 132 — Money left with vendee for payment to decree-holder of vendor — Failure — Suit for enforcing lien and personal remedy — Limitation — Starting point — Law applicable — (Travancore Limitation Act (6 of 1100)) — (Travancore Limitation Act (2 of 1062), Art. 91).

The vendee agreed under the sale deed to pay the amount reserved therein to the decree-holder of the vendor and discharge that debt. He failed to do so and the decree schedule properties that belonged to the plaintiff-vendor were sold in Court auction on 4-7-1101. There was no time stipulated in the sale deed for payment of the decree debt.

Held that in so far as the document did not fix any time for payment it was not unreasonable to infer that the vendee had time for payment till execution was taken out under the decree and the properties were sold in court auction. The cause of action both for enforcing the lien on the properties and enforcing the personal remedy against the vendee arose on 4-7-1101. Hence claim against the properties was not barred under Art. 91 of Travancore Act 2 of 1062. The law of Limitation applicable to the case was the one in force at the time when the cause of action arose, i.e., Act 6 of 1100. 18 Trav. L.J. 760, Rel. on; 13 Trav. L.J. 154 (FB), disting. (Para 3)

Anno: Lim. Act Pre. N. 15; Art. 83 N. 5, 6; Art. 111 N. 2; Art. 132 N. 7.

T. R. Subramania Iyer, for Appellant.

REFERENCES: Courtwar/Chronological/ Paras
('21) 43 All 544: (AIR 1921 All 74 (2)) 2
('22) 13 Trav LJ 154 (FB) 2
18 Trav LJ 760 2, 3

GANGADHARA MENON J.: The 4th defendant is the appellant. The plaintiff sold the plaint schedule properties to the 1st defendant on 29-10-1094. Under the recital in the sale deed the vendee was directed to pay to the decree-holder in O. S. 878 of 1093, a part of the sale consideration, viz., Rs. 835/- in satisfaction of that decree obtained against the plaintiff and some of his other properties. 1st defendant did not pay the decree amount as agreed to and the properties of the plaintiff were sold in court auction in O. S. 878 of 1093 on 4-7-1101. Plaintiff has therefore brought the present suit for recovery of the amount of Rs. 835/- with interest amounting to a moiety of the principal from the 1st defendant and also charged (charge?) on the plaint schedule properties. In the suit as originally framed defendants 1 to 3 were alone made parties. It was decreed 'ex parte'. But on the application of the 2nd defendant the suit was restored to file on 16-2-1121.

After restoration defendants 4 and 5 were also impleaded in the case. Defendants 2 and 4 contended that the decree debt in O. S. 878 of 1093 was discharged and that the court sale in that case was fraudulent and collusive. The 4th defendant also raised the contention that on the basis of a hypothecation bond executed by the 1st defendant in his favour he has obtained a decree in O. S. 1247 of 1101 and in execution purchased the plaint properties in court auction and that in any event he is entitled to a first charge on the properties to the extent of the decree amount in O. S. 1247 of 1101. The trial court repelled the contentions of the defendants and decreed the suit.

(2) The only point urged in appeal is that the suit is barred by limitation in respect of the relief sought for against the plaint properties. The sale deed in favour of the 1st defendant is dated 24-10-1094. The Limitation Act then in force was Regulation II of 1062. It is contended that a suit for enforcement of the vendor's lien over the properties was governed by Article 91 of that Act, that the suit not having been filed within three years from the date of the sale deed was barred by limitation under that Article even while that Act was in force, and that a cause of action which was so barred could not be deemed to have been revived by the Limitation Act VI of 1100 now in force. In support of his contention the learned advocate relied on the Full Bench decision in 'GHEVARGHESE CHACKO v. AIYAPPAN SANKARAN', 13 Trav. L.J. 154. No doubt it was held in that case that

"Where part of the consideration for a sale of immovable property in writing registered is money reserved with the purchaser for payment to a creditor of the vendor, and on the purchaser's default to make the payment the vendor discharges the debt and sues for recovery of the amount from the purchaser and the property sold, the right as against the property will be governed by Article 91, and the remedy against the person will be governed by Article 96, of the Limitation Regulation."

But the real question for consideration is as to the time from which the three years period mentioned in Article 91 begins to run in a case like the present. In other words when exactly did the cause of action arise for the plaintiff? Is

it from the date of the sale deed that he executed in favour of the 1st defendant or is it from the date on which he was damnified by the sale of his properties in O. S. 878 of 1093? This question had come up for consideration in almost a similar case reported in 18 Trav LJ 760.

The learned Judges in that case observed that: "As regards the claim against the property Article 91 (Article 97 of the Regulation of 1100) is clearly applicable as the relief in question can only be sought by way of enforcement of the vendor's lien. In computing this period, the time from which the same should be calculated is laid down to be the time fixed for completing the sale. This expression has to be reasonably construed for the lien of the vendor for his unpaid purchase money would not be affected even if a time limit has been fixed for the payment. This view is supported by the ruling in 'BASHIR AHMAD KHAN v. NAZIR AHAMAD KHAN', 43 All 544 wherein an intent to relinquish such a lien was held to be not gatherable by the taking of an instalment bond for the unpaid portion of the purchase money. There may be cases where the parties agree to the payment of such portion of the purchase money more than three years after the date of the same. If the completion of the sale contemplated in this Article is construed as referring to the time when the ownership passes to the vendee, there would be a virtual denial of the lien in such cases. This anomalous position could be avoided by interpreting the expression 'when the sale is completed' occurring in this article as referring to the time fixed for the performance of the obligations imposed on the parties to the sale with respect to that transaction thereby including the dates fixed for the payment of the unpaid portion of the purchase money."

(3) In this case the vendee agreed under the sale deed to pay the amount reserved therein to the decree-holder in O. S. 878 of 1093 and discharge that debt. He failed to do so and the decree schedule properties in O. S. 878 of 1093 that belonged to the plaintiff were sold in court auction on 4-7-1101. There was no time stipulated in the sale deed for payment of the decree debt. In so far as the document did not fix any time for payment it is not unreasonable to infer that the vendee had time for payment till execution was taken out in O. S. 878 of 1093 and the properties were sold in court auction. Therefore consistently with the view taken in 18 Trav LJ 760 even under Article 91 of the Limitation Act II of 1062 the cause of action for the plaintiff for enforcing the lien on the properties arose only on 4-7-1101. As against the person undoubtedly the sale deed being a registered one. the cause of action for damages on account of the breach of contract arose on the date of the court sale, that is, on 4-7-1101. Therefore the cause of action both for enforcing the lien on the properties and enforcing the personal remedy against the vendee arose in this case on 4-7-1101, that is, after the Limitation Act VI of 1100 came into force. This being the case there is no force in the contention that claim against the properties was barred under Article 91 of Act II of 1062. The law of Limitation that is applicable to the case is the one in force at the time when the cause of action arose, i.e., Act VI of 1100. Admittedly under the Act VI of 1100 the plaintiff's suit is in time for the relief against the plaint properties as well.

(4) No other point was urged in appeal.

(5) Therefore in confirmation of the decree of the Court below we dismiss the appeal with costs.

B/D.H. Appeal dismissed.

AIR 1952 TRAVANCORE-COCHIN 467

KOSHI AND GOVINDA PILLAI JJ.

Kochuponchi Varughese, Appellant v. Ouseph Lonan, Respondent.

A. S. No. 146 of 1124 (Tr), D/- 13-11-1951.

(a) Civil P. C. (1908), S. 64 — Prior agreement to sell — (Transfer of Property Act (1882), S. 54).

Though an agreement to sell immovable property does not create any interest or charge on the property it can prevail over a subsequent attachment. The attachment holds good only as against the then unpaid balance of the purchase money under the prior agreement to sell. View of Cuming J. in AIR 1929 Cal 494, Dissent from. Case law discussed. (Para 6)

Anno: C. P. C., S. 64 N. 15.

(b) Civil P. C. (1908), S. 47 — Representative — Contract to sell property — Subsequent attachment — Sale — Vendee is not representative of vendor.

Where subsequent to a contract to sell certain property that property is attached by a decree-holder of the proposed vendor and the sale in pursuance of the contract takes place afterwards, the vendee is not a representative of the judgment-debtor (the vendor) within the meaning of S. 47 and as such a suit by the vendee for a declaration that the property was not liable to attachment is not barred by S. 47. AIR 1936 Nag 163, Foll. (Para 10)

Anno: C. P. C., S. 47 N. 17 Pt. 4.

K. Narayana Panicker, for Appellant; T. K. Joseph, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('22) 45 Mad LJ 770: AIR 1922 PC 393 7, 8
('39) AIR 1939 Bom 492: (185 Ind Cas 225) 8
('17) 21 Cal WN 158: 23 Cal LJ 115: (AIR 1916 Cal 927) 6, 8
('29) AIR 1929 Cal 494: 57 Cal 274 6, 8
('10) 21 Mad LJ 82: 7 Ind Cas 795 7
('17) 5 Mad LW 234: 38 Ind Cas 107: (AIR 1917 Mad 4) 7
('35) 68 Mad LJ 67: AIR 1935 Mad 193 7, 8
('35) 50 Mad 1: AIR 1935 Mad 872 7, 8
('39) 1939-2 Mad LJ 822: AIR 1939 Mad 702 7, 8
('42) AIR 1942 Mad 67: (201 Ind Cas 307) 7
('36) AIR 1936 Nag 163: (ILR (1936) Nag 172) 10

GOVINDA PILLAI J.: The plaintiff is the appellant. The plaint properties originally belonged to one Variathu. He had executed a Will in 1077 bequeathing all his properties to his daughter Anna Meenka and her male issues, one of whom is the 4th defendant. The 5th defendant is the son of another son of hers by name Ouseph who died in 1091. Anna Meenka and Ouseph's wife had executed a mortgage in 1091 to one Yohannan Kathanar for the plaint properties and took back the same on lease. Yohannan Kathanar had filed O. S. 979/1100 in the Munsiff's Court of Alleppey for arrears of pattom and for recovery of possession of the properties. The same mortgagors had also hypothecated the properties to one Ummer Kutti who obtained a decree in O. S. 1628/1098 on the same.

While so, the 4th defendant filed O. S. 1232/1102 in the Alleppey Munsiff's Court for a declaration of his ¼th share and for recovery of the same after division by metes and bounds after declaring that the decrees in O. S. 979/1100 and O. S. 1628/1098 and the Otti deed of 1091 to Yohannan Kathanar were not binding on him or his share in the property. The 5th defendant had also filed a similar suit O. S. 1522/1105 for the identical reliefs. These suits were tried together. Subsequently they were compromised on 32-12-1108 by which each of defendants 4 and 5 agreed to pay Rs. 600 to Ummerkutty to get release of his rights over the properties. The Otti deed to Yohannan Kathanar and the decree obtained by his children were agreed to be set aside.

While the partition suit was pending, Yohannan Kathanar's children executed a submortgage of their right to the 1st defendant's father, and on the basis of the same he obtained a decree in O. S. 46/1108. Before the partition suit was compromised the 4th defendant had executed a gift deed Ext. A on 10-11-1102 to his wife and 3rd defendant and her children. By this they were allowed to continue the suit and recover possession of his share in the properties in execution. The donees were directed to maintain the 4th defendant for his life. There was a further provision that in case he was not maintained properly he would be entitled to one-half of the income from the properties that would go to his share. With the compromise, the properties were divided and the plaint and other properties were allotted to the share of the 4th defendant.

Defendants 3 and 4, on 24-11-1117 agreed to sell the plaint properties to the plaintiff and executed Ext. B agreement on receipt of an advance of Rs. 50/-. The properties were subsequently sold to him on 24-5-1118. Ext. C is that sale deed. The properties were put in his possession from the date of Ext. B. While he was thus in possession, a receiver had been appointed in O. S. 46 of 1108 mentioned above. The 2nd defendant was the receiver and he obtained possession of the properties on 29-2-1120. The present suit was filed for declaration of the plaintiff's right to the plaint properties and for recovery of possession of the same with mesne profit at the rate of Rs. 225 a year.

(2) The 5th defendant was the main contesting defendant. It was not mentioned in the plaint why he was impleaded in the case. But he contended that at the time of the compromise the 4th defendant agreed to pay him Rs. 100/- to equalise the shares and executed an agreement in his favour. Since this amount was not paid he had filed the suit O. S. 620/1112 and obtained a decree thereon. In execution of this decree he had attached the plaint properties on 30-5-1118 and sold them in court auction on 16-12-1118. He himself purchased the same and obtained delivery of possession on 22-11-1120. Ext. X is copy of that delivery kychit. He therefore contended that he was in rightful possession and that he was not to be evicted. He also stated that Ext. A gift deed in favour of the 3rd defendant and her children by the 4th defendant was without any consideration, that it was vitiated by lis pendens, that on the date of the gift, the 4th defendant was not entitled to the plaint properties, and that the gift deed was also not intended to take effect. He had no objection to the decree in O. S. 46/1108 being set aside. According to him the mesne profits from the plaint properties would not be more than Rs. 60 a year.

(3) The lower court found that though Ext. A was executed during the pendency of O. S. 1232/1102 it did not affect the plaintiff's case in any way, that by Ext. A the 4th defendant was not divested of the ownership of the plaint properties, that by virtue of the agreement between defendants 4 and 5, the 5th defendant became entitled to get Rs. 100 from the 4th defendant by way of equalisation of the shares, that the decree obtained by the 5th defendant against the 4th defendant in O. S. 626/1112 was valid, that the attachment by the 5th defendant of the plaint properties was also valid and binding on the plaint properties, that the plaintiff was not entitled to question the same, and that the decree and execution proceedings in O. S. 46/1108 were liable to be set aside. Since the decree and execution proceedings in O. S. 626/1112 obtained by the 5th defendant were found binding on the plaint properties, the suit was dismissed with costs to the 5th defendant.

(4) Though there were no allegations in the plaint attacking the decree obtained by the 5th defendant in O. S. 626/1112 it would appear that the validity of the same and the execution proceedings had been disputed by the plaintiff. Issues 1 and 2 relating to the claim of Rs. 100 advanced by the 5th defendant and the attachment and execution proceedings in O. S. 626/1112 would show the same. It would have been well if the plaintiff had definitely put forward his case in the pleadings instead of attempting to develop his case as the trial went on. At any rate, the 5th defendant could not be held to be prejudiced in any way because of the two pertinent issues 1 and 2 raised in the case. So we are inclined to go into the merits of the case relating to the contentions advanced by the several parties.

(5) The dispute is now only between the plaintiff and the 5th defendant. The 5th defendant is now in possession of the plaint properties. The plaintiff had stated that while he was in possession of the plaint properties, the 2nd defendant who was appointed as the receiver in O. S. 46/1108 had divested him of his possession in 1120. That was admitted by the 5th defendant in paragraph 6 of his written statement. So it was clear that the plaintiff was in possession of the plaint properties pursuant to the arrangement entered into between him and defendants 3 and 4. Ext. H is the agreement for sale executed by defendants 3 and 4 in favour of the plaintiff. This agreement, though mentioned in the plaint, was not denied by the 5th defendant in his written statement. The agreement shows that the plaintiff was put in possession of the properties on the date of Ext. B that is on 24-11-1117.

What the 5th defendant had obtained was only a simple money decree for Rs. 100 and future interest from the date of the suit. He had effected an attachment of the plaint properties in execution of that decree only on 20-5-1118, that is nearly six months after the agreement for sale, but four days before the actual execution of the sale deed Ext. C. The plaintiff's case was that the 5th defendant was not entitled to proceed against the properties for a debt due from the 4th defendant as he had no alienable interest in the properties on the date of attachment because he had gifted away the properties to his wife and children in 1102 under Ext. A. The 5th defendant would say that this gift deed had not taken effect, and he had produced at the time of argument, two documents, Exts. XI and XII to show that the

4th defendant had executed a sale deed in 1110 for one of the properties obtained for his share. On the other hand, the plaintiff had produced Exts. F, G and J to show that the 3rd defendant was exercising the right of ownership after the date of Ext. A over some of the properties obtained under the gift deed.

Whatever might be the real position, it would be seen that the 4th defendant had retained some right over the properties for his lifetime for the purpose of his maintenance. It cannot therefore be said that he had no manner of right over these properties. Being so, it would only be proper if without causing any undue hardship to any of the parties, the equities between them are settled. The plaint properties were sold by defendants 3 and 4 to the plaintiff for Rs. 668. It had been found by the commissioner sent from court that the annual income from these properties would be Rs. 148 and odd. The lower court had found that the mesne profits would be this amount, and the 5th defendant had not questioned that finding.

The amount due to the 5th defendant under the decree in O. S. 626/1112 was only Indian Rs. 100 and interest from the date of suit i.e., from 29-6-1112. Ext. VIII is copy of the plaint in that case. Since it was an 'ex parte' decree it may be presumed that the future interest claimed by the 5th defendant in the plaint was also allowed by the court. Copy of that decree had not been produced in the case. At any rate, it could be seen that on the date of the court sale, the amount due to the 5th defendant would not have been anything more than Rs. 150 and for this he had knocked away valuable properties. It was also seen that in 1117 the plaintiff had obtained an agreement for sale and also secured possession of the plaint properties. He could use that as a shield against any person who wanted to secure possession from him by a title completed subsequently. On the date of the attachment what he was liable to pay was only the balance of consideration agreed to be paid for the sale. So what the 5th defendant could legitimately claim out of that sale consideration was only the amount that would satisfy the decree. For this purpose we assume that the decree obtained by the 5th defendant was valid.

Though this position was hotly contested by the learned Advocate for the appellant we do not go into that question further, as the plaintiff had not by specific pleadings questioned its validity mentioning the grounds of attack. As mentioned already, the 5th defendant had not produced a copy of the decree in O. S. 626/1112 or the sale sannad which he had obtained in execution of that decree. The sale itself was in 1115 so that the money due to him by way of interest at 6 per cent. on the principal sum would not have been more than Rs. 50/-. We would therefore allow him Indian Rs. 150/- in satisfaction of his claim. The plaintiff is liable to pay the same. The 5th defendant had secured possession of the properties and he is allowed to retain the same till the said sum of Indian Rs. 150 is paid to him by the plaintiff. Till that amount is deposited the plaintiff is not allowed mesne profits in the properties.

(5a) Thus we set aside the decree of the lower court and pass a decree allowing the plaintiff to recover possession of the plaint properties from the 5th defendant on payment of Indian Rs. 150/-. The plaintiff will not get any mesne profits till he deposits the said amount and serve notice of the same on the 5th defendant. On the failure of the 5th defendant to surrender possession of the properties after the date of service of the notice of deposit the plaintiff will get mesne profits at the rate of Indian Rupees One hundred and forty eight — twelve 'chuckrams' (148/- 12 chs.) a year from the 5th defendant. The pleadings of the plaintiff were defective, and he does not also get an unconditional decree. The 5th defendant has also set up unnecessary and vexatious contentions. So the proper order will be to direct the parties to suffer their costs throughout. The appeal is thus allowed as indicated above.

(5b) KOSHI, J.: I agree, but at the same time think it proper to add a few words.

(6) With great insistence learned counsel for the 5th defendant respondent commended for our acceptance the view that as an agreement to sell immovable property does not create any interest or charge on the property it cannot prevail over a subsequent attachment. The decision of Cuming, J. in 'TARAK NATH v. SANAT KUMAR', AIR 1929 Cal. 494 was cited as authority. To put it mildly that view is a much criticised one. Pearson J. who sat with Cuming J. in the decision of that case did not share his learned colleague's view and was inclined to agree with the earlier decision Woodroffs and Richardson, JJ. gave in 'MADAN MOHAN v. REBATI MOHAN', 21 Cal. W. N. 158. The learned Judge said that the attachment holds good only as against the then unpaid balance of the purchase money under the prior agreement to sell. That view it is that my learned brother has adopted in the decision of this appeal.

(7) The law to be applied when competing title holders as we have in this case are brought face to face is clearly and succinctly set out by Wadsworth J. in the decision reported in 'ATHINARAYANA KONAR v. SUBRAMANIA AYYAR', AIR 1942 Mad 67 and I think it proper to extract a portion of that judgment here. The facts of that case closely resemble the facts in this case, the only difference being that there the suit was brought by the court auction-purchaser. The attachment in that case was effected after the agreement to sell was made and the court sale took place after the judgment-debtor had sold the property to the defendants in due performance of the agreement. Two years after the court sale the plaintiff got delivery through court and thereafter the defendants were alleged to have entered upon the land. The plaintiff then brought the suit that gave rise to that appeal for recovery of possession. After setting out these facts the learned Judge proceeded to state as follows at page 68 of the report:

"Now, there is a line of decisions of this court which make it quite clear that though a contract to sell does not, having regard to the terms of S. 54, T. P. Act create any interest in or charge on the property, it does not give rise to an obligation which limits the right of the judgment-debtor and that the attachment of the right, title and interest of the judgment-debtor is subject to any such limitation by which the judgment-debtor was bound. The cases which have been quoted before me on this point are: 'BAPINEEDU v. G. VENKAYYA', 21 Mad. L.J. 82: 7 Ind. Cas. 795; 'VENKATA REDDI v. YELLAPPA CHETTY', 5 Mad. L.W. 234: 38 Ind. Cas. 107; 'VEERARAGHAVAYYA v. KAMALA DEVI', 68 Mad. L.J. 67: AIR 1935 Mad. 193; 'VEERAPPA THEVAR v. VENKATARAMA AIYAR', 50 Mad. 1: AIR 1935 Mad. 872; 'DIRAVYAM

PILLAI v. VEERANAN AMBALAM', 1939-2 Mad. L.J. 822: AIR 1939 Mad. 702 and there is a decision of the Privy Council which throws light on the same subject reported in NUR MAHOMED PEERBHOY v. DINSHAW HORMASJI', 45 Mad. L.J. 770: AIR 1922 P.C. 393. An attempt has been made to distinguish these decisions on the ground that they are cases in which the prospective purchaser has under his contract either paid money or got possession, but it does not seem to me that this is the basis of any of these decisions. The matter has been well put by Varadacharier J. at page 831 of the decision in 1939-2 Mad L.J. 822 at page 828. The learned Judge says that:

> 'The question is not whether any interest has passed under the contract to sell. The attaching decree-holder attaches not the physical property but only the rights of the judgment-debtor in the property.'

As explained in the decisions and recognised in S. 40, T. P. Act, the right of the judgment-debtor in the property is on the date of the attachment qualified by the obligation incurred by him under the earlier contract to sell and the attaching creditor cannot claim to ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor....."

Wadsworth J. was sitting alone to decide that case but that is the latest case I was able to come across bearing on the question. Most of the earlier decisions referred to there are Division Bench Rulings.

(8) Varadachariar J., from whose judgment Wadsworth J. quoted a passage has discussed the question more elaborately and it would be very instructive to quote here a few passages from that decision. Gentle J. as he then was, concurred in the judgment Varadacharier J. gave. The relevant passages occur at pages 706 and 707 of 'DIRAVYAM PILLAI v. VEERANAN AMBALAN', AIR 1939 Mad 702 and they read as follows:

> "All that S. 64 of the Code (Civil P.C.) provides is that any private transfer by the judgment-debtor of the property attached shall be void as against all claims enforceable under the attachment. It will not be accurate to read S. 64 as putting an end to the power of sale, because as between the transferor and the transferee, the alienation will undoubtedly be operative. If the attaching creditor is paid off or for any reason the attachment ceases to subsist, the alienee's title will be unassailable. The only effect of S. 64 is that such transfer shall not prejudice the rights of the attaching creditor.
>
> If the above is the true position, the question arises whether when a sale is made in pursuance of a contract entered into prior to the attachment, such conveyance is one contrary to the terms of S. 64 at all. We cannot agree with Mr. Krishnanswami Iyer that the uniform course of decisions on this point referred to already is in any way opposed to the recent decisions of the Privy Council as to the effect of S. 54 T. P. Act. The argument based on S. 54 has been considered in many of the cases referred to. The question is not whether any interest has passed under the contract to sell. An attaching decree holder attaches not the physical property. As explained in the decisions and recognised in S. 40, T. P. Act, the right of the judgment-debtor in the property is on the date of the attachment qualified by the obligation incurred by him under the earlier contract to sell and the attaching creditor cannot claim to ignore that it remained the absolute property of the judgment-debtor. Nor can it be said that the sale by the contracting parties executed in pursuance of a pre-existing contract to sell, prejudices the attaching creditor, because the sale is merely the fulfilment of the obligation to which the judgment-debtor was already subject. The utmost that the attaching decree-holder will be entitled to, in such circumstances is the payment of the balance of the purchase money if anything remained due on the date of the attachment.
>
> Mr. Krishnaswami Iyer relied on the observation of Sir D. F. Mulla in the notes to S. 40, T. P. Act to the effect that the attaching decree-holder will not be bound by a conveyance even in pursuance of a pre-existing contract to sell but the learned author draws a distinction between a conveyance voluntarily executed by the judgment-debtor in pursuance of pre-existing contract and a conveyance executed by him under an order of court in pursuance of a pre-existing contract. In the latter case, the author seems to think that the attaching creditor cannot object to the conveyance. If this distinction is well founded, it is sufficient to support the decision of the lower court in this case because the sale deed was executed in this case in pursuance of an order of court. But we are inclined to agree with Mr. Krishnaswami Iyer that there really ought to be no distinction between the two classes of cases, because in both cases, the conveyance is really not voluntary but is only the fulfilment of an obligation already incurred; only we would also hold that such a conveyance is not in reality contrary to the attachment within the meaning of S. 54, Civil Procedure Code.
>
> Reliance was placed by the learned counsel for the appellants on some observations of Cuming J. in 'TARAK NATH v. SANAT KUMAR', 57 Cal. 274: AIR 1929 Cal. 494. In one part of the judgment, the learned Judge seems to grant that the vendee will have a right to claim specific performance as against the court auction purchaser. If that be the position, it is difficult to see the justification for his differing from the other decisions referred to already including the decision of the Calcutta High Court in 'MADAN MOHAN v. REBATI MOHAN', 21 Cal. W. N. 158. With all respect, we prefer to adopt the view of Pearson J., the other learned Judge who took part in 'TARAK NATH v. SANAT KUMAR', 57 Cal. 274: AIR 1929 Cal. 494 and that is in accordance with the weight of authority as we have already observed. Our attention was drawn by Mr. Krishnaswamy Iyer to the decision of the Judicial Committee in 'NUR MAHOMED PEERBHOY v. DINSHAW HORMASJI', 45 Mad. L.J. 770: AIR 1922 P.C. 393. We do not find anything in that judgment to help the appellants. Their Lordships merely leave the question open and they have not given any indication that may be said even to throw doubt on the correctness of the decisions of the several High Courts on the point."

The view Cuming J. expressed in AIR 1929 Cal. 494 was dissented from in three other cases. Two of them are among the cases referred to by Wadsworth J. See 'VEERARAGHAVAYYA v. KAMALA DEVI', AIR 1935 Mad. 193 and

'VEERAPPA THEVAR v. VENKATARAMA AIYAR', AIR 1935 Mad 872. The former case was decided by Venkatasubba Rao J. and the latter by Beasley C. J. and Cornish J. The third case in 'BASAPPA CHAMBASAPPA v. HANMAPPA RAMAPPA', AIR 1939 Bom. 492 and the decision was given by Beaumont C. J. The relevant passage occurs at p. 493 and it is in these terms :

"Therefore, I think, there is a good deal of force in the contention of the present appellant that the plaintiff did get a good title. Mr. Murdeswar relies on 57 Cal. 274: AIR 1929 Cal. 494 but that case is opposed to an earlier decision of the Calcutta High Court in 23 Cal. L.J. 115: 21 Cal. W. N. 158 in which the Court held that a conveyance of a property, executed after its attachment before judgment by a creditor, in pursuance of a contract dated before the attachment should prevail over the attachment. I think that decision is right, and I prefer it to the later decision of the Calcutta High Court, which, I must confess, I have some difficulty in understanding."

(9) Regard being had to the large preponderance of judicial opinion opposed to the view Cuming J. took in the case referred to and the innate logic and sense of justice behind that opposite view, we have with respect chosen to follow that.

(10) The respondent's learned counsel also urged a further point that the plaintiff should have sought his remedy in O. S. 626 of 1112 when possession was given to his client pursuant to the sale certificate granted to him. We cannot subscribe to that view. No doubt he could have resorted to the summary remedy provided by the Civil Procedure Code but he was not bound to do it. Presumably the argument was that the appellant was a representative of defendant 4, the judgment-debtor in O. S. 626/1112. A similar argument was advanced and repelled in 'GHUSARAM v. PARASHRAM', AIR 1936 Nag. 163. There it was held that where subsequent to a contract to sell certain property, that property was attached by a decree-holder of the proposed vendor and the sale in pursuance of the contract took place afterwards, the vendee was not a representative of the judgment-debtor (the vendor) within the meaning of S. 47 and that as such a suit by the vendee for a declaration that the property was not liable to attachment was not barred by S. 47. We respectfully agree with this view; in other words this contention of the respondent has also to be repelled.

(11) With these observations I agree with the judgment delivered by my learned brother and in the decree proposed by him.

B/V.R.B. Appeal allowed.

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KUNHI RAMAN C. J.
AND SUBRAMANIA IYER J.

Aiyappan Pillai and another, Appellants v. Bhagavathi Pillai and others, Respondents.

A. S. Nos. 252 and 385 of 1120 (T), D/- 21-3-51.

(a) Malabar Law — Tarwad — Acquisition by thavazhis — Presumption.

The presumption that arises in certain cases about the tarwad character of properties acquired by a member whether he be de jure karnavan, de facto manager, or otherwise in a fiduciary relation to the family, does not arise in respect of properties acquired by sub-thavazhis or thavazhis forming component part of a common tarwad. (Para 13)

(b) Malabar Law — Tarwad within tarwad.

Law recognises the possibility of the existence of a co-parcenary within a co-parcenary, "of a tarwad within a tarwad": 25 Mad 149; AIR 1916 Mad 751 FB, Rel. on. (Para 14)

(c) Malabar Law — Tarwad — Thavazhis and sub-thavazhis separately enjoying specific properties — Income derived by such thavazhis from such property is their own.

Where in a tarwad, the various thavazhis and sub-thavazhis composing it were separately in enjoyment of specific properties for their own benefit each of the component parties functioning separately, the income derived by the component thavazhis or sub-thavazhis from the tarwad properties in their possession would be their own and saving made therefrom or any extra profit arising thereout would be their own, as they are not accountable to the tarwad. Though, there is a tarwad with component thavazhis and sub-thavazhis having community of interest in tarwad properties, there is not that jointness of residence, management and enjoyment of tarwad properties which in certain cases renders it immaterial in whose name particular properties were acquired or particular properties stood, as they in such cases would all be for and on behalf of the family: AIR 1924 Lah 224, Ref.; 28 Mad 1 (FB), Rel. on. (Para 15)

(d) Evidence Act (1872), S. 114 — Possession and title.

Possession is a substantive root of title except in cases where it is proved or can be presumed to be on behalf of the holder of the title. The onus of proof of title claimed by a party out of possession against the party in possession of properties is thus on the claimant: AIR 1936 Bom 201, Ref. (Para 16)

Anno: Evid. Act, S. 114, N. 26.

(e) Evidence Act (1872), S. 114 — Document in possession of plaintiff — Non-production — Inference is that if produced, it would go against him. (Para 21)

Anno: Evi. Act, S. 114 N. 10.

(f) Evidence Act (1872), S. 114 — Property, tarwad property from inception — Presumption is that title continues in tarwad — Members of tarwad claiming separate title have to prove that they have right in derogation of tarwad — (Malabar Law — Tarwad). (Para 21)

Anno: Evi. Act, S. 114 N. 19.

(g) Partition suit — Parties claiming shares are in position of plaintiffs though arrayed as defendants.

In a suit for partition plaintiffs and defendants who claim shares are all to be regarded as plaintiffs on whichever side they may be arrayed on the record. The circumstances that the plaintiffs originally claimed only a declaration in respect of some properties is immaterial. The result that would have ensued had they themselves claimed a partition of those properties in the plaint enures to their advantage by the claim for partition not made by them, but made against them by the defendants. (Para 24)

T. K. Narayana Pillai, for Appellants; M. P. Ramakrishna Pillai, P. Krishnan Thambi, K. P. Abraham and P. Govindan Nair, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('93) 20 Ind App 99: (20 Cal 834 PC) 16
('82) 6 Bom 215 16
(1900) 25 Bom 287: (2 Bom LR 1111) 16
('36) AIR 1936 Bom 201: (163 Ind Cas 632) 16
('24) AIR 1924 Lah 224: (72 Ind Cas 900) 15
('02) 25 Mad 149: (11 Mad LJ 353) 14
('05) 28 Mad 1 (FB) 15
('15) 38 Mad 48: (AIR 1916 Mad 751 FB) 14

SUBRAMANIA IYER J.: These appeals arise out of O. S. 103 of 1106 on the file of the District Court of Trivandrum, filed on 21-7-1106 by two members of a Nair Tarwad called Puthuveettil, against the remaining members of the tarwad who were 40 in number and who were all impleaded in the suit as defendants 1 to 40 of whom, the 1st defendant who died pending the suit was the karnavan. The parties are not in agreement as to the genealogy relating to the past and present members. Two genealogical tables have been filed in the case. The one filed by the plaintiffs is marked Ext. AU, which is accepted as correct by defendants 38 to 40. The other filed on behalf of defendants 1 to 37, is marked Ext. XXXIII. These genealogical trees cannot be said to have been proved in the case and they can, therefore, be taken only as representing the case of the parties, and to the extent to which they agree, they may be taken as the common case of the parties. These genealogical trees are subjoined for facility of reference.

(2) The two genealogical trees agree in the following respects: The common ancestress of the parties was one Mathevi. The plaintiffs and defts. 38 to 40 are the descendants of her daughter Pandi and defendants 1 to 37 are the descendants of her daughter Aruvi. The plaintiffs are the descendants and the surviving members of the thavazhi of Pandi's daughter Lekshmi called Pandi Lekshmi. To that thavazhi belonged Mathevan Kumaran, Mathevan Padmanabhan and Kumaran Kumaran. Defendants 38 to 40 are the descendants and the surviving members of the thavazhi of Pandi's daughter Thevi called Pandi Thevi. The Thavazhis of Pandi Lekshmi to which the plaintiffs belong and the thavazhi of Pandi Thevi to which defendants 38 to 40 belong would be subthavazhis in relation to the thavazhi of Pandi, that is, the mother of Lekshmi and Thevi. Plaintiffs and defendants 38 to 40 are thus members of Pandi's thavazhi. The 1st plaintiff was the karnavan of that thavazhi at the time of the suit. He died within a year or two after the suit was filed and the second plaintiff became the karnavan of that thavazhi. Defendants 1 to 37 belong to Aruvi's thavazhi in which there are three subthavazhis. Defendants 1 to 7 are members of the first sub-thavazhi, defendants 8 to 19 of the second sub-thavazhi, and defendants 20 to 37 belong to the third sub-thavazhi. The differences between the two genealogical trees to the extent relevant to the case will be dealt with in the sequel.

(3) The suit was for partition of the properties mentioned in the A schedule to the plaint, sub-divided into three and marked A1, A2 and A3, into 42 shares and delivery to the plaintiffs of a 2/42 share. It was also for a declaration that properties mentioned in the B schedule to the plaint also sub-divided into three and marked as B1, B2 and B3, belong exclusively to the plaintiffs' sub-thavazhi and that the properties mentioned in the C schedule to the plaint, also sub-divided into three and marked as C1, C2 and C3, belong to the thavazhi of the plaintiffs and defts. 38 to 40, that is, Pandi's thavazhi, & that defendants 1 to 37, that is the members of Aruvi's thavazhi, have no manner of right over the properties mentioned in the B and C schedules. The reason for the inclusion of schedules B and C to the plaint with the relief for declaration in respect thereof, was the execution of a deed of partition, by defendants 1 to 37 without the knowledge and consent of the plaintiffs and defendants 38 to 40, including the properties in B and C schedules therein along with the properties in the A schedule as though all those properties belonged to the tarwad and were divisible among the 42 members thereof. In the written statement filed by the members of Aruvi's thavazhi, the deed of partition was contended to be free from the faults ascribed thereto by the plaintiffs. It is also prayed that, in the event of a fresh partition, all the properties mentioned in schedules, A, B and C to the plaint have to be divided equally between all the members of the tarwad as the claim put forward to exclusive title of the plaintiffs to the B schedule properties and of the plaintiffs and defendants 38 to 40 to the C schedule properties is unfounded. Defendants 30 to 33 included in their written statements certain items of properties not comprised in the schedules attached to the plaint and that they have also to be dealt with and divided in the suit between all the members of the tarwad. Defendants 38 to 40 accepted the plaint in so far as it confined the properties divisible among all the members of the tarwad to the properties mentioned in the A schedule, but repudiated the plaintiffs' claim to exclusive right to the properties comprised in the B schedule to the plaint. They contended that the properties in B schedule are, just like the properties in the C schedule, properties of their common thavazhi that is Pandi's thavazhi, which properties were therefore divisible among the members of that thavazhi namely the plaintiffs and defendants 38 to 40. They claimed partition thereof and delivery to them of a 3/5 share of those properties.

(4) The plaint and the schedules thereof were amended as per order on C. M. P. No. 3903 of 1107 dated 11-4-1108. Written statements were filed subsequent to the amendments but no new pleas were raised.

(5) The learned temporary Second Judge of Trivandrum, by his judgment and decree dated 7th Dhanu 1119 (22nd December 1943) set aside the partition deed impeached in the plaint, found on the other points in issue in favour of defendants 1 to 37, held that all the properties comprised in all the schedules attached to the plaint were divisible tarwad properties and passed a preliminary decree directing the division of all those properties into 42 shares and delivery to the plaintiffs of their share, i.e., 2/42 claimed by them. Incidental and consequential directions were also given by the learned Judge in his judgment.

(6) Both the plaintiffs died pending the suit. On the death of the 1st plaintiff, all the rights became vested in the second plaintiff which, on his death, devolved upon his legal representatives who were impleaded as plaintiffs 3 to 6. Several of the defendants also died pending the suit and their legal representatives have been impleaded as supplemental defendants.

(7) Appeal No. 252 of 1120 is filed by defendants 38 to 40. Memoranda of objections have been filed in this appeal by respondents 28 and 31 who are defendants 30 and 33 respectively.

A memorandum of objections has been filed by the additional respondents who are the children born to the respondents 18 and 32 (defendants 16 and 34) after the suit, and who were impleaded as per orders of this court in C. M. Ps. 3132 and 3134 of 1123 to the effect that their impleading would be without prejudice to the rights of parties and on condition that the question as to whether they are entitled to separate shares will be considered by the court below in due time. Their memoranda of objections do not therefore come up for consideration or decision here.

(8) Appeal No. 385 of 1120 is filed by plaintiffs 3 to 6. A memorandum of objections is filed by respondents 37 and 50 (defendants 42 and 55). No exception is taken by any party to the setting aside of the partition deed by the lower court and all parties here are agreed that a fresh partition may be directed of all the divisible tarwad properties in these proceedings.

(9) The properties mentioned in the A schedule to the plaint are admittedly divisible among all the members of the tarwad. In respect of the additional properties included in the written statement of the 33rd defendant, a special issue No. 15 was raised as to "whether the properties comprised in the schedule annexed to the 33rd defendant (see 33rd deft's. written statement) are also partible. The learned Judge recorded no finding upon this issue. All the parties are in agreement and it was so expressly mentioned before us that the properties included in the written statement of the 33rd defendant are properties divisible among the 42 members of the tarwad and that the parties claiming shares in the tarwad properties are entitled to be given their respective shares in those properties also. The want of a finding by the learned Judge upon issue 15 is clearly due to an oversight which, however, is immaterial in this case because as already stated, all the parties are at one in that those properties are divisible and that a decree for partition thereof may be given by this court. The properties comprised in the schedule to the written statement of the 33rd defendant, are therefore directed to be divided along with the other divisible tarwad properties i.e., the properties included in the A schedule to the plaint, as also the items 1, 2, 3, 5 and 6 in schedule B2.

(10) Issue 18 framed by the court below is: "Is the suit bad for partial partition and is the suit maintainable?" The court below considered this issue in paragraph 69 of its judgment. Neither the reasoning nor the conclusion of the learned Judge in this paragraph is intelligible and no party sought to support his disposal of that issue. Reference has, however, to be made to this issue and paragraph 69 of the judgment of the learned Judge because on a comparison of the schedules attached to the written statement of defendants 30 and 33 which are dealt with in that paragraph, it is found that the schedule given by the 30th defendant contains one item in excess of the items contained in the written statement of the defendant 33. If the extra item contained in the written statement of the 30th defendant is divisible, it is also to be divided in these proceedings. Parties did not, however appear to have adverted to this extra item. If parties agree that this item is divisible, the court below is directed to divide that item also along with the other divisible tarwad properties.

(11) The main dispute in the case relates to the properties in schedules B and C attached to the plaint about which there is a three-cornered fight. Plaintiffs claim the properties in the B schedule exclusively for themselves. This exclusive claim of the plaintiffs is denied by the two sets of the other parties, viz., defendants 1 to 37 and defendants 38 and 40. Plaintiffs claim the properties in the C schedule as belonging to themselves and defendants 38 to 40. This claim is disputed by the remaining defendants who claim all the properties as belonging to the tarwad. The question for decision is, therefore, which if any of the properties comprised in schedules B and C to the plaint belong (1) to the plaintiff's sub-thavazhi exclusively, (2) to the thavazhi of plaintiffs and defendants 38 to 40 and (3) to the tarwad. In respect of the properties to which the plaintiffs lay exclusive claim, their case is that those properties were acquired in the name of certain members for their sub-thavazhi and that the properties have always been in the possession and enjoyment of their sub-thavazhi and that on the date of the suit those properties were in the possession of the 1st plaintiff as the karnavan of that sub-thavazhi. Defendants 38 to 40 claim these properties as those of the thavazhi to which themselves and the plaintiffs belong, but no special reason is stated as a foundation of that claim. Defendants 1 to 37 who claim the properties on behalf of the tarwad as a whole lay claim to them on the ground that they were acquired on behalf of the tarwad by, and in the names of Mathevan Sankaran, Sankaran Krishnan, Sankaran Raman, Sankaran Mathevan, Mathevan Padmanabhan, Kumaran Kumaran etc. who were all alleged to have been karnavans of the tarwad. It is also stated in their written statements that pursuant to the practice prevalent at that time, certain properties of the tarwad were registered in the name of the eldest female member namely, Mathevi Pandi. (Paragraph 10 of the written statement of defendants 4, 8, 9 etc.). In paragraph 11 of their written statement they proceed to say that Sankaran Krishnan mentioned in paragraph 10 is the son of Mathevi Kali & that that thavazhi has become extinct & the properties of that thavazhi belong equally to all the members of the tarwad. This is one of the points of difference between the two genealogical trees. Whereas in Ext. XXXIII Kali is shown as the daughter of Mathevi and Krishnan as the son of the said Kali, Ext. U shows Kali and Krishnan as the children of Pandi, the daughter of Mathevi. The material of the difference is this, that if Sankaran Krishnan, in whose name certain properties are seen to stand, is Mathevi's grandson in the manner alleged by defendants 1 to 37 and that branch became extinct then the properties of that branch would as claimed by them, devolve equally on the members of the thavazhis of Pandi and Aruvi, that is, upon the entire tarwad. If, on the other hand Sankaran Krishnan is Pandi's son, then no question of the extinction of the thavazhi to which he belonged arises, and the properties would continue to be that of the thavazhi to which Sankaran Krishnan belonged, that is the thavazhi of Pandi, in which case, plaintiffs and defendants 38 to 40 alone would be entitled thereto and defendants 1 to 37 who are members of Aruvi's thavazhi, would have no rights. No evidence has been adduced in the case to enable the court to choose between these two conflicting cases as regards Sankaran Krishnan. The properties standing in the name of Sankaran Krishnan are items 7 to 24 in schedule B2, to the extent of a mortgage for 564 fanams as per a document dated 23-11-1023. See Ext. XXXVII.

The point that is common to these conflicting cases about Sankaran Krishnan is that all parties agree that the properties standing in the name of Sankaran Krishnan were originally thavazhi properties and not those of the tarwad. The case put forward by the parties involves an admission of the existence of thavazhis within the tarwad owning and holding properties. Neither in respect of Sankaran Krishnan nor in respect of any other male member in whose name the disputed properties stand is it contended that those individuals ever owned or held them as their self-acquisitions.

(12) Arguments were urged at the Bar as to the devolution of self-acquired properties of male members, whether the properties lapsed to the tarwad or thavazhi on their death. In the case of male members of a tarwad under the Marumakkathayam system of law that prevailed before the law was regulated by statute, no one could be said to succeed to the properties of the late owner because succession would have meaning ordinarily to a case where one's own descendants take the properties. The children of male members of Marumakkathayam tarwads had, under the customary law, no manner of claim over the properties of the deceased. Those properties lapsed to the tarwad according to one view and to the thavazhi according to another view. The term 'thavazhi' which means 'thai vazhi' or 'thayar vazhi' i.e., the way of the mother, can have no application in the case of a male member. It is, therefore, taken that the thavazhi of a male is the thavazhi of his mother or grandmother or other ancestress as the case may be. Conflicting views have been held in the province of Madras and the States of Travancore and Cochin as regards the devolution of the self-acquired properties of male members of Marumakkathayam tarwad. Even in the same court, different views prevailed at different times. This conflict of view formed the subject-matter of some arguments at the Bar. The question as to which of the parties are the rightful claimants to the self-acquired properties of deceased male members does not, however, arise for consideration in the facts of this case, as the same is ruled out by the pleadings of the parties which, as already mentioned, refer to and rely upon, claims arising out of acquisitions having been made in a representative capacity by the various acquirers in whose name properties stood. Whether the representation is of the sub-thavazhi to which the several persons who acquired the properties or in whose names the properties stood, or whether it is of the thavazhi to which sub-thavazhi belongs or of the entire tarwad consisting of the two main thavazhis of Pandi and Aruvi, that is the whole tarwad, is the only controversy which falls to be decided in this case.

(13) The contention of defendants 1 to 37 is, as already mentioned that the various persons in whose names the properties in dispute stand, were karnavans of the tarwad. There is no case set up that any one of those persons was a de facto manager of the tarwad or of any of the tarwad properties, who collected and dealt with the moneys of the tarwad by way of income from tarwad properties or otherwise, for and on behalf of the tarwad. The presumption that arises in certain cases about the tarwad character of properties acquired by a member whether he be the de jure karnavan, de facto manager, or otherwise in a fiduciary relation to the family, does not arise in respect of properties acquired by sub-thavazhis or thavazhis forming component parts of a common tarwad.

(14) Law recognises the possibility of the existence of a co-parcenary within a co-parcenary, "of a tarwad within a tarwad". In 'SUNDARSANAM MAISTRI v. NARSIMHULU MAISTRI', 25 Mad 149 Bhashyam Ayyangar J. said regarding families under Hindu Law:

> ".....there may, of course, be one or more families all with one common ancestor and each of the branches of that family, with a separate common ancestor. As regards the property of such family, the 'unobstructed heritage' devolving on such family, with its accretions, is owned by the family as a corporate body, and one or more branches of that family, each forming a corporate body within a larger corporate body, may possess separate 'unobstructed heritage' which, with its accretions, may be exclusively owned by such branch as a corporate body."

This applies equally to Marumakkathayam tarwads and to thavazhis and sub-thavazhis i.e., the various groups within the said tarwads; see 'T. KRISHNAN NAIR v. T. DAMODARAN NAIR', 38 Mad. 48.

(15) The plaint alleges that some of the properties shown in the A schedule which are admittedly tarwad properties are in the possession of the plaintiffs, having been allotted to their thavazhi for the maintenance and other expenses of the members thereof. As regards the properties in schedules B and C the plaint alleges that the plaintiffs are in possession thereof as representatives of their sub-thavazhis in respect of the properties in the B schedule, and as representatives of the main thavazhi of Pandi in respect of the properties in the C schedule. Defendants 38 to 40 admit the possession of the plaintiffs, but contend that their representative character of the main thavazhi is not limited to the properties in the C schedule, but extends to those contained in the B schedule as well. Defendants 1 to 37 admit plaintiffs' possession as alleged in the plaint, but explain and account for it by reference to an arrangement and allotment for maintenance to their thavazhi made in days of old. Under that allotment they contend, the plaintiffs' thavazhis were given not merely some of the properties shown in the A schedule but also all the properties shown in schedules B and C. It is also stated that besides the sub-thavazhi of the plaintiffs, the other sub-thavazhis were also given properties for their maintenance. The position of the tarwad as envisaged by the pleadings and the evidence in the case is that there was no common mess, nor residence under the same roof, nor any common management of all the properties of the tarwad from very early times. Though, therefore, there was a tarwad with component thavazhis and sub-thavazhis having community of interest in tarwad properties, there was not that jointness of residence, management and enjoyment of tarwad properties which in certain cases renders it immaterial in whose name particular properties were acquired or particular properties stood, as they in such cases would all be for and on behalf of the family as was the case in 'KHUDA BAKHSH & SONS v. GHULAM QUADIR & SONS', AIR 1924 Lah. 224. In this tarwad, the various thavazhis and sub-thavazhis composing it were separately in enjoyment of specific properties for their own benefit. Each of the component parts was functioning separately. The income derived by the component thavazhis or sub-thavazhis from the tarwad properties in their possession would be their

own. Any saving made therefrom or any extra profit arising thereout would be their own, as they are not accountable to the tarwad, see 'SUBRAMANIAN CHETTI v. ARUNACHELLAM CHETTY', 28 Mad. 1, (F.B.).

(16) Possession is a substantive root of title except in cases where it is proved or can be presumed to be on behalf of the holder of the title. "Possession by itself may, in some cases be sufficient to relieve a person who is or has been from the necessity of proving his title, is a proposition which I think cannot be disputed", said Broomfield J., in 'GOVINDBHAI LALLUBHAI v. DAHYABHAI NATHAMBHAI', AIR 1936 Bom. 201. See also 'PEMRAJ BHAVANIRAM v. NARAYAN SHIVARAM', 6 Bom. 215 (F.B.), 'ISMAIL ARIFF v. MD. GHOUSE', 20 Ind. App. 99 (P.C.) and 'HANMONTRAV v. SECY. OF STATE', 25 Bom. 287. The onus of proof of title claimed by a party out of possession against the party in possession of properties is thus on the claimant. The view taken by the learned District Judge that the onus is on the plaintiffs and as they have not discharged it, their case regarding items in the B schedule, relating to which the documents have been filed, has to fail, cannot be supported. The learned counsel for the respondents who represent the group of defendants 1 to 37 argued in support of the view taken by the learned Judge on the question of onus of proof. Except urging that the onus is upon the plaintiffs, no fact, principle or authority was relied upon in support of the contention, which is opposed to facts, principle and authority, and has to be repelled as such. This conclusion will apply to all the items in the B and B 3 schedules about which there is no document of title produced in the case except the patta.

(17, 18, 19 and 20) The position of the items of properties about which documents have been produced may now be considered. In order to have a proper perspective of the position and for a satisfactory appreciation of the evidence, it is necessary to examine the facts and events in their chronological order as evidenced by and referred to in the various documents presented at the hearing for our consideration relating to properties in the various schedules attached to the plaint, as also to properties not comprised in the schedules to the plaint. (His Lordship enumerated the documents and considering the evidence proceeded :)

(21) Special mention has to be made regarding items 1, 2, 3, 5 and 6 in schedule B2. The earliest document relating to these items is of the year 1048, Ext. XVI, which an otti in the names of Sankaran Mathevan admittedly a common karnavan of the tarwad and Pandi Chakki. It refers to and is a renewal of an earlier transaction in the name of Mathevan Sankaran an admitted karnavan of the tarwad. One of these items is dealt with in the year 1061 under Ext. XVIII which is a mortgage executed by three members of Aruvi's thavazhi as also by Kumaran Kumaran. It is there admitted that the item is 'MOOTHAN VAZHKA' that is, tarwad. The consideration for Ext. XVIII is stated to be the repayment of amounts borrowed for tarwad purposes. In the year 1078, Kumaran Kumaran takes a renewal of Ext. XVI for the consideration already due and for some extra consideration advanced by him. This document is Ext. XXVII. The next document that we find filed in the case relating to this item is Ext. R which is a puramkadam dated 6-9-1100 which states that the properties are outstanding with the executee, the first plaintiff, under a possessory mortgage of the year 1089. The document of 1089 is not seen filed. The first plaintiff should be in possession of that document. From the non-production of that document by him an inference would arise that he failed to produce it because if produced it would be against him. These items having been tarwad property from the inception and having admittedly continued to have that character until the year 1078 unless it is proved that the title of the tarwad has been displaced it has to be presumed that the title continues to be in the tarwad. In the face of the admitted prior title of the tarwad over these items, the plaintiffs being members of the tarwad claiming separate title to the items, the burden is upon them to prove that they have rights in derogation to those of the tarwad. They do (Sic) having made any attempt to prove any separate rights over these items as tarwad properties outstanding under the mortgage of 1078, Ext. XXVII.

(22) We cannot help remarking that this is an instance of a case where justice delayed may amount to justice denied. The protracted character of the proceedings which were started as early as in the year 1106 subsequent to which all those who were parties to or who were acquainted with the various transactions and who could give valuable evidence have died and the representatives who inherited the properties feel a sort of despair at their inability to tackle the matter on account of sheer ignorance. It has become more a business of the court than of the parties to dispose of the matter. Even the court below omitted to record a finding upon one issue. When we suggested a remand for further evidence upon certain matters no party was agreeable to such a course being pursued and all parties requested that the matter may be finally disposed of here. We would invite the attention of the parties and of the subordinate courts of the utility of and the necessity for, expediting trial and disposal of cases and of having resort to the various provisions of the Code of Civil Procedure tending in that direction, viz., provisions regarding notice to admit facts and documents, discovery and inspection of documents etc. The provisions regarding interrogatories appear to have been availed of in this case, but not to the extent and in the manner possible. It has also to be pointed out that in cases where useful evidence can be given by persons (whether parties or not) and it is apprehended that on account of old age, ill-health, infirmity or other good causes that evidence may become unavailable if delayed, such persons could be examined even before the case becomes 'ripe for trial' as it is called and even regard to the question of burden of proof as the question of burden is often not sure nor steady.

(23) There is no document relating to item 4, in the B2 schedule. Our finding regarding the items comprised in B, and B3 schedule for which no document has been produced will apply to this and we find that this item belongs to Pandi Lekshmi's thavazhi, that is to the plaintiff's 1 and 2 exclusively and therefore to plaintiffs 3 to 6. Our finding regarding the properties shown in schedule C1, C2 and C3 to the plaint as amended is that they belong to the thavazhi of Pandi that is to the thavazhi to which the original plaintiffs as also defendants 38 and 40 belong.

(24) The next question is whether the properties comprised in Schedule C1, C2 and C3

in the plaint can be directed to be divided between the plaintiffs 1 and 2 and defendants 38 to 40 in this suit. The contention on behalf of defendants 38 to 40 was that the only relief claimed by plaintiffs 1 and 2 in respect of those items being one for a declaration of the joint rights of themselves and defendants 38 to 40 on the death of the plaintiffs, the entire right over those items became theirs (defendants 38 to 40) as surviving members of the thavazhi there being nothing to be inherited by the heirs of the second plaintiff. Defendants 38 to 40 in their written statement filed on 15-i-1107 prayed for a partition and delivery of a 3/42 share of the tarwad properties with proportionate income thereon. They also pray that the properties in the C schedule to the plaint which were admittedly thavazhi properties belonging to themselves and plaintiffs, as also properties in the B schedule which they claimed as having the same character as the properties in the C schedule, as also certain moveables alleged to belong to the thavazhi of themselves and plaintiffs should be divided into 5 shares and their 3/5th share delivered to them separately. In a suit for partition the plaintiffs and defendants who claim shares are all to be regarded as plaintiffs on whichever side they may be arrayed on the record. Defendants 38 to 40 having claimed division of the thavazhi properties between themselves and the plaintiffs must be regarded as plaintiffs as regards that claim and the original plaintiffs must be regarded as defendants in respect thereof. So regarded, defendants 38 to 40 on the one hand and plaintiffs 1 and 2 on the other become divided in status from the date of the said claim for partition. The consequence of this is that the original plaintiffs became entitled to a separate 2/5th share in the thavazhi properties which would on the death of the first plaintiff go to the survivor, the 2nd plaintiff, and which would be transmissible to the heirs of the said survivor viz., plaintiffs 3 to 6 who would thus be entitled to a 2/5th share in the thavazhi properties, that is the properties belonging to plaintiffs 1 and 2 and defendants 38 to 40. In this view the circumstance that the plaintiffs originally claimed only a declaration in respect of these properties is immaterial. The result that would have ensued had they themselves claimed a partition of those thavazhi properties in the plaint enures to their advantage by the claim for partition not made by them, but made against them by defendants 38 to 40. We therefore direct that there be a preliminary decree for partition of the properties in the schedules C1, C2, and C3 items 1 to 41 of the amended plaint into five shares and delivery of 3/5th share to defendants 38 to 40 and a 2/5th share belonging to plaintiffs 1 and 2 to plaintiffs 3 to 6.

(25) A receiver appointed by the court appears to have taken possession and to be in management of the properties mentioned in the various schedules to the plaint. The several parties entitled to shares in the corpus would also be entitled to a proportionate share of the profits arising out of the corpus. The receiver will restore to the plaintiffs the items found to belong to them exclusively with the profits accruing therefrom.

(26) Plaintiffs 3 to 6 are thus entitled to a decree for partition and delivery to them of a 2/42 share of the properties in schedules A1, A2 and A3 and items 1, 2, 3, 5 and 16 of schedule B2 and to 2/5th share of the properties in schedules C1, C2 and C3 as also to a 2/42 share of the properties shown in the written statement of the 33rd defendant and the extra item shown in the written statement of the 30th defendant, if parties agree to its division, with proportionate income in all cases. They are declared to be exclusively entitled to the properties shown in schedules B1 and B3 and items 4 and 7 to 24 in schedule B2. The question as to whether the members born subsequent to the filing of the suit in the group of defendants 1 to 37 would be entitled to shares is not one arising for consideration in these appeals and it is reserved to be decided by the court at the appropriate time.

(27) The decree passed by the court below is modified to the extent and in the manner above indicated, in which terms there will be a preliminary decree for partition in the case. We also reserve liberty to such of the other parties who are entitled to shares to claim actual partition and delivery of their shares even in this suit. Defendants 38 to 40 also are entitled to a decree for partition and delivery of a 3/42 share of the tarwad properties of a 3/5th share of the thavazhi properties belonging to themselves and to the plaintiffs with proportionate income in both cases.

(28) The costs will be borne by the estate; as regards the tarwad properties by tarwad estate and as regards the thavazhi properties by the estate of the thavazhi in accordance with the usual rule applicable to suits for partition. Costs regarding the exclusive claim of the plaintiffs over the properties in B schedule which claim has been upheld by us will be paid to the contesting defendants; both here and in the court below.

(29) Both appeals are allowed with costs to the extent indicated above. No special mention is called for regarding the memorandum of objections filed by the 33rd defendant as the point raised therein has been dealt with in the course of this judgment.

(30) KUNHI RAMAN, C. J.: I agree.

C/R.G.D. Decree modified.

AIR 1952 TRAVANCORE-COCHIN 476

KUNHI RAMAN C. J. AND SUBRAMANIA IYER J.

State v. Gangadharan Ramachandran, Respondent.

Criminal Appeal No. 117 of 1951, D/- 4-10-1951.

Travancore Criminal P. C. (VIII (8) of 1117) S. 244 — Prosecution on police report — Acquittal on absence of complainant — Validity.

Section 244 does not refer to a case which was taken cognizance of on a Police Report. The order made by the Magistrate acquitting the accused under that section on absence of the complainant is, therefore, incorrect. Unreported decision in Cr. App. No. 91 and 93 of 1951 (Trav. C.), Foll. (Para 1)

Anno: Cr. P.C. S. 247 N. 2.

Public Prosecutor, K. C. Chacko, for the State; K. Narayana Panicker, for Respondent.

/Para

REFERENCE:

('51) Cri Appeals Nos 91 and 93 of 1951: (1951 Ker LT 520) 1

KUNHI RAMAN C. J.: This is an appeal presented on behalf of the State by the learned Public Prosecutor from an order of acquittal made by the Stationary Second Class Magistrate of Trivandrum City. It appears from the

order made by the court below that there was a police report submitted to the Magistrate about the commission of an offence by the accused under Section 352 of the Travancore Penal Code and Section 53 of Act XXII of 1115. Admittedly, the case was a summons case because the punishment provided in both these sections does not exceed three months' imprisonment. On the date to which the case was posted, the Magistrate has stated in his order, the complainant was found to be absent and although his name was called out both at the commencement of the sitting of the Court and at the time the court rose for the day, there was no response. In the circumstances, professing to act under Section 244 of the Travancore Code of Criminal Procedure the Magistrate has passed an order of acquittal. Section 244 refers to cases which are started upon a complaint. In the present case, the Magistrate took cognizance of the offence not upon any complaint, but upon a Police report. Therefore the statements in the order that the case was started on a complaint and that on the adjourned date the complainant was absent, cannot be supported. Section 244 does not refer to a case which was taken cognizance of on a Police Report. The order made by the Magistrate acquitting the accused under Section 244 is, therefore, incorrect. Following our decision in a similar case which came up before this court on the 23rd of July 1951, in 'STATE v. KITTAN VELAYUDHAN', Criminal appeals Nos. 91 and 93 of 1951 we set aside the order of acquittal and direct the Magistrate to deal with the case according to law.

C/D.R.R. Order set aside.

AIR 1952 TRAVANCORE-COCHIN 477

VITHAYATHIL J.

A. Narayana Iyer, Petitioner v. T. R. Mahadeva Iyer, Counter-petitioner.

C.R. P. No. 896 of 1950, D/- 19-9-1951.

Cochin Village Courts Act (XII(12) of 1118) S. 10 — Plaintiff claiming half share in crossword competition prize, on ground that he and defendant submitted solution jointly and contributed equally — Suit is not one for money due on contract — Neither is it a suit for balance of partnership account — Suit held triable by Small Cause Court and not by village Court or as original suit in Munsiff's Court — Cochin Civil Courts Act (III(3) of 1076) Sch. 2, Art. 27.

The plaintiff's case was that he and the defendant jointly sent solutions for the crossword puzzle published in a certain weekly magazine that although solutions were sent in the name of the defendant they were the result of the joint efforts of both the plaintiff and the defendant and both of them contributed equally to the expenses and that the defendant received Rs. 95-6-0 as prize for the successful solution. The plaintiff claimed one-half of the same.

Held (i) that although the basis of the plaintiff's claim was a contract between the plaintiff and the defendant the suit was not one for money "due on contract" within the meaning of S. 10, Cochin Village Courts Act. The suit must be taken to be one for money belonging to the plaintiff wrongfully retained by the defendant and did not fall under S. 10. 37 Bom. 700 Applied. (Para 3)

(ii) that the suit could not also be regarded as one for balance of partnership account, the suit being not one for dissolution of partnership or for the balance of partnership account. It did not therefore come within the scope of Art. 27 of Schedule 2 of the Cochin Civil Courts Act. (Para 5)

(iii) that the suit was triable as Small Cause suit. (Para 5)

T. S. Venkiteswara Iyer and C. S. Anantha-krishna Iyer, for Petitioner; A. S. Krishna Iyer, for Counter-petitioner.

REFERENCES: Courtwar/Chronological/ Paras

('13) 37 Bom 700: (21 Ind Cas 181) 3
31 Cochin 51 3
39 Cochin 87 3

VITHAYATHIL J.: The defendant in S.C. S. No. 146 of 1124 of the Vadakkanchery Munsiff's Court is the Revision Petitioner in this case. The plaintiff's case is that he and the defendant jointly sent solutions for the crossword puzzle published in the Anandavikadan, a Tamil Weekly Magazine published from Madras. Out of the solutions sent for puzzle No. 631, one solution fetched the first prize and two other solutions fetched the second prize. Although the solutions were sent in the name of the defendant they were the result of the joint efforts of both the plaintiff and the defendant and both of them contributed equally to the expenses. The defendant received Rs. 95-6-0 as prize for the successful solutions. The plaintiff claimed one-half of the same deducting Rs. 5 paid by the defendant. The defendant denied the plaint allegations and also contended that the Small Cause Court had no jurisdiction to try the suit. According to him the suit ought to have been filed either in the Village Court or as an Original Suit in the Munsiff's Court. The lower court held that the suit was triable as a Small Cause suit and also found that the plaintiff's case was true. The suit was therefore decreed.

(2) In the Revision Petition the main point urged was that the Small Cause Court had no jurisdiction to try the suit. According to the defendant the suit is either one for money due on contract in which case it should be filed in the Village Court or one for balance of partnership account in which case it should be filed as an Original Suit.

(3) I do not think that these contentions are tenable. Under Section 10 of the Cochin Village Courts Act suits for money due on contract when the amount does not exceed Rs. 50 should be filed in the Village Court subject to certain exceptions. The question for consideration is whether the present suit is for money due on contract. Although the basis of the plaintiff's claim is a contract between the plaintiff and the defendant I do not think that the suit is one for money "due on contract." The suit must be taken to be one for money belonging to the plaintiff wrongfully retained by the defendant. Although the plaintiff's right to the money received by the defendant is based on a contract it cannot be said that the claim is for money due on contract. It is true that the two decisions of the Cochin High Court referred to in the judgment of the lower court, namely 'LEXMIKUTTY AMMA v. ASHTAMICHIRA NAYAR', 31 Cochin 51 and 39 Cochin 87, do not apply to the facts of this case. But in 'LEXMIKUTTY AMMA v. ASHTAMICHIRA NAYAR', 31 Cochin 51, their Lordships have pointed out the distinction between a claim for money "due on contract" and a claim for

money the right to which is based on a contract. In 'BHIKAJI HARI v. RADHABAI', 37 Bom. 700, the plaintiff filed a suit against the defendant alleging that they were both sharers in a Kulkarni Vatan, that the defendant had received the profits of the office and had not paid to the plaintiff her share. It was held that the suit was one for money had and received by the defendant for the use of the plaintiff and that it was triable as a Small Cause suit. I think that the same principle applies to this case also.

(4) I therefore hold that this suit is not one that comes within Section 10 of the Cochin Village Courts Act.

(5) With regard to the contention that the suit should be regarded as one for balance of partnership account, I think that there is no force in that contention also. The suit is clearly not one for dissolution of partnership or for the balance of partnership account. Therefore it does not come within the scope of Article 27 of Schedule 2 of the Cochin Civil Courts Act. For the above reasons I agree with the lower court in its view that the suit is triable as a Small Cause Suit.

(6) With regard to the finding of fact by the lower court no attempt was made by the learned Advocate for the petitioner to show that it is wrong or contrary to law. I find no reason to interfere with the decision of the lower court.

(7) The revision petition is dismissed with costs.

B/R.G.D. Revision dismissed.

AIR 1952 TRAVANCORE-COCHIN 478

KOSHI AND GOVINDA PILLAI JJ.

Raman Velayudhan, Appellant *v.* Narayanan Madhava Panicker, Respondent.

A.S. No. 761 of 1950, D/- 22-10-1951.

(a) Civil P.C. (1908) O. 32, R. 12 — Execution against minor — Notices properly sent to guardian appointed by Court — Minor attaining majority — No steps taken by him or guardian to get the fact recorded in court — Fact that no notice was sent to minor after he attained majority does not make execution invalid.

The execution taken against a person, who was a minor, through his guardian, who had been appointed in the suit, would be valid, even though notice had not been sent directly to the minor defendant, after attaining majority, provided the notice in execution was served properly on the guardian appointed by Court. This is sufficient for purposes of enabling the execution court to carry on the steps in execution. When no step taken by the minor or by his guardian to see that the fact of the attaining majority recorded in court. (Para 2)

Anno: Civil P.C. O. 32 R. 12 N. 4.

(b) Civil P.C. (1908), S. 11 — Attachment allowed after expiry of twelve years after appellate decree — No objection taken by any one inspite of notice — Properties attached — Decree holder's application for leave to bid at auction — Notice of application — Further executions allowed — No ground on question of limitation raised in memorandum of appeal by defendant — Objection on ground of limitation held could not be allowed to be taken on the ground of constructive res judicata. (Para 2)

Anno: Civil P.C. S. 11 N. 23.

(c) Civil P.C. (1908), S. 11 — Assignee of decree allowed to execute decree after notice to all defendants, without objection — Objection that assignment was taken benami for one of the defendants, held could not be allowed to be raised in appeal. (Para 2)

Anno: Civil P.C. S. 11 N. 23.

K. Narayana Panicker, for Appellant; N. K. Narayana Pillai, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras
('48) 1948 Trav LR 194 2
('50) 1950 Trav-C LR 413:
(1950 Ker LT 30) 2

GOVINDA PILLAI J.: The additional 8th defendant is the appellant. The suit was for recovery of possession of property with arrears of rent. The 1st defendant was the original lessee. He had assigned his right to defendants 2 and 3. The 2nd defendant died and his legal representative is the fourth defendant. The 1st defendant also died and his legal representatives are defendants 5 to 9. In execution, the plaintiff sought to attach certain properties of the 1st defendant, on 26-3-1122. Pursuant to that, attachment was allowed. The attached properties were proclaimed for sale; and the sale itself had been conducted. The sale was to take place on 13-9-1950; and on 12-9-1950 the 8th defendant filed his petition, impeaching all the proceedings in execution. The grounds urged were that, according to the plaintiff's petition to implead the legal representatives of the 1st defendant, the 8th defendant had attained majority in 1118, that, even after this, notices in execution had been given only to the guardian and not to him direct, that, therefore, all the execution proceedings were invalid, that the attachment allowed on 26-3-1122 was after the expiry of twelve years of the appellate court decree and that, therefore, the attachment should not have been allowed. The court below, after hearing both sides, dismissed this petition. The appeal is against this order.

(2) Though the 8th defendant had attained majority in 1118, there was no step taken by him or by his guardian to see that fact recorded in court, and that notices in execution were sent directly to him. The execution taken against a person, who was a minor, through his guardian, who had been appointed in the suit, would be valid, even though notice had not been sent directly to the minor defendant, after attaining majority, provided the notice in execution was served properly on the guardian appointed by court. (Vide 'SIVASUBRAMANIA PILLAI v. THAYAMMAL', 1948 Trav. L.R. 194 and 'MARIACHEVITHITHAN NADAR v. VELAYUDHAN PILLAI', 1950 Trav-C L.R. 413. The execution diary would show that the necessary notices that had to be sent from the execution court had been sent to the guardian appointed by court and that those notices had been accepted by the guardian. That was sufficient for purposes of enabling the execution court to carry on the steps in execution. So, there is no substance in the first objection taken.

As regards the question of limitation, it was seen that the High Court decree in the case was passed on 6-5-1109. The execution application, pursuant to which the attachment of the first defendant's properties was applied for, had been filed in court on 18-11-1120. That

was within twelve years of the appellate court decree. The prayer there was that, after notice to defendants 4 to 9, under Order XXI Rule 20 of the Civil Procedure Code, the properties of the second defendant shown in the schedule might be attached and sold and that the properties of the other defendants, as per the schedule that would be presented thereafter, might also be attached and sold. This was an application which was pending at the time the 8th defendant filed his objections. It was true that the attachment schedule regarding the first defendant's properties was filed only on 26-3-1122. But that could be taken to be an amendment to the existing execution application as well as the curing of the defect which existed when the petition was presented in court on 18-11-1120. It was seen that several notices had been issued after this to the 8th defendant's guardian as well as to the other defendants. The only party, who entered appearance, was the 8th defendant's elder brother, the 6th defendant, who had filed an objection petition on 21-7-1122. The objections taken were that he had not obtained any notice from court, that since the prayer in the execution petition being one to proceed against the 4th defendant's properties in the first instance, there was no justification to proceed against the properties of the 1st defendant, that the transaction under the decree had been satisfied, that the assignee was the fourth defendant's niece's husband, and that, in case the court finds that the plaintiff was entitled to execute the decree, item No. 7 in the proclamation schedule should be sold first before taking steps against the first defendant's properties. This was pending for a very long time and eventually it was dismissed on 9-9-1950. Three days afterwards, the 8th defendant-appellant had filed the present petition. Even the 6th defendant had not taken a ground that the attachment, pursuant to the application dated 26-3-1122, was invalid as the schedule had been filed beyond twelve years after the date of the decree.

Thus, it would be seen that, till the present petition was filed by the 8th defendant, there was no objection taken by any one, inspite of notice, that the execution should not be allowed in pursuance of the attachment applied for on 26-3-1122. The properties were attached; they were proclaimed for sale after notice to the parties; and notice had been given on the plaintiff's application for leave to bid at the time of auction. All these orders allowing further execution would operate as constructive res judicata so far as the present contention of the 8th defendant was concerned. Though the validity of the attachment of 26-3-1122 was argued by the appellant's learned Advocate, no ground had been taken in the appeal memorandum regarding the same. But, since there was some indication in the statement of facts given in the appeal memorandum, that the attachment of 1122 also was attacked, we allowed the appellant to argue that question. From what had been stated already, it would be seen that this objection was without substance.

Similarly, the 8th defendant's objection, that the assignment was taken benami for the fourth defendant, could not also be considered at this stage, for the assignee had been allowed to execute the decree after notice to all the judgment-debtors. Several judicial orders had also been passed subsequently and, so, there was no substance in the contentions raised by the appellant. The order of the court below is, therefore, confirmed; and the appeal is dismissed with costs.

B/R.G.D. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 479

KOSHI AND GOVINDA PILLAI JJ.

Souriyar Kuriyakose, Appellant v. Raman Nair, Respondent.

Second Appeal No. 827 of 1950, D/- 22-8-1951.

(a) T. P. Act (1882), S. 41 — Default by P in payment of sirkar tax — Revenue sale — D purchasing property benami for P — D to be ostensible owner — Property purchased by decree-holder in execution of decree against D — Decree-holder-auction-purchaser held protected. (Para 3)

Anno: T. P. Act, S. 41 N. 1, 8.

(b) Travancore Revenue Recovery Act (1 of 1068), Ss. 34, 35, 36 — Non-payment of sirkar tax — Revenue sale by Tahsildar — Sale confirmed by Division Peishkar — Auction-purchaser's title becomes complete on confirmation before the issue of certificate of sale under S. 34 (6) — Object of sale certificate is to prove the fact of purchase — It is not by issue of certificate that purchaser obtains title to property — Non-issue or non-registration after issue of certificate does not affect title of purchaser. (Para 4)

K. P. Abraham and K. T. Ninan, for Appellant; N. M. Narayana Pillai and M. Ramanatha Pillai, for Respondent.

GOVINDA PILLAI J.: The plaintiff is the appellant. The plaint properties belonged to him and they were sold on 16-7-1111, for arrears of Sirkar tax and purchased in the name of the second defendant. The plaintiff would say that this purchase was with his money and was benami for him. The first defendant, who was a creditor of the second defendant, had obtained a decree in O. S. 570 of 1112 against him. In execution of that decree, the first defendant attached the plaint properties as if they belonged to the second defendant and brought the same to sale. The first defendant himself purchased them in court auction and secured delivery of possession through court. The plaintiff had filed a claim petition. But that was dismissed and the order of dismissal was confirmed by the High Court. Pursuant to the revenue sale, the second defendant had not obtained the sale-sannad or delivery of possession of the plaint properties, so that the plaintiff remained in possession of the plaint properties, till the first defendant secured possession in execution of the decree in O. S. 570 of 1112. The decree and execution proceedings in O. S. 570 of 1112 would not be binding on the plaintiff, as he was not a party to the same. In these circumstances, the plaintiff filed this suit for a declaration of his title to the plaint properties and for recovery of possession of the same with mesne profits. The first defendant alone contested the suit. He stated that the properties belonged exclusively to the second defendant, that the revenue sale was not benami for the plaintiff, that the second defendant had obtained full rights over and possession of the plaint properties under the revenue sale, that the attachment, sale and delivery in O. S. 570 of 1112 were valid and not liable to be set aside, that the suit was barred by limitation, and that the plaintiff was not entitled to any relief.

(2) The trial court found that the revenue authorities did not issue any sannad to the second defendant as his auction right had been attached and sold in execution of the decree in O. S. 570 of 1112, that the revenue sale had become merged in the court sale, that, as the sale-sannad issued by the civil court had been registered, there was no necessity for the sale-certificate which the revenue authorities were to issue to the auction-purchaser (second defendant), that the suit was not barred by limitation, that the revenue sale was benami for the plaintiff, that the plaintiff was, therefore, the owner of the plaint properties, that the delivery effected in O. S. 570 of 1112 was illegal, and that the plaintiff was entitled to the declaration prayed for. The suit was, therefore, decreed by the trial court.

In appeal by the 1st defendant, the learned District Judge held that the revenue sale was not taken benami for the plaintiff, that there was no necessity to obtain the sale-certificate from the revenue authorities and register the same in order to confer full title on the auction-purchaser, that the first defendant obtained possession of the properties while the second defendant was in possession thereof, and that the plaintiff was not entitled to any of the reliefs claimed by him. The trial court decree was, therefore, set aside and the plaintiff's suit was dismissed with costs in both the courts.

(3) The plaintiff never questioned the validity of the revenue sale. In one place he had stated that he had asked the second defendant to pay the arrears of tax due on these properties and that the second defendant, inspite of paying the same, fraudulently purchased the properties in his name. In another place he stated that he had asked the second defendant to purchase the properties in revenue sale for him, as he had debts to a considerable extent and as he desired that these properties at least remained with him.

The second defendant, while examined as P. W. 3, stated that he had purchased the properties in revenue auction without the knowledge of the plaintiff. According to him, the plaintiff was surprised when he heard that he had purchased the properties in revenue sale. This is what he said as P. W. 3.

* * * (Original in Malyalam).

He had also stated that he had never paid the Sirkar Tax due from the plaintiff and that he had also been never asked by the plaintiff to pay the same. The second defendant was a dealer in cocoanuts and the plaintiff was one of his customers. There are certain entries in the second defendant's accounts showing certain debits against the plaintiff, on the date of the revenue sale and on its 30th day when the sale was to be confirmed. It was based on these entries that the plaintiff in this case raised the contention that the revenue sale was taken by the second defendant for his benefit. When he filed Ext. IV, claim petition in O. S. 570 of 1112, he had no such case. The second defendant was in insolvent circumstances and the first defendant's suggestion was that these entries might have been made by the second defendant in collusion with the plaintiff, after he attached the revenue auction right of the second defendant. The attachment was in 1112. It was admitted that the plaintiff and the second defendant were on intimate terms and so there was considerable force in the suggestion made by the first defendant. While the plaintiff was examined as P. W. 6 he had stated in chief examination that, in the revenue auction, the properties were purchased by the second defendant at his instance and in cross examination he would say that he did so as he was otherwise heavily involved. It was, therefore, evident that, according to the plaintiff and the second defendant, the latter was to be the ostensible owner of the properties by virtue of the revenue sale. That was sufficient to protect the first defendant. The steps taken by him in execution of the decree obtained by him against the second defendant were proper and legal.

(4) The main argument advanced by the appellant's learned advocate was that the second defendant had not obtained any right over the plaint properties by virtue of the revenue sale, as he had not obtained a sale certificate from the Peishkar. According to the appellant, unless the auction-purchaser obtained the sale certificate and got it registered, as provided for in S. 37 of the Revenue Recovery Act, the auction-purchaser's title to the properties would not be complete. The position taken by the appellant did not appear to be correct. After the revenue sale, if it is conducted by the Tahsildar, as is done in this case, he was to report the result to the Peishkar, under Section 34 (1) of the Revenue Recovery Act, 1 of 1068 (Travancore). Then, under clause (4) of the same section, the Peishkar was to wait for thirty days to see whether any application to set aside the sale was forthcoming. If no such application was made, or if it was made and rejected, the Division Peishkar had the power to confirm the sale. He is also given the discretion even if no one has filed a petition to set aside the sale provided he had reason to think that the sale has to be set aside. Anyhow, with the confirmation of the sale, the auction-purchaser's title to the properties would become complete. That was evident from clause (6) of S. 34 and S. 35. In clause (6) of Section 34, it is stated that after confirmation of the sale, the Division Peishkar shall register the lands sold in the name of the person declared to be the purchaser and shall execute and grant a certificate of sale bearing his seal and signature to such purchaser. Section 35 lays down that before the issue of the certificate referred to in section 34, the Tahsildar shall publish in the villages in which the lands sold are situated and in the Preverthiear's Cutcherry the name of the purchaser and the date of the purchase together with a declaration of the lawful succession of such purchaser to all the rights and property of the former land-holder in the said land.

Thus, before the issue of the certificate by the Division Peishkar, the statute recognises the full rights of the auction-purchaser in the properties. In the second sentence in clause (6) of Section 34 there is a provision that the certificate issued by the Peishkar is to state the property sold and the name of the purchaser. This certificate shall be conclusive evidence of the fact of the purchase in all Courts and tribunals where it may be necessary to prove the same. So the real object in issuing a sale certificate is for purposes of proving the purchaser's title to the properties. It is not by the issue of the certificate that the purchaser obtains title to the properties purchased. The certificate is only evidence of title and not one conferring title on the purchaser. There is, no doubt, the provision in section 37 that certificates issued under section 34 shall be registered under the Registration Act. The non-issue of the certificate by the Peishkar or the non-registration of the same after its issue would not in any way

affect the purchaser's title to the properties, as pointed out already.

The necessity for the certificate in the revenue courts is only when, after the sale, the purchaser is not able to obtain possession of the purchased land. Section 36 states that where, notwithstanding the publication mentioned in Section 35, any lawful purchaser of land may be resisted and prevented from obtaining possession of his purchased land, the Division Peishkar, on application and production of the certificate of sale provided for by Section 34, shall cause the proper process to be issued for the purpose of putting such purchaser in possession in the same manner as if the purchased lands had been decreed to the purchaser by a decision of a Civil Court.

It is, therefore, abundantly clear that, with the confirmation of the sale, the purchaser's title to the properties has become absolute. For purposes of conferring title, the issue of the sale-certificate or its registration, as provided for in Section 37, are not necessary. Thus, the second defendant had obtained full title over the properties by virtue of the revenue sale and its confirmation by the Division Peishkar. It is also seen that a sale certificate had been prepared by the Assistant Peishkar to whom the right to confirm the sale had been conferred by Government. This was on stamp paper and a copy of the same had been issued to the first defendant, on application. He had produced the same in court and it is Ex. IX. Since the second defendant had lost all interest in the properties by virtue of the attachment and court sale in O. S. 570 of 1112, he had not moved further in the matter in the revenue court and this was not going to affect the transfer of his right to the first defendant in the court-sale. It would be open to the first defendant himself, now that he had obtained the full rights of the second defendant over the properties, to get the sale certificate from the Peishkar, if necessary, and to get it registered. It was true that the second defendant had not obtained possession of the properties sold in revenue auction. That was because of the collusion between the plaintiff and the second defendant and the plaintiff's possession was to be decreed as on behalf of the second defendant, for the plaintiff himself, as Pw. 6, had admitted that he allowed the second defendant to purchase the properties in auction in order to screen them away from his (plaintiff's) creditors. It was not necessary for the auction-purchaser or his assignee to apply for possession through the revenue court. It was enough if the purchaser secured possession. In this case, in execution of the decree in O. S. 570 of 1112, the first defendant had secured possession and the plaintiff had admitted that the first defendant was in possession of the properties when the suit was filed. That was sufficient so far as the first defendant was concerned.

(5) There was a further development in this case. The plaintiff was heavily involved in debts and, even according to him, such debts came to over Rs. 17,000. A church had obtained a decree against him in O. S. 770 of 1113. It was admitted by the plff., as Pw. 6, that this decree was got assignment by his son (?) who was in military service, that the same was executed by one Sreedharan Nair as the power of attorney holder of his son and that this Sreedharan Nair had, after the institution of the present suit, secured possession of the properties from the first defendant. The fight is now between that Sreedharan Nair and the first defendant, in O. S. 770 of 1113, for possession of the properties. At any rate, on the admission of the plaintiff, it was seen that he no longer retained any right over the properties as, even according to him, the properties were purchased by Sreedharan Nair on behalf of his son in execution of a decree. He could, therefore, have no further right over these properties except to the building in them where he was living. This building had not been sold in the revenue auction. The plaintiff could not, therefore, have any further interest in these properties. He had also not made out any ground to avoid the decree and execution proceedings in O. S. 570 of 1112. In substance, therefore, the decree of the lower appellate court is correct. It is confirmed and this appeal is dismissed with costs.

B/R.G.D. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 481

VITHAYATHIL J.

Muhamed Ummal Kannu, Petitioner v. Muthu Pillai, Counter-Petitioner.

C. R. P. No. 166 of 1951, D/- 16-11-1951.

Civil P. C. (1908), S. 151 and O. 23, R. 3 — Suit decreed on basis of compromise petition purported to have been signed by plaintiff and defendant — Defendant filing petition under S. 151 to set aside decree — Allegation that defendant had not signed compromise petition — Application held was maintainable — (Travancore Civil P. C. (8 (VIII) of 1100), S. 115): 29 Trav LJ 1057 (FB), Foll.; 26 Trav LJ 452, Disting. (Paras 1 and 2)

Anno: C. P. C., S. 151, N. 2, O. 23 R. 3 N. 28.

S. Narayanan Potti, for Petitioner; M. Madhavan Nair, for Counter-Petitioner.

REFERENCES: Courtwar/Chronological/ Paras

('35) 26 Trav L J 452 1

('38) 29 Trav L J1057 (FB) 2

ORDER: The defendant in O. S. No. 507 of 1121 of the Padmanabhapuram Munsiff's Court is the Revision Petitioner in this case. The suit was decreed on the basis of a compromise petition which purported to have been signed by the plaintiffs and the defendants. The defendant filed a petition to set aside the decree alleging that she had not signed the compromise petition. The lower Court dismissed the petition on the ground that it is not maintainable. According to the lower Court, the remedy of the petitioner is a fresh suit. The lower Court has relied on the ruling reported in '26 Trav L J 452'. That was a case in which the records of the case showed that the defendant appeared in court and confessed judgment. The defendant contended that he did not appear in court and confess judgment and that it was a case of false personation and fraud practised by the plaintiff. It was held that the decree passed in the case was not an ex parte decree and that an application under O. 9, R. 13 would not lie. It was also held that the allegation of fraud and false personation was not substantiated. For these reasons the petition was dismissed. I do not think that that ruling applies to the facts of this case.

(2) 'MATHU EALI v. PYLI VARKEY', 29 Trav L J 1057 (FB) is a direct authority for the position that when a party to a compromise decree claimed the fact of his not having signed the compromise petition the court has got juris-

diction to investigate the matter under Section 115 of the Civil Procedure Code (Travancore). It was held in that case that a distinction has to be drawn between cases where a fraud is practised upon the Court and cases where a fraud is practised upon the party.

"Where the question is whether there was consent in fact to the compromise there is power on the Court to investigate the matter under S. 115, Civil P. C. and to set aside the decree if it is satisfied that a party never in fact consented to it but that the Court was induced to pass the decree on the fraudulent representation made to it that the parties had consented to the same. But where the parties have filed a compromise petition thus admitting consent as a matter of fact and when one of the parties alleges that this consent was procured by fraud this matter cannot be considered under the inherent powers of the court."

In the light of this ruling it has to be held that his petition filed by the defendant is maintainable.

(3) The order of the lower Court is therefore set aside and the petition of the defendant is remanded to the lower Court for disposal on the merits. The revision petition is allowed. There will be no order as to costs.

C/V.R.B. Revision allowed.

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* A. I. R 1952 TRAVANCORE-COCHIN 482
FULL BENCH

KOSHI C. J., GOVINDA PILLAI AND VITHAYATHIL JJ.

State v. Parameswaran Pillai, Counter Petitioner.

Criminal R. P. No. 216 of 1951, D/- 10-6-1952.

*** (a) Evidence Act (1872), S. 73 — "Any person" includes accused — Court has no power to compel accused to write out contents of document — (Travancore Evidence Act (7 of 1117), S. 73).**

The words "any person" in Para 2 of S. 73 are wide enough to cover an accused person. But the Court has no power to compel an accused person to write out the contents of a document alleged to have been forged by him; it can only direct him to do so: Case law discussed.

(Paras 7 and 8)

Anno: Evidence Act S. 73, N. 1.

***(b) Evidence Act (1872), Ss. 45, Illustration (c) and 73 — Practice of taking thumb impression of accused — Validity — (Identification of Prisoners Act (1920), S. 5) — (Travancore Evidence Act (7 of 1117), Ss. 45 and 73) — (Travancore Identification of Prisoners Act (11 of 1112), S. 5).**

The practice of taking the thumb impression of the accused under the direction of the Court and using it against him is in strict compliance with S. 45, Illustration (c) and S. 73 of the Evidence Act and also S. 5 of the Identification of Prisoners Act (1920): 1 Pat 242: AIR 1922 Pat 73: 23 Cri LJ 638, Dissent, 1950 Ker LT 80: AIR 1950 Trav-C 5: 51 Cri LJ 569, Overruled.

(Paras 13, 15 and 18)

Anno: Evidence Act, S. 45 N. 6, S. 73 N. 4.
Identification of Prisoners Act, S. 5 N. 1.

(c) Interpretation of statutes — Language of statute plain and unambiguous — There is no room for construction — Departure from plain language in search of intention not suggested by words of statute is not justified.

(Para 4)

Anno: C.P. C., Preamble N. 7.

K. C. Chacko, Public Prosecutor, for the State; K. P. Abraham, for Counter-petitioner.

REFERENCES: Courtwar/Chronological/ Paras

('39) AIR 1939 PC 47: (40 Cri LJ 364) 5
('32) 56 Bom 304: (AIR 1932 Bom 406: 33 Cri LJ 666) 4, 15
('26) 30 Cal WN 373: AIR 1926 Cal 531: 27 Cri LJ 409 15
('27) 54 Cal 237: (AIR 1927 Cal 17: 28 Cri LJ 99) 4, 5
('35) 39 Cal WN 986: (AIR 1935 Cal 308: 36 Cri LJ 921) 4, 15
('50) AIR 1950 Cal 66: (51 Cri LJ 376) 6, 15
('51) AIR 1951 Cal 101: (52 Cri LJ 946 FB) 5, 16
('27) 50 Mad 462: AIR 1927 Mad 696: 27 Cri LJ 1251 15
('32) 55 Mad 903: (AIR 1932 Mad 391: 33 Cri LJ 418 FB) 5
('22) 1 Pat 242: (AIR 1922 Pat 73: 23 Cri LJ 638) 2, 15
('27) 6 Pat 623: AIR 1928 Pat 103: 28 Cri LJ 1028 15
('27) 6 Pat 305: AIR 1928 Pat 129: 28 Cri LJ 850 15
('23) 1 Rang 759: (AIR 1924 Rang 115: 26 Cri LJ 108 FB) 4, 15
9 Trav LT 69 (SN) 14
('35) 1935 Trav LT 524 9, 13, 14, 32
('50) AIR 1950 Trav-C 5: (51 Cri LJ 569) 2, 13, 14, 15, 18
(1891) 15 AC 531: (61 LJ QB 265) 5
(1844) 11 Cl and F 85: (65 R R 11) 5
(1857) 6 HLC 61: (26 LJ Ch 473) 5
(1797) 1 Plowden 353: (75 ER 536) 5
(1886) 116 US 616: 29 Law Ed 746 16
(1910) 218 US 245: 54 Law Ed 1021 17

KOSHI, C. J.: This revision petition is directed against an order of the Division First Class Magistrate of Padmanabhapurom refusing to compel an accused person to write out in Court two documents which are alleged to be in his handwriting. The prosecution is for cheating and forgery for the purpose of cheating. The State, representing the prosecution, made an application to the Court that the accused should be made to write four copies of each of the two documents forming the subject of the forgery charge against him. The provision of law relied upon in that behalf was section 73 of the Evidence Act. The accused who was given notice of the application filed a written objection to the effect that he cannot be compelled to write out the documents and that the court should turn down the request of the prosecution. The Court rejected the application accepting the defence contention that an accused person cannot be compelled to write out in Court copies of documents alleged to have been forged by him. Hence this revision petition by the State.

(2) The lower Court places reliance for its decision upon 'BAZARI HAJAM v. EMPEROR', 1 Pat 242 and 'GUNAMUDAYAM PAKKIANATHAN v. SIRKAR', A. I. R. 1950 Trav-C 5.

(3) After the revision was duly admitted when it came up before a learned Single Judge (Kunhi Raman C. J.) the learned counsel for the accused counter-petitioner raised an argument that the expression 'any person present in Court' occurring in paragraph 2 of Section 73, Evidence Act, will not include an accused person. It was pointed out that the decisions on the point were not all uniform. The learned Chief Justice took the view that the question was of sufficient importance for

reference to a Full Bench and consequently ordered

'I, therefore, direct that the question as to whether an accused person will come under the category of "any person present in Court" within the meaning of the second paragraph of Section 73 of the Indian Evidence Act in the circumstances of this case be referred for the opinion of a Full Bench of this Court.'

(4) Section 73 of the Evidence Act is in these terms:

"In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature written or seal admitted or proved to the satisfaction of the Court to have been written or made by the person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

This section applies also, with any necessary modifications, to finger-impressions."

Paragraph 2 is couched in very wide terms. The words "any person" are wide enough to cover an accused person. It is a well-established rule of construction of statutes that where the language is plain and unambiguous, there is no room for construction, and the court is not justified in departing from the plain language of the statute in search of an intention which the words themselves do not suggest. Giving the words "any person present in court" occurring in paragraph 2 the meaning which those plain words require, it is clear that no category of person present in court is sought to be excluded from the scope of the provision enacted in paragraph 2 or paragraph 3. If the Legislature intended to exclude accused persons from the category of persons contemplated by the provision there is no reason why it should not have said so.

That indeed is the view a Full Bench of the Rangoon High Court took in 'EMPEROR v. NGA TUN HLAING', 1 Rang. 759. Young, Offg. C. J. observed that paragraph 2 makes no exception in favour of accused persons. Words to the same effect are seen also in the judgments of the other two learned Judges. This decision was followed by a learned Single Judge of the Bombay High Court in 'EMPEROR v. RAMRAO MANGESH', 56 Bom. 304. Wadia J. who decided that case repeated the observation in the Rangoon case that if it was the intention of the Legislature to exempt an accused person from the operation of Section 73, there was nothing to prevent it from saying so and said he agreed with the judgment.

Doubt was however expressed by Lort-Williams J. in 'KISHORI KISHORE v. EMPEROR', 39 Cal. W N 986 as to whether the expression 'any person' in paragraph 2 includes an accused person. It was really unnecessary in that case to decide the point and the learned Judge's doubt was based on a decision of Rankin J. in 'AZIMUDDY v. EMPEROR', 54 Cal. 237 about the meaning of the same expression, 'any person' occurring in Section 162 of the Criminal Procedure Code. Jack J. who sat with Lort-Williams J. to decide the above Calcutta case however stated that had it been necessary to decide the question in that case he would have held that Section 73 does include an accused person. The learned Judges also referred to the Rangoon case and the Bombay case referred to above.

(5) Here it is useful to notice that the decision in 'AZIMUDDY v. EMPEROR', (54 Cal. 237) has since been overruled by a Board of the Judicial Committee of which Sir George Rankin was himself a member. See 'NARAYANA SWAMI v. EMPEROR', AIR 1939 P. C. 47. The question there was whether the words 'any person' in Section 162 of the Criminal Procedure Code would include a person eventually accused, but who at the time of making statement was not even suspected. The point arose whether his statement had to be excluded from evidence under the provision enacted by the section. Commenting on the conflict of decisions bearing upon the point Lord Atkin who pronounced the judgment in the case said thus at pp. 50 and 51:

"This section which in its amended form was substituted for the original Section by S. 34, Criminal P. C. Amendment Act, 1923, has been the subject of repeated decisions in the High Courts of India and has given rise to a distinct cleavage of opinion. The majority of the High Courts have held that it has no application to a statement made by a person who at the time it is tendered in evidence is an accused person; the minority have held that there is no such limitation. Their Lordships have been referred to at least twelve reported cases, all of which with others they have considered.

The representative opinions on either side may be taken to be 54 Cal. 237 in a judgment of the then Rankin J. admitting such a statement against the accused and 'SYAMO MAHA PATRO v. EMPEROR', 55 Mad. 903 in a judgment of Reilly J. sitting in a Full Bench of the High Court of Madras rejecting the statement. The present Board have had the advantage of the presence of Sir George Rankin in giving a full consideration to all the reported decisions; and they have come to the conclusion that the words of the Section lead to the conclusion that the statement is not admissible even when made by the person "ultimately accused".

Other passages from the judgment of Lord Atkin, useful to the present occasion, are seen quoted by Harries C. J. in a recent Full Bench decision of the Calcutta High Court reported as 'SATYA KINKAR v. NIKHIL CHANDRA', AIR 1951 Cal. 101. In that case the controversy was whether the provisions in Sections 94 and 96 of the Criminal Procedure Code relating respectively to "summons to produce document or other thing" and "when search warrant may be issued" would bring within their scope accused persons. Clause 1 of Section 94 states 'inter alia' that the Court may issue a summons to the person in whose possession or power the relevant document or thing is believed to be, requiring him to attend and produce it, and clause 2 states that any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition, if he causes such document or thing to be produced instead of attending personally to produce the same.

Among other things Section 96 prescribes the procedure the Court is empowered to adopt when the Court is satisfied that a summons under Section 94 will not be complied with etc., and in that section also occur the words 'any person'. Before the Full Bench it was contended that these sections would not apply to accused persons. Harries C. J. who pronounced the judgment of the Full Bench exhaustively reviewed the case law bearing on the question and referring to Section 94 said:

"The section is framed wide enough to cover the right to serve a summons on a person accused in a case to produce a document, and there is nothing in the section to suggest that it would

not cover an accused person. Sub-s. (2) of S. 94 provides that any person who is required to produce may do so in a certain manner. Again the words "any peron" are wide enough to cover a person accused".

Section 96 is then quoted and it is observed:

"Again this section is absolutely general in terms and would apply to any person to whom a summons or order under section 94 has been addressed. Of course if no summons under section 94 could be addressed to an accused person then S.96 would not apply to an accused person. But as I have already said S. 94 is framed in the widest possible terms, and that being so it appears to me that a search warrant under section 96, Cr. P. C could be issued to search the premises of an accused person who was known to be in possession of a document and who had refused to produce it after a summons for production has been served upon him".

In the course of the judgment the learned Chief Justice quotes from the judgment of Lord Atkin in 'NARAYAN SWAMI v. EMPEROR'. The relevant passages occur at pp. 104 and 105 and they read as follows:

"The importance of giving all words in a section their full and grammatical meaning was stressed by their Lordships of the P. C. in the case of 'NARAYANA SWAMI v. EMPEROR', AIR 1939 P. C. 47. In that case, their Lordships had to consider whether the phrase "any person" in S. 162, Cr. P. C. covered an accused person. This Court had held in the case of 'AZIMUDDY v. EMPEROR', 54 Cal. 237 that the phrase "any person' could not cover an accused person because if such a meaning was given to it then S. 162, Cr. P. C., would be in conflict with S. 27, Evidence Act.

Nevertheless their Lordships of the P. C. held that the term "any person" in S. 162, Cr. P. C. had to be given its ordinary and grammatical meaning and as the phrase was wide enough to cover a person accused in the case the section applied to him as well as to others. In the judgment of the Board which was delivered by Lord Atkin stress is laid on the importance of a grammatical construction and two well-known observations of very distinguished English Judges were referred to. In 'GREY v. PEARSON', (1857) 6 HLC 61 at p. 106 Lord Wensleydale observed:

'I have been long and deeply impressed with the wisdom of the rule, now I believe universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency but no further.'

'In 'COMMRS. FOR SPECIAL PURPOSES OF INCOME-TAX v. PEMSEL', (1891) 15 AC 531, Lord Halsbury L. C. observed at p. 542: "My lords, to quote from the language of Tindal C. J. when delivering the opinion of the Judges in the 'SUSSEX PEERAGE CASE', (1844) 11 Cl & F 85 at p. 143 the only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble which according to Dyer C. J. ('STOWEL v. LORD ZOUCH', (1797) 1 Plowden, 353 at p. 369) is a key to open the minds of the makers of the Act and the mischiefs which they are intended to redress."'

As I have said earlier, giving S. 94 ordinary grammatical construction it must be held that it applies to accused persons as well to others.... ....."

(6) In 'GOLAM v. THE KING', AIR 1950 Cal 66 the Calcutta High Court had to consider the question of the applicability of Section 73, Evidence Act, to accused persons and the view held was that the section did apply to such persons. The case related to the legality of taking specimen thumb impressions in Court and that case will be referred to in greater detail later on in this order.

(7) The foregoing discussion and the authorities cited will clearly show that there is no substance in the contention that Section 73 of the Evidence Act has no application to accused persons. We accordingly repel it.

(8) The question then is whether the learned Magistrate went wrong in holding that he had no power to compel the accused to write out from (in?) court the alleged forged documents. The relevant words used in paragraph 2 of sections 73 are that the Court "'may direct' any person present in Court" (the italics (here in ' ' are ours). It is plain that the word 'direct' connotes an idea different from what the word 'compel' signifies. The word compel occurs in several sections of the Evidence Act. See for instance Sections 125, 129, 130, 131 and 132. The idea of using or not using, as the case may be, of force appears on the face of these sections. There is hence no warrant for the contention raised on behalf of the State that the Court can compel an accused person to write down something to its dictation when all that section 73 states is that the Court may 'direct' any person present in Court etc. When this aspect was discussed at the bar the learned Public Prosecutor was constrained to concede that the Court had no power to compel an accused to write out the contents of a document alleged to have been forged by him.

(9) In this context reference may usefully be made to the decision in 'SIRKAR v. ITTICHERIA', (1935) Trav LT 524 where this identical question came up for decision. At that time there was no Evidence Act in Travancore, but the learned Judges, Nokes and Sivasankara Pillai JJ. held that in conducting trials the provisions of section 73 could be invoked by courts in that Jurisdiction. Their view was that while criminal courts had power to require an accused person present in Court to write words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by him, such courts had no power to use any compulsion in that behalf. The conclusion we have come to here is the same. Indeed the decisions are for the most part really all one way.

(10) The learned Public Prosecutor however complained that the lower Court did not even exercise the power vested in it under Section 73 to 'direct' the accused to write out the contents of the 2 documents forming the subject of the charge against him. The complaint is legitimate but we blame the parties more for the result. The matter was agitated in the court below only as to the question of compulsion and as it happened in the case last referred to the Magistrate never considered the

question whether he had, to use the language employed by Nokes J., the lesser jurisdiction merely to require the accused to write. It is clear that the Magistrate did not attempt to exercise that lesser jurisdiction and we therefore set aside the order and direct the Magistrate to rehear the petition and to exercise the discretion vested in him by law in the light of the observations herein contained.

(11) Whether any adverse inference could be drawn by the accused's refusal to comply with any direction the Court will hereafter give is a matter about which we do not now feel obliged to pronounce upon.

(12) In allowing the revision and directing the lower court to rehear the matter we have not omitted to notice that the reference order has only asked for the opinion of the Full Bench. At the hearing both sides invited us to finally dispose of the petition ourselves and acceding to that we have decided the revision petition itself.

(13) The revision petition has challenged the correctness of the decision in 'GUNAMUDAYAN PAKKIANATHAN v. SIRKAR', AIR 1950 Trav C 5. Though the counter-petitioner would seem to have relied upon it before the learned Single Judge no reference was made to that case before us by his learned counsel. For the State it was strenuously argued that in enunciating the rule of the decision that the practice of taking the thumb impression of the accused and using it against him is inconsistent with the principle of a fair trial, the learned Judges had overlooked the provisions of Section 73, Evidence Act, and Section 5 of the Travancore Identification of Prisoners Act, XI(11) of 1112. The Travancore Evidence Act was enacted in 1117 and Section 73 thereof is in the same terms as Section 73 of the Indian Evidence Act. Section 73 of the Indian Evidence Act has already been quoted in this order. Section 5 of the Travancore Identification of Prisoners Act reads thus:

"If a Magistrate is satisfied that, for the purpose of any investigation or proceeding under the Code of Criminal Procedure, it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken as the case may be by a police officer;

Provided that no order shall be made directing any person to be photographed except by a Magistrate of the First Class;

Provided, further, that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding."

Section 6 provides as follows:

"(1) If any person who under this Act is required to allow his measurements or photograph to be taken resists or refuses to allow the taking of the same, it shall be lawful to use all means necessary to secure the taking thereof.

(2) Resistance to or refusal to allow the taking of measurements or photographs under this Act shall be deemed to be an offence under Section 179 of the Travancore Penal Code."

By the definition the said Act gives to "measurement", it includes finger impressions and foot-print impressions, (Vide Section 2a). Presumably the difficulty which the Courts felt in 'SIRKAR v. ITTICHERIA', (1935) Trav LT 524 paved the way for the enactment of the Travancore Identification of Prisoners Act and that Act is practically a verbatim reproduction of the Identification of Prisoners Act, XXXIII(33) of 1920 passed by the Indian Legislature. Cochin also adopted that law by enacting the Identification of Prisoners Act, XV(15) of 1112. As in Travancore it followed the same lines as Act XXXIII (33) of 1920. In the statement of Objects and Reasons attached to the Bill which eventually became the Identification of Prisoners Act, XXXIII (33) of 1920 the necessity for the law relating to the identification of prisoners has been explained as follows:

"The object of the Bill is to provide legal authority for the taking of measurements, finger impressions, foot-prints and photographs of persons convicted of or arrested in connection with certain offences. The value of the scientific use of finger impressions and photographs as agents in the detection of crime and the identification of criminals is well known, & modern developments in England and other European countries render it unnecessary to enlarge upon the need for the proposed legislation.

The existing system by which the Police in India take finger impressions, photographs etc., of criminals and suspected criminals is void of legal sanction, except as regards registered members of criminal tribes, in whose case provision exists for the taking of finger impressions in Section 9 of Criminal Tribes Act, 1911 (III(3) of 1911). The need for legalising the practice has long been recognised, but it was not thought expedient to take the matter up so long as no practical difficulties arose. Instances have recently been reported to the Government of India where prisoners have refused to allow their finger prints or photographs to be taken. With a view to prevent such refusals in future it is considered necessary without further delay to place the taking of measurements etc., which is a normal incident of police work in India as elsewhere, on a regular footing."

(14) We consider it unfortunate that the attention of the learned judges in 'GUNNAMUDAYAM PAKKIANATHAN v. SIRKAR', (AIR 1950 Trav-C 5) was not invited to either of the statutory provisions referred to above or to the case in 'SIRKAR v. ITTYCHERIA', (1935 Trav LT 524). The learned Sessions Judge who tried the case (Sessions case No. 14 of 1123 of the Nagercoil Sessions Court) which gave rise to 'GUNNAMUDAYAN PAKKIANATHAN v. SIRKAR', was bound by the decision in 'SIRKAR v. ITTYCHERIA'. The Evidence Act and the Identification of Prisoners Act had long been passed into law when the trial in the later case took place. It is remarkable that the Public Prosecutor or the defence counsel did not bring to the notice of the Judges of this Court the relevant statutes or the decision. The case in '9 Trav. LT 69' (short notes) referred to by the learned Judges did not relate to a case of an accused person being made to write or to give his thumb impressions. In a prosecution for counterfeiting the Committing Magistrate got the accused to demonstrate the process of counterfeiting and naturally the High Court condemned that method in severe terms. There is no law warranting such a procedure, but that case was no guide to decide 'GUNNAMUDAYAM PAKKIANATHAN v. SIRKAR'.

(15) In 'GUNNAMUDAYAM PAKKIANATHAN v. SIRKAR', (AIR 1950 Trav-C 5) the learned Judges fell into the error of following 'BAZARI HAJAM v. EMPEROR', (1 Pat 242) which in its turn had omitted to notice Section 73 of the Evidence Act and Section 5 of the Identification of Prisoners Act. The Patna High Court itself has dissented from that decision in subsequent cases and so too other High Courts. A very instructive summary of the subsequent case law on the point

is to be found in the judgment of the Calcutta High Court in 'GOLAM RAHMAN v. THE KING', (AIR 1950 Cal 66) already referred to. Lahiri J. who gave the decision of the Division Bench states as follows in paragraph 18 of his judgment:

"The fourth point of law raised in the appeal relates to the legality of taking specimen thumb impressions in Court. Mr. Taluqdar has argued that this procedure is wholly unwarranted and relied upon 'BAZARI v. EMPEROR', 1 Pat 242: AIR 1922 Pat 73, where it was observed that there is no law which authorises a Court to ask the accused to do something which may have a tendency to incriminate them. It is remarkable that in this case the attention of the Court was not invited to S. 73, Evidence Act. This decision was dissented from by the same High Court in the cases of 'BASGIT SINGH v. EMPEROR', 6 Pat 305: AIR 1928 Pat 129: 28 Cr. L. J. 850 and 'ZAHURI SAHU v. EMPEROR', 6 Pat 623: AIR 1928 Pat 103: 28 Cr LJ 1028 in which reliance was placed upon S. 5 of the Act XXXIII (33) of 1920 (Identification of Prisoners Act) which authorises a Magistrate for the purpose of any investigation under the Criminal Procedure Code to direct finger impression to be taken.

In the case of 'PUBLIC PROSECUTOR v. KANDA SAMI', 50 Mad 462: AIR 1927 Mad 696: 27 Cr. LJ 1251 the Madras High Court has dissented from the view taken by the Patna High Court in 'BAZARI'S CASE', 1 Pat 242: AIR 1922 Pat. 73 and held that it is not illegal or improper for a Magistrate to direct the finger print of the accused to be taken in the course of a criminal trial where he is charged with the offence of forgery of a finger print. The Bombay High Court has taken the same view as the Madras High Court in the case of 'EMPEROR v. RAM RAO', 56 Bom 304: AIR 1932 Bom 406: 33 Cr LJ 666.

In the case of 'SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL v. KIRAN BALA DASI', reported in '30 Cal. W. N. 373: AIR 1926 Cal 531: 27 Cr LJ 409, (C. C. Ghosh and Duval JJ.) it was held that the procedure of directing the specimen of the thumb impression of the accused to be taken was permissible under S. 5 of Act XXXIII (33) of 1920 as also under illustration (c) of S. 45, Evidence Act, but no reference was made to the provisions of S. 73, Evidence Act. In 'KISHORI v. EMPEROR', 39 CWN 986: AIR 1935 Cal 308: 36 Cri LJ 921, there was a difference of opinion between Lort-Williams and Jack JJ. on the question whether S. 73, Evidence Act, applied to such a case although it was not necessary for the learned Judges to decide the point.

The obiter dictum of Lort-Williams J. was to the effect that it was doubtful whether the word "person" in S. 73 applies to an accused person whereas the obiter dictum of Jack J. was to the effect that S. 73 does apply to the accused in a criminal trial. The question of the applicability of S. 73 to the accused in a criminal trial was decided in the affirmative by a Full Bench of the Rangoon High Court in 'KING EMPEROR v. NAGA TUN ALAING', 1 Rang 759: AIR 1924 Rang. 115: 26 Cri LJ 108 FB where it was pointed out that S. 342, Criminal P. C., does not prevent the application of S. 73, Evidence Act to a criminal trial. Young C. J. observed as follows:

"Section 342, Criminal P. C., relates only to oral questioning of the accused and does not prohibit a direction to make a thumb impression any more than it prohibits a direction to him to face a witness in order that he may be identified."

Section 73, Evidence Act, is quite general in its terms and applied to all cases and there is no exception in favour of an accused person. If there is nothing in the Criminal Procedure Code which precludes its application to criminal trials we do not see any reason why the plain language of the section should not be given its full effect. The operation of any other Act is, of course, expressly saved by S. 2, Evidence Act. We agree with Young C. J. that S. 342, Cr. P. C. does not make S. 73, Evidence Act, inapplicable to criminal trials. We accordingly, hold that the procedure followed in taking specimen thumb impressions under the direction of the Court is in strict compliance with S. 73 and S. 45, ill(c), Evidence Act, & also S. 5 of Act XXXIII(33) of 1920. The fourth point raised by Mr. Taluqdar is accordingly overruled."

The point referred to in the latter half of the above extract would appear to have troubled the minds of the learned Judges in 'GUNNAMUDAYAM PAKKIANATHAN v. SIRKAR'. It is seen stated in their Judgment that on principle it appeared to them that the accused could not be required to furnish any evidence in support of the case for the prosecution. Mr. K. P. Abraham the learned counsel who appeared before us for the counter-petitioner, while not referring to 'GUNNAMUDYAN PAKKIANATHAN v. SIRKAR', sought to reinforce the idea underlying that decision by contending that to compel a person to write down anything to Court's dictation or to give finger impressions came within the interdict of Article 20(3) of the Constitution of India which provides that no person accused of any offence shall be compelled to be a witness against himself.

(16) The point does not strictly arise in this case as we have held that the Court cannot compel an accused person to write down the contents of a document alleged to have been forged by him, or even his name or signature. However as law permits compulsion to be used by a Court to take an accused person's finger-impressions and as we are discussing the correctness of the decision in 'GUNNAMUDAYAM PAKKIANATHAN v. SIRKAR', it is interesting to notice that the same argument was raised in 'SATYA KINKAR v. NIKAIL CHANDRA', (AIR 1951 Cal 101) with reference to Ss. 94 and 96 of the Criminal Procedure Code. The argument was repelled there.

The learned Counsel for the counter-petitioner invited our attention to 'BOYD v. UNITED STATES', (1886) 116 US 616: 29 Law Edn. 746. A provision similar or identical in terms to Article 20(3) of the Constitution forms part of the Fifth Amendment to the Constitution of the United States of America, but the said case deals not only with the Fifth Amendment but also with the Fourth Amendment. Attempt was made in the Indian Constituent Assembly to introduce a fourth clause to Article 20 on the lines of the Fourth Amendment but it was negatived. Vide Volume VII Constituent Assembly Debates pp. 794 to 797 and 840 to 842. Besides, 'BOYD v. UNITED STATES', has not been approved in subsequent decisions.

(17) It would here be instructive to quote a passage from a judgment of Justice Oliver Wendell Holmes. In 'HOLT v. UNITED STATES', (1910) 218 U.S., 245: 54 Law Edn. 1021 at page 1030 (Lawyer's edition) that very distinguished Judge said:

"Another objection is based upon an extravagant extension of the 5th Amendment. A question arose as to whether the blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that

he did this under the same duress that made his statements inadmissible, & that it should be excluded for the same reasons. But the prohibition of compelling a man in a criminal Court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent."

(18) The foregoing discussion would show that the contention raised on behalf of the State that 'GUNAMUDAYAN PAKKIANATHAN v. SIRKAR', (AIR 1950 Trav-C 5) does not correctly lay down the law regarding the Court's jurisdiction to compel an accused person present in Court to give his finger impressions or the use which the Court could make of the impressions so taken is plainly right. We accordingly overrule that decision. The judgment in that case does not even show that the accused had raised any objection to his finger impressions being taken by the Court.

(19) In the result we allow the revision, direct the lower Court to rehear the petition giving rise to it and dispose of it according to law in the light of this order.

A/V.R.B. Revision allowed.

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KOSHI AND GOVINDA PILLAI JJ.

Mamman Mathai, Appellant v. Geeverghese Zacheria and others, Respondents.

Second Appeal No. 575 of 1124, D/- 20-8-1951.

Civil P.C. (1908) O. 21, R. 16, proviso 2 — Subsequent mortgagee obtaining decree on his mortgage and purchasing in execution mortgaged property subject to prior mortgage — Prior mortgagee obtaining decree on his mortgage — Debt directed to be realised personally from mortgagor — Puisne mortgagee purchasing decree obtained by prior mortgagee and taking out execution — Proviso 2 to O. 21, R. 16 held did not apply — By purchase of equity of redemption decree held was extinguished pro tanto. — (T.P. Act (1882), S. 82)

A decree was passed on foot of a simple mortgage which defendant 1 had executed in favour of original decree-holder. Defendants 2 to 6 were impleaded in the suit as subsequent encumbrancers. The suit was on the first mortgage. The decree directed realisation of debt personally from defendant 1 and by sale of mortgaged property. Long prior to this suit defendant 2 had obtained a decree on the puisne mortgage in his favour and in execution thereof had purchased the mortgaged property subject to the first (prior) mortgage. Subsequently he got the first mortgage decree assigned in his favour and filed execution application. The execution was objected to by the subsequent encumbrancer on the ground that the purchase of the prior mortgagee's decree by the puisne mortgagee-auction-purchaser brought about the extinguishment of the decree:

Held that the proviso 2 to O. 21, R. 16 had no application to the case, the assigned decree not being one "for payment of money against two or more persons." The fact that a mortgage decree for sale has for certain purposes been recognised as a decree for money was not sufficient to attract to such a decree the proviso. 12 Ind. Cas. 70 (Cal.); 1947 Trav. LR 603, Rel. on; Case law discussed. (Paras 5, 6)

(Principle of merger embodied in proviso to O. 21, R. 16 discussed (Para 6)).

Held further, that had it not been for the super imposition of a purchase by defendant 2, of the equity of redemption of the mortgaged property in execution of the decree he obtained on his mortgage, defendant 2 could have been allowed to execute the decree. The two mortgages, the prior mortgage and the puisne mortgage were in respect of the same property and when defendant 2 who had purchased the mortgaged property in execution of the decree he obtained, acquired the entire interest of the prior mortgagee-decree-holder there was complete fusion of the interests of the judgment-debtor and the judgment-creditor in one and the same person. The decree therefore got extinguished pro tanto, i.e., in the ratio which the property purchased bore to the rest of the property mortgaged, the moment the defendant 2 purchased the prior mortgagee-decree-holder's rights. If the vesting of part of the equity of redemption in the mortgagee is tantamount to a discharge or satisfaction of a proportionate part of the mortgage debt, there was no reason why an execution court should not recognise it and go into the question of the extent to which the decree had been satisfied. Section 47 would seem to be comprehensive enough to cover the case. Thus the decree did not become unexecutable but was extinguished only pro tanto: 5 All 27, Rel. on; Case law reviewed. (Paras 7, 8-10)

Anno: Civil P.C. O. 21 R. 16 N. 17 and 3 T.P. Act S. 82 N. 18.

T. K. Joseph, for Appellant; P. K. Varghese, for Respondents.

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('27) 19 Cochin LR 23 2
('47) 1947 Trav LR 603 2, 5

KOSHI J.: This second appeal is brought by the assignee-decree-holder in O. S. 676 of 1111 of the Chengannur District Munsiff's Court against the concurrent decisions that court and the District Court of Mavelikara passed refusing execution of the decree at his instance. He was defendant 2 in the suit. The decree is dated 9-4-1117 and it was passed on foot of a simple mortgage, defendant 1 had executed in favour of the original decree-holder. Defendants 2 to 6 were impleaded in that suit as subsequent encumbrancers. The bond put in suit created the first mortgage over the property. The decree directed realization of the debt personally from defendant 1 and by the sale of the mortgaged property. Long prior to the institution of that suit defendant 2 had obtained a decree in O. S. No. 868 of 1103 on the file of the Thiruvella District Munsiff's Court on the puisne mortgage in his favour and in execution thereof had purchased the mortgaged property subject to the prior (first) mortgage. That court purchase was in 1108. On 1-11-1120 defendant 2 got the decree in O. S. 676 of 1111 assigned in his favour and on 9-11-1120 together with the original decree-holder filed the execution application giving rise to this second appeal. On notices being given of the application to the defendants, defendant 5, one of the persons impleaded as a puisne encumbrancer, objected to the execution on the ground that the purchase of the prior mortgagee's decree by the puisne mortgagee-auction-purchaser brought about the extinguishment of the decree and that the execution application should therefore be dismissed as the decree itself had ceased to exist. Defendant 2 resisted the contention and even contended that defendant 5 had no locus standi to oppose the application. The learned District Munsiff upheld the objection raised by defendant 5 and passed an order dismissing the execution application. The decree was also recorded as satisfied. The Munsiff's order is brief and clear and it may well be quoted here:

> "The 5th defendant has filed this objection. The decree is against the first defendant and defendants 2 onwards are subsequent encumbrancers. The second defendant is the assignee-decree-holder. The second defendant purchased the properties in court sale in O. S. No. 868 of 1113 of the Thiruvella Munsiff's subject to this decree debt. He has therefore become liable to pay the debt and is the representative of the defendant. The decree has therefore been satisfied. This contention of the defendant-petitioner has not been seriously disputed at the argument. It was argued that even if the assignee-decree-holder is a representative of the defendant prior charge subject to which the properties were purchased in O. S. 868 of 1103 was only Rs. 190 and a moiety thereof and interest will together amount to Rs. 285 and that there remains a large balance in the decree debt and that the assignee-decree-holder has not got possession of the property purchased in court sale owing to the obstruction at the instance of the first defendant. Since the purchase was subject to the prior charge and interest, the debt has been satisfied when the purchase was made. The argument therefore cannot be accepted. The objection petition is in the circumstances allowed and the suit is struck off."

Defendant 2 took the matter in appeal before the Mavelikara District Court in A. S. 235 of 1121 and the learned Temporary Second Judge who heard the appeal dismissed it confirming the Munsiff's decision. In so doing while referring to the ground on which the learned Munsiff rested his decision the learned Second Judge held that the case fell within the mischief of the second proviso to Order XXI R. 16, C.P.C. and based his decision of the appeal on that ground. As a result of that the best part of the argument in the second appeal happened to be confined to the question how far the learned Judge's view is correct.

(2) Rule 16 of Order XXI relates to applications for execution by transferees of decrees and proviso 2 to the said rule enacts that where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others. Here the decree under execution grants personal relief only against defendant 1, the executant of the mortgage and it is therefore difficult to hold that the decree is one "for payment of money against two or more persons." The true construction of this proviso has been the subject of much controversy but it has now come to be recognised that the true meaning to be given to it is what Sir Asutosh Mookerjee J. attributed to it in 'LALDHARI SINGH v. MANAGER, COURT OF WARDS, BHABATPURA', 12 Ind Cas 70 (Cal.). In that case the learned Judge said:

> "The plain meaning of the proviso is, that it is applicable only to the case of a decree for payment of money personally by several persons jointly: in other words the expression "a decree for money against several persons" signifies a personal decree for the payment of money against two or more defendants jointly."

Among cases which follow this interpretation mention may be made of the decisions in 'RAJARATHNA NAIDU v. RAMACHANDRA NAIDU', AIR 1924 Mad. 901(1) and 'MD. ABDUL KADIR v. ABDUL KADIR', AIR 1926 Mad. 1141. Even earlier to the decision in 12 Ind Cas 70 (Cal.), the Calcutta High Court and in 'LALLA BHAGUN PERSHAD v. HOLLOWAY', 11 Cal. 393 said that the proviso referred to a decree for money personally due by two or more persons and that it did not apply to a case where a defendant from whom nothing was personally due purchased the decree. In 'PANACHAND POMAJI v. SUNDRA BAI', 31 Bom. 308 the Bombay High Court held that the proviso applied only where in the decree there was a distinct order upon the defendant personally to pay the money. In the two Calcutta cases and in the Bombay decision it was the old S. 232 that came up for interpretation. In the old Code the words in at proviso 2 were "for the money"; but those words have now been replaced by the words "for payment of money." In AIR 1924 Mad. 901 (1) and in 'MT. ASIA BIBI v. NAZIR AHMAD', AIR 1932 All. 704 it has been pointed out that the change was intended to emphasise that the proviso was confined to cases of personal decrees. There was some conflict in the Travancore High Court about the true interpretation of the proviso, but in 'ANTHONY v. KRISHNAN', 1947 Trav. L.R. 603 a Division Bench held that the proviso can apply only in cases where there is a decree for payment of money against two or more persons and where one of them has taken an assignment of the decree in his favour. The same view was taken in Cochin in the cases reported as 'DASAN v. KURUVANCHAN', (1927) 19 Cochin L.R. 23. The Travancore decision reviews the decisions bearing on the ques-

tion both in Travancore and outside fairly exhaustively.

(3) In the Travancore and Cochin cases mentioned above the puisne mortgagee who had obtained an assignment of the prior mortgagee's decree was allowed to execute the decree as in either case the puisne mortgagee-purchaser was not personally liable for the debt.

(4) Had it not been for the superimposition of a purchase by defendant 2, the appellant of the equity of redemption of the mortgaged property in execution of the decree he obtained on his mortgage we would have had to allow the second appeal and permit the appellant to execute the decree. The learned Munsiff fully comprehended the bearing of that fact on the decision of the case, but unfortunately the learned appellate Judge thought it fit to base his conclusion on the second proviso to Order XXI, R. 16 which we have shown cannot apply to a case where there is no decree for payment of money against two or more persons jointly. It was the view taken by the learned Judge in the court below that the contesting respondent (4th respondent-defendant hereinafter referred to as the respondent) was trying to support. We have therefore necessarily to refer to the cases to which our attention was invited by the respondent's learned Counsel.

(5) The more important among those cases have been referred to and distinguished, or dissented from, by Sankarasubba Iyer J. in the decision in 'ANTHONY v. KRISHNAN', 1947 Trav. LR 603 and as we are generally in agreement with the view expressed in that case we do not think it necessary to traverse the same ground here. In a recent case that came up before this Bench, S. A. 164 of 1123 (T), we had occasion to refer to the decision in 1947 Trav. L.R. 603 and though we could not apply it to that case we had made it more or less clear that our view on the question now raised was in agreement with the view expressed in that decision. The fact that a mortgage decree for sale has for certain purposes been recognised as a decree for money is not sufficient to attract to such a decree the proviso referred to which speaks of "a decree for the payment of money against two or more persons" which expression as referred to above has been interpreted to mean a personal decree for the payment of money against two or more persons. It has as mentioned earlier repeatedly been held that it will not apply to a mortgage decree for sale. The above aspect viz., that a mortgage decree for sale is for some purposes regarded as a decree for money was duly considered in the decisions in 'LALDHARI SINGH v. MANAGER', COURT OF WARDS, BHABATPURA', 12 Ind Cas 70 (Cal) and 1947 Trav LR 603. Outside Travancore cases the respondent's learned Counsel referred us to the decisions in 'SADAGOPA AYYANGAR v. SELLAMMAL', AIR 1922 Mad. 510(1), 'NANHELAL v. MANGILAL', AIR 1924 Nag. 41 and 'THAYARAMMA v. ANNAPOORNAMMA', AIR 1943 Mad. 641. The first two cases were referred to in 1947 Trav. L.R. 603. The judgment in AIR 1922 Mad. 510 (1) contains observations somewhat favourable to the respondent's contention but the decree there was a "decree for the payment of money" although in the case of the first defendant the decree directed the money to be paid out of his family property. The discussion opens with the words: "The decree was one for the payment of money against first defendant and three others". A later Madras decision cited already viz., 'RAJARATHNA NAIDU v. RAMACHANDRA NAIDU', AIR 1924 Mad. 901 (1) refers to the case in AIR 1922 Mad. 510(1) and explains that that decision does not affect the general principle laid down in the cases referred to earlier and inherent in the rule itself that the proviso does not apply to decrees which are in essence decrees, not for the payment of money but for the sale of property. The second case mentioned is a decision of a learned Single Judge of the Court of the Judicial Commissioner, Nagpur, and that followed the case in AIR 1922 Mad. 510(1). As in the Madras case which it followed there was no mortgage decree in the Nagpur case either. There, of the two joint judgment-debtors under a decree for money one debtor died and the question arose whether the proviso applied when one of the legal heirs bound to pay the decree debt out of his father's assets in his hands purchased the decree. It was held that the words of the proviso were comprehensive enough to include a decree against one who is obliged to pay the decree amount out of the assets of the deceased in his hands. The case in AIR 1943 Mad. 641 is similar and what was held there was that the expression "one of them" in the proviso includes the estate of one of them after his death. In that case one of the judgment-debtors against whom a joint decree for money was passed died and the decree was afterwards assigned to a person benami for the estate of the deceased judgment-debtor. The bar of the proviso was held to apply and the decree was not allowed to be executed. In all these cases there were more persons than one jointly made liable for the decree debt. The only question for decision was whether a person asked to discharge the debt out of his family property or the legal heir of a deceased judgment-debtor could be classed as falling within the purview of the words "one of them" occurring in the proviso. The view which found favour with the learned judges who decided these cases has been criticised in two other cases already referred to viz., 'PANACHAND PAMAJI v. SUNDAR BAI', 31 Bom. 308 and 'MT. ASIA BIBI v. NAZIR AHMAD', AIR 1932 All. 704. We are not here concerned with the question whether the view taken in the cases relied on by the respondent's counsel is correct or not. The present case is clearly distinguishable from those cases, and it is not necessary for our present purpose to go beyond that. Here nobody other than defendant 1 is made personally liable under the decree.

(6) The result of our discussion is that the proviso cannot apply in terms to the case in hand and we have next to examine whether the ground on which the learned Munsiff rested his decision is not correct. His view though not expressed in so many words is that the decree has become inexecutable in virtue of the doctrine of merger. In fact, the principle underlying the proviso is the doctrine of merger. To use the facile language Venkatasubba Rao J. (Abdur Rahman J. concurring) employed in 'SANKARALINGAM v. ARUMUGAM', AIR 1938 Mad. 814, apart from the letter of the Rule (referring to proviso 2 to O. XXI, R. 16) there is a principle which it embodies, namely where the decree holder's right and the judgment-debtor's liability become united in one and the same individual, it stands to reason that the decree should be treated as satisfied. The learned Judge then referred to the decision in AIR 1932 All. 704

and concurs in the view embodied in the following passage occurring in the judgment in that case :

"Where the rights of a decree-holder and the liabilities of a judgment-debtor become united in one and the same person there would obviously be merger. But the doctrine of complete merger involves the essential condition of the co-extensiveness of such rights and liabilities."

In S. A. 164 of 1123 (T) this principle was given effect to and execution refused to an assignee of the decree who was a benamidar for the principal defendant. In a later case, S. A. 120 of 1124 (T) another Bench to which one of us was a party discussed the principle more elaborately and relying upon it a suit instituted by a person who had obtained an assignment of a mortgage in favour of a third party in respect of a decree against him (the plaintiff) was dismissed. Subramania Iyer J. who delivered the judgment in that case said during the course of his judgment

".....the two opposite characters or qualities of debtor and creditor became united in the same person, viz., the plaintiff. It is a principle of jurisprudence that a person cannot, at one and the same time, unite in himself two opposite characters. For instance, a person cannot be his own creditor, or the mortgagee of his own rights. The doctrine of merger proceeds upon this principle ..... The coincidence of the two opposite characters of debtor and creditor in the same person operates as an annihilation or extinguishment, whereafter there is no more creditor or debtor. If the quantum of the interests that coincide is coextensive, the extinguishment is complete; otherwise there would be an extinguishment pro tanto. The principle applies to all obligations whatever be their origin and nature; it applies to obligations arising out of or merged in and evidenced by decrees as well. The principle would equally apply whatever be the manner in which the two characters happen to become vested in the same individual whether by act of parties or by operation of law. This principle is well established, is covered by authorities from very early times, and has been recognised everywhere."

In the present case the two mortgages, the prior mortgage in favour of the plaintiff and the puisne mortgage in favour of the appellant, were in respect of the same property and when the appellant who had purchased the mortgaged property in execution of the decree he obtained, acquired the entire interest of the prior mortgagee-decree-holder there is complete fusion of the interests of the judgment-debtor and the judgment-creditor in one and the same person. The decree therefore got extinguished the moment the appellant purchased the prior mortgagee-decree-holder's rights. The learned Munsiff's view is therefore as indicated earlier absolutely correct and we have to uphold it.

(7) In the decision in S. A. 120 of 1124 (Trav) some of the relevant decisions bearing on the principle mentioned above have been referred to, but we shall refer here to some more cases. In 'KUDHAI v. SHEO DAYAL', 10 All. 570 it was held that where subsequent to a decree a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor, or is acquired by him under a valid transfer the decree does not become incapable of execution, but is extinguished only pro tanto. It was also held that the rule was sufficiently general to comprehend alike cases in which the decree was for money only and where it is for immoveable property. There the judgment-debtors had acquired the interest of some of the joint decree-holders in a decree for redemption. The judgment in that case was delivered by Mahmood J. who followed his own judgment in a Bench decision in 'BANARSI DAS v. MAHARANI KUAR', 5 All. 27 referred to by Subramania Iyer J. in S. A. 120 of 1124 (T). The principle enunciated in these two decisions was extended to a decree of the present nature in 'SARJU KUMAR MUKERJI v. THAKUR PRASAD', 42 All. 544. In that case after a mortgage decree for sale some of the mortgaged items were purchased by the appellant benami in the name of his son at a sale held in execution of a money decree against the mortgagor. (The Head-note to the case sets out the facts incorrectly). Afterwards the appellant purchased the whole of the mortgage decree from the decree-holder. Under an order of the court, he got his name substituted in place of the original decree-holder, proceeded to execute the decree and wanted to realise the whole of the decretal amount by sale of the properties other than those purchased by him benami in the name of his son. It was held that the effect of the appellant's purchase of the decree was to discharge the mortgage debt pro tanto, that is to say, in the ratio which the property purchased bore to the rest of the property mortgaged, and that the decree could only be executed for the balance. In arriving at the above conclusion the learned Judges (Tudball and Sulaiman JJ.) referred to the decision of a Full Bench of the Allahabad High Court in 'BISHESHUR DIAL v. RAM SARUP', 22 All. 284 and proceeded to state :

"Banerji J., in delivering the main judgment of the Court, pointed out that when the mortgagee bought a portion of the mortgaged property, the rights of the mortgagee and the mortgagor, as regards the portion purchased, became vested in the same person, and the result was that a part of the mortgage debt was wiped out by reason of this fusion of interests, and the balance only was recoverable from the remainder of the mortgaged property. The court thereupon held that only so much of the debt could be held to be discharged as was proportionate to the value of the property in respect of which the confluence of rights had taken place."

The question that remains to be considered is whether there is any difference in principle in the case where it is after the decree for sale, and not before it, that the mortgagee acquires a part of the mortgaged property, or what comes practically to the same thing, where a co-mortgagor acquires the mortgagee's rights. The contention for the appellant is that the effect of the passing of the decree is to put it beyond the competence of the court to consider whether there should be any proportionate reduction in the amount sought to be recovered. It is true that an execution court cannot go behind the decree and must execute it as it finds it, and it is also true that ordinarily it is open to the mortgagee to recover the whole of his mortgage money from any part of the mortgaged property he likes and that the mortgagor cannot insist that the mortgaged properties should be sold in any particular order. But if the vesting of part of the equity of redemption in the

mortgagee is tantamount to a discharge or satisfaction of a proportionate part of the mortgage debt, there is no reason why an execution court should not recognise it and go into the question of the extent to which the decree has been satisfied. Section 47 of the Code of Civil Procedure would seem to be comprehensive enough to cover the case.

No reported case which can be said to be on all fours with the present case has been brought to our notice, and the nearest approach to it to which our attention has been drawn is the case of 'KUDHAI v. SHEO DAYAL', (10 All. 570). That was a case where a joint decree for possession by redemption of a house was passed in favour of Kudhai and several other persons against the mortgagee. Subsequent to the decree the right of all the decree-holders other than Kudhai passed to the judgment-debtors. Kudhai sought execution in respect of the whole house and the mortgagee judgment-debtors objected that in consequence of the events that had happened Kudhai was not entitled to get possession of the whole house. Mahmood J., after remarking that the question raised in that case was not free from difficulty principally because the Code of Civil Procedure contained no express provision to meet cases such as this, was clearly of opinion that

'when subsequent to a decree a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor, or is acquired by him under a valid transfer, the decree does not become incapable of execution, but is extinguished only pro tanto.'

The learned Judge based this rule upon

"the common principle of jurisprudence that a person cannot at one and the same time unite in himself two opposite characters. For instance, a person cannot be his own creditor, or the mortgagee of his own rights, and it is upon this principle that the doctrine of merger and what would in Roman Law be called 'confusio' proceed."

In our opinion, the rule enunciated by Mahmood J., is based on a sound and equitable principle of law and clearly applies to the case before us. Dr. Mukerji (appellant) has become owner of the equity of redemption in the bulk of the mortgaged property and has also acquired the whole of the mortgage decree. The legal effect of these devolutions of interest is an extinguishment of his decree pro tanto. It is, therefore, no longer open to him to say that in spite of the bulk of the mortgaged property having vested in him, his mortgage decree still remains intact, and the court cannot take into account the rateable liability of the property purchased by him but must allow him to realise the whole of the decree from the remainder of the property. It would be a very cumbersome and circuitous procedure indeed if the law were that Dr. Mukerji should realise the whole of the decretal amount in this proceeding, and then refund the excess amount realised by him in a subsequent regular suit for contribution brought against him by the mortgagor. We are satisfied that this is not the law."

(8-10) It is needless to observe that had the confluence of the estates of the mortgagor and the mortgagee in the appellant there been complete the mortgage decree would have been held to be completely extinguished.

(11) It is now interesting to notice what two other learned Judges (Piggott and Walsh JJ.) of the same High Court said in a later case about the decision in 'SARJU KUMAR v. THAKUR PARSAD', 42 All. 544. The comment runs as follows:

"The learned Judges who decided that case obviously felt that they were applying a recognised principle of law to circumstances to which it had never previously been applied in any reported case. Their decision however amounts to no more than this. Even after a decree has been passed upon a mortgage it is open to a judgment-debtor to enter in the execution court a pleading, to the effect that something has taken place since the passing of the decree which amounts to a partial satisfaction of the decree. If such a plea be entered the execution court is entitled and indeed is under a duty to enquire into the same and to continue the execution proceedings in respect of so much only of the decree which it finds after enquiry to be still unsatisfied." 'PARSHOTTAM SARAN v. BRAHMA NAND'. AIR 1924 All 297 at p. 298.

(12) In 'CHINNIAH v. A. B. MUTHURAMAN', AIR 1934 Mad 250, Madhavan Nair, J. (as he then was) followed the decision in 'SARJU KUMAR v. THAKUR PARSAD', 42 All 544. There a puisne mortgagee purchased one of the mortgaged properties in execution of a decree obtained by the mortgagee immediately prior to him & subsequently took an assignment of the entire decree obtained by the first mortgagee. It was held, he was not entitled to execute the entire decree as against the other properties not purchased by him, the reason given being that by the fusion of the interests of the mortgagor and the mortgagee the mortgage decree became discharged pro tanto. The assignee-decree-holder was allowed to proceed against the property which he had not purchased after first finding out the proportionate value of the property he purchased as against the mortgage debt. Incidentally, it was also held that another puisne mortgagee was entitled to raise the objection that the decree has been satisfied pro tanto. A similar objection was faintly suggested before us in this case, but so long as it is not shown that the respondent had completely lost all his interests in the property the objection cannot have any force. Regarding partial extinguishment, the same view as in AIR 1934 Mad 250 was taken by Burn J. in 'IYYAMPERUMAL PATHAR v. NATARAJA PATHAR', 1937 Mad WN 384. In 'MT. ASIA BIBI v. NAZIR AHMAD', AIR 1932 All 704 and in 'SANKARALINGAM v. ARUMUGAM', AIR 1938 Mad 814 the decree-holders succeeded by inheritance to fractional shares in the estates of their judgment-debtors and the principle recognised in the foregoing decisions was given effect to by permitting execution to the extent of the shares of the rest of the heirs.

(13) The Calcutta High Court has invariably not followed the view enunciated in the Allahabad and Madras cases referred to above. An analysis of the decisions would show that the difference is only regarding procedure and not with regard to the principle. When there is only partial satisfaction, the view the Calcutta High Court more often took was that the proper course was to have the equities adjusted in a regular suit for contribution and not by way of objection in execution. The difficulty pointed out in those cases cannot however exist in a case where the merger is complete. It is unnecessary

to refer to all the Calcutta cases bearing on the point as a decision by R. C. Mitter J. in 'AYMAMUD v. EBARUDDIN" AIR 1936 Cal 537 summarises the position emerging from them. In the case mentioned the mortgagee had after obtaining a decree on his mortgage purchased the equity of redemption over one of the several mortgaged properties and the learned Judge held that notwithstanding that purchase the mortgagee was entitled to execute the decree for the entire amount against the remaining properties. In referring to the view of the Allahabad and Madras High Courts the learned Judge observed at page 539 as follows:

"The point raised is a difficult one. Not only do the Allahabad and Madras High Courts support the contention of the appellant, but in this court divergent views have been expressed. The cases of the Allahabad and Madras High Courts expressly in point are respectively 'SARJU KUMAR v. THAKUR PARSAD', 42 All 544 and 'CHINNIAH v. MUTHURAMAN', 141 Ind Cas 366: AIR 1934 Mad 250. In this Court the cases in 'MD. TAKI REZA v. THOMAS', 4 Cal LJ 15n and 'HARENDRA KUMAR v. DINDAYAL', 4 Cal LJ 195 support the contention of the appellant, while the cases in 'NAFFER CHANDRA v. BAIKANTO NATH', 4 Cal LR 156 and 'AMIR CHAND v. SHEO PRASAD', 34 Cal 13 are against the appellant the decision in the last mentioned two cases proceeding on the view that the question cannot be raised in execution proceedings but whatever equity there is must be enforced by a suit for contribution. In 34 Cal 13 the Division Bench refused to refer the case to the Full Bench on the ground that the judgment in 4 Cal LJ 195 proceeded upon earlier cases of this court which did not support the proposition laid down therein. The objection of the appellant can only be given effect to, if it comes within S. 47 of the Code, that is to say only if it can be held that the purchase of the equity of redemption of one of the properties or of a share of the properties included in the mortgage decree by the mortgagee decree-holder before his execution amounts to pro tanto satisfaction of the decree."

The further discussion would bear out the comment that the difference of opinion between the Calcutta High Court on the one hand and the Allahabad and Madras High Courts on the other hand noticeable in the cases referred to is only with reference to the procedure to be adopted and not with reference to the principle applicable. Where the confluence of the opposing interests of the mortgagee and the mortgagor in the same person is co-extensive the case would assume a very simple form. This is in fact pointed out in one of the early Calcutta cases referred to by Mitter J. in his judgment viz., the case in 'HARENDRA KUMAR GUHA v. DINDAYAL SAHA', 4 Cal LJ 195 at p. 197.

(14) Before we leave decided cases which have a bearing on the question under consideration we must once again refer to the decision in 'LALLA BHAGUN PERSHAD v. HOLLOWAY', 11 Cal 393. We referred to it in connection with the proper construction of the concerned proviso to O. XXI, R. 10, C. P. C. The appellant's learned Counsel invited our attention to it as containing an answer to the view point expressed by the learned Munsiff in his order. In that case, the purchaser of the equity of redemption of the mortgaged items was made a party defendant in a suit on the mortgage bond. The decree passed in that suit was purchased by that defendant and the objection raised by the mortgagor to the execution based on proviso (b) to section 232 of the then Code (the same proviso with which we are concerned) was upheld by the trial court, but the decision was reversed on appeal and that appellate decision was affirmed by the High Court. There was a personal decree against the mortgagor in default of the property being sufficient and the High Court said the proviso refers to a decree for money personally due by two or more persons and that it does not apply to a case like the one before it in which nothing was due from the assignee of the decree personally as he was made a defendant only by reason that he had become the owner of the property mortgaged under the bond and subject to the mortgage. We have already said that we are in full accord with the above construction of the proviso but the learned Judges did not look beyond the provision contained in the proviso. The case certainly supports the appellant to the extent it goes but we have also to look into the principle behind the proviso as has been repeatedly pointed out in decided cases. The point raised here as to merger or extinguishment was not at all raised or considered there. The principle of merger is of general application, and is not limited by the specific words of the Code in this respect.

(15) In this context the following observations of Mahmood J. in 'BANARSI DAS v. MAHARANI KUNWAR', 5 All 27 at p. 32 appear to be very apposite:

"In our opinion, the question is not altogether free from difficulty, as it is not expressly provided for by the Code. Whilst in a matter of this kind we are bound to consider the language of the Civil Procedure Code, we do not think that the rules of adjective law should be administered regardless of the fundamental principles of substantive law and equity. Where the language of the statute itself is silent upon any special point, the Courts in applying the rules of procedure will import such considerations as will render the application of those rules consistent with equity and substantive law."

It is the principle underlying this observation that has been given effect to in the cases we have relied on and it will be a travesty of justice to permit a person who purchased the property subject to a charge to enforce the decree passed on the basis of the bond creating the charge.

(16) Before concluding we have to refer to a further point mentioned at the Bar by the appellant's learned Counsel that in any view of the matter certain amounts which had come into court by execution before the decree was assigned in favour of the appellant should be directed to be paid to the appellant especially when the assignment deed expressly authorises him to receive the same from court. Consistently with the view taken by us that the effect of the purchase was to extinguish the decree we cannot accede to the argument. To permit the appellant to draw the amounts in court will be allowing payment to him twice over to the extent of those amounts. As observed by the learned Judge in the court below the assignment cannot be recognised by parts. In one of the cases referred to in this judgment 'SADAGOPA AYYENGAR v. SELLAMMAL', AIR 1922 Mad 510 (1) it is seen stated, if we may say so with respect correctly that the transferee must first prove his right before he can be allowed to claim the fruits of the decree.

(17) In the result we confirm the decisions of the courts below and dismiss the second appeal with costs.

B/R.G.D. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 493

SANKARAN AND GANGADHARA MENON JJ.

Koruthu Kochukoshy and others, Appellants v. Narayanan Kunju Pillai, Respondent.

Second Appeal No. 248 of 1950, D/- 14-3-1952.

Limitation Act (1908) Art. 182(2) — Appeal admitted — Dismissal for non-payment of deficit court-fee — Limitation starts from such date — (Civil P. C. (1908) O. 41, R. 3).

The proper procedure to be followed by a court on finding that the memorandum of appeal presented to it is not properly stamped, is to refuse to admit and register it unless and until the required fee is paid up by the party concerned. But if due to mistake or inadvertence the defect of insufficiency of court-fee is not noticed and the memorandum of appeal which is in substantial compliance with S. 96 and O. 41, R. 1 is admitted and registered as an appeal under O. 41, R. 9 the consequence is that there is an appeal as contemplated by clause 2 of Article 182 of the Limitation Act. Where there has been an appeal in this sense the starting point of limitation for the execution of the decree in the case will be the date of the final order of the appellate court dismissing the appeal for non-payment of court-fees as specified in clause 2 of the said article. The period of limitation for the execution of the decree in the case therefore commences from the date of dismissal of appeal, as per clause 2 of Article 182 of the Limitation Act: AIR 1932 P.C. 165 followed; case law Ref. (Para 4)

Anno: Limitation Act Art. 182, N. 40 Civil P.C. O. 41, R. 3 N. 1.

K. T. Thomas and K. M. Joseph, for Appellants; K. S. Nataraja Sarma, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('32) AIR 1932 PC 165: (60 Cal 1 PC) 4
('51) AIR 1951 All 79: (1950 All LJ 824 FB) 3, 4
('09) 32 Mad 305: (4 Ind Cas 503) 4
('34) 57 Mad 741: (AIR 1934 Mad 303) 4
('38) AIR 1938 Pat 79: (173 Ind Cas 615) 4
28 Trav LR 36 4

SANKARAN J.: In this second appeal preferred by defendants 1, 2, 4 and 6 to 10, the question raised is one of limitation. The trial Court's decree in the case was passed on 1-8-1110. Against that decree, the 2nd plaintiff had preferred an appeal to the District Court and that appeal was admitted and registered as A. S. No. 620/1110, but it was eventually dismissed on 25-3-1111 on account of the failure of the appellant to pay the deficit court-fee due on the memorandum of appeal, within the period fixed by the Court. When the decree-holder filed the present execution petition on 24-3-1123, the defendants raised a plea of limitation and contended that the execution petition having been filed after the lapse of 12 years from the date of the trial court's decree, is out of time and unsustainable.

The decree-holder replied that the period of limitation for execution of the decree has to be computed from 25-3-1111, the date on which A. S. No. 620/1110 the appeal against the trial court's decree was dismissed by the appellate court, and that there is no bar of limitation for the present execution petition filed within 12 years from that date and also within three years from 9-6-1122 the date of the dismissal of the prior execution petition. The execution court accepted the contentions of the defendants and held that the execution petition filed on 24-3-1123 is out of time. The lower appellate court, however, took a different view of the matter and held that the starting point of limitation for the execution petition is the date of dismissal of A. S. 620/1110 and that the present execution petition is within time. The correctness of this view is challenged in this second appeal.

(2) The question for consideration is whether the execution of the decree in this case is governed by Article 182(2) of the Limitation Act. The provision in clause (2) of that Article is to the effect that where there has been an appeal, the date of passing the decree or order by the appellate court or the date of withdrawal of the appeal should be the starting point from which the period of limitation for execution has to be computed. If it can be said that there has been an appeal against the trial court's decree in this case as contemplated by Article 182, the decree-holder's execution petition filed on 23-4-1123 has to be held to be within time. But it is urged on behalf of the appellants that since the appeal preferred by the decree-holder, A. S. No. 620/1110, was dismissed for non-payment of deficit court-fee due on the appeal memorandum, it cannot be said that there has been an appeal in the proper sense of the term.

The question therefore resolves to this: When can it be said that there has been an appeal? There is no definition given to the word "appeal" in the Civil Procedure Code. But there are enough provisions in the Code indicating the conditions to be satisfied in order that it can be said that there has been an appeal in any particular case. The right of appeal against the decree passed by any Court is conferred by Section 96 of the Code. In clause (1) of that section it is laid down as follows:

"Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court."

It is clear from the provision that the appeal must be filed to the Court having the appellate jurisdiction over the Court which passed the decree. Rule 1 of Order 41 lays down:

"Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the appellate Court dispenses therewith) of the judgment on which it is founded."

Rule 3 of Order 41 lays down that:

"Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there."

The procedure to be followed when a memorandum of Appeal is admitted is prescribed in R. 9. This rule prescribes that when a memorandum of appeal is admitted the appellate court or the proper officer of that court shall endorse thereon the date of presentation and shall register the appeal in a book to be kept for that purpose and known as the register of appeals. When a memorandum of Appeal has thus been admitted and registered as an appeal it has to be taken that there has been an appeal in that particular case.

(3) It is however argued on behalf of the appellant that in view of the mandatory provisions contained in the Court-fees Act the payment of the court-fee payable on the memorandum of appeal is the essential condition to be satisfied before the memorandum of appeal is admitted and filed as an appeal. So far as the present appeal is concerned, the Court-fees Act, which was in force during the relevant period was Act VI of 1087 of Travancore. Section 3 of that Act contains a provision similar to that contained in Section 2 of the present Act, Act II of 1115. The provision is to the effect that no document of any of the kinds specified in the first or second schedule to the Act annexed as chargeable with fees shall be filed, exhibited or recorded in any court of justice unless in respect of that document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document. A memorandum of appeal is one of the documents specified in the 1st schedule annexed to the Court-fees Act. In view of the mandate contained in Section 3 of the Court-fees Act the court could refuse to accept the Appeal memorandum presented to it unless the required court-fee is also paid. If the court refuses to accept the memorandum of appeal or returns or rejects the same for the reason of the non-payment of the court-fee due on it the result will undoubtedly be that there has been no appeal.

But what would be the position in respect of a memorandum of appeal admitted by the court and registered as an appeal even before the levying of the court-fee due on it? Can it be said that there has been no appeal at all unless and until the full fee due on the memorandum of appeal is paid? There is nothing in the Civil Procedure Code to indicate that only after payment of the full fee due on a memorandum of appeal can it be admitted and registered as an appeal. On the other hand, there are provisions in the Code sanctioning the acceptance and registering of plaints and memorandum of appeals without the levy of the prescribed court-fee; such are the provisions contained in Orders 33 and 44 of the Code. The provisions in these orders sanction the filing of suits and appeals in forma pauperis and the consideration of such suits and appeals even before the levy of the prescribed court-fee. No doubt these provisions are exceptions to the general rules. All the same, it is clear from these provisions that there could be suits and appeals even before the levy of the proper court-fee due thereon. Such fee is normally to be recovered before or at the time of filing the suit or appeal. In exceptional cases, the fee may be recovered at some stage subsequent to the filing of these documents. The levy of the prescribed fees at either of these stages would be sufficient to satisfy the requirements of the Court-fees Act. Necessarily it does follow that the payment of such fee cannot be a factor determining the question whether there has been a suit or an appeal in any particular case. Section 149 of the Civil Procedure Code empowers the court to validate the proceedings already commenced on the basis of a document in respect of which the prescribed court-fee has not been paid, by permitting the payment of such fee within a time fixed by the Court. The provision is as follows :

> "Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to Court-fees has not been paid, the court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."

Thus, if a memorandum of appeal happens to be admitted and registered as an appeal without levying the prescribed court-fee the defect could be allowed to be remedied at any subsequent stage, when the same is brought to the notice of the court.

The position taken up by the appellant is that only when the defect is thus cured can it be said that there is an appeal. The decision of a Full Bench of Allahabad High Court in — 'Harihar Prasad Singh v. Beni Chand', AIR 1951 All. 79 (FB) is relied on in support of that position. The view taken in that case is that Section 149 of the Civil Procedure Code has to be read as a proviso to the section of the Court-fees Act which prohibits the court from filing, exhibiting or recording a document unless the prescribed court-fee has been paid. Accordingly, it is stated that when any such document happens to be received and filed in court it must be deemed to have been received merely for the purpose of enabling the party to pay up the prescribed fee within a time to be fixed by the court as contemplated by Section 149 of the Civil Procedure Code. With all respect to the learned Judges who took part in that decision, we have to point out that Section 149 as it stands does not warrant such a narrow and restricted construction being put upon it. It is expressly stated in the Section that the Court may in its discretion permit the party to pay the court-fee at any stage. The expression "at any stage" indicates that it does not contemplate a case where the document is received and retained merely to enable the party to pay the court-fee within the period to be fixed by the court. That contingency can arise only at the initial stage when it is known that the court-fee due on the document has not been paid. In that case the court can certainly insist on the payment of the court-fee before admitting and filing the document.

Section 149 contemplates a case where the non-payment of the required court-fee is detected or brought to the notice of the court at some stage subsequent to the admission and filing of the document. There is a corresponding provision in the Court-fees Act also enabling the court to regularise the proceedings already commenced on the basis of a document not properly taxed, by permitting the fee due thereon to be paid within the time fixed by the Court. That provision is contained in Section 19 of Act VI of 1087 corresponding to Section 32 of Act II of 1125. The relevant provision is as follows :

> "But, if any such document is, through mistake or inadvertence, received, filed or used

in any court or office, without being properly stamped, the presiding or senior Judge in the Civil and Criminal Court or the head of the office as the case may be, or, in the case of the High Court any Judge of such Court, may if he thinks fit, order that such document be stamped as he may direct; and on such document being stamped accordingly, the same and every proceeding relating thereto shall be as valid as if it has been properly stamped in the first instance.

The Court may also pass an order in favour of the Government after giving notice to the party liable and hearing his objection, for the recovery, from him, with expenses of such recovery, any court-fee which he ought to have paid but has not paid; and the Government may recover the same as if the said order was a decree in its favour."

It is clear from these provisions that the levy of the court-fee contemplated therein is not at a stage prior to the admission and filing of the insufficiently stamped document but only at a stage subsequent to the filing of the document. The provision that on levying such court-fee the document and every proceedings relating thereto shall be as valid as if the fee had been levied at the first instance indicating unmistakably that the document had been filed and proceedings taken on the basis of that document. The provision enabling the court to pass an order directing the Sirkar to realise the court-fee from the defaulting party also indicates that the primary object underlying the Court-fees Act is that the public revenue is realised at one stage or another. It is also significant to note that the provision quoted above is expressly made to govern such cases where the document is through mistake or inadvertence received, filed or used in any court or office without being properly stamped. Thus, it cannot be said that the provision for levy of the court-fee as contained in section 32 of the Court-fees Act or in Section 149 of the Civil Procedure Code relates to the stage of admission and filing of the document. On the other hand, it is clear that these provisions come into effect only after the document not properly stamped and through mistakes or inadvertence been received, filed or used in any court or office. It follows therefore irrespective of the question as to whether the court-fee due on the Appeal Memorandum has been levied or not, such memorandum will become an appeal when the same is admitted and registered as contemplated by Or. 41, R. 9.

(4) A similar question regarding the effect of filing a plaint prepared on a paper insufficiently stamped came up for the consideration of a Full Bench of Madras High Court in — 'Gavaranga Sahu v. Botokrishna Patro', 32 Mad. 305. Such a plaint was filed within the prescribed period of limitation, but the deficiency in the Court-fee was made good with the sanction of the court only after the period of limitation prescribed for the suit had expired. It was held that the deficiency in the court-fee paid at the time of filing the plaint did not matter and that the plaint had to be treated as a proper plaint filed within the period of limitation. It was further pointed out that a document purporting to be a plaint and drawn up in accordance with the relevant provisions of the Civil Procedure Code is a plaint whether it is properly stamped or not and that there is no justification for construing such a document as anything other than a plaint merely because the proper court-fee due on it had not been paid.

To the same effect is the decision of a Full Bench of the erstwhile Travancore High Court in — 'Chembakom Kochu v. Mathevan', 28 Trav. L.R. 36. The question of interpretation of the clause "where there has been an appeal" as used in clause (2) of Article 182 of the Limitation Act directly arose for consideration of the Judicial Committee of the Privy Council in — 'Nagendra Nath v. Suresh Chandra', AIR 1932 P.C. 165. The appeal that had to be construed in that case was one which was dismissed as being irregular in form and also defective for non-impleading of all the necessary parties. In spite of these defects it was ruled by the Privy Council that there has been an appeal, within the meaning of Clause (2) of Article 182 of the Limitation Act and that the date of dismissal of that appeal was the starting point of limitation for the execution of the decree in the case. In the course of the judgment in that case their Lordships of the Privy Council observed as follows:

"There is no warrant for reading into the words "where there has been an appeal" any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say."

There is nothing in the expression "where there has been an appeal" to suggest that the appeal contemplated is only an appeal in which full court-fee due on it has been levied. There is no justification for thus qualifying the word "appeal" by reading more words into the expression where there has been an "appeal."

The decision in AIR 1932 P.C. 165 was followed by the Patna High Court in — 'Krishna Kant Prasad v. Radhey Singh', AIR 1938 Pat. 79. In that case, it was held that where an appeal presented on insufficiently stamped paper is duly admitted and registered and is subsequently rejected after hearing the parties the period of limitation for execution of the decree begins to run from the date of the final order of the appellate court.

The question whether it can be said that there has been an appeal within the meaning of Article 182 clause 2 of the Limitation Act, when a memorandum of appeal is rejected as being out of time came up for the consideration of the Madras High Court in — 'Bayya Reddi v. Gopala Rao', 57 Mad. 741. In that case, the memorandum of appeal was presented beyond the period prescribed by law. There was also an application under Section 5 of the Limitation Act for condoning the delay. That application was rejected and as a consequence the memorandum of appeal also was rejected. It was ruled that since the memorandum of appeal had been filed out of time it cannot be said that there has been an appeal within the meaning of Article 182(2) of the Limitation Act. The ground stated was that only when the memorandum of appeal is admitted by the Court can it be said that there has been an appeal? The ruling in AIR 1932 P.C. 165 was thus explained as governing only cases where the memorandum of appeal has been admitted and the appeal registered.

This is the view taken by the Allahabad High Court also in — 'Harihar Prasad Singh v. Beni Chand', AIR 1951 All. 79 (FB). It is pointed out in that case that there is clear distinction between a case in which memorandum of appeal has been returned before it is admitted and registered and a case in which the memorandum

of appeal though insufficiently stamped has been by mistake or by inadvertence admitted and registered but subsequently rejected for non-payment of deficit court-fee. It is said that in the latter case, it must be held that there has been an appeal and a final order thereon and that in the former case it has to be held that there was no appeal at all.

Thus the position is well settled that the proper procedure to be followed by a court in finding that the memorandum of appeal presented to it is not properly stamped is to refuse to admit and register it unless and until the required fee is paid up by the party concerned. Similarly, if a memorandum of appeal is seen to be clearly out of time the court has to refuse to admit it unless and until the party has obtained an order condoning the delay. But if due to mistake or inadvertence these defects are not noticed and the memorandum of appeal is admitted and registered the consequence is that there is an appeal as contemplated by clause 2 of Article 182 of the Limitation Act. Where there has been an appeal in this sense the starting point of limitation for the execution of the decree in the case will be the date of the final order of the appellate court or the date of the withdrawal of the appeal as specified in clause 2 of the said Article. The present case satisfies all the essential elements required for the application of clause 2 of Article 182 of the Limitation Act. Against the trial court's decree, there was an appeal to the District Court as A. S. 620/1110. The memorandum of appeal was prepared in substantial compliance with Section 96 and Or. 41, R. 1 of the Civil Procedure Code and was presented on 14-12-1110. The memorandum of appeal was insufficiently stamped. All the same, it was duly admitted and registered as an appeal under R. 9 of Or. 41 of the Civil Procedure Code and numbered as A. S. 620/1110. Subsequently, the appeal was dismissed on 25-3-1111, for non-payment of court-fee. These facts are seen from the copy of the decree in A. S. 620/1110 which is among the records in the case. Thus it is clear that there has been an appeal in this case as A. S. 620/1110 and that it was disposed of by the Appellate Court by its final order passed on 26-3-1111: The period of limitation for the execution of the decree in the case therefore commences on 25-3-1111 as per clause 2 of Article 182 of the Limitation Act. The present execution petition filed on 24-3-1123 is within twelve years from the date of the final order of the Appellate Court in the appeal against the trial court decree and as such it is within time. The finding of the lower appellate court to that effect is therefore upheld.

(5) In the result, the Second Appeal is dismissed with costs.

B/R.G.D. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 496

KUNHI RAMAN C. J.
AND VITHAYATHIL J.

Kurien Varki, Petitioner v. Sirkar, Counter-Petitioner.

C. R. P. No. 130 of 1124, D/- 21-11-1951.

Travancore Regulation (3 of 1075), Ss. 13 and 14 — Vakil wholly absenting from practice for five years.

The petitioner was employed as a clerk in the civil judicial department in a Munsiff's Court until 1100. Then he applied for and obtained special leave because he was aspiring to join the ranks of the legal profession. He qualified himself as a First Grade Pleader by 1106 and got enrolled as a vakil under Regulation 3 of 1075. During the period of his studies, he did not resign his appointment. After getting enrolled as a pleader on 23-3-1106, he joined the Bar and practised for a period of four years. In 1110, he stopped practice and rejoined his former appointment in the Civil Judicial department. He worked there until 14-4-1124 when he retired from service on a pension and resumed his practice at the Bar. When he worked in Government service after rejoining duty for a period of 14 years, he did not surrender the sanad which entitled him to practise.

Held that action was called for under S. 14. There is one advantage, if action is taken under S. 14. A vakil whose sanad has been delivered up under this section in compliance with an order made by the High Court is entitled to apply for a fresh sanad if he is qualified to do so. Such a remedy is not open to a person who is proceeded against under S. 13. (Para 2)

K. P. Abraham, for Petitioner; Government Pleader, for Counter-Petitioner.

KUNHI RAMAN C. J.: An interesting question arises for decision in this civil revision petition. The petitioner was employed as a clerk in the civil judicial department in a Munsiff's Court until 1100. Then he applied for study leave because he was aspiring to join the ranks of the legal profession. He qualified himself as a First Grade Pleader by 1106 and got enrolled as a vakil under Regulation 3 of 1075. During the period of his studies, he did not resign his appointment. On the other hand, he seems to have obtained special study leave from the erstwhile Travancore High Court informing the court what his plans were. After getting enrolled as a pleader on 23-3-1106, he joined the Bar and practised for a period of four years. In 1110 he stopped practice and rejoined his former appointment in the civil judicial department. He worked there until 14-4-24 when he retired from service on a pension and then he resumed his practice at the Bar. When he worked in Government service after rejoining duty for a period of 14 years, he did not surrender the sanad which entitled him to practise. After he retired from service and rejoined the Bar, the learned District Judge of Kottayam thought that there was something wrong with the procedure adopted by the petitioner. He thereupon called upon him to show cause why his old sanad should not be taken away and why he should not be compelled to apply for a fresh sanad.

On hearing the contentions of the petitioner and of the Government Pleader and the President of the Bar Association, the learned Judge held that this was a case in which the petitioner should not be permitted to act or plead as a vakil on the basis of his original sanad obtained by him in 1106. He, therefore, prohibited the petitioner from practising as a vakil on the strength of the sanad that he had originally obtained in 1106 and ordered him to deliver up that sanad after the expiry of the period for preferring an appeal from his order. This order was made by the learned Judge on the 15th of Menom 1124. The petitioner came

up in revision before this court under S. 89 of the Travancore Code of Civil Procedure under which this court has jurisdiction to satisfy itself as to the legality of any order made by a court subordinate to the High Court. Records were sent for and the case was argued today, Mr. Ninan appearing for the petitioner and Mr. Balakrishna Iyer Government Pleader appearing on behalf of the State. It is pointed out by learned counsel appearing in this case that there are two relevant provisions of law in Travancore Regulation 3 of 1075. According to Section 13 which is the section under which the learned District Judge has professed to act, when a vakil accepts permanent employment under Government other than that of a Professor of law or Law Reporter, he shall forthwith deliver up his sanad to the court in which he was practising at the time he became employed in that manner, or to such officer mentioned by the High Court in an order passed under this section.

There is no provision in the section for a person in the position of the petitioner applying for a fresh sanad if action is taken under Section 13. It is contended on behalf of the petitioner by his learned counsel that this section will not apply because petitioner did not accept "permanent employment" under the Government after obtaining the sanad. On the other hand, long before he obtained his sanad, he was employed in the permanent service of the Government. He had taken leave with the express object of qualifying to be a legal practitioner and all that he did was to rejoin his appointment after he got the sanad which would not amount to accepting permanent employment under the Government.

(2) It seems to us that it is not necessary to decide this question in the present case as to whether the petitioner had accepted permanent employment under the Government, because there is provision in Section 14 of Regulation 3 of 1075 under which the High Court may order a vakil who has wholly abstained from practice continuously for a period of five years to deliver up the sanad to such officer or court as the High Court may appoint in this behalf. Then it is incumbent upon the vakil forthwith to deliver up the sanad to the officer or court. There is one advantage, if action is taken under Section 14. A vakil whose sanad has been delivered up under this section in compliance with an order made by the High Court is entitled to apply for a fresh sanad if he is qualified to do so. Such a remedy is not open to a person who is proceeded against under Section 13. It seems to us that from the admitted facts in the present case, action is called for under Section 14, because it is conceded by the petitioner that he wholly abstained from practice for a period of 14 years terminating with 14-4-1124. Therefore, by virtue of the power vested in this court under section 14, we direct that the petitioner shall deliver up his sanad to the Registrar of the High Court and we set aside the order passed by the learned District Judge under Section 13.

B/D.H. Order accordingly.

A. I. R. 1952 TRAVANCORE-COCHIN 497

GOVINDA PILLAI
AND GANGADHARA MENON JJ.

Subramania Nadar Manuel Nadar, Appellant v. Devasahayam Nadar Varuvel Nadar and others, Respondents.

Second Appeal No. 454 of 1950, D/- 8-2-1952.

(Travancore) Chitties Act (3 of 1094), Ss. 28, 36 — Defeating or delaying non-prized subscriber.

A decree was obtained on 9-5-1121 by the foreman of a chitty on the basis of a chitty security bond for the arrears of subscriptions due from a prized subscriber. On 24-5-1121 the decree-holder and one S filed a joint execution application stating that the decree was assigned to the latter and praying that he may be permitted to execute the decree. The assignment was without consideration. For the money due to the appellant as a non-prized subscriber in the identical chitty he had obtained a decree against the foreman on 15-6-1112. In execution of that decree, the appellant attached the decree in this case. The order of attachment was received in the case on 15-10-1121 and it was given effect to:

Held that the facts and circumstances disclosed clearly established that the assignment of the decree in favour of S had the effect of defeating and delaying the appellant who had obtained the decree as early as 16-6-1122 for the chitty money due to him. The speed with which the foreman created evidence of assignment in favour of S by filing a joint execution application along with him added to the fact that the assignment was without consideration indicated clearly the purpose behind the assignment. The assignment in question was voidable under S. 28: 22 Trav LJ 674; 22 Trav LJ 513 and 28 Trav LJ 771, Ref. (Para 2)

M. Madhavan Nair, for Appellant; K. Velayudhan Nair, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
22 Trav LJ 513
22 Trav LJ 674 2
('38) 28 Trav LJ 771 2
2

GANGADHARA MENON J.: The attaching decree-holder is the appellant. The appeal raises the question of the competing claims of the attaching decree-holder and the assignee-decree-holder to execute the decree. The decree in the case was obtained by the foreman of a chitty on the basis of a chitty security bond for the arrears of subscriptions due from a prized subscriber. It is dated 9-5-1121. On 24-5-1121 the decree-holder and one Savarimuthu Nadar Devasahayam Nadar filed a joint execution application stating that the decree was assigned to the latter and praying that he may be permitted to execute the decree. For the money due to the appellant as a non-prized subscriber in the identical chitty he had obtained Ext. I decree against the foreman. In execution of that decree, the appellant attached the decree in this case. The order of attachment was received in the case on 15-10-1121 and it was given effect to.

Savarimuthu Nadar Devasahayam Nadar died and his children as his legal representatives filed an execution application on 24-4-1124 praying that the assignment of the decree in favour of their father may be recognised and they may be permitted to execute the decree.

They contended that the attachment is of no consequence as it was effected only after the assignment of the decree. The attaching decree-holder to whom notice was given resisted the execution application and pleaded that the assignment in question is voidable under S. 28 of the Chitties Act (Act 3 of 1094) as it was created fraudulently without consideration for the purpose of defeating and delaying the realisation of the chitty money due to him under Ext. I decree and that he is entitled to execute the decree in pursuance of the attachment and realise the amounts due to him. The execution court upheld the plea of the attaching decree-holder and dismissed the execution application of the respondents. In appeal the lower appellate Court reversed that order. The attaching decree-holder has therefore come in second appeal.

(2) The courts below have concurrently found that the assignment relied on by the respondents was without consideration. The joint execution application that evidences the assignment was filed in Court within 15 days of the date of the decree. Admittedly, the decree that was assigned was one of the assets of the chitty and at the time of the assignment money in relation to the self-same chitty was due to the appellant under Ext. I decree. Section 36 of the Chitties Act provides:

"Where there are debts due from the foreman of a chitty in relation thereto and also other debts due from such foreman the chitty assets shall be applied in the first instance for payment of the chitty debts due to the subscribers". Therefore, even in cases where the foreman has debts other than the chitty debts, he is bound in law to apply the chitty assets in the first instance for payment of the debts due to the subscribers. The purpose behind this section is that the chitty assets should be available for payment to the prized and non-prized subscribers. But in this case what the foreman has done is to transfer the assets of the chitty to another without even any consideration therefor. Section 28 of the Chitties Act enacts:

"1. "any voluntary or involuntary transfer of the rights of a foreman to receive subscriptions from prized subscribers shall, if it defeats or delays a non-prized or unpaid prized subscriber, be voidable at the instance of such subscriber."

2. "When under sub-section (1) of this Section a transfer is disputed by a subscriber; the burden of proving that the transfer does not defeat or delay such subscriber is upon the transferee."

The learned Judge thinks that in order that a non-prized subscriber to whom money is due under the chitty transaction may avoid an alienation of the chitty assets by the foreman, under Section 28 of the Chitties Act, he must establish that the foreman was in insolvent circumstances at the time of the transfer. We are unable to read Section 28 of the Chitties Act in that way. The Section states that if the transfer defeats or delays a non-prized or unpaid prized subscriber, it shall be voidable at the instance of such subscriber. Therefore, what the courts have to see in such cases is whether the transfer defeats or delays such a subscriber. If it does, then the subscriber has an unquestionable right under Section 28 of the Act to avoid the transfer. No doubt the insolvency of the foreman at the time of the transfer may be a circumstance in determining the question whether the transfer defeats or delays a non-prized or unpaid prized subscriber. But that is not the sole criterion. It may be that the transfer impugned was made by the foreman while he was in solvent circumstances. Still, if such transfer defeats or delays a non-prized or unpaid prized subscriber, he can avoid the transfer under Section 28 of the Chitties Act.

It is also clear from sub-section (2) of the Section, that when the transfer is disputed the burden is on the transferee to prove that it does not defeat or delay the non-prized or unpaid prized subscriber. We do not think that the decisions reported in — 22 Trav L J 674, — 22 Trav L J 513 and — 'Kunjuraman v. Padmanabhan', 28 Trav L J 771 relied on by the learned Judge go counter to the above view that we have taken of Section 28 of the Chitties Act. The respondents have not adduced any evidence in this case to show that the assignment does not defeat or delay the appellant. On the other hand the facts and circumstances disclosed clearly establish that the assignment of the decree in favour of the father of the respondents has the effect of defeating and delaying the appellant who has obtained Ext. I decree as early as 15-6-1122 for the chitty money due to him. In spite of several steps in execution he has not yet been able to realise the decree amount due to him. The speed with which the foreman created evidence of assignment in favour of the father of the respondents by filing a joint execution application along with him added to the fact that the assignment was without consideration indicates clearly the purpose behind the assignment. We have therefore no doubt that the assignment in question is voidable under Section 28 of the Chitties Act (Act III of 1094) as contended for by the appellant.

(3) It is not necessary for the appellant to have recourse to a separate suit to avoid the transfer. He can avoid it by effecting the attachment on the decree as he has done and if the transfer is found to be voidable on the grounds mentioned in Section 28 he is entitled to execute the decree in pursuance of the attachment and recover the amount due to him.

(4) It follows that the order appealed against cannot stand. Therefore, in reversal of the order of the learned Judge we allow this appeal with costs throughout and restore the order of the learned Munsiff.

Appeal allowed.

B/D.H.

A. I. R. 1952 TRAVANCORE-COCHIN 498

SANKARAN AND GANGADHARA MENON JJ.

Chandy Makkel and others, Appellants v. Korah Thomas, Respondent.

A. S. No. 837 of 1950, D/- 1-2-1952.

(a) Limitation Act (1908), Arts. 116 and 120 — Suit for past profits on basis of registered agreement — Travancore Limitation Act (6 of 1100), Arts. 104 and 109.

The property was leased to defendant. The tenant was to improve the property and also to give one half of the yield to the landlord. It was also stipulated that if improvements were effected, half of the property will be given to the tenant on partition and the other half alone need be surrendered to the landlord. On the allegation that the defendant had defaulted to

give half of the yield the plaintiff brought the suit for recovery of his share of the past profits.

Held that the lease which embodied the agreement between the parties being a registered one, the Article applicable was Art. 104 of the Travancore Limitation Act, and that even if that Article was not applicable the suit being one by one co-sharer against another who was in exclusive possession of the property for his share of rent and profits, it was residuary Art. 109 that governed. Therefore the claim for past profits from 1118 for nearly five years till date of suit was within time. 31 Trav LJ 605, Rel. on. (Para 4)

Anno: Lim. Act, Art. 116 N. 8; Art. 120 N. 2.

(b) Civil P. C. (1908), S. 35 — Both parties partly unsuccessful — Parties to bear their costs.

The plaintiff prayed for recovery of the entire property on the allegation that no improvements as stipulated had been effected by the defendants. But during trial he gave up that contention and admitted the defendants' right to one-half of the property as contended for by them. In regard to the question of past and future profits also, the plaintiff's claim was found to be excessive. The defendants had also set up a plea of discharge on the question of past profits which was found against them.

Held that the proper order as to costs was to direct the parties to suffer their costs. (Para 6)

Anno: C.P.C., S. 35 N. 5, 7.

M. T. Paikaday, for Appellants; N. Varadaraja Iyengar, for Respondent.

REFERENCE..... Para.

('41) 31 Trav LJ 605 4

GANGADHARA MENON J.: Defendants 1 to 5 are the appellants. The plaint property belonged to plaintiff's father. After the death of his father plaintiff got it on partition. The property was outstanding on Ext. A vechupathy lease with the father of defendants 1 to 5. The tenant was to improve the property and also to give one half of the yield to the landlord. It was also stipulated that if improvements are effected as agreed to in the deed, one-half of the property will be given to the tenant on partition and the other half alone need be surrendered to the landlord. On the allegations that the defendants have defaulted to give half of the yield from 1118 onwards and that they have not improved the property as enjoined in Ext. A the plaintiff has brought the suit for recovery of the entire property with his share of past profits at the rate of Rs. 600/- per annum and also with future mesne profits at the rate of Rs. 1200/- per annum. The defendants contended that they have effected improvements as directed in Ext. A and that the plaintiff is therefore entitled to recover only one-half of the property, that profits till date of suit had been paid to the plaintiff, that the claim for past profits for more than three years is barred by limitation, that the income from the entire property will not exceed Rs. 600/- per annum and that in any view the plaintiff can get past and future profits only on the basis of that income.

(2) At the evidence stage the plaintiff gave up his claim for the recovery of the entire property. The learned Judge therefore gave a preliminary decree to the plaintiff for recovery of one-half of the plaint property. On the question of past profits, the plea of discharge set up by the defendants was found against and fixing the income from the property from 1118 to 1122 at Rs. 900/- per annum the learned Judge allowed the plaintiff to recover half of that amount per annum towards past profits. The income after suit was fixed at Rs. 1200/- per annum and half of that amount was allowed to be recovered in lieu of mesne profits from the date of suit.

(3) There is no reliable evidence in the case regarding the payment of the plaintiff's share of the profits of the property till the date of suit as contended for by the appellants. We are therefore in agreement with the findings of the learned Judge on this question.

(4) On the question of limitation, it is argued by the learned Advocate for the appellants that it is Article 95 of the Travancore Limitation Act that applied and that the plaintiff can recover his share of past profits only for three years. The learned Advocate for the respondent contends that Ext. A which embodies the agreement between the parties being a registered one the Article that is applicable is article 104 of the Limitation Act and that even if that Article is not applicable the suit being one by one co-sharer against another who is in exclusive possession of the property for his share of rent and profits, it is residuary Article 109 that governs. Reliance for this latter position was placed on the decision reported in—'Subramania Aiyar Ramaswami Aiyar v. Mathu Poulo', 31 Trav. L. J. 605. Therefore it is contended that in either view of the matter the claim for past profits from 1118 for nearly five years till date of suit is within time. We think that the position taken up by the respondent is correct. Therefore we hold that the claim for past profits is not barred by limitation as contended for by the appellants.

(5) Regarding past and future profits we are of the view that the rates fixed by the learned Judge are too high. As stated by the learned Judge, the evidence on both sides in regard to the question of the income from the property is not very satisfactory. The defendants in their written statements state that the profits of the entire property will not exceed Rs. 600/- per annum. Plaintiff and P. W. 1 in their evidence estimate the yield from the property at six to seven thousand cocoanuts, six to seven thulams of pepper, four to five maunds of coffee, one thousand jack fruits and nearly twenty-five thousand arecanuts. Estimating the value of these products at the market rate during 1118 to 1122, the value will not exceed Rs. 600/- per annum. Therefore, we think that in regard to the question of past profits, the amounts stated by the defendants in their written statements may be taken to be correct. The plaintiff will be entitled to one-half of this amount. Therefore in modification of the decree of the lower court we award past profits to the plaintiff only at the rate of Rs. 300/- per annum. Regarding future profits, the matter stands on a different footing. It is admitted that the price of almost all the products has increased abnormally after 1122. But the plaintiff has admitted that there is a decrease in the produce after 1122. Taking into account these two factors, we think, that the income of the property from date of suit may be fixed at Rs. 1000/-

per annum. Plaintiff will be entitled to get one-half of the amount, viz., Rs. 500/- per annum towards future profits from date of suit.

(6) There remains only the question of costs. The plaintiff prayed for recovery of the entire property on the allegation that no improvements as stipulated in Ext. A have been effected by the defendants. But during trial he gave up that contention and admitted the appellants' right to one-half of the property as contended for by them. In regard to the question of past and future profits also, the plaintiff's claim is found to be excessive. The defendants have also set up a plea of discharge on the question of past profits which is found against them. In view of these circumstances, we think that the proper order as to costs is to direct the parties to suffer their costs.

(7) Therefore, in modification of the decree of the lower court the appeal is allowed to the extent indicated above. The parties will suffer their costs throughout.

B/D.H. Order accordingly.

A. I. R. 1952 TRAVANCORE-COCHIN 500

SUBRAMANIA IYER & VITHAYATHIL JJ.

Velayudhaperumal Nadar Thanumalavaperumal Nadar, Appellant v. Palavesamuthu Nadar Chidambara Nadar, Respondent.

Appeal Suit No. 767 of 1951, D/- 1-4-1952.

Debt Laws — Travancore Agriculturists' Relief Act (III of 1112), S. 30 — Section applies to cases coming not only under Limitation Act, but also under S. 48, Civil P.C. (Civil P.C. (1908) S. 48) (Travancore Civil P.C.; S. 41) (Limitation Act (1908), S. 29(2)(a)). AIR 1932 Oudh 69 Rel. on. (Para 3)

Anno: Civil P.C. S. 48 N. 14 Limitation Act S. 29 N. 4.

N. Varadaraja Iyengar, for Appellant.

REFERENCE ..... Para

('31) 134 Ind Cas 878: (AIR 1932 Oudh 69) 4

VITHAYATHIL J.: The defendant is the appellant. The appeal is from an order in execution and the question raised is one of limitation. The last execution application was filed more than 12 years after the date of the decree. The decree-holder claimed exemption from limitation on the ground that the judgment-debtor had applied under the Travancore Agriculturists' Relief Act, III of 1112, for a certificate from the Debt Conciliation Board. The court below exempted the period covered by those proceedings and held that the execution petition was not barred by limitation.

(2) Section 30 of Act III of 1112 provided thus:

"The time occupied by the proceedings before a Board for the settlement of any debt, the time during which any application under S. 18 is pending disposal and the time during which a person is debarred by S. 28 from instituting or prosecuting a suit, an application for the execution of a decree or other proceedings shall be excluded in computing the period of limitation prescribed for any suit, application or other proceedings in respect of the debt by the law of limitation for the time being in force."

It is argued for the appellant that this section applies only to cases coming under the Limitation Act, and not to those coming under S. 41 of the Travancore Code of Civil Procedure (Section 48 of the Indian Code). The argument is based on the use of words

"in computing the period of limitation prescribed for any suit, application or other proceedings in respect of the debt by the 'law of limitation' for the time being in force."

It is argued that the 12 years' period provided in S. 41 of the Code of Civil Procedure is not a period prescribed by the law of limitation and that therefore S. 30 of Act III of 1112 will not apply to it.

(3) We do not think that we can accept this position. Apart from S. 30, there is S. 28 which prohibited the execution of a decree in respect of a debt for the settlement of which an application was pending before the Conciliation Board. That section reads thus:

"Except for special reasons to be recorded in writing no court of law shall entertain or allow to be prosecuted any suit, application for the execution of a decree, or other proceedings for recovery of any debt for a settlement of which an application is pending before a Board."

Section 29, sub-section 2(a) of the Limitation Act provides thus:

".....for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law the provisions contained in S. 4, Ss. 10 to 18 and S. 23 shall apply only in so far as and to the extent to which they are not expressly excluded by any special or local law."

This means that except in cases in which these sections are expressly excluded they will apply to cases of limitation prescribed by a special law. If the provision contained in S. 41 of the Travancore Code of Civil Procedure is regarded as a period of limitation prescribed by a special law the above mentioned sections of the Limitation Act will apply to it. Under S. 15 of the Limitation Act when the institution of a suit or the making of an application has been stayed by an injunction or order, the time of the continuance of the injunction or order shall be excluded in computing the period of limitation. It is true that the Explanation in Section 41 of the Code of Civil Procedure (Travancore) refers only to Section 7 of the Limitation Act. That may be because Section 30 of the Limitation Act makes Ss. 4, 10 to 18 and 23 of that Act applicable to period of limitation prescribed by any special law including the Code of Civil Procedure.

(4) Reference may be made in this connection to a decision of the Oudh Chief Court in — 'Dhan Dei v. Kashmiri Bank Ltd.', 134 Ind. Cas. 878 (Oudh). Section 78(2) of the Provincial Insolvency Act, V of 1920 contains a provision similar to section 30 of Act III of 1112. It was held in that case that the words "the period of limitation prescribed for any suit or application for the execution of a decree" in Section 78(2) of the Provincial Insolvency Act would include the period of time prescribed in Section 48 of the Indian Code of Civil Procedure.

(5) We therefore agree with the lower court in its view that the execution petition in this case is not barred by limitation and dismiss the appeal. As there was no appearance for the respondent there will be no order as to costs.

B/R.G.D. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 501

SANKARAN AND VITHAYATHIL JJ.

Geeri Kammathi, Appellant v. Padmavathi and others, Respondents.

A. S. No. 74 of 1125, D/- 28-2-1952.

(a) Hindu Law — Joint family property — Acquisition — Presumption.

Under the Hindu Law the presumption is that an acquisition in the name of a female member of a joint family is joint family property. But this presumption arises only when there is evidence with regard to the existence of a nucleus of family property. But this is subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. And it is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self-acquisition affirmatively to make out that the property was acquired without any aid from the family estate: Case Law Ref. (Para 7)

(b) Hindu Law — School of law — Mayukha — Gowda Saraswath Brahmins of Travancore are not governed by Mayukha Law but by Mitakshara: 29 Cochin 729 and 35 Cochin 796, Rel. on. (Para 12)

(c) Hindu law — Stridhan — Succession — Sons do not succeed in presence of daughters — Rule is not restricted to Stridhan strictly so called.

The rule excluding sons from inheritance to Stridhan property when there are daughters is not restricted only to Stridhan technically so called.

Property acquired by female with her own wit and labour goes to her daughter and not to her son, in her presence: Case law discussed.

S. 123(3) in Mulla's Hindu law held not correct view of law. (Paras 13 & 15)

V. Bhaskara Menon, for Appellant; K. N. Balakrishna Menon and V. Krishna Bhatt, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('66-67) 11 MIA 139: (10 WR 3 PC)	13, 14
('03) 25 All 468: (30 Ind App 202 PC)	13, 14
('12) 34 All 234: (39 Ind App 121 PC)	13, 15
('98) 21 Mad 100: (8 Mad LJ 14)	15
('15) 38 Mad 1036: (AIR 1914 Mad 128)	15
('33) AIR 1933 Rang 347: (147 Ind Cas 736)	15
10 Cochin 371	7, 15
13 Cochin 391	7
23 Cochin 88	7
29 Cochin 234	7
29 Cochin 729	12
35 Cochin 796	12
36 Cochin 779	7
36 Cochin 844	7

VITHAYATHIL J.: The plaintiff is the appellant. The suit is for declaration of the plaintiff's title to the plaint property and for recovery of possession of the same with mesne profits after setting aside a claim order, or in the alternative for partition of plaintiff's one half share in the property. The plaint property is a leasehold interest in 6 cents of land in the Mattancheri Street. The jenmi of the property is the Cochin Thirumala Devaswom. There are a street house and kayyalappura in the property. The leasehold interest originally belonged to one Narayanan who assigned it in favour of the plaintiff's mother Sathyabhama under Ext. I on 23-11-1063. Sathyabhama attorned to the Devaswom and executed a fresh lease deed Ext. II on 17-12-1063. This lease deed was renewed by her on 2-1-1097. Ext. C. is the lease deed executed by her on that date. The plaintiff's case is that on the death of his mother he became the absolute owner of the property and that in any case he is entitled to one half of the same. The plaintiff's father was one Guna Kammath. Guna Kammath and Sathyabhama had 4 children, the plaintiff being the eldest. The second son was Ranga Kammath who died leaving a son Guna Kammath. Guna Kammath the junior also died leaving a minor son who is the 3rd defendant in the case. The 1st defendant is the sister of the plaintiff. He has another sister Kaveru by name who is not a party to this suit. D. W. 1 is her husband.

(2) On 30-11-1095, Sathyabhama and Ranga Kammath together executed a mortgage Ext. XIII in respect of the plaint property to one Kamala for Rs. 150/-. A suit was filed on that mortgage and a decree was obtained by the creditor. To discharge that liability Sathyabhama and Ranga Kammath executed a usufructuary mortgage Ext. IX in respect of the plaint property in favour of one Bikhari Shenoi for Rs. 275 on 13-1-1100. That mortgage right was purchased by Guna Kammath the junior on 12-1-1106 under Ext. XIV. On 28-1-1110, Ranga Kammath and Guna Kammath the junior executed a usufructuary mortgage in respect of the property to one Jembi for Rs. 200 and took the property back on lease. Exts. X and XI are the mortgage and lease. For a debt due from Guna Kammath one Jembla filed Small Cause Suit No. 426 of 1116 of the Cochin Munsiff's Court and obtained a decree against him. In execution of that decree, the plaint property was attached and sold on 12-7-1119 and the 1st defendant purchased the same. Ext. XVI is the sale certificate in that case. The 1st defendant obtained delivery of possession of the property on 14-10-1119 under Ext. XV. On 27-10-1119 the plaintiff filed a petition for redelivery of the property alleging that he was in possession of the same and that the first defendant had no right to obtain delivery from him. That petition was rejected by the District Munsiff. Ext. J is the copy of the order. The plaintiff seeks to set aside that order and to recover possession of the property.

(3) Defendants 1 and 2 contested the suit. The 1st defendant denied the plaintiff's title to the plaint property. According to her, the street house belonged to Sathyabhama and it was repaired by Ranga Kammath and the Kayyalappura was also put up by him. Sathyabhama and Ranga Kammath were in possession of the property, and after the death of Ranga Kammath his son Guna Kammath the junior executed a mortgage in favour of the 1st defendant in respect of the Kayyalappura. In 1119 she filed a suit upon that mortgage as O. S. No. 52 of 1119 of the Cochin Munsiff's Court impleading the present plaintiff and the 3rd defendant as parties to the suit, and obtained a decree. The plaintiff filed an appeal from that decree but the appeal also was dismissed. By purchase in the court sale in S. C. No. 426 of 1116 the first defendant acquired the mortgage right in the property that belonged to Guna Kammath.

(4) It is further contended that the plaint property and the street house were the Sthri-

dhanom property of Sathyabhama and that therefore after the death of Sathyabhama her daughters succeeded to the same to the exclusion of the sons. It was, therefore, contended that the plaintiff was not entitled to any relief in the suit. The first defendant executed a usufructuary mortgage in respect of the property in favour of the 2nd defendant for Rs. 600/- in 1120 and the 2nd defendant is in possession of the property under that mortgage. The 2nd defendant contends that he is entitled to the amount under that mortgage as also the arrears of pattom paid by him to the Devaswom.

(5) The Court below found that the plaint property and the street house were the Sthridhanom property of Sathyabhama and that the plaintiff was not entitled to any share therein. It was also found that the Kayyalappura was constructed by Ranga Kammath and that the plaintiff had no right to the same. It was, therefore, held that the claim order in S. C. No. 426 of 1116 was not liable to be set aside and that the plaintiff was not entitled to get delivery of possession of the property or to get partition of one-half share in the property. The suit was accordingly dismissed with costs.

(6) The question to be decided in this appeal is whether the plaintiff is entitled to the plaint property and the buildings thereon as absolute owner of the same. and, if not, whether he is entitled to one half share as claimed by him. It is argued for the plaintiff that the leasehold interest was purchased in the name of his mother with money belonging to his father and that it was therefore a joint family property. But the plaintiff had no such case in the plaint. On the other hand, the averments in paragraphs 1 and 8 of the plaint show that according to the plaintiff his mother was the owner of the leasehold interest. What is stated in paragraph 8 is that the plaintiff and his brother were alone entitled to share in the property that belonged to their mother. Nowhere is it stated in the plaint that Ext. I was taken in the name of Sathyabhama with money that belonged to her husband.

(7) The plaintiff's learned Counsel argued that under the Hindu Law the presumption is that an acquisition in the name of a female member of a joint family is joint family property. But this presumption arises only when there is evidence with regard to the existence of a nucleus of family property (Vide Mayne's Hindu Law, 10th Edn. p. 373). The learned author says thus:

> "The burden of proving that any particular property is joint family property is in the first instance upon the person who claims it as coparcenary property. Where the possession of a nucleus of joint family property is either admitted or proved an acquisition made by a member of the family is presumed to be joint family property. But this is subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. And it is only after the possession of an adequate nucleus is shown, the onus shifts on to the person who claims the property as self-acquisition affirmatively to make out that the property was acquired without any aid from the family estate."

To the same effect are the decisions of the Cochin High Court in the following cases: — 'Mouthayan Pillai v. Arokya Ammal', 10 Cochin 371; — 'Vasudevan Nambiar v. Raman Nambiar', 13 Cochin 391; — 'Odan Sanku v. Moorti', 23 Cochin 88; — Nilakantan v. Nilakantan', 29 Cochin 234; — 'Vasudeva Prabhu v. Padmanabha Prabhu', 36 Cochin 779; — 'Venkitarama Iyer v. Padmanabha Iyer', 36 Cochin 844. In '10 Cochin 371 and 36 Cochin 844', the acquisition was in the name of a female member.

(8) There is no evidence in this case to show that the plaintiff's family had any nucleus with which the assignment of the leasehold interest could be taken in the name of Sathyabhama. (His Lordship considered the evidence and proceeded:) Under the circumstances there is no basis for the contention that the leasehold interest belonged to the joint family of the plaintiff.

(9) With regard to the street house in the property, Ext. I shows that there was a building in the property on the date of the document. Ext. II shows that Sathyabhama purchased that building from the Devaswom. Ext. VI the judgment in A. S. No. 214 of 1120 of the Anjikaimal District Court which was filed by the present plaintiff from the decision in Ext. V case and Ext. VIII, the decree in that appeal show that the Kayyalappura in the property has been put up by Ranga Kammath.

(10) The plaintiff has produced certain documents to show that he was in possession of the plaint property. Ext. G series are the demand notice and receipts in respect of property tax issued by the Mattanchery Municipality in favour of the plaintiff. Ext. A is a coolicharth executed by P. W. 4 and another in favour of the plaintiff. Ext. B is another Coolicharth executed by P. W. 2. These are of the year 1117. In 1119 the plaintiff took another coolicharth, Ext. F, from one Kanaka. The plaintiff relies on these documents to show that he was in possession of the property.

(11) It is in evidence that Ranga Kamath died about the year 1110. His only son Guna Kammath the junior was a consumption-patient and he died in 1118 leaving his young widow and a baby who is the 3rd defendant in the case. The plaintiff seems to have assumed management of the affairs of Guna Kammath even during his lifetime. This must be the reason why Exts. A, B and F happened to be taken in the name of the plaintiff. As regards the demand notices and receipts it is not clear whether they relate to the house in the plaint property. In the plaint the number of the street house is given as 5/85 and it is also stated that the previous number was 5/73. Exts. A, B and F show that the number was 5/23 in 1117, 1118 and 1119. The number shown in Ext. G is 5/84 while that shown in G1 and G6 is 5/206. The receipts relating to the years 1117 to 1119 contain the number 5/85. During that period, the plaintiff was managing the affairs of Guna Kammath as stated above. In the circumstances much importance cannot be attached to the fact that these receipts were taken in the name of the plaintiff. In any view of the case there is nothing to show that the plaintiff has acquired title to the plaint property by adverse possession. It is thus clear that the leasehold interest in the plaint property belonged to the plaintiff's mother Sathyabhama, that the kayyalappura was put up by Ranga Kammath, & that the 1st defendant has acquired the rights of Ranga Kammath and his son Guna Kammath.

(12) The only other question for consideration is whether the plaintiff is entitled to a share in the estate of his mother as her heir. It is argued

for the appellant that the law applicable to the community to which the plaintiff belongs, namely, the Gowda Saraswath Brahmin community, is the Mayukha Law that prevails in North Konkan. It is submitted that the Gowda Saraswath Brahmins migrated to Travancore and Cochin from North Konkan and that they carried with them their personal law. Reference was made to Cochin Tribes and Castes by L. K. Ananthakrishna Iyer — Vol. II, p. 346, where the learned author deals with the history of this community. According to Mayukha Law both the sons and daughters are entitled to equal share in the Stridanam property of their mother, while under the Mitakshara Law the daughters inherit the Stridhanam property of their mother to the exclusion of the sons. The question whether the Mayukha system applies to the Gowda Saraswath Brahmin Community settled in Cochin came up for consideration before the erstwhile Cochin High Court in — 'Lexmi Bai v. Anantha Shenoi', 29 Cochin 729. In that case the history of the community was considered and it was held that the community migrated to Cochin and Travancore from South Konkan in the 16th Century. The Mayukha Law prevails in North Konkan and not in South Konkan. Moreover the Mayukha was compiled only in the 17th century, long after the community migrated to Malabar. In the circumstances it cannot be said that the personal law that applied to the community at the time of the migration was the Mayukha. It was, therefore, held that the Gowda Saraswath Community in Cochin is governed by the Mitakshara law. The same view was taken by the Cochin High Court in — 'Saraswathi v. Lexmi', 35 Cochin 796. It was observed thus by Kunjunni Raja J. in that case:

> "I do not wish to commit myself to say that the Gowda Saraswath Brahmins domiciled in Cochin are governed by Mayukha School of Hindu Law prevailing in the Bombay Presidency without a fuller argument than we had at the bar. Considering the long period of domicile in Cochin of this community the Courts in the State have been applying the Mitakshara Law to this community and I am not prepared to say that it is wrong to have done so."

It has to be noted that the decision in '29 Cochin 729', in which the question has been elaborately discussed was not brought to the notice of the learned Judges who decided this case.

(13) It was next argued for the appellant that even under the Mitakshara law the rule excluding sons from inheritance to Stridhana property when there are daughters applies only to Stridhana technically so called. According to the Smrithis:

> "It is only gifts obtained by a woman from her relations and her ornaments and apparel which constitute her stridhana and the only sorts of gifts from strangers which come under that denomination are presents before the nuptial fire and those made at the bridal procession. But neither gifts obtained from strangers at any other time, nor her acquisitions by labour and skill constitute her stridhana." (Mulla's Principles of Hindu Law: 10th Edn. Sec. 113).

The commentators of the different schools have given their own interpretations to the definition of Stridhana as given by the Smrithi Writers. Vijnaneswara has given his own interpretation in Mitakshara to the text of Yajnavalkya. Yajnavalkya's text is this:

> "What was given to a woman by the father, mother, her husband, or her brother, or received by her at the nuptial fire or presented on her supersession (Adhivedanika) and the like (adya) is denominated Stridhana. That which is given by the bandhus, sulka, anvadheyaka, these her kinsmen (bandhavas) take if she die without issue".

Vijnaneswara explains the word "adya" in this text as including "property which a woman may have acquired by inheritance, purchase, partition, seizure and finding" and says that "the term 'woman's property' conforms in its import with its etymology and is not technical." It is argued for the appellant that this expansion of the definition of Stridhana by Vijnaneswara was not accepted by the Privy Council, and reference was made to the decision in — 'Thakoor Deyhee v. Rai Baluk Ram', 11 M I A 139 (PC); — Sheo Shankar Lal v. Debi Sahai', 25 All 468 (PC) and 'Debi Mangal Prosad Singh v. Mahadeo Prasad Singh', 34 All 234 (PC).

(14) We do not think that these decisions of the Privy Council have the effect of restricting the meaning of Stridhana to what is called technical stridhana. What was held in — 'Thakoor Deyhee v. Rai Baluk Ram', 11 M I A 139 (PC), is that a widow has no power of alienating any immoveable property which she has inherited from her husband and that on her death it will pass to the heirs of her husband. What was held in — 'Sheo Shankar Lal v. Debi Sahai', 25 All 468 (PC) was that under the Hindu Law of the Banares School property which a woman has inherited from a female is not her Stridhana in such a sense that on her death it passes to her stridhana heirs in the female line to the exclusion of males. With regard to Vignaneswara's expansion of the definition of Stridhana this is what their Lordships say in that case:

> "The author of the Mitakshara and some other authors seem to apply the term broadly to every kind of property which a woman can possess, from whatever source it may be derived. Their Lordships do not propose to dwell upon this particular question. It may perhaps be regarded as one mainly of phraseology, not necessarily involving, however it be answered, much distinction in the substance of the law, for most of the old commentators recognise with regard to the property of a woman, whether called Stridhana or by any other name, that there may be room for differences in its line of descent according to the mode of its acquisition. The question of substance is how the property descends in a case like the present. As to this the decision of the High Court was based upon the text of the Mitakshara, which seems to make all property taken by a woman by inheritance her Stridhana with all the incidents which belong to that kind of absolute property, and to make it descend as such, primarily to females, and in the special line prescribed for stridhana strictly so called. It cannot now be contended that the rule thus derived from the Mitakshara is law as to inherited property generally."

Their Lordships held that the law is not the same under the Benares School. What was held in the third case is that under the Mitakshara law the share which a widow gets on

partition of the joint family property devolves, on her death, upon the heirs of her husband. Their Lordships however observed in that case "that the members of a joint family effecting a partition may agree that a portion of the property shall be transferred to the widow by way of a absolute gift, as part of her stridhana, so as to constitute a provision for her stridhana heirs."

(15) In Mulla's Principles of Hindu Law, S. 123 (3) it is stated that the effect of these decisions of the Privy Council is to "curtail the definition of Stridhana as propounded by Vijnaneswara by excluding from it in effect the five additional sorts of stridhana enumerated by him. This view does not appear to be correct. The question is dealt with in the Mayne's Hindu Law and Usage (10th Edn.) Paragraph 615A. Dealing with the Privy Council case in — 'Debi Mangal Prosad Singh v. Mahadeo Prosad Singh', 34 All 234 (PC) the learned author says thus: "The actual point decided in the above case was that there was no substantial difference in principle between woman's property acquired by inheritance and that acquired by partition. It has however been suggested that the decision of the Privy Council limits stridhana to the kinds enumerated in the Smrithi texts. This does not appear to be correct. On the other hand their Lordships thought that the word "Adi" would include property acquired in any other manner 'ejusdem generis' with the modes mentioned by Yajnavalkya. It is difficult to see any reason why the enumeration mentioned in the Smrithis should be taken as exhaustive and not as illustrative only which is the uniform opinion of all the Mitakshara authorities. Rules of Hindu Law are not so inelastic as to be incapable of application to any acquisitions which were not known when the Smriti rules were first formulated. The Smrithi texts are in terms not restrictive and the very fact that one Smrithi adds to the list given in another shows that the subject of Stridhana was in a stage of development. None of the Smriti texts can be held to cover modern conditions of life or to rule out as Stridhana acquisitions which a woman might make for herself and over which she would have full powers of disposition. With the exception of the property inherited by a woman or allotted to her at a partition Vijnaneswara's view as to the other modes of acquisition has been accepted by the courts. One such mode of acquisition is purchase by her. Vide —'Muthu Ramakrishna v. Marimuthu', 38 Mad 1036; — 'Salemma v. Latchmana Reddi', 21 Mad 100; — and 'Mumma v. Krishna', AIR 1933 Rang. 347. In — 'Mouthayan Pillai v. Arokya Ammal', 10 Cochin 371, the Cochin Chief Court held that property acquired by a female by her own wit and labour is her stridhana called "ayautaks" and that according to the Mitakshara School it goes to her daughter in preference to the son. We, therefore, hold that the property purchased by the plaintiff's mother under Ext. I was her stridhana property & that under the Mitakshara law which applies to the parties the daughters inherit it to the exclusion of the sons. The plaintiff is, therefore, not entitled to any share in the property. The suit was therefore rightly dismissed by the court below. We confirm the decree of the learned District Judge and dismiss the Appeal with costs.

B/R.G.D. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 504

KOSHI C. J. AND GANGADHARA MENON J.

Govinda Pillai Sankara Pillai, Appellant v. Krishna Pillai Kesava Pillai and others, Respondents.

A. S. Nos. 231, 250 and 251 of 1124 (T), D/- 1-4-1952.

(a) Civil P. C. (1908), S. 146, O. 21 R. 16 and O. 22 R. 12 — Death of decree-holder during execution — Substitution of legal representative.

Though Order 22 has no application to execution proceedings, still by reason of S. 146 and O. 21, R. 16 the legal representative of a decree-holder who dies during the pendency of an execution petition can be substituted in the execution petition and be allowed to continue it. AIR 1937 Mad 73 (FB), Foll. (Para 2)

The practice of substituting the name of the legal representative in the place of the decree-holder who died in the course of execution, prevailing in Travancore and Cochin is quite warranted by the provisions of the Code and any change therefrom would result in serious consequence vitally affecting the rights of the legal representatives of a deceased decree-holder. (Para 2)

Anno: C. P. C., S. 146 N. 4 Pt. 8; O. 21 R. 16 N. 19, O. 22 R. 12 N. 1 Pts. 6 to 13.

(b) Civil P. C. (1908), Ss. 38 and 47 — Executing Court cannot go behind decree.

Where a decree for redemption has been passed in favour of two members of a tarward in their individual and separate capacities, the other members of the tarward have no right to raise an objection to execution of the decree by the legal representatives or assigns of the decree-holder on ground that the decree was in fact in favour of the tarwad. It is not for the execution court to go into the rights of the parties on the basis of a document that has come into existence 'pendente lite' and on that footing override the express provisions in the decree that has been passed subsequently. The execution Court is concerned only with the execution of the decree as it stands and cannot go behind it. (Para 3)

Anno: C. P. C., S. 38 N. 8; S. 47 N. 31.

(c) Civil P. C. (1908), S. 49 O. 21 R. 16 — Application for execution by transferee — Pleas open.

Where the legal representatives or transferees of the deceased decree-holder want to execute the decree in continuation of the application of the original decree holder, it is not open to them to put forward contentions inconsistent with the prayers in execution of the original decree holder. (Para 4)

Anno: C. P. C., S. 49 N. 1; O. 21 R. 16.

In No. 231/1124.

K. K. Mathew, for Appellant; Advocate General T. N. Subramonia Iyer and S. Subramonia Iyer (for Nos. 1, 2 and 4) and M. T. Paikaday (for No. 3), for Respondents.

In No. 250/1124.

M. T. Paikaday, for Appellant; Advocate General T. N. Subramonia Iyer, for Respondents.

In No. 251/1124.

M. T. Paikaday, for Appellant; Advocate General T. N. Subramonia Iyer, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('27) AIR 1927 Mad 184: (50 Mad 1) 2
('27) AIR 1927 Mad 284: (99 Ind Cas 694) 2
('32) AIR 1932 Mad 73: (55 Mad 352 FB) 2

GANGADHARA MENON J.: These appeals were heard together. The matter arises in execution. The decree in the case allows the plaintiffs to recover possession of plots 5 and 7 in Ext. Z, plan on payment of the mortgage money and the value of improvements. Before the lower court, in C. M. P. 5413 of 1122, the 2nd plaintiff and the legal representatives of the deceased 1st plaintiff and their assignees stated that the rights of the decree-holders in block No. 5 have been assigned in favour of petitioners Nos. 5 and 6 under a sale deed dated 21-5-1121 and prayed that delivery of 3 acres and 75 cents in block No. 7 may be given to petitioners Nos. 1 to 3 and that block No. 5 may be delivered over to petitioners Nos. 5 and 6 on payment of the mortgage money and the value of improvements. One Govinda Pillai Sankara Pillai who is a member of the tarwad of plaintiffs 1 and 2 resisted the execution of the decree by the petitioners in C. M. P. 5413, on the ground that the rights under the decree belong to the tarwad and that the assignment of the decree is invalid and prayed that he may be permitted to execute the decree. One Ouseph Ouseph, on the strength of the sale deed from the members of the tarwad in his favour, also resisted the application in C. M. P. 5413 and prayed that he may be permitted to execute the decree in respect of block No. 5 and obtain delivery.

The 49th defendant who is in possession of 9 acres in block No. 5 in C. M. P. 2024 of 1124 while questioning the rights of the petitioners to execute the decree on the same grounds as those taken by the above parties further pleaded that the execution is barred by limitation and that in any event he is entitled to have the proportionate mortgage money as per the mortgage of 1092 in his favour and also the value of improvements from the date ascertained in execution and paid to him before delivery is ordered. The learned Judge under one order disposed of all the above civil miscellaneous petitions and allowed the petitioners in C.M.P. 5413 to execute the decree and obtain delivery of possession of the properties as prayed for in their application. From the above order the 49th defendant has preferred A. S. 251 of 1124. Govinda Pillai Sankara Pillai petitioner in C. M. P. 5532 of 1123 is the appellant in A.S. 231 of 1124 and Ouseph Ouseph, the petitioner in C. M. P. 5188 of 1123 is the appellant in A. S. 250/1124.

(2) The contention that the decree is barred by the 12 years' rule is without any substance. The 1st plaintiff had on 20-12-1113 applied for execution of the decree and recovery of possession of the properties. That execution application is still pending and if C. M. P. 5413 is only in continuation of that application, it cannot be said that the decree is barred by 12 years' rule. It is however contended that since the 1st plaintiff died, any application for execution thereafter either by the 2nd plaintiff or the legal representatives of the deceased 1st plaintiff or by their assignees could be made only by a substantive execution application and that any such application could not be treated as a continuation of the prior execution application. For this position reliance is placed on the ruling reported in — 'Palaniappa Chettiar v. Valliammai Achi', AIR 1927 Mad 184 in which it is held that:

> "On the death of a decree-holder who is in course of executing his decree, his legal representative cannot be substituted in the execution petition to continue it."

This decision has come up for consideration in a later Full Bench decision of the Madras High Court reported in — 'Venkatachalam Chetti v. Ramaswami Servai', AIR 1932 Mad 73. The Full Bench after a review of the case law has come to the conclusion that

> "though order 22 has no application to execution proceedings, still by reason of section 146 and Order 21, rule 16, the legal representative of a decree-holder who dies during the pendency of an execution petition can be substituted in the execution petition and be allowed to continue it."

It is not obligatory on him to file a fresh application for execution. The decision in — 'Perraju v. S. Bapireddi', AIR 1927 Mad 284 has been expressly dissented from in the above ruling. We are in entire agreement with the view taken in AIR 1932 Mad. 73. We may also state that the practice as far as we are aware both the Courts in Travancore and Cochin has all along been to substitute the name of the legal representative in the place of the decree-holder who died in the course of execution. This practice is quite warranted by the provisions of the Code and any change therefrom would result in serious consequence vitally affecting the rights of the legal representatives of a deceased decree-holder. C.M.P. 5413 of 1122 is in effect an application to continue the execution application filed by the 1st plaintiff after the substitution of the legal representatives of the deceased 1st plaintiff and their assignees in his place. We are therefore unable to treat the C. M. P. 5413 of 1122 as a fresh application and are of the view that it has to be treated as an application in continuation of the previous pending execution application of the 1st plaintiff. Therefore the execution of the decree is not barred as contended for by the appellants.

(3) Next the question of the right of the petitioners in C. M. P. 5413 to execute the decree has to be considered. The main ground on which it is challenged is that the rights under the decree belong to the tarwad of plaintiffs 1 and 2. It is contended that plaintiffs 1 and 2 had at best only a power conferred on them and that the power had ceased with the death of the 1st plaintiff. There is nothing on the face of the decree to indicate that plaintiffs 1 and 2 have obtained the decree on behalf of the tarwad. As far as it could be gathered from the decree and the other records available in the case we are inclined to think that plaintiffs 1 and 2 sued and obtained the decree for redemption by virtue of their separate individual rights. Their rights in the decree are therefore both heritable and transferable. The legal representatives of the 1st plaintiff and their transferees petitioners Nos. 5 and 6 have consequently obtained valid rights to execute the decree. Reliance is placed on Ext. A udampadi to show that whatever rights that plaintiffs 1 & 2 had over the properties had been surrendered in favour of the tarwad and that at any rate after the date of Ext. A the rights in the decree vested in the tarwad. It is also contended that Ext. A, if at all, only authorises the plaintiffs 1 and 2 to recover the

property on behalf of the tarwad. It has to be noted that Ex. A came into existence while the case was pending in appeal before the High Court. The rights that were created under Exhibit A whatever they be, have not been availed of in the suit and nobody moved the court for a decree in the light of the alleged rights obtained by the tarwad on the basis of Ext. A. It is not for the execution court to go into the rights of the parties on the basis of a document that has come into existence 'pendente lite' and on that footing override the express provisions in the decree that has been passed subsequently. Therefore we do not think it necessary in this case to construe Ext. A and ascertain the exact rights which the plaintiffs 1 and 2 have over the properties comprised in the decree. The decree as it stands confers on plaintiffs 1 and 2 the right to redeem the decree schedule properties and the petitioners in C. M. P. 5413 of 1122 are entitled to execute the decree and recover possession of the properties as prayed for by them. The execution court is concerned only with the execution of the decree as it stands and cannot go behind it. It may be open to the appellants in A. S. 231 of 1124 and A. S. 250/1124 to work out their rights, if any, in a fresh suit. But we do not think they can question the rights of plaintiffs 1 & 2 or their assignees or legal representatives to execute the decree. We would therefore, repeal their contentions in these proceedings and leave the question of their rights to the properties open to be agitated in appropriate proceedings if so advised.

(4) The claim of the 49th defendant for the value of improvements and the mortgage money stands on a different footing. The 49th defendant has a mortgage right over 9 acres of the property comprised in block No. 5 on the basis of a mortgage executed by the plaintiffs in his favour in 1092. In the judgment in A. S. 439 of 1103 passed on review this right has been recognised. It states:

> "The appellant is the 17th defendant" (i.e., the present 49th defendant). "The plaintiff is directed to recover item No. 5 even though one-half of it coming to 9 acres is in his possession under an otti executed by the plaintiff himself. Before he surrenders that he should certainly get proportionate mortgage amount and value of improvements. Unfortunately this court in its prior judgment, did not refer to this aspect at all. We have, therefore, to hold that the 17th defendant is entitled to proportionate mortgage amount and value of improvements before the area which he is holding under the said otti should be surrendered. What this amount will be is left for the execution court to decide. To this extent, the prior judgment of this court is altered."

But it is contended that the 2nd plaintiff was no party to this appeal and that decree in appeal will not bind him. There is no substance in this contention. It has to be remembered in this connection that O. S. 25/1095 was tried along with O. S. 30 of 1089 and appeals filed against the decrees in the two suits were heard and disposed of together by the High Court. All the parties in the two suits were before the court. There were review petitions in most of the appeals and they were also heard and disposed of together, when both plaintiffs 1 and 2 were before the Court. Further 1st plaintiff was admittedly a party in A. S. 439 of 1103 itself and in the execution application filed by him he has recognised the right of the 49th defendant as determined by the above judgment by the High Court passed on review. In fact the decree was sought to be executed by the 1st plaintiff only on that basis. The 2nd plaintiff and the legal representatives of the 1st plaintiff now want to execute the decree in continuation of the application of the 1st plaintiff. In these circumstances we do not think that it is open to them to put forward contentions inconsistent with the prayers in execution application of the 1st plaintiff and contend that the judgment in review will not bind them. The 49th defendant is therefore entitled to the proportionate mortgage money as well as the value of improvements ascertained in execution and paid to him.

The learned advocate for respondents does not question the right of the 49th defendant for the value of improvements. All that he contends for is that since there has already been a commission issued at the trial that report has to be adopted as the basis of the value of improvements. That report was there in the case at the time when the review was heard. But in spite of it the court left open the question of the value of improvements to be determined by the execution court. Therefore there is no warrant in the plea that the 49th defendant should be pinned down to that report. Further in that report the value of improvements assessed was from the year 1072. The claim of the 49th defendant which was recognised in the judgment in review was that of the mortgage of 1092 and value of improvements effected as per that mortgage from the year 1092. It is difficult to understand how the report could be made a basis of ascertaining the value of improvements effected in the property from the year 1092. The learned advocate for the respondents relies on an admission in an objection petition filed by the 49th defendant on 31-1-1114 to the effect that he will be satisfied with the value of improvements as fixed in the report of the commissioner at the trial side. The offer contained in that objection petition has not been accepted by the decree-holders then and we do not think that it is just to fix the 49th defendant to that offer now, after the lapse of nearly 12 years from that date. We are therefore clear that the claim of the 49th defendant for the proportionate mortgage money as well as for the value of improvements have to be determined in execution afresh and the amount due to him paid before the property in his possession is delivered over as prayed for by the respondents.

(5) We would, therefore, allow A. S. 251 to the above extent and direct the lower court to ascertain the proportionate mortgage money due to the 49th defendant and also to ascertain by the issue of a commission the value of improvements effected by him in the property from the date of the mortgage in his favour. The proportionate mortagge money and the value of improvements thus determined by the court below will be awarded to him before the property in his possession is delivered over. A. S. 251 is allowed to the above extent and dismissed in all other respects. A. S. 231 and A. S. 250 are also dismissed. In the circumstances of this case we direct the parties to suffer their costs in the appeals.

Order accordingly.

B/K.S.

A. I. R. 1952 TRAVANCORE-COCHIN 507

VITHAYATHIL J.

Narayanan Pappu, Appellant v. Easwaran Krishnan, Respondent.

Second Appeal No. 724 of 1950, D/- 18-3-1952.

(a) **Transfer of Property Act (1882), S. 63 A — Suit for redemption — Value of coconut trees on land — Deduction towards dropping of coconuts (Improvements — Value of).**

In calculating the value of the coconut trees planted on the mortgaged land, the deduction towards the droppings of coconuts should be the one fourth of the total number of nuts and not the one fourth of the tender nuts which have not passed the stage of dropping. 15 Trav LT 717 and 1950 Ker LT 19, Foll; 18 Trav LJ 609, dist. (Para 3)

Anno: T. P. Act, S. 63 A N. 1.

(b) **Court fees Act (1870), S. 28 — Cross objection — Party claiming reduction of Rs. 200/- in certain item — Court fee paid only on Rs. 200/- — Court deciding the amount to be Rs. 293/- — Amount to be allowed should be only Rs. 200/-. (Para 3)**

Anno: Court fees Act, S. 28 N. 2.

C. K. Sivasankara Panicker, for Appellant; V. G. Sankaranarayana Pillai, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('50) 1950 Ker LT 19 3
18 Trav LJ 609 3
15 Trav LT 717 3

JUDGMENT: The defendant is the appellant. The suit is for redemption of a mortgage. The dispute relates to the value of improvements. The defendant claimed Rs. 5000/- as value of improvements and Rs. 300/- as value of plaint item No. 2 building. The trial court accepted the commissioner's report and awarded Rs. 3335 Chs. 7 Ca. 12 as value of improvements. The defendant appealed from this decree and claimed an additional amount of Rs. 1000/- as value of improvements. The plaintiff filed an objection memorandum in which he objected to the award of Rs. 200/- by the trial court. In calculating the value of cocoanut trees the commissioner had deducted towards droppings one fourth of the number of nuts which had not passed the stage of dropping and not from the total number of nuts. The plaintiff contended in the lower appellate court that one-fourth of the total number of nuts should be deducted towards droppings. This contention was accepted by the lower appellate court and that court fixed the value of coconut trees on the basis of that calculation. Accordingly a sum of Rs. 293-3-8 was deducted from the value of cocoanut trees as found by the trial court.

(2) The defendant claimed an additional amount of Rs. 1000/- under various heads. The lower appellate court accepted his case in respect of certain items and awarded an additional amount of Rs. 413-2-4 and deducted the sum of Rs. 293-3-8 out of this amount of Rs. 413-2-4. The defendant was thus given a decree for an additional amount of Rs. 120 in round figures, thereby enhancing the total value of improvements to Rs. 3455-7-12. Both parties were directed to suffer their respective costs in the appeal. In this second appeal the defendant claims Rs. 880 which was not allowed by the lower appellate court. The plaintiff has filed an objection memorandum claiming a reduction of Rs. 400 out of the amount awarded by the lower appellate court.

(3) The ground urged by the learned counsel for the appellant is that the lower appellate court has gone wrong in deducting towards droppings one fourth of the total number of nuts. According to him the commissioner acted correctly in deducting one-fourth of the nuts which had not passed the stage of dropping. He relied on the ruling of the Travancore High Court in — 'Narayanan v. Sankaran', 18 Trav LJ 609. In that case the commissioner deducted one-half of the tender nuts towards droppings. The High Court observed that the deduction of one-half of the tender nuts towards droppings could not be accepted as a general rule and that the rule must vary according to the locality and other conditions which may affect the extent of droppings. In that particular case the commissioner deducted one-half of the tender nuts which had not passed the stage of dropping. The High Court did not hold that only one-fourth of the tender nuts should have been deducted. In — '15 Trav LJ 717' it was held that one fourth of the total number of nuts and not one-fourth of the tender nuts should be deducted towards droppings. This decision was followed in — 'Kuruvilla Thoma v. Govinda Menon Raghava Menon', 1950 Ker LT 19. I therefore agree with the lower appellate court in its view that one fourth of the total number of nuts should have been deducted towards droppings in calculating the value of cocoanut trees. The additional amount that will have to be deducted on this account will be Rs. 293-3-8 as found by the lower appellate court. But the plaintiff had in his objection memorandum filed in the lower appellate court claimed reduction of only Rs. 200 on this account and had paid court fee only for the amount. The lower appellate court was therefore not justified in deducting more than Rs. 200 on this account.

(4) Another ground taken by the appellant relates to the price of cocoanuts. The commissioner fixed the price of cocoanuts at Rs. 7-0-0 per 100. The trial court accepted this. In the lower appellate court the defendant contended that this was too low. But that court did not enhance the price since the defendant had not let in any evidence to show that the price was low. In determining the value of cocoanut trees this court has in some cases fixed the price of cocoanuts at Rs. 9 while in other cases at Rs. 8 and in some other cases at Rs. 7. I think that Rs. 8 per hundred will be a reasonable price. Calculated at that rate the defendant will be entitled to an additional amount of Rs. 155 as value of cocoanut trees.

(5) With regard to the other items I do not think that the defendant is entitled to get any additional amount.

(6) The plaintiff has filed an objection memorandum in which he claims a reduction of Rs. 400. I find no reason to reduce the value of improvements on any of the grounds urged by the plaintiff. But it is pointed out, that in fixing the value of Anjili and Jack trees the lower appellate court has raised the value of timber from Rs. 24 to Rs. 48 per kandy while even according to the defendant the price is only Rs. 40 per kandy. A sum of Rs. 11 has to be reduced on this account. Thus the defendant will be entitled to an additional amount of Rs. 155 as value of cocoanut trees and a further sum of Rs. 93-3-8 which was wrongly disallowed by the lower appellate court. Out of this a sum of Rs. 11 will have to be deducted. In the result the defendant will be entitled to Rs. 237-3-8 over and above the sum of

Rs. 3455-7-12 awarded by the lower appellate court as value of improvements.

(7) It was argued for the respondent that the trial court went wrong in awarding only michavarom and not mesne profits from the date of deposit of the mortgage amount and value of improvements. In the suit the plaintiff has claimed only future michavarom. In the objection memorandum filed in the District Court the plaintiff did not object to this portion of the decree. In the circumstances the plaintiff cannot be allowed to raise this plea in this Court. He has also not paid court fee for such a relief.

(8) As per the order of this court on the petition filed by the appellant for stay of execution of the decree the plaintiff has deposited Rs. 880 in the trial court under protest. The defendant is allowed to draw the additional amount of value of improvements awarded by this court from out of the amount deposited by the plaintiff. The plaintiff is allowed to draw the balance amount.

(9) The appeal and the objection memorandum are allowed to the extent mentioned above and dismissed in other respects. Both parties will bear their respective costs in this Court.

C/D.R.R. Order accordingly.

A. I. R. 1952 TRAVANCORE-COCHIN 508

SANKARAN AND GANGADHARA MENON JJ.

Raman Nilacantan Namboori, Appellant v. Mathai Augusty, Respondent.

Second Appeal No. 378 of 1124, D/- 16-11-1951.

(a) Civil P. C. (1908), S. 60 and O. 21 R. 46 — 'Debts' — Right to future rent cannot be attached — (Travancore Civil P. C., S. 52).

Future rents and profits are not debts within the meaning of the expression in S. 52 of Travancore Civil Procedure Code, and as such cannot be attached. Hence an attachment of future rent which has not become due under a lease deed in favour of the judgment debtor is null and void and cannot give the decree-holder auction purchaser any right to recover the future rent in pursuance of such attachment and sale. 15 Trav LJ 324; 19 Trav LJ 1152 and 14 Moo Ind App 400 (PC), Rel. on. (Para 4)

Anno: C. P. C., S. 60 N. 7 Pts. 7, 8.

(b) Civil P. C. (1908), O. 21 R. 46 — Set off by garnishee of cross-debt — Attachment of rent due to judgment-debtor from his lessee — Court sale — Decree holder auction purchaser's right to recover rent in pursuance of such attachment and sale is subject to garnishee's right to set off any cross debt due to him from judgment-debtor — If such rent is already adjusted towards cross-debt, decree holder has no right to recover same. (Para 5)

Anno: C. P. C., O. 21 R. 46 N. 8.

(c) Civil P. C. (1908), S. 11 and O. 21 R. 46 — Execution proceedings — Attachment of debt due to judgment-debtor without any notice to garnishee as contemplated by O. 21 R. 46 — No enquiry as contemplated by O. 21 R. 46 instituted in pursuance of such attachment and garnishee not having any opportunity to dispute validity of attachment — Garnishee is not precluded from disputing validity of attachment and sale in a subsequent suit against him for recovery of the debt. (Para 6)

Anno: C. P. C., S. 11 N. 23; O. 21 R. 46 N. 15.

T. K. Narayana Pillai and D. Narayanan Potti, for Appellant; George Vadakayil, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('71) 14 Moo Ind App 40: (7 Beng LR 186 PC) 4
('25) 15 Trav LJ 324 4
('29) 19 Trav LJ 1152 4

GANGADHARA MENON, J.: The legal representative of the deceased plaintiff is the appellant. In execution of the decree in O. S. 49 of 1105 obtained against the 2nd defendant the plaintiff on 18-1-1108 attached as a debt due to the 2nd defendant the pattom payable to him by the 1st defendant for the years 1107 and 1108. Pursuant to the attachment that right was brought to sale and purchased by the plaintiff. On the basis of the court sale the plaintiff has brought the present suit for the recovery of the pattom amount alleged to be due.

(2) The 1st defendant contended that he has no knowledge of the attachment, that the attachment and the court sale are illegal and void and that the pattom due had been duly paid and the property surrendered in the year 1108. The courts below upheld the plea of discharge and also found that the attachment of pattom for the year 1108 was illegal and dismissed the plaintiff's suit.

(3) In regard to the plea of discharge the findings are concurrent. Exts. III to VII are receipts granted by the 2nd defendant for the payment of pattom for the year 1107. These receipts have been found to be genuine by both the courts below. We do not see any reason to interfere with the findings. The payments under these receipts were made long before the date of attachment. Therefore there was no pattom in arrears for the year 1107 that could be attached by the plaintiff.

(4) In regard to the attachment of the amount of pattom for 1108 plaintiff's claim has to be disallowed for two reasons. It is seen that the pattom for 1108 has not accrued due on the date of the attachment. Future rents and profits are not debts within the meaning of the expression in section 52 of the Travancore Civil Procedure Code. The rent for 1108 had not fallen due on or before the date of attachment and therefore it had no existence as a debt on that date. This question whether future rent can be attached as a debt came up for consideration in — 'Vayalil Kumaran v. Govindan Gopala Pillai', 15 Trav LJ 324. Their Lordships following the decision of the Privy Council in — 'Syud Tuffuzzool Hossein Khan v. Raghoonath Pershad', 14 Moo Ind App 40 (PC) held that the attachment was null and void and that the plaintiff who bases his claim on the sale following the attachment must fail. The question again came up for consideration in the case reported in — 'Udhuman Lebba v. Kaliyugathumeyya Pillai', 19 Trav LJ 1152, where the same view was taken. We do not think that the principle laid down in the above decisions is open to question. Therefore the attachment of the future rent under the lease deed in favour of the 2nd defendant was void and the plaintiff did not get any valid right to recover the pattom for 1108 by the court sale in pursuance of the attachment.

(5) Further the right of the 2nd defendant for the rent for 1108 was clearly subject to the 1st defendant's right to set off the premium paid against the rent due at the time of surrender of the property. Therefore even assuming that the plaintiff could have effected a valid attachment on the rent for the year 1108

any right that the plaintiff might obtain in pursuance of the attachment and court sale was subject to the 1st defendant's right to set off the arrears of pattom for 1108 against the premium. The 1st defendant has adjusted the rent for 1108 against the premium that was due to him and has surrendered the property under Ext. VIII release deed. Therefore in any view of the case plaintiff has no right to recover the pattom for the year 1108.

(6) It is contended that the 1st defendant garnishee has not objected to the attachment in execution and that he is therefore debarred from questioning the validity of attachment and the court sale in the present action. Reliance is placed on the provisions of Order XXI, Rule 44 (1) of the Travancore Civil Procedure Code and it is argued that in so far as the 1st defendant has not raised any contention with regard to the validity of attachment and his liability to pay the amount, he should be deemed to have been concluded by the proceedings in execution. We do not think that there is any substance in this contention. No notice was issued to the 1st defendant by the court which effected the attachment calling upon him to appear before it and show cause why he should not pay or deliver into court the alleged debt which was the subject matter of the attachment and no enquiry contemplated in Order XXI, Rule 44 (a) to (l) was instituted in pursuance of the attachment. It is only when such an enquiry was instituted and the liability of the garnishee was tried and determined by the court that he will be precluded from agitating his liability under the attachment in a fresh suit. The plaintiff did not move the court for the issue of any notice as contemplated in Order XXI, Rule 44 (a) calling upon the garnishee to bring the property attached into court or seek any enquiry for fixing the liability on the garnishee in case he disputed it. Instead the plaintiff brought the attached right to sale. In the absence of any proceedings of the nature contemplated in Order XXI, Rule 44 (a) to (l) we do not think that the 1st defendant is debarred from contending the validity of the attachment and the court sale and from disputing his liability for the amount claimed by the Plaintiff. We are therefore clear that the appeal is groundless and must fail. In the result the appeal is dismissed with costs.

B/K.S. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 509
FULL BENCH

KOSHI C. J., GOVINDA PILLAI AND VITHAYATHIL JJ.

Pattabhirama Iyer, Petitioner v. Subbaraman and another, Counter Petitioners.

C. R. P. No. 501 of 1950, D/- 2-6-1952.

Court-fees Act (1870), S. 7 (V) and S. 7 (iv) (b), (c) — Suit for setting aside partition arrangement made in pursuance of compromise decree and fresh partition — Plaintiff not in possession — Recovery and possession of plaintiff's share asked for — Relief by way of rendition of accounts also sought — Suit held fell under S. 4 (v), Cochin Court-fees Act — Relief for rendition of account held distinct relief — (Cochin Court-fees Act (2 of 1080), S. 4 (v) and S. 4 (iv) — Travancore Court-fees Act (6 of 1087), S. 3 (v) and S. 3 (iv)).

The plaint sought to have a partition arrangement carried out under the terms of a previous compromise decree reversed and to bring into hotchpot, for the purpose of making a fresh division, the properties which under the previous arrangement went to defendants 1 to 3 & also to have a one-fourth share of those properties delivered to the plaintiff for and on behalf of his branch of the family. The plaintiff was a minor at the time of the previous decree but he was eo nomine a party thereto. The plaintiff claimed a declaration that the previous decree and all proceedings pursuant thereto were invalid, or in other words that they should all be set aside, that defendants 1 to 3 should be made to account for all profits received by them since the prior partition arrangement came into being, that a fresh partition should be effected and the one-fourth share due to his branch should be delivered to him and that pending the decision of the suit defendants 1 to 3 should be restrained by an injunction from alienating the plaint properties, that is the properties they obtained under the previous partition arrangement.

Held that though the amount of court-fee payable on a plaint has to be determined with reference to the allegations in the plaint as to the cause of action and reliefs the court has the right and duty to look into the substance of the plaint and the true scope of the suit. (Para 6)

The substantial relief claimed in the suit was the recovery of possession of a one-fourth share of the joint family properties alleged to be due to the plaintiff's branch. Possession was not asked for on any other ground than that the previous compromise decree, pursuant to which the plaintiff's branch lost its share, should be declared invalid; it was, therefore, asked for consequently on the grant of declaration. The suit was primarily one for partition and possession of the share and the declaration sought was only ancillary to the prayer for partition and recovery of possession. In this view of the matter the suit really fell under S. 4 (v), Cochin Court-fees Act (corresponding to S. 7 (v), Court-fees Act). (Para 8)

When ad valorem court fee was paid on the value of the plaintiff's share on the basis that the suit was in substance to recover that share no further court-fee was leviable for setting aside the decree and the execution proceedings or for partition or even for the injunction asked for in the plaint. The relief by way of rendition of accounts, or for recovery of the plaintiff's share of the profits, as the case may be, constituted a distinct relief for which separate court fee had to be levied. Case law reviewed. (Para 19)

Anno: Court-fees Act, S. 7 (v) N. 7, 9; S. 7 (iv) (b) N. 7.

T. S. Venkiteswara Iyer, for Petitioner; A. S. Krishna Iyer, for Counter-Petitioner.

REFERENCES: Courtwar/Chronological/ Paras

('82) 8 Cal 757: (11 Cal LR 95) 13
('10) 5 Ind Cas 582 (Cal) 15
('25) AIR 1925 Cal 320: (52 Cal 128) 13
('30) AIR 1930 Cal 686: (58 Cal 281) 7
('32) AIR 1932 Cal 227: (59 Cal 315) 13
('04) 27 Mad 480 9, 10, 16
('14) 25 Ind Cas 375 (1): (AIR 1915 Mad 386 (2)) 7

('15) 38 Mad 1184: (AIR 1915 Mad 550) 7, 10
('32) AIR 1932 Mad 605: (56 Mad 212) 10
('35) AIR 1935 Mad 346: (156 Ind Cas 840) 11
('35) AIR 1935 Mad 569: (58 Mad 1051) 11, 16
('36) AIR 1936 Mad 411: (161 Ind Cas 679) 12
('37) AIR 1937 Mad 529: (ILR (1937) Mad 672) 12
('41) AIR 1941 Sind 154: (ILR (1941) Kar 102) 15
17 Cochin LR 389 3
29 Cochin LR 453 3
('07) 4 Select Decisions 400 (FB) (Cochin) 10, 16
('25) 40 Trav LR 205 18
('26) 42 Trav LR 473 (FB) 18
('49) 1949 Trav CLR 225 (FB) 6, 13

KOSHI C. J.: This revision petition relates to a question of valuation and court-fee. The learned Additional District Judge of Anjikaimal before whom the suit came up for trial heard the issue raised with reference to the question as a preliminary issue & recorded his decision in plaintiff's favour. Defendant 1, at whose instance the issue was dealt with as a preliminary one, feeling dissatisfied with the trial court's finding moved this court in revision. The learned Single Judge before whom the matter came up for disposal referred the petition for decision by a Full Bench. An important question affecting court-fee was considered to be involved in it. The two plaintiffs in the suit are made counter-petitioners here. Though the trial court's decision as to court-fee is in their favour and though the decision of the question in a different way will not affect the jurisdiction of the District Court to try the suit no point was raised before us on their behalf as to the propriety of this court interfering with the order in revision. It was, however, strenuously argued on their side that the order is right on the merits.

(2) Originally there was only one plaintiff & hereafter he will be referred to as the plaintiff. He is a Hindu governed by the Mitakshara law. The plaint sought to have a partition arrangement carried out under the terms of a previous compromise decree reversed and to bring into hotchpot, for the purpose of making a fresh division, the properties which under the previous arrangement went to defendants 1 to 3 and also to have a one-fourth share of those properties delivered to the plaintiff for and on behalf of his branch of the family. The plaintiff was a minor at the time of the previous decree but he was eo nomine a party thereto. His father who is defendant 4 in this suit represented him as guardian 'ad litem.' Under the terms of the compromise decree the plaintiff's branch received Rs. 15,000/- in lieu of its share in the joint family properties and all movable and immovable properties of the joint family went to defendants 1 to 3. The plaintiff claims a declaration that the previous decree and all proceedings pursuant thereto are invalid, or in other words that they should all be set aside, that defendants 1 to 3 should be made to account for all profits received by them since the prior partition arrangement came into being, that a fresh partition should be effected and the one-fourth share due to his branch should be delivered to him and that pending the decision of the suit defendants 1 to 3 should be restrained by an injunction from alienating the plaint properties, that is the properties they obtained under the previous partition arrangement. The relief for setting aside the decree is valued in the plaint at Rs. 100/- the relief for rendition of accounts at Rs. 200/- the relief for partition at Rs. 2000/- and the relief by way of injunction at Rs. 50/- & court-fee of Rs. 7-8-0, Rs. 15/- Rs. 10 & Rs. 3-12-0 are paid respectively thereon. That is 'ad valorem' court-fee has been paid on all reliefs except that as to partition; in respect thereof the fixed fee of Rs. 10/- under Article 7 (v) of Schedule 2 of the Cochin Court Fees Act II of 1080 has been paid.

(3) The plea that defendant 1 raised before the lower court as to valuation and court fee was that as the plaintiff was 'eo nomine' a party to the prior decree, to have the same set aside, he should have valued the plaint and paid court-fee on the value of the decree. An alternative contention raised was that as possession of a one-fourth share was asked for the plaint should at least have been valued at and court fee paid, on the value of that share. By the time the question came to be argued before the lower court an additional plaintiff was also impleaded and between the two plaintiffs several answers to the contentions of defendant 1 were given. It is unnecessary for our purpose to recount them here; suffice it to say that the learned Judge in the court below treated the plaint as one in a suit to obtain a declaratory decree, where consequential relief is prayed for. According to him the suit therefore, fell under Section 4 (iv) (c) of the Cochin Court Fees Act and he held that in such suits it was for the plaintiff to state the amount at which he values the reliefs sought and that the court could not revise such valuation. The learned Judge purports to follow the decisions in — 'Lakshmikutty Amma v. Dharmaraja Bhagavathar', 17 Cochin LR 389 and — 'Krishnan Elayath v. Vareed', 29 Cochin L R 453. The concluding words of the learned Judge's order read thus:

> "In the instant suit, plaintiff has valued his consequential reliefs and paid 'ad valorem' court-fee on the valuation he has chosen to put upon them, except on the relief for partition which has to bear a court-fee of Rs. 10/- only under law.
>
> In these circumstances, I hold that the suit has been properly valued and that adequate court-fee has been paid on such valuation. The issue is answered in favour of the plaintiff".

In his revision application what defendant 1 has done is to reiterate the alternative contention he raised before the lower court that valuation and court-fee should follow the value of the plaintiff's share of the joint family properties but before the learned Single Judge the dispute would seem to have centred round the question whether in suits falling under S. 4 (iv) of the Cochin Court Fees Act (corresponding to Section 3 (iv) of the Travancore-Cochin Court Fees Act, 1125 and S. 7 (iv) of the Indian Court Fees Act, VII of 1870) the court could revise the valuation given in the plaint.

Section 4 (iv) of the Cochin Court Fees Act enacted that the amount of fee payable in suits falling under that provision shall be computed according to the amount at which the relief sought is valued in the plaint and that in all such suits, the plaintiff shall state the amount at which he values the relief sought. Identical provisions obtain in section 3 (4) of the Travancore-Cochin Court Fees Act and in Section 7 (iv) of the Indian Court Fees Act. The question of the court's power to revise the

plaintiffs' valuation in such suits has been a matter of sharp controversy in several of the Indian High Courts and it is on account of that conflict the learned Single Judge referred the petition to a Full Bench. Outstanding judicial pronouncements for the opposing views are mentioned in the order of reference.

(4) When the matter first came up before this Bench it occurred to us that on a true construction of the plaint it was not possible to treat the suit as one falling under Section 4 (iv) (c) of the Cochin Court Fees Act as the lower court construed it, and whether the applicatory provision was not Section 4 (v). Counsel engaged in the case were not prepared to meet that situation and at their request the hearing was adjourned. When arguments were resumed on the next day the petitioner's counsel contended that the suit really fell under section 4 (v) while counsel for the counter-petitioners argued contra. The plaintiff and the additional plaintiff had retained different counsel and they strenuously contended that the lower court's decision was right. The learned Government pleader to whom notice was given about the revision petition supported the petitioner's contention.

(5) We have after mature deliberation come to the conclusion that the suit really falls under Section 4 (v) of the Cochin Court Fees Act and that the plaintiffs should pay 'ad valorem' court-fee on the value of the share sought to be recovered on partition. The petition itself has been referred for decision by a Full Bench and there cannot, therefore, be any objection to our proceeding to decide it. Before we proceed to state our reasons therefor we shall first refer to a certain averment in the plaint and then to certain matters arising out of the lower court's order.

(6) In one of the paragraphs in the plaint, namely paragraph 11, the plaintiff has chosen to state that the properties sought to be partitioned are in the joint possession of himself & the defendants. This, however, is thoroughly inconsistent with the averments contained in the earlier paragraphs and the entire burden of the plaint, nay even inconceivable on the facts disclosed by it and the general scheme of the suit. The compromise decree sought to be annulled is stated to be in derogation of the rights vouchsafed to each and every branch of the family as per a registered karar of 1107 and the arrangement to give the plaintiff's branch Rs. 15,000/- in lieu of its share and to defendants 1 to 3 all the movable and immovable properties is attacked as fraudulent. After stating that under that partition arrangement defendants 1 to 3 took all the movable and immovable properties of the family it is unthinkable that the plaintiff or his branch could have any manner of possession, actual or constructive, over them. Though the amount of court-fee payable on a plaint has to be determined with reference to the allegations in the plaint as to the cause of action and reliefs the court has the right and duty to look into the substance of the plaint and the true scope of the suit. The decision of this court in — 'Apparahan v. Rappal Kutty', 1949 Trav C L R 225 (FB) is clear authority for this position and in view of the large number of cases relied upon there we do not desire to encumber this judgment with further authorities on the point. We have, therefore, to ignore paragraph and decide the question of court-fee on the facts disclosed by the plaint read as a whole. We venture to observe that paragraph 11 was inserted without any bona-fides and with a view to evade payment of proper court-fee.

(6a) Now to turn to the lower court's order, the two Cochin cases which the learned Judge purported to follow related to cases where parties to certain prior decrees sought to have those decrees declared invalid and not binding on them or to set aside those decrees. In either of the two cases no question of partition or recovery of property was involved. Obviously those cases cannot, therefore, govern the present case where the plaintiff seeks recovery of the share of the family properties due to his branch out of the possession of the other members of the family to whom under a prior partition arrangement the family properties were allotted. The sequel will explain that if the relief prayed for consequential upon the declaration be the recovery of any of the matters mentioned in paragraphs other than paragraph 4 of Section 4 the mode of valuation to be adopted is that prescribed in those paragraphs and that in such cases the plaintiff must value the relief sought accordingly. When possession of immovable property is asked for the valuation and court-fee should be as in an ordinary suit for recovery of possession even though the recovery happens to be consequential upon a declaration claimed in the plaint.

(7) Another point to be mentioned about the lower court's order is that its view that in suits falling under section 4 (iv) the different reliefs claimed could be separately valued is wrong. In a suit falling under the said provision the plaintiff has the right and duty to put down one single entire sum as representing the value of the total reliefs sought by him in the suit. See — 'Krishna Mallar v. Secretary of State', 25 Ind Cas 375 (Mad); — 'Rajagopala v. Vijayaraghavalu', 38 Mad 1184 and 'In the matter of Kalipada Mukharjee', AIR 1930 Cal 686. The plaintiff valued the several reliefs he claims differently and the lower court has without demur accepted the mode of valuation as the proper mode to be adopted under sec. 4 (iv). Though we hold that the suit does not fall under that provision we think it proper here to point out the lower court's error.

(8) We shall now proceed to state the reasons for our decision that the suit really falls under section 4 (v) of the Cochin Court Fees Act. The substantial relief claimed in the suit is the recovery of possession of a one-fourth share of the joint family properties alleged to be due to the plaintiff's branch. Possession is not asked for on any other ground than that the previous compromise decree, pursuant to which the plaintiff's branch lost its share, should be declared invalid; it is therefore asked for consequently on the grant of declaration. The suit is primarily one for partition and possession of the share and the declaration sought is only ancillary to the prayer for partition and recovery of possession.

(9) In — 'Chinnammal v. Madarsa Rowther', 27 Mad 480 the question arose for decision whether in suits falling under section 7 (iv) (C) of the Indian Court Fees Act the plaintiff's valuation could be revised by the court. After answering the question in the negative the learned Judges Boddam and Bhashyam Ayyangar JJ. went on to observe as follows:

"If the relief prayed for consequential upon the declaration be the recovery of any of the matters mentioned in paragraphs I, II, III, V, VI, VII, VIII, IX, X & XI of Sec. 7, the mode of valuing the relief is regulated by the legislature itself in those paragraphs and in such cases the plaintiff must value the relief sought accordingly."

Section 7 (v) of the Indian Court Fees Act (corresponding to section 4 (v) of the Cochin Court Fees Act and section 3 (5) of the Travancore Cochin Court Fees Act) contains the provision as to valuation and court-fee in suits to recover possession of land, house or garden. The rule is that the amount of fee payable is according to the value of the subject matter and under the Cochin Act the mode of valuation of the subject matter in case of land or garden is 15 times the annual rent of such land or garden. The Indian Court Fees Act and the Travancore-Cochin Court Fees Act have each a different mode of valuation of the subject matter than that obtaining in the Cochin Act.

(10) So long as 1907 in — 'Narayana Row v. Suba Row', 4 Select Decisions 400—a Full Bench of the Chief Court of Cochin took identically the same view as to the applicatory provision of the Court Fees Act with reference to a suit where possession was asked for consequential upon a declaration that an execution sale was invalid as that the Madras High Court indicated in — 'Chinnammal v. Madarsa Rowther', 27 Mad 480. There the plaintiffs, who were defendants to the decree in execution of which the sale took place, brought the suit to set aside the sale on the ground of fraud and for recovery of possession of the property which the purchasers (decree-holders) got possession on the strength of the sale certificate in their favour. The decision points out that as the plaintiffs were defendants to the former suit they could not get possession of the property until the sale was set aside and that a suit for setting aside a sale is itself in such cases a suit for a declaratory decree in which consequential relief is prayed for, falling under cl. (c) of sub-section (iv) of Section 4 of the Court Fees Act (II of 1080). Kochunni Menon J. who delivered the leading judgment in the case further observed:

"The claim for possession is a further relief in the case. I am inclined to think that in such cases the recovery of possession must be regarded as the main relief in the case and the setting aside of the sale as merely auxiliary to that relief. If that is so the court-fee payable is on the value of the property as laid down by clause 5 of section 4 of the Court Fees Act.

It is not denied by the respondent's pleader that the suit may also fall under clause (c) of sub-section 4 of Section 4, but he contends that the consequential reliefs contemplated in that clause are those not otherwise provided for by the Court Fees Act. This contention does not appear to me unreasonable and is supported by one of the commentators of the Court Fees Act. (See page 47. Jaganatha Iyer's Commentaries on the Act.)"

In two decisions reported in — 'Rajagopala v. Vijayaraghavalu', 38 Mad 1184 the Madras High Court reiterated the view expressed in — 'Chinnammal v. Madarsa Rowther'. The first case — 'Rajagopala v. Vijayaraghvalu', is reported at page 1184 of the volume and it has already been referred to in another connection. There it was held that a suit for (1) a declaration that a certain decree was of no legal effect against the plaintiffs or the various properties in their hands and (2) possession of a portion of those properties which has been sold, in execution of the decree, is a suit for declaration with possession as a consequential relief inasmuch as possession is not asked for on any other ground than that the decree in execution of which it was lost should be declared invalid. Therefore, court-fee was held to be payable only for the relief regarding possession. The decision was given by a Division Bench — Oldfield and Tyabji JJ. The other case — 'Arunachalam Chetty v. Rangaswamy Pillai', though decided later is reported at an earlier page, p. 922 and it is a Full Bench decision. What was actually decided there was that a suit for declaration that a mortgage decree is not binding on the plaintiff and for an injunction restraining the defendant from executing the same is a suit for a declaratory decree with consequential relief within the meaning of Section 7, clause (iv) (c) of the Court-fees Act and that an 'ad valorem' fee is payable on the valuation fixed in the plaint. The opinion of the Full Bench; consisting of Sir John Wallis, Officiating Chief Justice, Mr. Justice Seshagiri Ayyar and Mr. Justice Kumaraswami Sastriyar, however, opens with the following words:

"A suit in which the plaintiff in terms prays for a declaratory decree and consequential relief 'prima facie' comes within clause 4, sub-clause (c) of Section 7 of the Court Fees Act, but if at the same time it comes within any of the other classes of suits specified in the section, it must be treated as a suit of that description and dealt with accordingly."

The reason for the view adumberated in the foregoing decisions is seen, if we may say so with respect succinctly stated by Railly and Ananthakrishna Ayyer JJ. in — 'Venkatasiva v. Venkatanarasimha', AIR 1932 Mad 605. The plaint prayed for a declaration that the decree defendant 1 obtained in a former suit is void, for setting aside that decree if necessary, and for recovery of the property covered by the decree. The plaintiff valued the suit for court-fee as if it came under clause (c) of Sec. 7 (iv) Court Fees Act. The defendants objected and said that in its nature it was a suit for the cancellation of a previous decree and that, therefore, the plaintiff should pay court-fee under Section 7 (iv) of the Act, i.e., under the sub-section introduced into the Act in 1922 by a Madras amendment. The subordinate Judge came to the conclusion that the suit was really one for possession of the property and therefore, that it came under S. 7 (v) of the Act and ordered court fee to be paid accordingly. Court fee due whether the suit came under S. 7 (v) as one for possession or under S. 7 (4-A) as one for cancellation of the previous decree was the same. In holding that the suit fell under S. 7 (v) Railly J. said:

"But it has been pointed out to us.....that in this case the plaintiff has prayed for recovery of possession and, that being so, quite apart from all other discussion, his suit comes under S. 7 (v) as the subordinate Judge has found. In — 'Chinnammal v. Madarsa Rowther', it was said by Boddam and Bhashyam Ayyangar JJ. that if in a suit for a declaration and consequential relief the

relief prayed for came within other provisions of the Court Fees Act then S. 7 (iv) (c) for instance within S. 7 (v), then the mode of valuing the relief was regulated by the legislature itself in those provisions.

".....That remark was made obiter. But in — 'Rajagopala v. Vijayaraghavalu', we have a case very similar to the present one. There the plaintiffs sued for a declaration that a certain decree had no legal effect against them and for possession of some property which had been sold in execution of that decree. Oldfield and Tyabji JJ. pointed out that the District Judge in that case was clearly mistaken in his statement that Sec. 7 (iv) (c) regulated the valuation of the whole suit, since part of the relief claimed related to possession, which had to be dealt with in accordance with S. 7 (v) notwithstanding that a declaration also was asked for, and they referred in — 'Chinnammal v. Madarsa Rowther', as an authority for that view. Then in — 'Arunachalam Chetty v. Rangaswami', the question of the court-fee to be paid on a declaratory suit came before a Full Bench, and the very first sentence of the opinion of the Full Bench is:

"A suit in which the plaintiff in terms prays for a declaratory decree and consequential relief prima facie comes within clause 4, sub-clause (c) Section 7 Court-fees Act, but if at the same time it comes within any of the other classes of suits specified in the section it must be treated as a suit of that description and dealt with accordingly."

That is a very important statement set out at the very opening of the opinion of the Full Bench. Mr. Somasundaram very properly admits that if a suit is really and in essence a suit for possession, the plaintiff cannot avoid praying court-fee as for possession merely by praying for some unnecessary or entirely incidental declaration in his plaint. But he contends that the principle set out by the Full Bench, which I have quoted, is not now applicable. Apart from the authority of the Full Bench in that case which I have quoted, it seems to me clear that in such an Act as the Court-fees Act, if there is a special provision which applies to a particular case, then that special provision must be applied by us rather than some general classification, in which the suit may also be included, which may be more favourable to the plaintiff."

Ananthakrishna Ayyar, J. expressed himself on this question thus:

".....Even where the suit was one for a declaratory decree and also for possession, it has been held by this Court that suits for possession having been specifically provided for by Section 7 (v) the suit has to be valued accordingly and court-fee paid under the provisions of that subsection. This question has been discussed in — 'Chinnammal v. Madarsa Rowther' and — 'Rajagopala v. Vijayaraghavalu', and is practically concluded by para 1 of the opinion given by the Full Bench in — 'Arunachalam Chetty v. Rangaswami Pillai'."

(11) In — 'Maroof Sahib v. Ayyakannu Naicker', AIR 1935 Mad 569 Venkatasubba Rao J. enumerated the same rule with reference to a suit where relief by way of declaration was followed by one for possession. The reason of the thing is pithily put by the same learned Judge in another decision reported in the same volume, — 'Ramakrishnayya v. Peda Seshamma', AIR 1935 Mad 346 as follows:

".....General words do not derogate from special; conversely, a special law derogates from a general law. There being a special provision relating to suits for possession, the general provision contained in S. 7 (iv)(c) is excluded."

The learned Judge then proceeded to refer to the earlier Madras cases mentioned above.

(12) Varadachariar J. as he then was took the same view on this question in the case reported as — 'Sellammal v. Jothimani Nadar', AIR 1936 Mad 411. There the plaintiffs sought recovery of their share of certain joint family properties after a declaration that the alienations effected by their fathers in respect thereof in favour of their stepmother were all sham. The learned Judge said:

"I am unable to agree with the lower court that the case falls under sub-clause (c) of Clause 4 S. 7. The reference to consequential relief in that sub-clause must be read along with other clauses providing for particular reliefs which in a sense are also consequential reliefs. Where the relief asked for is by way of possession, the suit will prima facie fall under Cl. 5 and not under clause 4 (c) and it can make no difference for this purpose that a prayer for a declaration is also included in the suit."

In — 'Amina Bibi v. Kadir Batcha Rowther', AIR 1937 Mad 529 a Division Bench (Mockett and Horwill JJ.) expressed the same view on the question on hand. Some of the cases referred to above as also some cases which take a different view are all reviewed there. We consider it unnecessary to refer to further decisions of the Madras High Court concerning this point.

(13) The Madras and the Cochin High Courts are not the only courts which have taken the view set forth above. In — In re Nanda Lal Mukherjee', AIR 1932 Cal. 227, Rankin C. J. had occasion to consider as to what court-fee has to be paid on a suit for partition when the plaintiff was out of possession. It was pointed out that he had to bring a suit to recover possession and for partition of his share, but that the court does not require him to bring two suits. As to court-fee it was said that as his suit was one to recover possession he has to pay court fee on the market value of his share. The following quotation from that decision would seem to be apposite here:

"Now, if this were a case in which the plaintiff was according to his own showing out of possession, I do not suppose that it would be right to allow him to appeal merely upon the question of partition. A person is not entitled to partition unless and until he is in possession of his share. But, if he is out of possession of his share, the court does not require him to bring two suits. He can bring a suit in which he may claim to recover possession of his share and he may also claim to have that share partitioned by the same decree. If it appears that he is out of possession according to his own showing, then he has to bring a suit to get possession of his share; and it is perfectly true that in that case he would have to pay court-fee on the market value of that share. It is not

a question of declaration or declaration with consequential relief. He would have to pay court-fee as in a suit for possession. That I take to be the meaning of what was said by Garth C. J. in the case of — 'Kirty Churn Mitter v. Aunath Nath Deb', 8 Cal 757 and also by Chakravarti J. in — 'Rajani Kanta Bag. v. Rajabala Desi', AIR 1925 Cal 320."

The decision in — In re Nanda Lal', and the two cases referred to the above extract were among others followed in the Full Bench decision of this court reported in — 'Apparahan v. Rappal Kutty', 1949 Trav-C L R 225 (F.B.), referred to elsewhere in this judgment in another connection. The above quotation from— In re Nanda Lal is also made there. That was also a suit for partition and among the items sought to be partitioned one item had already been sold away in execution of a mortgage decree to which the plaintiff, then a minor, was eo nomine a party. The usual fee for partition viz., Rs. 10/- alone was paid on the plaint and the question of the inadequacy of the court fee raised before the trial court was repelled by that Court. This court, however, reversed that decision with respect to the item sold in execution of the prior decree and of which the purchaser had taken possession. Like the present plaint the plaint in that suit also contained a prayer that the previous decree and the execution proceedings and court sale etc. should be held to be invalid and not binding on the plaintiff or his share. The only question raised there was whether with respect to that one item the plaintiff should not pay ad valorem court fee on the market value of his share or whether the fixed fee of Rs. 10/- paid under article 7 (v) of schedule II Court Fees Act will suffice with reference to that item also. The Full Bench took the view that regard being had to the prior decree to which the plaintiff was eo nomine a party he had to displace the title of the defendant before he could seek partition and that as the suit involved the establishment of title to that item and recovery of possession of a share therein, the plaintiff must pay ad valorem court fee upon the value of that share. The question whether section 4(iv)(c) or Section 4(v) applied was not drawn into controversy there, but so far as the property affected by the prior decree the relief claimed was substantially the same as that claimed in this suit against the present plaint schedule properties. Consistently with the view the Full Bench took in that case it has to be held that the present plaint also should bear a court fee calculated on the market value of the share the plaintiff seeks to recover possession of in the suit. In view of the nature of the controversy raised there the line of reasoning adopted in the earlier part of this judgment or the authorities which set out that reasoning had not to be referred to in the Full Bench decision now referred to, but a fairly exhaustive review of the case law bearing on the controversy raised there is contained in the judgment in that case. We consider it unnecessary to traverse the same ground again here though the cases referred to there are really helpful to understand the exact scope of the present suit as well. Here also the plaintiff seeks the displacement of the title of the defendants and establishment of his own.

(14) On the authority of the decisions referred to earlier and the reasoning contained in them, with which we respectfully agree we hold that the present suit falls under Section 4 (v) of the Cochin Court Fees Act and that court-fee has to be paid accordingly.

(15) However, before concluding it is only proper that we refer to a few decisions which take a view different from ours as to the applicatory provision of the Court Fees Act with reference to suits of the present nature. In — 'Hara Gowri Saha v. Dukhi Saha', 5 Ind Cas 582 (Cal), the suit was for partition after setting aside a partition arrangement effected under the terms of a previous decree. The learned Judges in that case held that the suit was for a declaratory decree and for consequential reliefs and that an ad valorem court fee was payable on the plaint under section 7 clause (iv) (c) of the Indian Court Fees Act. This case was followed in — 'Mt. Fazilat Khatun v. Rahimbux', AIR 1941 Sind 154. The anomaly that would result from adopting the view laid down in those cases is well brought out in two of the cases already referred to.

(16) In — 'Narayana Rao v. Subah Row', 4 Select Decisions 400 (FB) the following passage occurs in the judgment:

"If this suit can be held as falling under subsection 4 simply on the ground that there is a declaration of right and also a relief asked for on the basis of that declaration, almost every suit for recovery of property can be brought under that clause."

In — 'Maroof Sahib v. Ayyakkannu Naicker', AIR 1935 Mad 569 after citing with approval the view expressed in — 'Chinnammal v. Madarsa Rowther', 27 Mad 480 Venkatasubba Rao J. said;

"A little reflection will show that if the opposite view should prevail, most anomalous consequences would follow. Supposing before action a person's right to a sum of money claimed by him is denied, in such a case the plaintiff, contending that the declaration is not an idle relief may so frame his plaint as to contain prayers both for declaration and recovery of money. In effect, whenever there is a previous denial of the plaintiff's right to the money, he may contrive to file his suit in that form; it seems unreasonable that because there is a prayer for declaration, the suit is not to be valued as for money but under Section 7 (iv) (c). Similarly, in every suit for possession of land, on the ground that the plaintiff's title had been previously denied, he may frame his plaint as one for declaration and recovery of possession; to hold likewise that such a suit is to be valued not as one for possession but under Section 7 (iv) (c) seems opposed to the scheme of the Act. These examples will serve to show that it is both good practice and good sense that as observed by Boddam and Bhashyam Ayyangar JJ. in the passage quoted above, the relief claimed consequent on the declaration should be valued under the paragraph dealing with that particular relief and not under S. 7 (iv) (c)."

Further comments to show that the opposite view does not commend itself to us would appear to us to be superfluous.

(17) Mention may here be made that for obvious reasons Travancore case law cannot throw much useful light on the question involved here. In the first place under the Travancore Court Fees Act VI of 1067, in suits to obtain a declaratory decree, whether or not

consequential relief is prayed for the amount of fee payable on the plaint is according to the market value of the subject matter. Vide Section 4 (v) (d).

(18) Secondly under the Travancore decisions in a suit for partition court-fee was leviable on the value of the plaintiff's share of the common properties that is as in a suit for recovery of land. See — 'Ittooly Amma v. Kesavan', 42 Trav L R 473 (F.B.). The same view obtained in Bombay until recently in 1947 when a Full Bench of the Bombay High Court held that for purpose of court-fee article 17 (vi) of Schedule II governed partition suits. The decision in — 'Ittooly Amma v. Kesavan', followed — 'Chellamuthu v. Devanayagom', 40 Trav LR 205. In that case some of the family properties had been alienated by the father and the plaintiff, one of the sons, brought a suit for partition of his share together with various declarations such as that he was entitled to an one-fifth share of the suit properties, that the alienations effected by the father were invalid and not binding on him or the family etc. The Munsiff held that the several reliefs claimed in the suit should all be separately valued and that when so valued he will have no jurisdiction to try the suit. On appeal while the two learned Judges of the Division Bench agreed that the Munsiff's view was wrong and that the appeal should be allowed they reached that result by different modes of approach. Varughese J. thought that the suit fell under Section 4 (v) (d) of the Travancore Court Fees Act i.e., a suit for a declaration with consequential reliefs while Sankara Pillai J. was of opinion that the case fell under section 4 (v) (c). The latter stated that having regard to the main reliefs set out in the plaint the suit was essentially one for partition and recovery of possession of the plaintiff's share. As such according to him the suit fell under clause (c) of sub-section (v) of Section 4 i.e. a suit for recovery of land. It was further pointed out that no separate fee need be paid in respect of the several declarations prayed for as those declarations were merely ancillary to the main relief of partition and recovery of the share. It is the view of Sankara Pillai J. that we see followed in — 'Ittooly Amma v. Kesavan'. No reference was made at the Bar to these cases. Notwithstanding the difference noticed in the provisions of the Travancore Court Fees Act and the different views taken there as to court fee payable in an ordinary suit for partition, these cases in a way support the view we have taken here.

(19) In the argument before us no reference was made to the relief as to accounting or as to the court-fee paid with respect thereto. It is for the trial court to decide whether in the light of the facts disclosed by the plaint and the view we have taken of the nature and scope of the suit Defendants 1 to 3 could really be called upon to render accounts of their management of the properties after the date of the prior partition arrangement. If they continued to be 'accounting parties' the court fee paid on the plaintiff's valuation with respect to that relief will no doubt be sufficient, but if such a liability did not survive the previous partition arrangement the plaintiff cannot recover any share of the profits unless the amount claimed is specified and ad valorem court fee is paid thereon. These observations are made lest it should be misunderstood that our decision covers all the reliefs claimed in the suit. When ad valorem court fee is paid on the value of the plaintiff's share on the basis that the suit is in substance to recover that share no further court-fee is leviable for setting aside the decree and the execution proceedings or for partition or even for the injunction asked for in the plaint. The relief by way of rendition of accounts, or for recovery of the plaintiff's share of the profits, as the case may be, constitutes a distinct relief for which separate court fee has to be levied.

(20) In the result, we allow this revision petition and set aside the lower court's order on issue No. 10 tried preliminarily. The plaintiffs will have one month from the date the lower court receives the records from here to ask for necessary amendments to the plaint and for payment of the deficit court fee. The court fee paid for all reliefs except that for rendition of accounts will of course be given credit for in fixing the amount in deficit. Plaintiffs 1 and 2 will pay defendant 1 the costs of this revision and bear their own.

(21) Order accordingly.

A/R.G.D. Revision allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 515

KOSHI C. J. AND GANGADHARA MENON J.

Lekshmi Ammal Bhagawathy Amma, Appellant v. Kuttalam Pillai Subbaian Pillai and others, Respondents.

A. S. No. 388 of 1123, D/- 28-3-1952.

Trusts Act (1882), S. 90 — Part owner of mortgagee rights recovering full amount of mortgage-money — Principle of S. 90 applies.

An assignee of mortgagee rights for Rs. 1,400 executed a gift deed in favour of the plaintiff, her daughter to the extent of Rs. 1000 keeping to herself the remaining interest over the mortgage. She then executed hypothecation bonds for Rs. 1,400 in favour of the defendant. After losing the property to one who had a superior title, the defendant brought a suit against the mortgagor and recovered the full amount of mortgage-money. At the time of this suit he was aware that his hypothecation was subject to the rights of the plaintiff. In a suit brought by the plaintiff to recover her Rs. 1000 under the gift:

Held that the plaintiff had every equity in her favour, that the principle of S. 90, Trusts Act, applied and that as the defendant had been enriched at the expense of the plaintiff he should make restitution to the plaintiff. AIR 1919 Mad 957, Dist. (Paras 4, 5)

Anno: Trusts Act, S. 90 N. 3.

C. I. Parameswaran Pillai, for Appellant; T. N. Subramonia Iyer, Advocate General (for No. 1) and V. V. Subramonia Iyer and P. Seshadiri Iyer (for Nos. 2 to 4), for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('18) 41 Mad 923: (AIR 1919 Mad 957) 4

11 Trav LT 1183 1, 3, 6

KOSHI C. J.: This is a plaintiff's appeal. The circumstances that lead to the suit are set out clearly in paragraph 1 of the lower Court's judgment as follows: "The plaint property originally belonged to one Ramaswami Pillai. On his death his widow and his step-mother sold the properties to one Nagappa Pillai.

Nagappa Pillai in his turn sold the property to one Subramonia Pillai. Subramonia Pillai mortgaged the property to one Naganatha Iyer under Ext. II for Rs. 1,000. Naganatha Iyer redeemed a prior mortgage and got possession under Ext. III release. Subramonia Pillai then executed a superior mortgage for Rs. 1,400 in favour of one Lekshmi Ammal, the mother of the plaintiff and she redeemed Naganatha Iyer under Ext. IV release. Lekshmi Ammal assigned her rights in favour of her mother the 5th defendant on 10-7-1082. The 5th defendant executed Exhibit A gift deed in favour of the plaintiff on 29-5-1083 to the extent of Rs. 1,000 keeping to herself the remaining interest over the mortgage. While so without disclosing the gift of 1083 the 5th defendant executed Ext. I hypothecation bond for Rs. 500 and again on 8-10-1086 another bond for Rs. 900 in favour of the Ist defendant under Ext. VI with recitals to pay off Ext. I debt. The 1st defendant paid off Ext. I debt and sued on Ext. VI bond, brought the properties to sale, purchased the same in court auction and took delivery through court on 11-3-1091 under Ext. VII delivery kychit. While he was thus in possession the reversioners of Ramaswami Pillai instituted O. S. 132 of 1099 of the Nagercoil District Court to set aside the alienations of the two widows in favour of Nagappa Pillai. The suit was decreed and as a consequence on 4-12-1103 the property was recovered back to the family of Ramaswami Pillai. The 1st defendant, therefore, sued the legal representatives of Subramonia Pillai for mortgage-money and obtained Ext. VIII decree. The defendants in that suit appealed and the appellate judgment is reported in — '11 Trav LT at p. 1183'. The plaintiff seeks to recover her Rs. 1000 under the gift in this suit from defendants 1 to 4. This is the brief history of the case". Defendants 2 to 4 were impleaded as the legal heirs of Subramonia Pillai the mortgagor. Defendants 3, 4 and 5 died in the course of the suit. Defendant 4 had left no legal heir and the 5th defendant's legal representative is the plaintiff herself. The suit was contested by defendants 1, 2 and 3. On the death of defendant 3, defendants 6 and 7, both minors, were brought on record as legal representatives.

(2) The lower Court found that the gift in favour of the plaintiff never took effect and the plaintiff was accordingly nonsuited. The defendants made an attempt to make out that the donee under the gift deed had died and that the plaintiff was an impostor i.e., another daughter of Lekshmi Ammal. That was found against. Before us no attempt was made to sustain the lower Court's finding that the gift had not taken effect. In fact the learned counsel for defendant 1 very fairly conceded that the appeal may be disposed of on the footing that the gift was a true and valid document. According to him notwithstanding that fact the plaintiff had no cause of action against defendant 1.

(3) We are afraid in the circumstances of the case that defence cannot be sustained. When at the instance of the reversionaries of Ramaswami Pillai, the alienation by his widow and step-mother was set aside, the right to call for the mortgage-money from Subramania Pillai or his estate was a right which arose in favour of the true owners of the mortgage created by him over the property he purchased from the limited owners. Antecedent to the hypothecation in favour of defendant 1, defendant 5 had made a gift of her interest in it to the plaintiff to the extent of Rs. 1,000 reserving to herself the remaining rights namely, the balance mortgage-money of Rs. 400/-, and the right to remain in possession and enjoy the usufruct until her death. The gift deed expressly limited her powers of disposition to those interests. If not at the time of the hypothecation in his favour, at least when he brought the suit O. S. 1306 of 1098, defendant 1 was aware that his hypothecation was subject to the rights of the plaintiff. In fact he had launched a criminal prosecution against defendant 5 and others for cheating in that in executing the hypothecation in his favour the prior encumbrances were wilfully suppressed from him. The civil suit for the hypothecation amount was brought after that. The decree passed in the suit or the sale held pursuant thereto did not confer on him any right other than what defendant 5 possessed at the time of the hypothecation in his favour. After the reversionaries dispossessed him, he brought O. S. 1658 of 1104 against the legal heirs of Subramonia Pillai for the whole mortgage money of Rs. 1,400. In that suit the plaintiff tried to intervene, but that attempt was unsuccessful owing to defendant 1's opposition. In due course a decree was passed in his favour and the High Court confirmed that decree in A. S. 443 of 1108. Vide — '11 Trav LT 1183'. A document produced in this Court by the plaintiff-appellant's learned counsel and marked as Ext. B shows that defendant 1 has realised the decretal amounts from Subramonia Pillai's estate. The question is, whether in all the circumstances of the case, the plaintiff can be said to have a cause of action against defendant 1.

(4) The plaintiff has every equity in her favour. When defendant 1 instituted the suit against Subramonia Pillai's heirs for mortgage-money, he was only a part-owner thereof and he knew that fact very well. There was no scope for any 'bona fide' belief for defendant 1 that he was entitled to the entire mortgage-money. As he knew that he was not the full owner of the mortgage-money and as law did not permit a suit to be instituted for a portion thereof, he must be deemed to have received the money as representing the present plaintiff and himself. The principle of section 90 of the Trusts Act comes into play. — 'Ramasami Naidu v. Muthusami Pillai', 41 Mad 923, cited on behalf of respondent 1 and the cases brought to our notice as following that decision are clearly distinguishable. Oldfield and Sadasiva Iyer, JJ. who decided the Madras case have pointed out that that case did not admit the rule of section 90, Trusts Act being invoked. Defendant 1 in that case had on the strength of a purchase of one co-obligee's rights recovered the amounts due to the remaining co-obligees as well. To start with there was no part or co-ownership between defendant 1 there and any one of the joint creditors. Originally he was a stranger to one and all of them. Further defendant 1 in that case purported to purchase and bona fide believed that he purchased the rights of all the joint creditors. Also moneys were realised by him on that footing. The facts of the Madras case differ from the facts of the present case in these respects. Even when he brought the first suit, O. S. 1306 of 1098, defendant 1 knew the true position that he was only a part-owner of the mortgage money. That relationship as part-owner commenced with the hypothecation in his favour & the execution purchase in O. S. 1306 of

1098 did not alter or destroy it. He was in a position of trust and confidence to the other part-owner, the plaintiff.

(5) Besides no suitor can approbate and reprobate. His opposition to the plaintiff's attempt to intervene in O. S. No. 1658 of 1104, was what really necessitated the present suit. Defendant 1 has been enriched at the expense of the plaintiff under circumstances which make it just that he should make restitution to the plaintiff. It is unjust and a wrong to the plaintiff, if defendant 1 fails to do so. His liability arises from the fact of unjust retention of what really belongs to the plaintiff. Defendant 1 has caused damage to the plaintiff without just excuse. The lower Court's decree cannot, therefore, be allowed to remain.

(6) The plaintiff's claim cannot, however, be decreed as sued for. She claims Rs. 1,000 with 12 per cent interest thereon from the date of her suit, 30-11-1107. Defendant 5 was alive till 25-4-1117. Under the terms of the gift-deed she was entitled to remain in possession and enjoy the usufruct until her death. The plaintiff, therefore, really became entitled to the money only on that date. Till then defendant 5 or her alienee defendant 1 had the right to be in possession of the property or to enjoy the mortgage-money. The plaintiff-appellant can, therefore, get only a decree for the principal amount of Rs. 1,000/- with interest thereon from the date of defendant 5's death i.e., 25-4-1117. We find from the case in — '11 Trav LT 1183' that defendant 1, who was plaintiff there, was awarded interest at 9 per cent per annum from the date of the suit till decree, and thereafter at 6 per cent till date of realisation. Reversing the trial Court's decree dismissing the suit, we pass a decree in favour of the plaintiff for her share of the mortgage-money of Rs. 1,000/- with interest at 9 per cent per annum from 25-4-1117 till this date, and future interest till realisation at 6 per cent against defendant 1, and the estate of Subramonia Pillai in the hands of the legal heirs impleaded in the suit. The plaintiff will be entitled to her costs in both the Courts with future interest at 6 per cent from defendant 1.

(7) Though the estate of Subramonia Pillai in the hands of his legal heirs is also to be made liable for the plaintiff's share of the mortgage-money and interest, the plaintiff shall first seek relief against defendant 1 and proceed against Subramonia Pillai's estate only to the extent, if any, found unrealisable from defendant 1.

(8) A further fact to be mentioned is that Ext. B, the document filed here, shows that Subramonia Pillai's estate took advantage of the provisions of the Debt Relief Act and that Defendant 1 was able to realise his decree-debt only as scaled down under the provisions of the Act. His counsel said that in case we pass a decree in the suit, there must be an enquiry as to what amounts he had realised. In this twenty years old suit, we do not want the matter to be protracted further. We have given a decree in favour of the plaintiff to the full extent of her claim, but the execution Court will give credit to the defendants for the percentage of the debt scaled down in O. S. 1658 of 1104 as per the provisions of the Debt Relief Act. That is, we do not here pause to enquire whether defendant 1 realised 80 per cent. or 75 per cent. or 70 per cent. of his decree-debt. A similar percentage, as he had to forego, will be given credit for in execution of this decree.

(9) We have allowed the plaintiff the same interest as defendant 1 was allowed in his suit O. S. 1658 of 1104, and thus gone against the provisions of section 12, Debt Relief Act. This is with a view to see that in the adjustment to be made by the execution Court, the plaintiff does not suffer by a lower rate of interest being allowed to her in this decree. It is only by allowing the same interest as in O. S. 1658 of 1104, that equality will be maintained and that is equity. Decree accordingly.

B/V.S.B. Ordered accordingly.

A. I. R. 1952 TRAVANCORE-COCHIN 517

SANKARAN AND GANGADHARA MENON JJ.

Kunhikutti Amma and another, Appellants v. Narayana Menon, Respondent.

Second Appeal No. 136 of 1951, D/- 2-12-1951.

Civil P. C. (1908), O. 20 R. 12 — Mesne profits — Decree for redemption giving right to recover mesne profits — Redemption stayed — Effect on right to mesne profits — (Travancore Proclamation (6 of 1124)).

Where the right to recover mesne profits given under a decree is incidental to the main relief for redemption of the mortgaged property, as long as redemption is stayed, no right to recover mesne profits can arise because the possession can be considered only as that of mortgagees. (Para 4)

Therefore, where a decree for redemption with the right to recover mesne profits falls within the class of decrees contemplated by S. 4 (1) of the subsequently promulgated Travancore Proclamation 6 of 1124, the decree for redemption becomes stayed under sub-s. (2) and consequently the right to mesne profits which is incidental to the main relief of redemption does not arise at all. In such a case the decree-holder would be entitled under sub-s. (3) only for the recovery of rent and puravaka dues for which the mortgage is liable. (Para 4)

Anno: Civ. P. C., O. 20 R. 12 N. 5, 9.

T. K. Sankara Menon, for Appellants; P. Sridhara Menon, for Respondent.

JUDGMENT: This is a matter arising in execution. Defendants 1 and 2 are the appellants. The decree allowed defendants 1 and 2 to draw the mortgage money that had already been deposited in court, and directed the plaintiff to recover possession of the mortgaged properties with mesne profits at the rate of 140 paras of paddy and the puravaka dues stipulated in the mortgage deed. Before the properties were recovered in execution Proclamation VI of 1124 came into force. Thereafter the decree-holder applied for execution of the decree in respect of mesne profits. Objection was taken that as per the provisions of the Act the decree-holder can recover only the rent stipulated in the document. The execution court upheld the objection. The lower appellate court reversed the order and allowed the decree-holder to execute the decree for the entire mesne profits allowed.

(2) Under the mortgage deed out of the total the pattom of 140 paras of paddy per annum was allowed to be appropriated towards the interest for the mortgage money of Rs. 200/- and the balance was stipulated to be paid as Michavaram. The decree allowed the entire amount of 140 paras of paddy as mesne profits from the date of the decree till recovery of the properties.

(3) Section 4 of Proclamation VI of 1124 provides :

"(1) Notwithstanding anything contained in any other law for the time being in force.

"(a) no suit for the redemption of a mortgage with possession executed on or after the first day of Chingom 1111 shall be maintainable in OUR courts where the property comprised in the mortgage was outstanding with the mortgagee or his predecessor in interest on verumpattom immediately prior to the mortgage with possession; and

"(b) no suit for the redemption of a mortgage with possession shall be maintainable in OUR courts where the interest on the mortgage amount is less than 40 per cent of the total rent fixed in the mortgage document and where the property comprised in the mortgage consists mainly of agricultural land other than lands planted with rubber, coffee, tea or chashew.

"(2) All suits, appeals, revisions, reviews and proceedings in execution of a decree for redemption of mortgages of the nature specified in sub-section (1) of this section shall be stayed by OUR courts in so far only as they relate to the relief for redemption.

"(3) Nothing contained in this section shall preclude the mortgagor from instituting a suit for the recovery of rent and puravaka dues for which the mortgagee shall be liable."

(4) It is admitted that the present decree is of the nature specified in sub-section 1 of section 4. Therefore by virtue of the operation of sub-sections 2 and 3 of section 4, all proceedings in execution of the decree in so far as they relate to the relief for redemption are to be stayed and the mortgagor is entitled to recover only the rent and puravaka dues, i.e., the michavaram stipulated in the mortgage deed and other puravaka dues mentioned therein. It is clear from the section that what the legislature intended was that the relationship of the mortgagor and the mortgagee should continue in spite of the decree for redemption that had been passed. The right given under the decree for recovery of mesne profits was incidental to the main relief for redemption granted under the decree. Therefore as long as redemption is stayed no right to recover mesne profits can arise as the possession of the defendants can be considered only as that of mortgagees. This is abundantly clear from subsection 3 to section 4 which expressly reserves the rights of the mortgagor for the recovery of the rent and puravaka dues for which the mortgagee is liable. The plaintiff can therefore recover only the michavaram of 130 paras of paddy and the puravaka dues stipulated in the mortgage document. The defendants have no objection in the plaintiff recovering these amounts in execution.

(5) Therefore we allow this appeal with costs and in reversal of the order of the lower appellate court restore that of the Munsif.

B/M.K.S. Appeal allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 518

KOSHI AND GOVINDA PILLAI JJ.

Aiyappan Ittaman, Appellant v. Raphael Thieyyol and others, Respondents.

Second Appeal No. 327 of 1124, D/- 15-10-1951.

(a) Limitation Act (1908) S. 19 — Statement in writing expressly or impliedly saying that debt has been discharged — Statement will not amount to sufficient acknowledgment — (Travancore Limitation Act (6 of 1100) S. 19). (Para 11)

Anno: Limitation Act S. 19 N. 20 Pt. 2.

(b) Limitation Act (1908) S. 19, Explanation I — Plea of set off found against — Effect.

The Court is concerned only with the form of the acknowledgment and not with the truth of its contents. Thus, where a written statement contains an acknowledgment of liability coupled with a set off, the fact that the plea of set off is found against the defendant does not affect the question whether the statement contains sufficient acknowledgment or not. (Travancore Limitation Act (6 of 1100) S. 19, Explanation I). (Para 13)

Anno: Limitation Act S. 19 N. 45.

(c) Deed — Construction — To understand true meaning of document it has to be read as whole — Effect cannot be given to part giving go-by to another part. (Para 14)

(d) Limitation Act (1908) S. 19, Explanation I — Written statement containing denial of liability — Alternative plea that time for payment has not yet come — There is no valid acknowledgment — (Travancore Limitation Act (6 of 1100) S. 19, Explanation I).

Explanation I can cover only admissions of liability coupled with a statement that the time for payment has not yet come. (Para 14)

Where a written statement contained an acknowledgment of liability coupled with an averment that the time for payment had not then come and the statement further contained a plea of a set off or a settlement in account anterior to the date of the statement which had the effect of putting an end to the liability:

Held that the written statement contained only a denial of liability with a plea in the alternative that the time for payment had not then come and, thus, being an antithesis of what S. 19 together with Explanation I requires, could not be held to contain a valid acknowledgment. (Para 14)

Anno: Limitation Act S. 19 N. 43 and 45.

P. Narayana Pillai, for Appellant; K. K. Mathew, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('45) AIR 1945 PC 85: (1945 Mad WN 596 PC) 10
('13) 11 All LJ 601: (20 Ind Cas 10) 9
('12) 25 Mad LJ 259: (21 Ind Cas 30) 13, 16
('19) 42 Mad 637: (AIR 1919 Mad 317) 11
('38) AIR 1938 Mad 496: (179 Ind Cas 236) 12
('49) AIR 1949 Mad 401: (1948-2 Mad LJ 454) 11
('33) AIR 1933 Nag 13: (141 Ind Cas 34) 13
('24) AIR 1924 Pat 806: (78 Ind Cas 919) 11, 13
(1873) 8 Ch 407: (42 LJ Ch 488) 10
(1922) 2 AC 507: (91 LJ KB 941) 15

JUDGMENT: Plaintiff I is the appellant. The circumstances leading to the institution of the suit giving rise to this second appeal, the nature of the claim made in the plaint in the suit and the defences raised are set out as follows in paragraphs 2, 3 and 4 of the lower appellate Court's judgment:

"The suit, which gives rise to this appeal, was filed by the 1st respondent for the recovery of Rs. 190 with interest thereon amounting

to half the principal, by the sale of the plaint properties.

"The plaint property belonged to one Chirukandan who obtained it under a family partition deed, Exhibit B dated 2-10-1090. By the terms of that partition deed, Chirukandan was to pay to his sister Mani Ittooly Rs. 190 on the death of their mother Mani. Chirukandan executed Exhibit A sale deed dated 22-8-1094 for the plaint property in favour of the 1st defendant. It was for consideration of Br. Rs. 685. One item of consideration was Rs. 190 which was recited to be paid to Mani Ittooli. Mani Ittooli assigned her rights to the 1st plaintiff in this case. He filed O. S. 428 of 1103 of the Parur Munsiff's Court for the recovery of the above amount against Chirukandan and the 1st defendant in this case and the plaint properties. The 1st defendant resisted the suit and contended that neither he nor the plaint properties are liable. That suit was ultimately decreed on 29-7-1104. Plaintiff was given a personal decree against Chirukandan. The other reliefs were denied. In execution of the above decree the right of Chirukandan to realise the unpaid purchase money from the 1st defendant was purchased by the plaintiff. Plaintiff is entitled to realise Rs. 190 with interest thereon as a charge on the plaint property. He claims it as an enforcement of the vendor's lien. This right has been hypothecated to the 2nd plaintiff. Hence the suit for the reliefs already stated.

"The 1st defendant raised the following contentions. Plaintiff has not obtained any right as he claims by the court sale in O. S. 428 of 1103 and he has no cause of action either against the defendant or the plaint properties. Exhibit A never created any vendor's lien in favour of Chirukandan. Even if there is any vendor's lien, the suit is barred by limitation. There is no valid acknowledgment by the defendant. He therefore contended that the plaintiff is not entitled to any relief."

(2) The trial court found that the plaintiff 1 had become the purchaser of the rights of Chirukandan to enforce the vendor's lien arising out of the non-payment by defendant 1 of part of the consideration for the sale evidenced by Ext. A, that the plaintiff had a right to sue and that there was no limitation. The appellate court came to the opposite conclusion on all these points and hence this appeal by plaintiff 1.

(3) Two nice and interesting questions of law arise for decision in the second appeal. One is, whether when a purchaser of immovable property covenants, in consideration of the transfer of such property to him, to discharge certain liabilities of the vendor, the amount reserved for payment to the latter's creditor can be held to be 'purchase money unpaid' so that the vendor may have a charge for the money remaining unpaid to the creditor. Chirukandan sold the property to defendant 1 and as part of the consideration for the sale, the latter undertook to discharge the amounts due to Ittooli as per the terms of the partition deed. The money was payable on the death of Mani, the mother of Chirukandan and Ittooli. Mani died on 10-9-1101 and the present suit was brought only on 4-4-1115. Assuming that Chirukandan was entitled to a vendor's lien and the appellant acquired that right under the court sale in O. S. 428 of 1103, the suit would be barred unless the acknowledgment relied upon by the plaintiff can be found to be true.

(4) The second question arising in the appeal is whether Ext. C, the written statement defendant 1 filed in O. S. 403 of 1103 contains an unequivocal admission of a subsisting debt, that is subsisting at the time of the acknowledgment. The written statement was filed on 16-8-1103 long before the expiration of twelve years after Mani's death. The suit would therefore, be in time, if it be found that Ext. C embodies an acknowledgment of a subsisting jural relationship of debtor and creditor between defendant 1 and Chirukandan on the date that document was filed in Court. The lower appellate court made a sad mistake in thinking that even without the acknowledgment the suit was in time as the twelve years' rule under Article 119 of the Travancore Limitation Act VI of 1100, applied to the case and not the three years' rule under the old Act of 1062. We have seen that, while Mani died in 1101, the suit was instituted only in 1115. Hence assuming the appellant is entitled to the benefit of the vendor's lien, the question, whether his suit was brought before it, was barred by limitation must depend upon the validity or otherwise of the acknowledgment referred to.

(5) Exhibit D, an objection petition, defendant 1 filed during the course of the execution of the decree in O. S. 428 of 1103, is said to contain another acknowledgment. That however was made only on 12-12-1113 beyond twelve years of Mani's death. If Exhibit C contains a valid acknowledgment there is no need to refer to Exhibit D at all, as the suit was brought before, hardly two years had elapsed after the date of that document. On the other hand, if Ext. C does not contain a valid acknowledgment Ext. D cannot serve any useful purpose as that document came into existence after twelve years had already expired from the date Mani died.

(6) Of the two questions mentioned above as arising for decision, on the first one there is a sharp cleavage of judicial opinion between the Travancore and the Cochin High Courts. Were we able to persuade ourselves to agree with the learned Munsiff who dealt with the case in the trial court that Ext. C contains a valid acknowledgment we would have referred the case to a Full Bench to resolve the said conflict. On a careful consideration of the relevant passages in the written statement defendant 1 filed in the previous suit, we are unable to agree with the Munsiff's view, though we feel free to confess that at the first blush that view would seem to be correct. Upon a close examination of the two paragraphs in that written statement relied upon by the appellant's learned counsel and on reading the written statement as a whole, we are inclined to think that it would be a superficial view to hold that the written statement contains a clear and unequivocal admission of a subsisting liability or a jural relationship of debtor and creditor.

In view of this decision we propose to take on the question of acknowledgment, we shall for the purpose of this case assume that the appellant is entitled to claim a charge on the property Chirukandan sold to defendant 1 for the money the latter failed to pay Ittooli, pursuant to the undertaking in Ext. A. In

other words, we proceed to examine the question relating to acknowledgment on the basis that the view consistently held by the Travancore High Court, that in circumstances similar to the present, the vendor is entitled to the unpaid vendor's lien for the consideration remaining unpaid, is the correct view. It is needless to repeat, we are not deciding it but only proceeding on that assumption.

(7) The appellant's learned counsel contended, that paragraphs 3 and 6 of Ext. C, the written statement, in the former suit, contained clear and unequivocal admissions which amount to acknowledgments within the meaning of S. 19 of the Limitation Act, read with explanation I thereto. Explanation I, so far as is material, provides that for purposes of the section an acknowledgment may be sufficient though it avers that the time for payment has not yet come, or is coupled with a claim to a set off. Paragraph 3 sets out that though defendant 1 had purchased item 2 of the plaint from Chirukandan undertaking to discharge the latter's liability to Ittooli under the partition arrangement, regard being had to a suit instituted by another member of Chirukandan's family to set aside the partition as also the alienation in his favour of item 3, the liability to discharge the consideration reserved for payment cannot arise until after the final determination of that litigation in his favour and that in case the litigation went against him, he would not at all be liable for the amount..

The paragraph further adds that the decision of the first Court was in his favour but that an appeal preferred against it was pending before the District Court. If this paragraph in the written statement had stood alone, or rather, was not qualified by any subsequent statements, it cannot for a moment be doubted that it contained a proper acknowledgment which Explanation I would cover. The paragraph contains an affirmation of the covenant to pay Ittooli though it is stated that the time for payment is not yet come. We have, therefore, to see whether the subsequent averments in the written statement nullify the effect of the above acknowledgment.

(8) Paragraph 6 while admitting that defendant 1 purchased item 2 of the plaint undertaking to pay Ittooli the amount due to her from Chirukandan under the partition arrangement, proceeds to state that by a subsequent agreement between the vendor and the vendee, the amount reserved with the latter for the said purpose was set off, (or agreed to be set off) towards amounts, due to the vendee as per a decree of the High Court and that the vendor had himself undertaken to pay off Ittooli. There was some controversy at the Bar whether this paragraph only referred to an agreement to set off at a future date or whether it spoke of a set off already effected.

Mr. P. Narayana Pillai, the learned Counsel for the appellant, argued that what the defendant claimed under that paragraph was a right to set off pursuant to a prior agreement and not an adjustment or set off already effected. There is no gainsaying that if Mr. Narayana Pillai's argument is sound the acknowledgment is covered by the Explanation referred to as one, coupled with a claim to a set off. Reading that paragraph as a whole and giving (sic) to the latter portion which speaks of an undertaking by Chirukandan to discharge Ittooli's dues, we cannot help thinking that what was pleaded was an adjustment as a past event and not something to be done thereafter. In other words the true meaning of the paragrapn is that while it admitted a past liability it also stated how that liability had been discharged.

(9) In this context we desire to refer to — 'Badri Dass v. Manohar Dass', 11 All L J 601. The head note to that case, which correctly sets out the facts and the purport of the decision, is in these terms:

"The plaintiff purchased a certain debt due to G, an insolvent, and gave notice to the defendants, who owed that debt, asking them to pay up. The defendants replied that they owed nothing as they had already discharged the debt partly by paying the amount of a certain Hundi drawn by G and partly by making a certain payment to the receiver. Held, that the defendant having directly and expressly repudiated the debt, only giving details of the manner in which it had been discharged, there was no acknowledgment of the debt within the meaning of section 19 of the Limitation Act nor was there an acknowledgment coupled with a claim to a set off within the meaning of Explanation (1) of that section."

Richards, C. J., who delivered the judgment in that case after setting out the terms of the alleged acknowledgment, referred to the argument that there was an acknowledgment of the debt coupled with a claim to a set off which would be sufficient under Explanation (1) to section 19 said that the statement in question was not an acknowledgment coupled with a claim to set off, but that it was a direct and express repudiation of the debt, giving details of the manner in which it had been discharged. Notwithstanding, the rather inartistic language employed in paragraph 6 of Ext. C, we have understood the same in the above sense. That is after referring to a past liability it proceeded to state how the liability was adjusted.

(10) We feel fortified in interpreting paragraph 6 in this manner by what Mellish L. J., said in — 'Spargo's case', (1873) 8 Ch. 407 at page 414 regarding the true meaning of a set off or a settlement in account. The relevant passage from the judgment of Mellish L. J. is cited with approval by Lord Wright in — 'Trinidad Lake Asphalt Operating Co. Ltd. v. Commrs. of Income Tax for Trinidad & Tobago', AIR 1945 P.C. 85 at p. 88 and it reads:

"Nothing is clearer than if parties account with each other and sums are stated to be due on the one side and sums of an equal amount due on the other side of that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on each side had been paid. Indeed, it is a general rule of law that in every case where a transaction resolves itself into paying money by A to B. and then handing it back again by B to A, if the parties meet together and agree to set one demand against the other, they need not go through the form or ceremony of handing the money backwards and forwards."

Lord Wright observes that this statement gives a description of what is often called a settlement in account or a set off in the ordinary sense of the term. Great reliance was placed by the respondent's learned Counsel on Mellish L. J.'s description of what a settlement in account or a set off means and Lord Wright's comments thereupon. Paragraph 6 of the writ-

ten statement makes it clear that the parties had met and decided upon to set one demand against the other. Nothing more remained to be done under that arrangement except the discharge by Chirukandan of the amount due to Ittooli, which arose as a result of the arranagements. The arrangement, if true, extinguished the liability of defendant 1 under Ext. A to pay Ittooli.

(11) It is settled law that a statement in writing, which expressly or impliedly says that the debt has been discharged, will not amount to sufficient acknowledgment under S. 19 of the Limitation Act. See — 'Rangaswami Chetti v. Thangavelu Chetti', 42 Mad 637; — 'Chaterdhari Mahto v. Nasib Singh', AIR 1924 Pat. 806 and — 'Karamdai Naicken v. R. Raju Pillai', AIR 1949 Mad 401.

(12) In construing a statement, as to whether it contains an acknowledgment of a subsisting liability, decided cases seek to draw a distinction between statements to the effect that even before the date thereof the liability had been discharged and statements which contain an admission of liability coupled with a declaration as regards the arrangement proposed for its satisfaction. With reference to the former class of statements, the view uniformly held is that no acknowledgment of liability can be spelled out from such statements but that they contain only repudiation of liability. Equally consistent is the view that statements, falling under the latter class, would satisfy the requirements of valid acknowledgments. This line of distinction is, if we may say so, with respect, well brought out in the decision of Varadachariar J. (as he then was) in—'Ramaswami v. Velayuthan', AIR 1938 Mad 496. Our reading of paragraph 6 brings it within the former class of cases.

(13) Before proceeding further, it may be observed that in O. S. 428 of 1103, 1st defendant's plea as to set off was found against. This does not however affect the question whether his statement contains sufficient acknowledgment or not. The Court is concerned only with the form of the acknowledgment and not with the truth of its contents. See — 'Chaterdhari Mahto v. Nasib Singh', AIR 1924 Pat 806; — 'Sheik Meera Sahib & Co. v. Sheik Naina', 25 Mad L J 259 and — 'Hiralal v. Kripalsingh', AIR 1933 Nag 13.

(14) To sum up what we have said so far concerning paragraphs 3 and 6 of defendant 1's written statement in O. S. 428/1103 (Ext. C), paragraph 3 taken by itself contains an acknowledgment covered by Explanation 1 to S. 19, Limitation Act. But paragraph 6 contains no such acknowledgment. In our view, the latter paragraph far from being an admission of an existing liability on the date the written statement was filed, is in effect a plea of a set off or a settlement in account anterior to that date which had the effect of putting an end to the liability in respect of the original undertaking in the sale deed. It is a repudiation that any liability subsists on the date the written statement was filed. It is a well-known rule of construction of documents, that, to understand the true meaning of a document it has to be read as a whole and that effect cannot be given to a part giving the go-by to another part.

Reading paragraphs 3 and 6 together (the rest of the written statement relates to pleas unconnected with the present question), we have a plea repudiating the liability coupled with a plea in the alternative that time for payment has not come. Reading section 19 by itself or together with Explanation 1, a document, containing such admissions of past liability, cannot be held to contain a valid acknowledgment. The written statement contains only a denial of liability with a plea in the alternative that the time for payment has not yet come. Explanation 1 can cover only admissions of liability coupled with a statement that the time for payment has not yet come. If we may say so, we have here the antithesis of what the section together with Explanation 1 requires.

(15) It is well known that decisions bearing on acknowledgments are very often irreconcilable. A decision upon the facts of one case cannot be of much assistance to a Court in coming to a conclusion on another set of facts. In — 'Spencer v. Hemmerade', (1922) 2 A. C. 507 Lord Atkinson observed at p. 519:

> "I do not propose to read the words used here in the light of the words judicially interpreted elsewhere, for everybody agreed that comparison with the words of other debtors is of little use. Still less, do I imagine it, to be possible to extract anything that deserves to be called a principle from the decisions of three centuries, which have been directed to what is after all the task of decorously disregarding an Act of Parliament."

In that case at page 534, Lord Sumner said that the decisions on the exact meaning and effect of the precise words employed by generations of shifty debtors are, it is agreed on all hands, irreconcilable and Lord Wrenbury's comment (Page 536) was:

> "Throughout the decisions, — and they are very numerous, I find little, if any, difference of opinion as to the principle and rule of law, yet the cases are often difficult to reconcile."

Notwithstanding these sharp criticisms, that it would be unprofitable to search for precedents when a question of acknowledgment has to be determined, we think it useful to refer at some length to a case already referred to.

(16) In — 'Sheik Meera Sahib & Co. v. Sheik Naina', 25 Mad L J 259, the defendants stated in 1909 in their written statement that there was an agreement in 1907 that the plaintiffs' firm should receive from the defendants 25 per cent of their dues in full satisfaction of their claims and that they were ready and willing to pay the same but that the plaintiffs made default. They also stated that the plaintiffs' firm had taken possession of goods belonging to them, that they were liable to give credit out of the value of those goods to the extent of 25 per cent of the claim and that in any event, the defendants' liability should be exonerated to the extent of the value of the goods. It was held that these statements were neither of them acknowledgments of liability in 1909 within the meaning of S. 19 of the Limitation Act so as to save limitation whether as regards the whole or as regards the 25 per cent.

It was further held that the plea of accord and satisfaction of the debt by reason of an agreement at an earlier date, could not operate as an acknowledgment of a specific liability at the date the plea was put in. The decision also held that, while acknowledgment of liability coupled with a claim to a set off, is a good

acknowledgment under S. 19, Limitation Act, a denial of liability, with a claim by way of set off in the alternative, is not. There the alternative plea was a plea of set off after a denial of liability. Here, according to the construction we put on paragraph 6 there is a denial of any subsisting liability while paragraph 3 contains the alternative plea that the time for payment has not yet come. Explanation 1 puts both these pleas, that is the plea that the claim is premature and the plea that there is a right to set off, on the same footing when there is an admission of liability. The line of argument we have adopted in this case is practically the same as Sir Arnold White C. J. (Oldfield, J. concurring) adopted in that case. The pleas set out in paragraphs 3 and 6 cannot stand together except as alternative pleas.

(17) In the result the Second Appeal fails and we dismiss it, but we make no order for costs. The lower appellate Court, no doubt, gave a judgment in favour of defendant 1, but as mentioned already the question of acknowledgment was not even adverted to. It mistakenly thought that the suit was brought within twelve years of Mani's death. Equally unsatisfactory is its decision on the question relating to the vendor's lien. That decision is clearly opposed to a long string of cases decided by the Travancore High Court which the learned Judge was bound to follow. These circumstances induce us to make no order for costs in this court.

(18) Decree accordingly.

B/V.R.B. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 522

KOSHI C. J. AND GOVINDA PILLAI J.

Mohammed Noohu, Petitioner v. The State of Travancore and others, Counter-petitioners.

O. P. No. 14 of 1952, D/- 16-7-1952.

(a) Land Acquisition Act (1894) Ss. 4 and 6 — Travancore Land Acquisition Act (11 of 1089) Ss. 4 and 6 — Declaration under S. 6 giving full description and particulars of land required — Absence of notification under S. 4 is not fatal to acquisition proceeding.

Under the Travancore Land Acquisition Act, unlike the Indian Act, if it is possible for the Government even at the first instance to fix, a particular land required for public purpose, the notification and preliminary investigation under Ss. 4 and 5 would be unnecessary. Hence, where the declaration made by the Government under S. 6 gives the full description and particulars of the land required in the particular locality, the absence of notification under S. 4 is not irregular or fatal to the land acquisition proceedings. (Difference between the provisions of the Indian Act and the Travancore Act pointed out). (Para 11)

Anno: Land Acquisition Act S. 4 N. 1; S. 6 N. 1.

(b) Land Acquisition Act (1894) S. 6 — Declaration under S. 6 stating that particular land was required for particular purpose without mentioning specifically that it was required for 'public purpose' — Absence of words 'Public purpose' is only an irregularity not affecting the validity of the acquisition proceeding if it is ultimately found that the purpose mentioned is a public purpose. (Para 12)

Anno: Land Acquisition Act S. 6 N. 5.

(c) Land Acquisition Act (1894) S. 6 — Declaration under S. 6 using word 'required' instead of word 'needed' — Irregularity, if any, does not affect validity of declaration. (Para 13)

Anno: Land Acquisition Act S. 6 N. 5.

(d) Land Acquisition Act (1894) Ss. 17 and 9 — Travancore Land Acquisition Act (11 of 1089), Ss. 17(1) and 9(1) and (5) — Possession of land taken after 15 days from date of publication of notice under S. 9(1) but within 15 days from publication of notice in Gazette under S. 9(5) — There is no irregularity. (Para 14)

(e) Land Acquisition Act (1894) S. 6 — Public purpose — Justiciability — Constitution of India Arts. 19(1)(f) and (5), 31 and 226.

The question whether the acquisition of land was for a public purpose is justiciable and courts are competent to go into that question in view of Arts. 19(5) and 31 of the Constitution inspite of the provision in S. 6(3) Land Acquisition Act that the declaration under S. 6(1) shall be conclusive evidence that the land was needed for public purpose. If the acquisition is not for a public purpose it is bad in law and the proceedings can be quashed by a writ of certiorari. Case law Ref. (Para 17)

Anno: Land Acquisition Act S. 6 N. 5, 6.

(f) Land Acquisition Act (1894) S. 6 — Public purpose — What is — (Constitution of India, Art. 31(2)).

Acquisition of land for the housing scheme framed by a co-operative society with a view to give accommodation to the fisher folk at Colachel who were living in huts under insanitary surroundings is one for a public purpose as envisaged by Art. 31(2) of the Constitution and S. 6(1) Land Acquisition Act. Though this will not benefit the general public, it cannot be said that it would not benefit a portion of the public. It is not essential that the entire community or even a considerable portion should directly enjoy or participate in an improvement in order to constitute a public use. It is not also an essential condition of public use that the property should be transferred to public ownership or for public user; it would be sufficient if the public derives advantage from the scheme. AIR 1951 All. 674 Foll; 198 US 361; (1906) 200 US 527; (1916) 240 US 30 and (1923) 262 US 700 Ref. (Para 19)

Anno: Land Acquisition Act S. 6 N. 5.

M. K. Nambiar and P. I. Simon, for Petitioner; Advocate General T. N. Subramania Iyer, for the State; K. P. Abraham and K. T. Ninan, for Counter Petitioner No. 3.

REFERENCES: Courtwar/Chronological/ Paras

('15) 42 Ind App 44: (AIR 1914 PC 20) 18
('50) AIR 1950 SC 222: (1950 SCR 621) 16, 18
('50) AIR 1950 SC 27: (51 Cri LJ 1383 SC) 16a
('50) AIR 1950 SC 211: (52 Cri LJ 550 SC) 16a
('50) 1950 SCR 869: (AIR 1951 SC 41) 17
('51) AIR 1951 All 674: (1951 All LJ 365 FB) 18
('52) 1952 All LJ 319: (AIR 1952 All 752) 16a
('50) AIR 1950 Bom 363: (52 Cri LJ 120 FB) 16a
('91) 18 Cal 99: (17 Ind App 90 PC) 17

('26) AIR 1926 Mad 1099: (97 Ind Cas 471) 17
('45) AIR 1945 Mad 394: (ILR (1946) Mad 153 FB) 17
(1896) 164 US 112: (41 Law Ed 369) 19
(1905) 198 US 361: (49 Law Ed 1085) 19
(1906) 200 US 527: (50 Law Ed 470) 19
(1916) 240 US 30: (60 Law Ed 507) 19
(1923) 262 US 700: (67 Law Ed 1186) 19
(1930) 281 US 439: (74 Law Ed 950) 16a

GOVINDA PILLAI J.: The petition is for quashing the proceedings taken by the State to acquire 1.71 acres of land in S. Nos. 8973 and 8974 of Colachel Pakuthy belonging to the petitioner. It is also for an order to stop all further proceedings in the matter and for the necessary orders, directions and writs in the nature of 'mandamus', prohibition and 'certiorari' being issued to the counter-petitioners for securing the rights of the petitioner over the property. There are 3 counter-petitioners in the case, the first of whom is the State of Travancore-Cochin, the second is the Tahsildar of Kalkulam Taluk and the third the South Travancore Latin Catholic Arasar Co-operative Society No. 2577 of Colachel represented by its President Shri A. M. Simon.

(2) The petitioner's case was stated before us as follows: He is the owner of the land in question which is situated in the sea port area of Colachel. It was purchased by him in the year 1117 M.E. (1942 A.D.) for a consideration amounting to Rs. 34,000/- for purpose of his export business and stevedoring work at the port. He had constructed the necessary godowns in the said property. The extent of the premises available was, however, hardly sufficient for the shipping and export business carried on by the petitioner. This plot was within a few yards of the flag-staff of the Colachel port and was the busiest part of the port area. A portion of this plot of land was in the possession of the parish priest of the Latin Catholic Church at Colachel under a mortgage of the year 1101 M.E. (1926 A.D.). When the petitioner asked for the surrender of the property on receipt of the mortgage money, the said priest started trouble by introducing into the property certain of the parishioners who were fishermen who came and squatted on the land. The priest also moved the Government that the said land might be compulsorily acquired for the purpose of providing house sites for the fishermen of the locality. The petition filed by the priest was dismissed by the Government on the 30th March 1943. The petitioner then filed O. S. No. 141 of 1119 in the District Court, Nagercoil, for redemption of the said mortgage. In spite of a hot contest by the priest, a decree for redemption was passed by the District Court. But the petitioner was unable to get the fruits of that litigation and secure possession of the property because of the obstruction caused by the fishermen who were brought into the property by the priest. Another suit for eviction of the fishermen (O. S. No. 163 of 1122) had, therefore, to be brought by the petitioner and that suit is now pending in the above District Court.

(3) The said priest having got foiled in his attempt to persuade Government to acquire the property, set up the third counter-petitioner the South Travancore Latin Catholic Arasar Co-operative Society which had been started under the aegis of the local Latin Catholic Church, to move Government for compulsory acquisition of the said land for providing house sites for the Catholic fishermen of Colachel. This was done by the priest for the purpose of defeating the execution of the mortgage decree for redemption obtained by the petitioner. The Co-operative Society itself was a creature of the Latin Church there, and the President of the society was a tool in the hands of the priest who was the defendant in the redemption suit. The petitioner came to know that the above-said persons were moving Government for the acquisition of the said land and that an order was passed on the 12th January 1951 that the land under reference might be acquired. He, therefore, preferred a petition before the Government on the 4th May 1951 for stopping the acquisition proceedings. But Government by its order L. Dis. 2254/51 dated 17th October 1951 allowed the petitioner twenty cents out of the land in dispute and directed the acquisition in respect of the remaining portion of the land.

On representation made by the petitioner, the then Chief Minister Shri T. K. Narayana Pillai had conducted a local inspection of the site on 17th June 1951 accompanied by the Government Secretary concerned who was in charge of this subject in the Secretariat. The notes made by the Minister and the Secretary on inspection are stated to be not now among the records of this case. The petitioner's objections were subsequently heard by the Minister Shri A. J. John on the 3rd August 1951. Shri A. J. John relinquished office as Minister without passing any orders and his successor-in-office Shri L. M. Piley, on 17th October 1951, without any further hearing of the petitioner or his Advocate, passed the order now complained against for compulsory acquisition. The petitioner thereupon filed another application before Government on 31st October 1951 praying for a re-consideration of the prior order of Government. But that was not allowed. It is the petitioner's case that the port of Colachel offered a deep anchorage for ships not far from the shore and it was more advantageously situated than the other ports at Alleppey and Trivandrum in the State, so that there was a great possibility for the expansion of that port. Necessarily therefore, all available lands in the port area at Colachel were to be preserved for the purpose of landing and storing goods for export as well as import. As a matter of public policy, the State ought not to interfere with the progress of such export and import trade by instituting acquisition proceedings in respect of the land used for it in the port area, with the ostensible purpose of providing house sites for a few fishermen.

(4) The local Latin Catholic Church itself owned extensive properties in the locality and there were vacant lands in the possession of that Church. There were also other plots in the vicinity which could be acquired at a very low price for the proposed housing scheme. In addition to this, there were sufficient Poramboke lands belonging to the State in the vicinity and such lands could have been used for the scheme without paying any compensation for those plots. The price of the petitioner's land in question was high and economically the proposition was not sound. The order of the Government to acquire the petitioner's property had been sought by the third counter-petitioner at the instance of the parish priest to circumvent the execution of the redemption decree

obtained by the petitioner. The fishermen to whom house sites were intended to be procured by the State were the identical persons obstructing the petitioner in the execution of the redemption decree.

(5) The order of acquisition was not passed for any purpose which might be called "public". On the other hand, it had been prompted by fraudulent motives. This order was tending to create ill-feeling between the Muslim inhabitants on the one hand, and the Latin Christian fishermen on the other. Another attempt of the petitioner to induce the Government to re-consider the whole matter was dismissed on 8th February 1952. The State had not considered all the matters raised by the petitioner and the orders passed were 'ultra vires' of the powers of the State. The fraudulent motives behind the application by the third counter-petitioner for the acquisition were not noticed by Government. The third counter-petitioner's application for the acquisition had been considered once before and it was rejected by orders D. Dis. 1341/41/Rev. dated 21st July 1949 and L. Dis. 45/49/RD. dated 8th August 1949. The subsequent application for the identical relief was actuated by 'mala fides' for the purpose of benefiting a few persons who had trespassed into the property. The process of acquisition now ordered by Government involved a discrimination by which one community was preferred to another and was contrary to the principles recognised by the Constitution of India. The orders passed by Government on 17th October and 17th December 1951 and 8th February 1952 were produced along with the petition. A relief by quashing the proceedings started by Government was prayed for on the above grounds.

(6) Notice of this petition was given to the counter-petitioners. On behalf of counter-petitioners 1 and 3, counter-affidavits answering the objections raised in the petition were filed. The counter-affidavit on behalf of the State was by a Clerk in the Agriculture Section of the Government Secretariat where the matter connected with this subject was dealt with. It was mentioned in this affidavit that the Government of Travancore-Cochin had launched a co-operative housing scheme in 1950, that Colachel being one of the most thickly populated fishing centres was selected as one of the centres where this scheme was to be worked out immediately, that it was decided that thirty houses should be built there for the benefit of the fishermen, that this scheme was proposed to be worked at Colachel through the third counter-petitioner society, that as there was no suitable Government land available in the area, it was decided to acquire the land in question along with other lands for the purpose, that the steps for the acquisition of a block of 10.21 acres were taken by the revenue authorities under the orders of Government, that it so happened that out of the said 10.21 acres thus proposed to be acquired, 1.68 acres belonged to the present petitioner, that the petitioner objected to the acquisition of this land and that the Government considered his objections, heard his Advocate and excluded 20 cents out of the area proposed to be acquired as it was found necessary for the petitioner's business. The acquisition was for a public purpose and the proceedings of Government were quite legal and proper.

The allegations that the Government started proceedings for the acquisition of the land at the instigation of the parish priest and the third counter-petitioner were not true. The Government was not also aware of the dispute between the petitioner and the said priest. It was true that a petition of the parish priest for the acquisition of this land was dismissed by Government in 1943. It was done so as at that time there was no housing scheme. The Ministers had inspected the locality, but they were not bound to make any report of their visits to anybody. There were no other available lands in the vicinity belonging to private parties suitable for acquisition. There was also no land, belonging to Government that could be used for house sites. The statement that the Government by these acquisition proceedings was helping persons to circumvent the execution of the decree obtained by the petitioner was not correct. The acquisition, being for public purpose, could not cause any ill-feeling between the classes and no communal ill-feeling was caused on account of the acquisition. The several orders referred to in the petition were passed by the Government after careful examination of all the aspects of the case. The acquisition was in no way opposed to the principles of natural justice and the present order could not be interpreted to indicate that the Government made any discrimination between one community and another. The petition was, therefore, frivolous and was accordingly pressed to be dismissed.

(7) The President of the third counter-petitioner society had also filed an affidavit opposing the application. He stated therein that the society in question was formed for the purpose of improving the social and economic condition of the South Travancore Latin Catholic Arasar community, that most of the members of this community had no lands of their own, that they were housed in miserable huts on the coast strip, that about seven thousand persons were occupying huts spread over barely eight acres of land, that because of the miserable conditions of these huts several of these persons happened to die every year on account of epidemics such as small-pox and cholera, that in order to improve the miserable conditions of these people the co-operative society in question was formed about ten years ago, that the Government in or about the year 1949 adopted a housing scheme so that homeless people who had necessarily to remain crowded in small huts could be enabled to live in more sanitary surroundings, that a commissioner for the co-operative housing scheme for the poor with the necessary staff had been appointed for the purpose, that the co-operative society was instrumental in bringing to the notice of the Government the miserable conditions of the fishermen in Colachel, that after due investigation & inspection by responsible officers the Government were pleased to bring the Colachel fishing village under their scheme, that the property which was the subject-matter of this petition as well as another property which formed the subject-matter of the connected O. P. 17 of 1952 were chosen by Government after careful enquiry and inspection at the spot as the only place suitable for the purpose of the housing scheme inaugurated by Government, that during the course of the investigation, the petitioners in both the cases tried to put obstacles in the way of the Government accomplishing their

object, that after they got themselves defeated they had resorted to file these petitions, that there was no case of fraud or mala fides or gross partiality on the part of Government in ordering the acquisition, that there were about a hundred houses of the fishermen spread over the area which had been in existence from very early times, that the portion of the property which the petitioner was in actual possession had been excluded from the acquisition and that there were no grounds made out for interfering with the steps taken by Government.

(8) The petitioner has filed a reply affidavit to the counter-affidavits of counter-petitioners 1 and 3. It was stated therein that the facts mentioned in the counter-affidavits were misleading and did not set out the true state of affairs, that the present acquisition was not the result of any housing scheme initiated by Government, that the Government were prevailed upon by the parish priest through the instrumentality of the third counter-petitioner to embark on this acquisition, that there was no public purpose whatsoever, that the objects of the third counter-petitioner-society would show that the acquisition was intended only for the benefit of a few individuals, that the Land Acquisition Act (Travancore) did not permit an acquisition on behalf of a corporation or of a co-operative society, that under the rules of the co-operative society the land acquired would be parcelled among the members thereof, that the acquisition for the co-operative society would ultimately end in benefiting its members, that immediately to the north of the property in question, there were four acres of land belonging to the Church which was used for soaking husks that the Church was making large income out of it, that this could have been utilised for putting up residential houses for the fishermen, that it was now understood that there was no notification regarding the acquisition published under S. 4 of the Land Acquisition Act, that possession of the land had been taken without conforming to the mandatory provisions of S. 9 read with S. 17 of the Land Acquisition Act which prohibited such possession being taken before the expiry of the fifteen days period mentioned therein, that the entire proceedings initiated under the Act were 'ultra vires' & totally without jurisdiction, that the declaration under S. 6 of the Act did not conform to the requirements laid down by it inasmuch as it did not contain specifically a statement that the land was required for a public purpose, that the acquisition proceedings had therefore become void, that there were not hundred houses in the petitioner's property, that there were only sixty-one persons squatting on the property and they had all been impleaded in the eviction suit (O. S. 163 of 1122) on the file of the Nagercoil District Court, that the proceedings for acquisition were lacking in good faith and that the petitioner was entitled to the reliefs claimed in the main petition.

(9) The State Government had published a declaration in the Gazette regarding the acquisition of 10.21 acres in Colachel. The owner of another plot (S. Nos. 10253/2 and 4) has filed O. P. No. 17 of 1952 in this Court for the issue of a writ to quash the land acquisition proceedings. The proprietor of the remaining area has not come forward so far. The present petition and O. P. No. 17 of 1952 being connected were heard together. The averments in O. P. No 17 of 1952 are to some extent different from those made in this petition. But the questions arising for consideration are practically the same in both petitions so that those questions will be considered in this order, a copy of which will be appended to the order in O. P. No. 17 of 1952.

(10) The questions argued before us were the following:

1. The entire land acquisition proceedings were ultra vires and not in accordance with the provisions of the Travancore Land Acquisition Act (XI of 1089). The irregularities in the proceedings were mentioned thus:
   (a) There was no notification under Section 4 of the Act;
   (b) that the declaration under S. 6 of the Act did not mention that the acquisition was for a public purpose;
   (c) that the said declaration was also defective in other respects; and
   (d) that the procedure adopted in taking possession of the property was against the mandatory provisions of S. 9 read with S. 17 of the Act.
2. The acquisition itself was not for a public purpose.
3. The proceedings adopted by Government in acquiring the lands were vitiated by 'mala fides' and fraud.

(11) The declaration of the Government to acquire the land and the subsequent taking possession of the same under the emergency clause were stated to be irregular. It was first argued that there was no notification published by Government provided for in S. 4 of the Act. It was admitted by the learned Advocate-General that there was no such notification and according to him, the absence of such a notification was not fatal in any way to the proceedings taken to acquire the land. The provisions of the Indian Land Acquisition Act (I of 1894) and of the Travancore Land Acquisition Act (XI of 1089) are not similar. Under the Indian Act, a notification had to be published whenever it appears to Government that land in any locality is needed or likely to be needed for any public purpose. After the publication of this notification, the officers of Government would be entitled to enter upon, survey and take levels of any land in such locality and to do other lawful acts for the purpose of finding out the suitability of the land for which the Government intended to acquire the property. Practically the provisions of the Travancore Act are similar to those mentioned above. There are of course certain differences which are not very material for the purpose of the present case. Section 5 then provides for the payment for all necessary damages which may be caused by the act mentioned in clause 2 of S. 4. This is also the same as in the Travancore Act.

Under the Indian Act, a new S. 5(A) was inserted by Act XXXVIII of 1923. That section provides for any person interested in any land which has been notified under S. 4 to object to the acquisition of the land or of any land in the locality within thirty days after the issue of the notification. That objection has to be heard by the Collector who, on a consideration of all such objections and after a making such further enquiry, if any, should submit the case for the decision of the Provincial Government. This provision is totally absent in the Travancore Act. Under the Indian Act, S. 6(1) provided for the statutory declaration to be made by the Government if it is satisfied after con-

sidering the report, if any, made under S. 5(A) that any particular land is needed for a public purpose, or for a company. In view of the absence of any provision corresponding to S. 5(A) of the Indian Act, S. 6 of the Travancore Act simply laid down that whenever it appeared to Government that any particular land was needed for a public purpose, a declaration shall be made to that effect, over the signature of the Chief Secretary to Government. Clause 2 of the section states the contents of the declaration. Thus unlike the Indian Act, neither the Government nor any of its officers was to call for any objections from parties interested or to hear the same before a declaration under S. 6 was made. In the Indian Act, S. 6 refers to S. 5(A) which again made reference to the notification under S. 4 and the objections filed within thirty days of that notification. Those three sections are therefore really connected unlike the sections in the Travancore Act. Sections 4 and 5 come under Part II of the Travancore Act under the heading "preliminary investigation". Sections 6 to 11 come under the heading "declaration of intended acquisitions". If the Government even at the first instance had pitched upon the property which they wanted to acquire, it would appear that the preliminary investigation provided for under Ss. 4 and 5 would be unnecessary.

Section 4(1) states that whenever it appears to Government that 'land in any locality' is likely to be needed for any public purpose, a notification to that effect shall be published. That does not fix upon the land any public purpose. The determination of such a land would be after the process mentioned in Sub-s. (2) of S. 4 and S. 5 of the Act and when we come to S. 6 we see that the land required is to be ascertained with definiteness, for, it states that when it appears to the Government that 'any particular land' is needed for a public purpose, a declaration shall be made to that effect, and sub-clause 2 provided for the contents of such a declaration. So by the declaration alone the Government fixed the land needed for the public purpose. If it was possible even at the first instance to fix a particular land, a notification under S. 4 was unnecessary. But in this case, it was seen that in the declaration made by Government under S. 6, the survey numbers, and the extent of the land required in the particular locality were given with full descriptions. Thus the absence of a notification under S. 4 in the present case was not irregular or fatal to the land acquisition proceedings.

(12) Another serious irregularity said to have been committed by the Government related to the declaration itself. The declaration stated that the particular lands were "required" for the utilisation of the housing scheme at Colachel. It did not mention that it was "needed" for a "public purpose" as mentioned in S. 6(1) of the Travancore Act. From a technical point of view, there was this irregularity, but it did not appear to be one fatal to the acquisition proceedings. Sub-clause 2 of S. 6 provides that the declaration shall be published in the Gazette and shall state the Taluk and Pakuthy in which the land is situate, the purpose for which it is needed its approximate area, and, where a plan shall have been made of the land, the place where such plan may be inspected. So, what the declaration should therefore really contain was the purpose for which the land was needed. The question whether that purpose was a public one or not could be gone into by the Courts and if it was found that the purpose mentioned in the declaration for which the land was needed was a public one, then the absence of the words "public purpose" in the declaration could only be an irregularity not affecting the merits of the case. At a later stage we would consider whether the purpose for which the present acquisition was announced was a public purpose or not. For the present purpose, if it could be taken that the purpose was a public one, then the provisions of S. 6 could be deemed to have been substantially complied with.

(13) Another objection taken by the petitioner's learned Advocate was that while section 6(1) of the Land Acquisition Act provided for a declaration that any particular land was "needed" for a public purpose, the declaration in this case appearing in the Gazette dated 25th December 1951 was that this land was "required" for the utilisation of the housing scheme at Colachel. It was argued that there is a lot of difference between the words "needed" and "required" for the word "required" indicated the expression of a desire, a wish or a want, whereas the word "needed" indicated that a definite decision was taken after consideration of the several facts relating to the necessity of the acquisition. We were also referred to the Malabar Tenancy Act (Madras) where the word "require" in S. 20 was substituted by "need" by an amendment because of certain interpretations put on that word in some of the decided cases. Since the word "need" was not used in the declaration, it was mentioned that the authority which published the declaration had not applied its mind to the necessity that led to the acquisition so that the declaration was defective on that score also. The form prescribed under the Land Acquisition Act for the publication of the declaration used the word "required" instead of "needed". Probably in Malayalam both the words meant the same thing though under the English language, there would be some difference in the idea conveyed by these words. This is not a serious matter affecting the validity of the declaration.

(14) A third irregularity that was referred to was the taking possession of the property by the Government under the emergency clause in S. 17 of the Travancore Land Acquisition Act. Section 9(1) lays down that the Division Peishkar shall after certain preliminary steps pursuant to the declaration made by the Government, cause public notice to be given at convenient places on or near the land to be taken, stating that the Government intend to take possession of the land and that claims to compensation of land or such lands may be made to him. Section 17(1) then provides that in case of urgency, whenever the Government so direct the Division Peishkar may, on the expiration of fifteen days from the publication of the notice mentioned in S. 9, sub-s. (1) take possession of any land needed for the public purposes. What was argued before us was that there was not this interval of fifteen days after the publication of the notification and the date of taking possession of the property by the revenue authorities. Clause 5 of S. 9 provides that the notice shall also be published in the Gazette but the notice referred to in sub-clause (1) will not be the notice mentioned in clause 5. The files of the District Collector and the

Tahsildar produced before us relating to the acquisition proceedings would show that a notice contemplated under S. 9(1) had been sent from the Collector's office to the Tahsildar on 14th February 1952 and that the Tahsildar caused the same to be published in the locality at Colachel, seven miles away from Thuckaley, the same day. It was admitted and it is seen from the records that the Tahsildar took possession of the properties only on 1st March 1952. This was after the expiry of fifteen days from the date of the publication of the notice, for, in 1952, February had twenty-nine days. We do not overlook the observations made by the superior revenue officials in one of the letters where it was mentioned that the Tahsildar was hasty in taking possession before the expiry of fifteen days after the publication of the notice. Evidently that officer was not in full possession of the facts. It was true that the notice mentioned in Cl. 5 of S. 9 was published only in the Gazette dated 26th February 1952. But it is not that notice that is referred to in Section 17 clause (1). Thus, as could be understood from the records, there was no irregularity in this matter also.

(15) The above were the irregularities on which the petitioner's learned Counsel had advanced his arguments. There was no scope for any such criticism so that we take it that, as regards the observance of the several provisions of the Land Acquisition Act, neither the Government nor its officers had committed any irregularity.

(16) This leads us to the next question whether the acquisition itself was for any public purpose. There was a suggestion made by the learned Advocate General that since section 6 (3) of the Land Acquisition Act laid down that the declaration under section 6(1) shall be conclusive evidence that the land was needed for a public purpose, the Courts are not competent to go into the question whether the acquisition was for that purpose. He also stated that the decision of the Government to acquire the land was by an administrative act so that the Courts were not to interfere in such matters and to issue any writ for quashing the proceedings. He had referred us to the decisions in — 'Province of Bombay v. Khushaldas S. Advani', AIR 1950 SC 222, where it was held that when the executive authority had to form an opinion about an objective matter as a preliminary step to the exercise of a certain power conferred on it, the determination of the objective fact and the exercise of the power based thereon are alike matters of an administrative character and are not amenable to the 'writ of certiorari'. This case, though decided after the Constitution of India came into force, was not one arising under any of the provisions of the Constitution. The building dealt with in that case had been requisitioned by the Government of Bombay in 1948 under section 3 of the Bombay Land Requisition Ordinance (v of 1947). It was with reference to the law in force in 1948 that this case was decided without any reference to the fundamental rights guaranteed by the Constitution.

Article 19 (1) (f) allows all citizens to have the right to acquire, hold and dispose of property. This was restricted only by clause 5 of Article 19. That clause laid down that nothing in sub-clause (d), (e) and (f) of clause (1) shall affect the operation of any existing law in so far as it imposes or prevents the State from making any law imposing reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe. Thus when the existing law prescribed restrictions on the enjoyment of the right conferred by Article 19 (1) (f), it is the duty of the Court to consider whether those restrictions are reasonable or not.

(16a) The Supreme Court has in — 'A. K. Gopalan v. The State of Madras', AIR 1950 SC 27, laid down that it was competent for the courts to go into the question whether the restrictions were reasonable or not. Applying this principle, their Lordships held in that case that section 14 of the Preventive Detention Act (IV of 1950) passed by the Central Legislature was 'ultra vires' as that section prohibited the Courts to go into certain matters relating to preventive detention. The same principle has been laid down in — 'Dr. N. B. Khare v. State of Delhi', AIR 1950 SC 211. A Full Bench of the Bombay High Court in — 'Jeshingbhai v. Emperor', AIR 1950 Bom 363 (F.B.) has held that the jurisdiction of the High Court to issue a writ of certiorari or other writs against executive authorities is not merely confined to the writs which it issued in the past, but power has been conferred upon it by the Constitution of India to issue directions, orders or writs for the enforcement of any of the rights conferred by Part II which dealt with fundamental rights. The Supreme Court of the United State has laid down in — 'Cincinnati v. Vester', (1930) 281 U.S. 439, that, in considering the application of the 14th Amendment to cases of expropriation of private property, the question as to what would constitute a public use is a judicial one. In a recent case the Allahabad High Court had held that the High Court had power to interfere even in the case of administrative orders which are made in defiance of mandatory provisions of law or without any jurisdiction. Vide — 'Ram Charan Lal v. State of Uttar Pradesh', 1952 All L J 319.

(17) Besides Article 31 of the Constitution impliedly authorises the court to go into the question whether the land of a citizen acquired by the State was for a public purpose or not. Article 31 (1) lays down that no person shall be deprived of his property save by authority of law. Clause 2 then provides for the essential requisites to be provided for in the law sanctioning compulsory acquisition for a public purpose. Mukherjea J., in — 'Charanjit Lal v. Union of India', 1950 SCR 869, at p. 902, considered the implications in this clause and mentioned thus:

"It is a right inherent in every sovereign to take and appropriate private property belonging to individual citizens for public use. This right, which is described as 'eminent' domain in American law, is like the power of taxation, an off-spring of political necessity, and it is supposed to be based upon an implied reservation by Government that private property acquired by its citizens under its protection may be taken or its use controlled for public benefit irrespective of the wishes of the owner. Article 31 (2) of the Constitution prescribes a two-fold limit within which such superior right of the State should be exercised. One limitation imposed upon acquisition or taking possession of private property which is implied in the clause is

that such taking must be for public purpose. The other condition is that no property can be taken, unless the law which authorises such appropriation contains a provision for payment of compensation in the manner laid down in the clause."

Necessarily therefore, the High Court will have to go into the question whether the acquisition was for a public purpose when the proceedings taken by the State are impeached as against the guaranteed fundamental rights in the Constitution. Following the decision of the Judicial Committee of the Privy Council in — 'Luchmeswar Singh v. Chairman Darbhanga Municipality', 18 Cal 99 (PC) the Madras High Court in — 'Ponnai v. Secy. of State', AIR 1926 Mad 1099 had held that if the provisions of the Land Acquisition Act are not strictly complied with, but are made a cloak for attempting to obtain a transfer of an indefeasible title under the guise of a public purpose, the proceedings do not operate towards the creation of a valid title to the land in Government. This view expressed in that decision stands, though another principle on a different matter had been overruled by a later Full Bench decision of the same Court in — 'Suryanarayana v. Madras Province', AIR 1945 Mad 394 (FB). If the compulsory acquisition is not for a public purpose, it is bad in law. In spite of the clause 3 of section 6, the question whether the acquisition was for a public purpose is justiciable.

(18) Before considering the question whether the acquisition was for a public purpose, it is necessary to find out the meaning of those words. A bench of five Judges of the Allahabad High Court had to consider this aspect of the case in — 'Surayapal Singh v. U .P. Government', AIR 1951 All 674 (FB). There was a full discussion of this matter and the opinion of the learned Judges, with which we are in full agreement, is recorded at pages 681, 682 and 683 of that report thus:

"There has been much discussion before us as to the meaning of the words "public purpose" as used in the Constitution. The case mainly relied on by Sri P. R. Das is that of—'Hamabai Framjee Petit v. Secy. of State', 42 Ind App 44 (PC). In that case the Government of Bombay had, under a lease and sanad (granted, respectively in 1854 and 1839) a right, subject to giving notice and paying compensation to resume possession of the land granted if they desired to use it for a public purpose. The Government gave notice of their intention to resume possession with the object of using the land for the provision of residences to be let at moderate rates to Government officials, but the applts. declined to give up possession. Suitable accommodation for such officers was difficult to obtain in Bombay, but it was not contended that it was impossible. The Judicial Committee in dismissing the appeal referred with approval to the view of Batchelor J. who had said:

'General definitions are, I think, rather to be avoided where the avoidance is possible and I make no attempt to define precisely the extent of the phrase 'public purposes', in the lease; it is enough to say that, in my opinion, the phrase whatever else it may mean must include a purpose, that is an object or aim, in which the general interest of the community as opposed to the particular interest of the individuals, is directly and vitally concerned, and learned counsel placed great reliance on the words 'general interest of the community', his contention being that the acquisition effected by the impugned Act cannot be said to be for the general interest of the community when (according to him) a substantial part of the community will inevitably be made to suffer as a consequence thereof. He also drew our attention to an observation of Fazl Ali J. in the case of — 'Province of Bombay v. Khushaldas S. Advani', 1950 SCR 621, where that learned Judge said:

'Indeed it appears to me that in a large majority of cases no inquiry should be necessary as the existence of a public purpose would be self-evident or obvious and a mere reference to the purpose will make anyone say: This is of course a public purpose'.

"The suggestion of learned counsel was that the existence of a public purpose must be so obvious that there can be no possibility of a difference of opinion on the point and that, as this was not the case in the present instance, the conclusion must be drawn that the existence of a public purpose had not been established. It is sufficient, we think, to point out that the learned Judge in the observation which we have quoted expressly recognises the possibility of there being cases in which the existence of a public purpose would not be self-evident or obvious.

"Emphasis was also laid on the distinction which has been drawn in the United States between public purpose or public use on the one hand and public benefit and public policy on the other, and it has been strongly urged before us that the acquisition of property effected by the impugned Act is not for a public purpose but is merely in implementation of the declared policy of a political party. We have been referred to a large number of decisions of the Supreme Court of the United States and to the works of distinguished American authors such as Cooley, Willis and Weaver, with reference both to the meaning of the expression public purpose (or public use) in the United States, and to the distinction which has in some instances been drawn between such purpose or use and public policy. We do not, however, think that it is necessary to refer to these authorities in detail, for it is to be observed that in all the cases to which our attention has been directed the acquisition was of a restricted area for a specific limited purpose, such as the acquisition of land for the purpose of the construction of a road, a railway, harbour, reservoir, town site and the like, and the question which had to be considered in every case was whether that limited purpose was a public purpose or use. That is not the question with which this Court is confronted. There is no question here of the acquisition of a restricted area for a limited purpose. The impugned Act provides for the acquisition and vesting (in the first instance) in the State of approximately 4,13,00,000 acres of land at present belonging to some 20,00,000 persons as part of a comprehensive scheme of land reforms. It is, we think abundantly clear that the circumstances in which property is proposed to be acquired under the present Act differ so widely from those which existed in the cases cited to us, that the latter can furnish no conclusive answer to the problem with which we are concerned. We

must, we think, arrive at a conclusion as to the proper interpretation of the expression 'public purpose' as used in the Constitution on a consideration not only of such principles as are to be derived from the decided cases, but of the principles set forth in the Constitution itself.

"'Homabai Framjee Petit's case', 42 Ind. Cas. 44 (PC), is the only English or Indian authority to which we have been referred and from the decision in that case three conclusions can, we think, be reached; first, the phrase 'public purpose' must include an object or aim in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned; secondly, it is not necessary that the property acquired, when in the form of land, should be made available to the public at large; it is enough if the purpose is one in which the general interest of the community is concerned, and thirdly, the fact that the object or aim of the particular scheme may be achieved in some other way does not necessarily negative the existence of a public purpose.

"The decisions in the United States' Courts, if we may say so with respect, are not easy to reconcile. So eminent a jurist as Dr. Cooley has expressed himself as being 'somewhat at sea' when endeavouring to define, in the light of the judicial decisions, what constitutes a public purpose and his conclusions he states in these words (Constitutional Limitations, Edn. 8, Vol. 2, page 1131):

'The reason of the case and the settled practice of free Governments must be our guides in determining what is or is not to be regarded a public use; and that only can be considered such where the Government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which, on account of their peculiar character and the difficulty — perhaps impossibility of making provision for them otherwise, it is alike proper, useful and needful for the Government to provide,' and elsewhere (at p. 1138) the learned author points out that:

'accepting as correct the decisions which have been made, it must be conceded that the term 'public use,' as employed in the law of eminent domain, has a meaning much controlled by the necessity and somewhat different from that which it bears generally'.

"We may also quote a passage from Willis in which, in our opinion, the author well summarises the present position under United States Law. At pages 817 and 818 of his work 'Constitutional Law of the United States' the learned author says:

'What is a public use? On this question there have been two view points. One may be called the old viewpoint and the other the newer view point. According to the older viewpoint, in order to have a public use, there must be the use by the public. This is perhaps still the majority viewpoint, and it is supported by a great number of cases...'

"According to the newer viewpoint there is a public use if the thing taken is useful to the public. This makes public use for eminent domain practically synonymous with public purpose for taxations and somewhat like social interest for police power..... .

"Under this rule it is not necessary for the benefit to be for the whole community, but it must be for a considerable number.'

"Now is there to be found in the Constitution of India anything to guide the Courts as to the meaning to be attributed to the expression 'public purpose' when used therein? We think there is. Chapter 4 contains what are described as directive principles of State policy, and although those principles are not enforceable by any Court, Art. 37 specifically lays down that they are nevertheless fundamental in the governance of the country and that 'it shall be the duty of the State to apply these principles in making laws'.

"If then we examine the directive principles we find that Art. 39, Cls. (b) and (c) provide:

'(b) that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good;

(c) 'that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment'.

Art. 40 says that:

'The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

Art. 43 says that:

'The State shall endeavour to secure by suitable legislation..... to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.'

And Art. 48 says that: 'The State shall endeavour to organise agricultural and animal husbandry on modern and scientific lines.....'

"The distinction to which we have already referred which has been drawn in some American cases between public purpose and public policy may, we think, be well founded if by public policy is meant no more than the policy of the political party which then holds office. But the distinction ceases, in our opinion, if by public policy is meant State policy or the policy solemnly laid down in the Constitution, the principles of which are declared to be fundamental to the governance of the country. In our opinion, a law made for the purpose of securing an aim declared in the Constitution to be a matter of State policy is for a public purpose."

(19) Bearing in mind the principles laid down there we have to examine whether the acquisition in this case is for a public purpose. The properties are acquired for the utilisation of the land for the housing scheme at Colachel. The files of the Government Secretariat called for and examined would show that this was mainly to give accommodation to the fisher folk at Colachel where they are now living in huts under insanitary surroundings. Though this will not benefit the general public, it cannot be said that it would not benefit a portion of the public. There was the older and stricter view that unless the property acquired was dedicated for the use of the public at large or a considerable section

thereof, it would not be a public use. Vide Nichols on Eminent Domain, 1950 Edn., Vol. III, page 430. But the modern and more liberal view is that it is not an essential condition of public use that the property should be transferred to public ownership or for public user and that it would be sufficient that if the public derives advantage from the scheme. According to this latter view, it is no objection to the validity of an acquisition that it is in favour of a private corporation or of individuals, provided the acquisition results in public advantage. Vide page 435 of the same book. This is the principle adopted in — 'Fall Brook Irrigation District v. Bradley', 164 U.S. 112, — 'Clark v. Nash', 198 US 361, — 'Strickley v. Highland Boy Mining Co.', 200 US 527 and — Mt. Vernon Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.', 240 U.S. 30. It is not essential therefore that the entire community or even a considerable portion should directly enjoy or participate in an improvement in order to constitute a public use. Vide also — 'Rindge Co. v. Los Angeles County', 262 US 700. Therefore, public use is considered to be a benefit and it is not considered essential that the entire community or even a considerable portion thereof should directly enjoy or participate in any improvement in order that it constituted a public use. This view was adopted by the Madras High Court in a recent decision on writ petitions Nos. 215, 76, 74, 72 and 78 of 1951 of that Court. Though it is only a section of the community that would be benefited by this scheme proposed to be started by Government, it is a public purpose. The acquisition is, therefore, for a public purpose as envisaged in Article 31 (2) of the Constitution and section 6 (1) of the Land Acquisition Act.

(20) The remaining question for consideration is whether the action of the Government is vitiated by fraud and 'mala fides'. The petitioner in O. P. No. 14 of 1952 has stated that the Government was led to acquire this land because of the machination of the Catholic parish priest at Colachel. It was stated that as soon as he demanded surrender of possession of the property, the priest moved the Government in 1943 to acquire this land for the use of the fishermen. It was admitted that there was such a petition and that petition was dismissed. Again Shri Simon the president of the Co-operative Society which was stated to have been started at the instance and control of the parish priest applied for the acquisition of the identical property in 1949. His petition was dismissed on 15-7-1949 and an endorsement was given to him to that effect on 21-7-1949. Shri Simon then applied for a reconsideration of this decision by a letter dated 19th July 1949, followed by another letter dated 23rd July 1949. On 8th August 1949, the Government passed an order declining to interfere with the decision already passed. Then it was that the housing scheme was sanctioned on 17th October 1949, though in the affidavit it was stated that it was sanctioned only in 1950.

On 18th October 1949, a memo was sent to the Tahsildar, Kalkulam Taluk, to ascertain whether there were suitable Poramboke lands for the purpose and if not to find out suitable sites. Meanwhile Shri Simon sent a letter to the Registrar of the Co-operative Societies expressing that the society of which he was the president was willing to undertake to construct houses for the fishermen. The letter was evidently addressed to the Registrar, because the Government had appointed a special officer from the Co-operative Department to attend to these works. This letter was forwarded by the Registrar to the Government on 27th October 1949. Subsequently on 15th July 1950, Shri Simon wrote to Government pressing for the acquisition and undertaking to pay even the compensation money by the society. On 23rd August 1950, the special officer appointed by the Government inspected the sites in Colachel in the company of Shri Simon and intimated to Government the desirability of acquiring the properties in question. On 19th September 1950, Shri Simon wrote to the Minister Shri A. J. John to speed up the acquisition proceedings. On 3rd January 1951, the special officer's letter to Government showed that Shri Simon agreed with him that these sites were suitable.

On 12th January 1951, the Government communicated their sanction for the housing scheme for Kalkulam Taluk and wrote to the Secretary to the Revenue Board to take steps to implement the same. Then on 4th May, 6th June and 3rd August 1951, petitions were sent by the petitioner in O. P. No. 14 of 1951 to Government objecting to the acquisition. He was heard by the Minister concerned. On 17th October 1951, orders were passed on the same. Twenty cents out of the land are excluded and directions were given to acquire the remaining extent. On 31st October 1951, the petitioner filed a review application and that was dismissed on 17th December 1951. On 21st December 1951, the declaration was published by the Government in the Gazette. On 9th June 1952 the parish priest filed an affidavit and a petition in the eviction suit (O. S. No. 163 of 1122) that the suit might be struck off the file as the Government had passed orders to acquire the land in question. It is from these circumstances that the petitioner wanted to argue that the whole acquisition proceedings were engineered by the parish priest because of the persistent demand for surrender of possession of the properties included in the mortgage deed. It is true that this petitioner had obtained a decree for redemption of the property and that the defendant did not if possible want to surrender. Even if the defendant was actuated by such motives, that had nothing to do with Government, for unless the Government was a party to the fraud alleged, there is nothing to invalidate the acquisition proceedings.

It was true that the Government had declined to interfere in 1943 and 1949 on the petitions filed by the parish priest and Shri Simon for the acquisition of this land for the use of the fishermen. The Government had then no scheme for providing house sites for the fishermen at Colachel. It was only after such a scheme was sanctioned and which scheme was in accordance with the directive principles enunciated in the Constitution that steps were taken to acquire the land. We do not however, ignore a letter dated the 22nd February 1952 sent under instructions by the Advocate for the petitioner in O. P. No. 14 of 1952 to Government in which it was mentioned that the Ministers who were responsible in passing orders for the acquisition belonged to the Catholic faith thereby suggesting that the present acquisition was intended to benefit the Roman Catholics. We are not prepared to accept that suggestion for, from the records,

we see that the Government was not in anyway influenced by such considerations.

(21) It was then argued that this acquisition would not benefit all the fishermen in Colachel but only those fishermen who were Roman Cathplics. There is nothing in the files produced before us to show that the Government had any intention to discriminate one set of fishermen from another, even though they were the followers of different religions. From the affidavit filed on behalf of the Government it was apparent that their object was only to entrust the construction of the houses to the third counter-petitioner-co-operative society and not to give over the land entirely to that society. In one of the letters sent by the special officer touching upon this matter, it had also been mentioned that the Hindu fishermen could also be benefited by this scheme if they joined the co-operative society as members. The petitioner in O. P. No. 17 of 1951 had no special grounds to allege in this matter except to state that he was put to this trouble because his property was lying near the property of the petitioner in O. P. No. 14 of 1952. There is, therefore, nothing to show that the Government was in any way actuated by mala fide motives or that they were misled in passing orders for the acquisition of the land. There is therefore no reason for interference by this Court in regard to this petition and the connected petition, O. P. No. 17 of 1952. Both the petitions are dismissed with costs. Advocate's fee will be Rupees Two Hundred in each case.

(22) We do not consider this case to be fit one for granting leave for appeal and accordingly refuse the leave asked for.

A/K.S. Petitions dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 531

VITHAYATHIL J.

Kochitti Chacko, Petitioner v. Markose Kathanar, Joseph Kathanar, Counter-Petitioners.

Criminal Revn. Petn. No. 38 of 1952, D/- 1-4-1952.

(a) Criminal P. C. (1898), S. 147 — Right of user of land — A dispute relating to the right of performance of service in a place of public worship comes within the purview of Section 147. AIR 1951 Cal 93 (FB), Foll.; Case law rel. on. (Para 4)

Anno: Cr. P. C., S. 147 N. 7.

(b) Criminal P. C. (1898), S. 146 (5) — Preliminary order — Cancellation of.

The question whether a dispute regarding the alleged right of a party to perform service in a church, likely to cause a breach of the peace, exists or has existed between the parties relating to the user of the church in question, is one of fact. If the dispute between the parties has ceased to exist, the Magistrate must record a finding to that effect and then only he will be justified in cancelling the preliminary order. In the absence of a definite finding on that question, the cancellation of the preliminary order cannot be justified.

Of course, the mere fact that one party contends that there is still a dispute will be no reason for holding that there is a dispute, if, as a matter of fact, the dispute must be taken to have been settled by the decision of a competent civil court. (Para 10)

Anno: Cr. P. C., S. 145 N. 48.

M. K. Govinda Pillai, P. I. Simon and M. Abraham, for Petitioner; K. P. Abraham, T. K. Joseph, K. T. Ninan and Joseph Augustine, for Counter Petitioners.

REFERENCES: Courtwar/Chronological/ Paras

('30) AIR 1930 All 452: (31 Cri LJ 1217)	4
(1900) 24 Bom 527: (2 Bom LR 84)	4
('10) 37 Cal 578: (11 Cri LJ 292)	4
('11) 38 Cal 387: (12 Cri LJ 3)	4
('25) 52 Cal 959: (AIR 1926 Cal 437: 27 Cri LJ 239)	4
('51) AIR 1951 Cal 93: (52 Cri LJ 940 FB)	4
('87) 11 Mad 323: (2 Weir 117)	4
('06) 29 Mad 237: (4 Cri LJ 58)	4
('14) 27 Mad LJ 587: (AIR 1915 Mad 84: 15 Cri LJ 671)	4
('15) 17 Cri LJ 235: 34 Ind Cas 651: (AIR 1917 Mad 840)	4
('25) AIR 1925 Mad 779: (26 Cri LJ 1057)	4
('38) AIR 1938 Mad 537: (39 Cri LJ 705)	4
('41) AIR 1941 Nag 171: (42 Cri LJ 675)	4
5 Cochin 507	4
29 Trav LJ 457	6
('41) 31 Trav LJ 1223	4
('46) 1946 Trav LR 683	3, 5, 6, 7, 8, 9, 10

ORDER: The petitioner in Miscellaneous Case No. 1 of 1951 of the Special First Class Magistrate's Court, Kottayam, is the Revision Petitioner. The Miscellaneous case is one taken under Section 147 of the Code of Criminal Procedure. The dispute relates to the right to officiate in three churches in Kottayam namely Cheriapally, Puthenpalli, and Kurisupalli. These three churches are said to be under the same management. They belong to the Malankara Jacobite Syrian Community. There are now two factions in that community, one called the Patriarch's Party and the other, the Catholicos' Party. The Petitioner belongs to the Catholicos' Party, while the 1st counter petitioner belongs to the Patriarch's Party. The second counter petitioner is the Malankara Metropolitan belonging to the Patriarch's Party and the 3rd counter petitioner is the Diocesan Metropolitan of Kottayam, belonging to that party.

(2) The petitioners' case is that these three churches belong to the Catholicos' Party and that the first counter petitioner was officiating in these churches as a priest belonging to that party and that he subsequently seceded from that party, and went over to the Patriarchs' side. When the first counter petitioner attempted to perform services in the Cheriapalli as a priest of the Patriarch's party, certain members belonging to the Catholicos' Party petitioned the District Magistrate, Kottayam on 13-3-51 for action being taken against him under Sec. 142, Travancore Code of Criminal Procedure (Section 144 of the Indian Code). The District Magistrate thereupon, passed an order prohibiting the first counter petitioner from entering the church and performing services there. In the meanwhile certain members of the Patriarch's Party complained to the District Magistrate that the members of the Catholicos' Party were attempting to install a priest belonging to that party in the place of the first counter petitioner. The District Magistrate referred the matter to the police and on their report passed an order on 23-3-1951, under Section 31 of the Police Act, closing the three churches until further orders, as he was satisfied that the dispute between the two parties regarding the right to perform services in the three churches, was likely to cause a breach of the

peace. He also directed the local First Class Magistrate to initiate proceedings under S. 145 of the Travancore Code of Criminal Procedure corresponding to section 147 of the Indian Code. Accordingly proceedings were started under that section by the First Class Magistrate and a preliminary order was passed on 3-4-1951. Proceedings started under Section 144 were accordingly dropped. Four Revision Petitions were filed in the High Court from the orders of the District Magistrate, and of the First Class Magistrate, and the High Court by its order dated 28-4-1951 dismissed those petitions and confirmed the orders of the District Magistrate and the First Class Magistrate.

(3) Written statements were filed by both parties and one witness was examined in the case. On 14-2-1952 the first counter petitioner filed a petition for dropping the proceedings or for staying the same till the disposal of two civil suits between the parties and relating to the churches in dispute, viz. O. S. No. 82 of 1122 of the Kottayam District Court and O.S. No. 108/51 of the Kottayam Munsiff's Court. The reason given for dropping the proceedings was that the dispute between the parties relating to the right to officiate in the churches has been finally settled by the decision of the Travancore High Court in O. S. No. 111/1113 of the Kottayam District Court, which is reported in 1946 Trav L R 683. In the meanwhile one Philipose Kathanar who belongs to the Catholicos' Party filed a petition for getting himself impleaded as a party to the proceedings. Certain other persons also filed similar petitions. The learned First Class Magistrate passed an order on 15-3-1952 relating to all these petitions. The petition of Philipose Kathanar was rejected. Some of the other persons were impleaded, while others were not allowed to be impleaded. With regard to the petition of the 1st counter petitioner, the learned Magistrate disallowed the prayer for stay of proceedings till the disposal of the two civil suits. But he dropped the proceedings under Section 147 and cancelled the preliminary order. The revision is from that order.

(4) One of the reasons given by the learned Magistrate for dropping the proceedings, is that he has no jurisdiction under section 147, Code of Criminal Procedure to initiate proceedings in respect of a dispute relating to the right to perform services in a church. According to the learned Magistrate the section applies only to a case of dispute regarding the right of user of land or water, and that the right to perform services in a church is not a right of user of land. He has relied on certain rulings of the Indian High Courts, particularly of the Calcutta High Court, as the basis of this view. The rulings relied on are — 'Palaniyandi Pandaram v. Palaniappa Thevan', 17 Cri L J 235 (Mad). — 'Guiram Ghoshal v. Lal Behary Das', 37 Cal. 578; — 'Ram Saran v. Raghu Nandan', 38 Cal. 387; — 'Surendra Nath v. Soshi Bhusan', 52 Cal 959 and — '15 Bom 329 (sic.)'. It is argued for the revision petitioner that this view of the learned Magistrate is clearly wrong and that the decisions of the Calcutta High Court referred to by him have been overruled in a recent Full Bench decision of that court in — 'Dhirendra Nath Das v. Hrishikesh', AIR 1951 Cal 93. In that case the decisions of the various High Courts in India on the point were considered and the learned Judges came to the conclusion that a dispute as to the right of worship in a temple necessarily involves a dispute as to the right of user of land, within the meaning of that term in section 147, Code of Criminal Procedure. Harries C. J. observed thus in that case:

> "The view expressed in the earlier cases of this court cannot be maintained, and in my judgment they should be overruled. In these cases the Benches concerned failed to appreciate that a right to worship in a particular place must involve the right to use that particular place for a particular purpose, or in a particular manner. The right to worship, as I have said, cannot be regarded as something entirely apart from the place of worship, if what has to be considered is the right to worship a deity in a particular building or place. The view of the other High Courts must, I think, be accepted and that being so it must be held that a dispute as to the right to worship a deity in a particular temple is a dispute falling within the ambit of section 147 Criminal Procedure Code".

37 Cal 578, 38 Cal 387 and 52 Cal 959 relied on by the learned Magistrate were expressly overruled by their Lordships. 'Palaniyandi v. Palaniyappa', 17 Cri L J 235 (Mad) another case relied on by the learned Magistrate is a decision of the Madras High Court by a single Judge. That is the only decision of the Madras High Court, in which it was held that a dispute relating to the right to perform pooja in a temple would not come under section 147 Criminal Procedure Code. This case also is referred to in AIR 1951 Cal. 93 There are various other rulings of the Madras High Court in which a contrary view was taken. Those decisions are referred to in AIR 1951 Cal 93. They are — 'Muhammad Musaliar v. Kunjichek Musaliar', 11 Mad 323, — 'Kader Batcha v. Kader Batcha Rowthen', 29 Mad 237; — 'Chidambara v. Sengoda', 27 Mad L J 587; — 'Sinnaswami Chetti v. Palani Goundan', AIR 1925 Mad 779; — 'Vellappa Goundan v. Ramaswamy Goundan', AIR 1938 Mad 537. The same view was taken by the Allahabad High Court in — 'Dayaram v. Emperor', AIR 1930 All 452, by the Bombay High Court in — 'In Re. Pandurang Govind', 24 Bom 527, and by the Nagpur High Court in — 'Abdul Majid v. Mohammad Sahib Azizuddin', AIR 1941 Nag 171. The Travancore High Court has taken the same view in — 'Thomas v. Skaria Kathanar', 31 Trav L J 1223, and the Cochin High Court in — 'Ahammadu Kunju v. Ammu Mohammed', 5 Cochin 507. Practically all the High Courts in India are now of the view that a dispute relating to the right of performance of service in a place of public worship comes within the purview of section 147 of the Code of Criminal Procedure. I am, therefore, clearly of opinion, that the learned First Class Magistrate has gone wrong in his view that the dispute in this case does not come under S. 147, Crl. P. C. and that he has no jurisdiction to hold an enquiry under that section. The learned Magistrate has, therefore, gone wrong in dropping the proceedings on that ground.

(5) The second reason given by the learned Magistrate for dropping the proceedings is that according to him the decision of the Travancore High Court in — '1946 Trav L R 683' has finally settled the controversy between the parties so far as the matter in dispute in these

proceedings is concerned. In the words of the learned Magistrate,

"there can no longer be any dispute about the established (by judgment in the — '1946 Trav L R case') right of the Patriarch's party to officiate and conduct service in the three churches, the rights having been judicially recognised in — '1946 Trav L R 683'."

(6) Section 147(1) of the Code of Crl. Procedure provides that the provisions of section 145 shall, as far as may be, applicable to an inquiry under section 147. Sub-section (5) of S. 145 reads thus:

"Nothing in this section shall preclude any party so required to attend or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order and all further proceedings thereon shall be stayed, but subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final."

It is therefore clear that if it is shown that no dispute likely to cause a breach of the peace exists or has existed regarding the alleged right of the 1st counter-petitioner to perform services in the churches in question, the Magistrate is bound to cancel the preliminary order passed in this case. It is argued for the counter-petitioners that the real point in dispute between the parties in these proceedings is whether a priest belonging to the Patriarch's Party has got the right to officiate in these churches, that this point has been finally decided by the High Court of Travancore in — '1946 Trav L R 683', and that, therefore, no dispute exists between the parties regarding that question.

It is further contended that in the compromise decree in O. S. No. 130/1100 of the Kottayam District Court, which was a representative suit relating to the churches in question it is provided that only priests approved by the Malankara Metropolitan have got the right to officiate in these churches and that in — '1946 Trav L R 683' the 2nd counter-petitioner in these proceedings has been declared to be the lawful Malankara Metropolitan. It is, therefore, argued that only priests approved by the 2nd counter-petitioner can perform services in these churches. The 1st counter-petitioner being a priest approved by the 2nd counter-petitioner it is contended that there can be no dispute between the parties relating to his right to officiate in the churches in question. The compromise decree in O. S. No. 130/1100 is reported in — '29 Trav L J 457'. The term in the compromise relating to the question is this: "As to the priests that are to officiate in these churches the decisions or commands of the Metropolitan in the matter will be accepted by the parties".

(7) On the other hand, it is argued for the petitioner that the decision in — '1946 Trav L R 683' has not settled the dispute between the parties regarding the right to perform services in the churches in question, that these churches were not the subject-matter of the suit in that case, that they do not form part of the trust properties which were the subject-matter of that suit, that they were all along in the possession of the Catholicos' Party, that even after the decision in — '1946 Trav L R case' suits have been instituted by the Patriarch's Party for the possession and management of these churches and their properties, which suits are still pending, and that the decision in — '1946 Trav L R 683' is not binding on the petitioner and those members of the Catholicos' Party who are not parties to that suit. It is also contended that according to the decision in that case the Catholicos' Party have gone out of the Jacobite church and have constituted a church of their own and that, if it is so, the churches in question must be deemed to belong to that independent church. It is, therefore, argued that it cannot be said that there is no dispute at present between the parties, relating to the right to perform services in these churches.

(8) If the decision in — '1946 Trav L R 683', has finally set at rest the dispute between the parties relating to the right to perform services in these churches the Magistrate is bound to cancel the preliminary order and to stay all further proceedings thereon as provided in section 145(5), Code of Criminal Procedure. But in this case proceedings under S. 147 were started long after the decision in — '1946 Trav L R 683'. Even after the decision in that case, the Catholicos' Party was contending that priests belonging to their party alone have the right to officiate in these churches. The dispute that gave rise to these proceedings was one that existed even after — '1946 Trav L R 683', was decided by the Travancore High Court. The District Magistrate was satisfied that this dispute was likely to cause a breach of the peace and he at first issued a prohibitory order against the 1st counter-petitioner under S. 142 of the Travancore Code of Criminal Procedure and subsequently directed the 1st Class Magistrate to take proceedings under S. 145 of that Code. The breach of peace was so imminent that on the report of the police the Magistrate even took action under S. 31 of the Police Act. The High Court confirmed the order of the District Magistrate. It cannot, therefore, be said that when the proceedings were started, there was no dispute between the parties relating to the user of the churches in question, although there was the decision of the Travancore High Court in — '1946 Trav L R 683', declaring that the 2nd counter-petitioner is the lawful Metropolitan of the Malankara Jacobite Syrian Church.

(9) It is, however, argued for the counter-petitioners that when proceedings were started in this case, there was a petition pending in the High Court to review the decision in — '1946 Trav L R 683', that notice has been ordered on that petition and that it was only in December 1951 that, that petition was dismissed by this court. It is, therefore, contended that it is only after the dismissal of the review petition that the dispute between the parties relating to the right to officiate in those churches can be said to have been finally settled. It is pointed out that in the report of the police to the District Magistrate it was stated that the Catholicos' Party was contending that the decision in — '1946 Trav L R 683', had not become final by reason of the pendency of the Review Petition. Now, that the Review Petition has been dismissed, it is argued that there can be no further dispute between the parties regarding the right of the 1st counter-petitioner to officiate in these churches and that, therefore, the Magistrate has no jurisdiction to continue the proceedings under S. 147, since under Sub-s. (4) of that section an order of the Magistrate under the section is subject to the decision of the civil court.

(10) But the learned First Class Magistrate has not given this as a reason for dropping the proceedings. He has not even referred to the Revision Petition and to the effect of the dismissal of that petition by this court so far as the controversy in these proceedings is concerned. Neither has the first counter-petitioner mentioned this as a ground in his petition for dropping the proceedings, although in the affidavit filed in this court by the advocate who appeared for him in the court below, it is stated that this point was argued before the learned Magistrate. The question whether a dispute likely to cause a breach of the peace exists or has existed between the parties relating to the user of the churches in question is one of fact. If by reason of the dismissal of the review petition the dispute between the parties has ceased to exist or must be taken to have ceased to exist, the learned Magistrate ought to record a finding to that effect, and then only he will be justified in cancelling the preliminary order. The learned Magistrate has not recorded a definite finding on that question. He only says that by reason of the decision in — '1946 Trav L R 683', there can no longer be any dispute relating to the right of the Patriarch's party to conduct services in the churches in question. As stated above, there has been real dispute between the parties relating to this matter even after the — '1946 Trav L R 683', case was decided. If according to the learned Magistrate that dispute has been set at rest by reason of the dismissal of the review petition, he must find it as a matter of fact and then cancel the preliminary order. Of course, the mere fact that one party contends that there is still a dispute will be no reason for holding that there is a dispute, if, as a matter of fact, the dispute must be taken to have been settled by the decision of a competent civil court.

(11) If, on the other hand, the learned Magistrate finds that in spite of the dismissal of the review petition, there is still a dispute between the parties relating to the user of the churches in question which is likely to cause a breach of the peace, the proper thing to do will be to pass an order under S. 147 of the Code of Criminal Procedure. The learned Magistrate has not declared the right of the 1st counter-petitioner to officiate in the churches and has not prohibited the interference with the exercise of such right. The order, as it is, is likely to give rise to complications if, as a matter of fact, there is still dispute between the parties relating to the matter in controversy which is likely to cause a breach of the peace. From the affidavit filed in this court it is seen that there is dispute between the parties as to the person who is entitled to get the keys of the churches from the police.

(12) For the above reasons I set aside the order of the learned First Class Magistrate and direct him to take the case back to his file and dispose it of according to law and in the light of the observations made above.

B/V.B.B. Revision allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 534

VITHAYATHIL J.

Ittaman Nair, Petitioner v. Andy, Counter Petitioner.

C. R. P. No. 16 of 1951, D/- 19-9-1951.

Civil P.C. (1908) O. 38 R. 5, O. 34 R. 6 — (Cochin) Civil P. C. O. 34 R. 3 — Mortgage suit — Attachment before judgment — Attachment before judgment of property other than mortgaged property not barred.

The provisions of Order 38 Rule 5 are not inapplicable to mortgage suits. Where the mortgage property is insufficient to discharge the mortgage debt, other properties of the defendant can be attached before judgment if the requirements of Order 38 Rule 5 are satisfied. AIR 1943 Bom. 24, AIR 1931 Bom. 329, AIR 1933 All. 191, AIR 1932 Cal 790, AIR 1929 Lah. 402, AIR 1925 Pat. 291(1), AIR 1936 All 408, Rel. on. (Para 2)

There is nothing in Order 34 Rule 3 of the Cochin Civil Procedure Code prohibiting the Court from attaching before judgment properties belonging to the mortgagor other than the mortgage property. 31 Cochin 452 Disting. (Para 2)

An attachment before judgment has not the same effect as an attachment in execution, although it is not necessary to reattach the property in execution when it has been attached before judgment. 38 Cal. 448 and 4 Beng. LR 63, Rel. on. (Para 3)

Anno: C.P.C., O. 38 R. 5 N. 3.

T. S. Venkiteswara Iyer and C. S. Ananthakrishna Iyer, for Petitioner; V. V. Subramonia Iyer, for Counter Petitioner.

REFERENCES: Courtwar/Chronological/ Paras

('33) AIR 1933 All 191: (55 All 179)	2
('36) AIR 1936 All 408: (58 All 884)	2
('31) AIR 1931 Bom 329: (135 Ind Cas 428)	2
('43) AIR 1943 Bom 24: (205 Ind Cas 100)	2
('70) 4 Beng LR 63: (13 WR 9 (FB))	3
('11) 38 Cal 448: (10 Ind Cas 305)	3
('32) AIR 1932 Cal 790: (140 Ind Cas 457)	2
('29) AIR 1929 Lah 402: (118 Ind Cas 446)	2
('25) AIR 1925 Pat 291(1): (3 Pat 966)	2
7 Cochin LJ 425: (31 Cochin 452)	1, 2

ORDER: The plaintiff in O. S. No. 377 of 1125 of the Vadakkanchery Munsiff's Court is the revision petitioner in this case. The suit is for mortgage money. The plaintiff applied for attachment before judgment of certain properties belonging to the defendant and the attachment was allowed. The 1st Counter-petitioner here put in a claim in respect of the properties attached before judgment. It was also contended by the claimant that the Court had no jurisdiction to order the attachment before judgment. The reason given is that under Order 34 Rule 3 of the Cochin Civil Procedure Code the decree holder in a mortgage suit can proceed personally against the judgment-debtor only after exhausting the remedies against the mortgage properties. It is therefore contended that only after such remedies are exhausted that execution can be taken against the person or other properties of the judgment debtor and that therefore the attachment before judgment in this case was illegal. Reliance was placed on the ruling of the Cochin High Court reported in — 'Thavu v. Achuthan Nair', 7 Cochin LJ 425: (31 Cochin 452) in which it was held that the attachment of standing crops in execution of a mortgage decree before any attempt was made to sell the mortgage property was premature and invalid. The lower court accepted this plea and without going into the merits of the claim petition held that the attachment was invalid and allowed the petition of the claimant.

(2) I have no doubt that the order of the lower court is wrong. There is nothing in Order 34 Rule 3 of the Cochin Civil Procedure

Code prohibiting the court from attaching before judgment properties belonging to the mortgagor other than the mortgage property. Order 34 Rule 3 only prescribes the manner in which a decree should be passed in a mortgage suit. It says that after directing the sale of the mortgage properties in the first instance for realisation of the amount due the decree shall also provide that

"in case the net proceeds of such sale be insufficient to pay the amount due to the plaintiff, the balance, if legally recoverable from the defendant otherwise than out of the properties sold, be paid by the defendant personally."

What was held in — 'Thavu v. Achuthan Nair', 31 Cochin 452 was that in view of the above provision in Order 34 Rule 3 personal execution against the mortgagor could be taken only after the remedies against the mortgage property were exhausted. It was therefore held that the attachment effected in execution of the decree before any attempt was made to sell the mortgage property was premature and invalid. But there is nothing in that decision to show that an attachment before judgment could not be effected in a mortgage suit. In fact an argument was advanced in that case that the attachment should be treated as an attachment before judgment and therefore valid. Their Lordships held that the attachment was one taken out in execution of the decree and could not be treated as an attachment before judgment. It was taken for granted in that case that if the attachment could be treated as an attachment before judgment it would be valid.

Under Order 38 Rule 5, Civil P. C., the court has power to attach before judgment properties belonging to the defendant if the conditions laid down in that rule are satisfied. There is nothing in that rule to show that the court has no power to order an attachment before judgment in a mortgage suit. It has been held in various cases that the provisions of Order 38 Rule 5 are not inapplicable to mortgage suits. Where the mortgage property is insufficient to discharge the mortgage debt other properties of the defendant can be attached before judgment if the requirements of Order 38 Rule 5 are satisfied. Vide — Gopaldas Hiralal v. Mahadu Dagdu', AIR 1943 Bom 24; — 'Shridhar v. Lakshman', AIR 1931 Bom 329; — 'Mahomed Shafiq Ahmad v. Mt. Ram Katori', AIR 1933 All 191; — 'Sikharja Nath v. Janaki Nath', AIR 1932 Cal 790; — 'Mahomed Din v. Devi Dass', AIR 1929 Lah 402; — 'Jotirmoyee Debi v. Raghunath Pathak', AIR 1925 Pat 291 (1); — 'Shyam Lal v. Bahal Rai', AIR 1936 All 408.

(3) The lower court has clearly gone wrong in treating the attachment before judgment as a process in execution and in holding that it has the same effect as an attachment in execution. An attachment before judgment is essentially different in character from an attachment made after decree. In — 'Basiram v. Kattyayani Debi', 38 Cal 448 the distinction has been pointed out thus:

"An attachment before judgment does not for all purposes stand on the same footing as an attachment in execution proceedings. This indeed is obvious from first principles. The attachment does not of necessity ensure the property to the person who attaches it. He becomes entitled to proceed against it only if he eventually gets a decree."

In — 'Sri Ram Manik v. Tincowri Rai', 4 Beng LR 63 Mitter J. observes thus:

"An attachment prior to a decree is not an attachment for the enforcement of the decree but it is a step taken merely for the purpose of preventing the debtor from delaying or obstructing such enforcement when the decree subsequently passed shall be sought to be executed. An attachment after decree is, on the other hand, an attachment made for the immediate purpose of carrying the decree into execution and it presupposes an application on the part of the decree-holder to have his decree executed."

It is thus clear that an attachment before judgment has not the same effect as an attachment in execution, although it is not necessary to re-attach the property in execution when it has been attached before judgment.

(4) I therefore do not think that Order 34 Rule 3 of the Cochin Civil P. C. is a bar to an attachment before judgment of properties belonging to the defendant other than the mortgage property. The lower court has therefore gone wrong in holding that the attachment before judgment is invalid. The order of the lower court is set aside and the lower court is directed to dispose of the claim petition on the merits.

(5) The Revision Petition is allowed with costs.

B/V.B.B. Petition allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 535

SANKARAN AND GANGADHARA MENON JJ.

Chacko Kuriyathu, Appellant v. Padmanabhan Govindan Nambooripad, Respondent.

A. S. Nos. 846 and 847 of 1950, D/- 2-11-1951.

Decree — Construction — Ambiguity and apparent inconsistency in directions — Construction — Decree construed.

In a suit by lessor for possession, the lessee claimed that he should be paid the premium amount due under the lease deed and also the value of the improvements effected by him on the property before the lessor was allowed to recover possession of the property. Before these matters were finally settled, the plaintiff was allowed to recover possession of the property on the basis of a certain amount which he had deposited in Court for payment to the defendant. Even though the defendant's complaint against such dispossession proved unsuccessful, he had obtained an order in his favour that in case it is ultimately found that he was entitled to an amount larger than the amount deposited by the plaintiff, he would be adequately compensated for having been dispossessed even before payment of the full amount due to him. As per the final decree passed in the suit it was found that the total amount which the plaintiff had to pay to the defendant before recovery of possession of the property exceeded the amount deposited. Since the plaintiff had obtained possession of the property without payment of the full amount due to the defendant lessee, the decree in the case made certain provisions for compensation being paid to the defendant for such early dispossession. The following directions, therefore, were made in the decree: (1) The plaintiff was directed to deposit the balance amount im-

mediately, (2) by way of compensation the defendant was to be paid by the plaintiff interest at the rate of 9 per cent per annum on the premium amount from the date of dispossession, till the date of deposit of the abovesaid balance amount of premium etc. (3) the plaintiff was to deposit that amount in Court and (4) if he failed to make such deposit the defendant was to be allowed to recover the amount as a charge on the plaint property with future interest at 6 per cent per annum. The ambiguity or inconsistency in these directions arose out of the two rates of 9 per cent and 6 per cent interest mentioned in respect of the amount due from the plaintiff.

Held that the plaintiff would be gaining an undue advantage by his failure to deposit the amount in Court as per the direction in the decree in so far as he would be getting a reduction of the interest from 9 per cent to 6 per cent. It could not be said that the Court intended by the latter portion of the decree to take away a benefit which was expressly conferred on the defendant by the earlier portion of the decree. When there was such an ambiguity and an apparent inconsistency in the terms of the decree it had to be seen whether the decree could be construed in a reasonable and sensible way so as to give effect to all the directions contained in it. The natural and reasonable meaning to be given was to be that the provision for future interest at 6 per cent per annum was to govern the said balance amount only which the plaintiff had been directed to deposit in Court immediately. The compensation amount awarded in favour of the defendant was independent of this balance amount and in addition to the same. So far as compensation was concerned, the rate of 9 per cent interest fixed by the decree would not be deemed to have been affected by the future interest at 6 per cent provided in respect of the balance amount that was directed to be deposited by the plaintiff. The compensation by way of 9 per cent interest on the premium amount had to run at the same rate even after the date of the decree until the full amount due to the defendant was deposited by the plaintiff in Court. The premium amount as well as the balance amount directed to be deposited by the plaintiff were both easily ascertainable. Future interest on such balance alone had to be calculated from the date of the decree onwards at the rate of 6 per cent per annum. The amount by way of compensation had to be ascertained by calculating interest at 9 per cent per annum on the premium amount from the date of dispossession of the defendant till date of deposit by the plaintiff of all the amounts due to the defendant. In this manner the different directions in the decree could be harmonised and be given effect to, and this was the only reasonable and sensible construction that could be put upon the decree in this case. (Para 4)

T. K. Joseph, for Appellant; T. M. Mahalinga Iyer, for Respondent.

SANKARAN J.: The question for decision in both these appeals is the same and it is one of interpretation of the trial Court's decree in these cases. The 1st defendant in O. S. No. 36/1117 on the file of the lower Court is the appellant in A. S No. 846 of 1950. The additional 13th defendant who is the legal representative of the deceased 1st defendant in O.S. No. 37 of 1117 on the file of the same Court, is the appellant in A. S. No. 847/1950. The plaintiff in both these suits is the same, and the suits were for recovery of the property from the lessees-defendants. By the final decree passed in the suits, certain amounts with interest have been directed to be paid by the plaintiff to the respective defendants. The directions in the two decrees regarding the payment of these amounts are almost similar and the dispute between the parties is about the construction of these directions. Undoubtedly there is an ambiguity or apparent inconsistency in the terms of these decrees. In order to reconcile the several terms of the decrees and to construe the decrees by giving a reasonable and sensible meaning to these terms, it is necessary to peruse the judgments in the cases and to have an idea of the circumstances under which the decrees happened to be passed.

(2) The 1st defendant-lessee in each of these suits had claimed that he should be paid the premium amount due under the lease deed and also the value of the improvements effected by him on the property before the plaintiff is allowed to recover possession of the property. Before these matters were finally settled, the plaintiff was allowed to recover possession of the property on the base of a certain amount which he had deposited in Court for payment to the defendant. Even though the defendant's complaint against such dispossession proved unsuccessful, he had obtained an order in his favour that in case it is ultimately found that he was entitled to an amount larger than the amount deposited by the plaintiff, he would be adequately compensated for having been dispossessed even before payment of the full amount due to him. As per the final decree passed in O. S. No. 36 of 1117 it was found that the total amount which the plaintiff had to pay to the defendant before recovery of possession of the property, was I. Rs. 2870-3-0 and that as a matter of fact the plaintiff had deposited in Court only a sum of S. Rs. 2642 Chs. 2.

The plaintiff had also obtained possession of the property from the defendant on 14-7-1118. Similarly it was found by the final decree passed in O. S. 37 of 1117 that the total amount which the plaintiff had to deposit for payment to the defendant was S. Rs. 3124 Chs. 14 Cash 10, that the plaintiff had actually deposited in Court only a sum of Rs. 3045 Chs. 11 cash 8 and that he had obtained possession of the property from the defendant on 14-7-1118. The total amount found to be due to the defendant in each of these cases consisted of the premium amount, the amount on account of the value of improvements and also a small amount by way of cost of seed and labour in view of the fact that delivery of the property was effected together with the crops which the defendant had raised thereon. Since the plaintiff had obtained possession of the property without payment of the full amount due to the defendant lessee, the decree in each of these cases made certain provisions for compensation being paid to the defendant for such early dispossession. Since these provisions are almost similar in the two decrees, the construction to be put upon such provisions in any one decree would hold good

so far as the provisions of the other decree also are concerned.

(3) The decree in O. S. No. 36 of 1117 which has come up for construction in A. S. No. 846 of 1950 may therefore be taken up. The following directions have been made in that decree:— (1) since the plaintiff had deposited only a sum of Rs. 2642 chs 2 on 18-8-1117 as against the total amount of I. Rs. 2870-3-0 found to be due from him, he is directed to deposit the balance amount immediately. (2) by way of compensation the 1st defendant will be paid by the plaintiff interest at the rate of 9 per cent per annum on the premium amount from 14-7-1118, the date of dispossession, till the date of deposit of the above said balance amount of premium etc. (3) the plaintiff will therefore deposit that amount in Court and (4) if he fails to make such deposit the 1st defendant will be allowed to recover the amount as a charge on the plaint property with future interest at 6 per cent per annum. The ambiguity or inconsistency in these directions arises out of the two rates of 9 per cent and 6 per cent interest mentioned in respect of the amount due from the plaintiff

The position taken up by the decree-holder is that subsequent to the date of decree interest on all the amounts due from him can be calculated only at the rate of 6 per cent as per the direction in the decree. This contention found favour with the lower Court and hence the defendant has come up in appeal.

(4) In the decree there is clear and specific direction that by way of compensation the defendant will be paid by the plaintiff interest at 9 per cent per annum on the premium amount from 14-7-1118 the date of dispossession till the date of deposit of the balance amount of premium etc. found to be due from the plaintiff. In the subsequent portion of the decree it is directed that in case of the failure of the plaintiff to deposit the amount due to the defendant, the defendant is allowed to recover such amount as a charge on the plaint property with future interest at 6 per cent per annum. If this rate of 6 per cent is to govern the interest on the premium amount also, it will result in a reduction of the interest at 9 per cent which had already been provided for in respect of the premium amount. In other words, the plaintiff will be gaining an undue advantage by his failure to deposit the amount in Court as per the direction in the decree, in so far as he would be getting a reduction of the interest from 9 per cent to 6 per cent. It cannot be said that the Court intended by the latter portion of the decree to take away a benefit which was expressly conferred on the defendant by the earlier portion of the decree. When there is such an ambiguity and an apparent inconsistency in the terms of the decree it has to be seen whether the decree could be construed in a reasonable and sensible way so as to give effect to all the directions contained in it.

As already pointed out, the total amount of I. Rs. 2870-3-0 found to be due from the plaintiff to defendant, consisted of the premium amount, the amount by way of value of improvements in the property and the amount by way of cost of seed and labour in respect of the crops that had been raised on the property. Naturally, therefore, it has to be taken that the balance amount due from the plaintiff to the defendant after deducting the sum of S. Rs. 2642 Chs. 2 which he had deposited on 18-8-1117, also consists of these three items. Such balance amount also was due to the defendant from 14-7-1118, the date on which he was dispossessed of the property. All the same no provision has been made in the decree for any interest being paid on such balance amount from 14-7-1118 till the date of the decree. The decree directed the plaintiff to deposit such balance amount immediately. The subsequent direction is to the effect that in case the plaintiff fails to make such deposit, the defendant is allowed to recover the amount as a charge on the property with future interest at 6 per cent per annum.

Thus the natural and reasonable meaning to be given to this part of the decree appears to be that the provision for future interest at 6 per cent per annum is to govern the said balance amount only which the plaintiff has been directed to deposit in Court. The compensation amount awarded in favour of the defendant is independent of this balance amount and in addition to the same. The compensation is awarded obviously on account of the mesne profits lost to the defendant because of his early dispossession of the property. On account of such compensation he has been awarded 9 per cent interest on the premium amount from 14-7-1118 till the date of deposit of the entire amount due to him i.e., the balance amount of premium etc., and also interest due to him. So far as such compensation is concerned, the rate of 9 per cent interest fixed by the decree cannot be deemed to have been affected by the future interest at 6 per cent provided in respect of the balance amount that is directed to be deposited by the plaintiff. The compensation by way of 9 per cent interest on the premium amount has to run at the same rate even after the date of the decree until the full amount due to the defendant is deposited by the plaintiff in Court. The premium amount as well as the balance amount directed to be deposited by the plaintiff are both easily ascertainable. Future interest on such balance amount alone has to be calculated from the date of the decree onwards at the rate of 6 per cent per annum. The amount by way of compensation will be ascertained by calculating interest at 9 per cent per annum on the premium amount from 14-7-1118 till date of deposit by the plaintiff of all the amounts due to the defendant. In this manner the different directions in the decree can be harmonised and be given effect to, and this is the only reasonable and sensible construction that can be put upon the decree in this case.

The lower Court is accordingly directed to make a revised calculation in the manner indicated above and to fix the amount due to the defendant as per the decree in this case, after calling for statements from both sides and hearing them. A. S. No. 846 of 1950 is thus allowed. In the circumstances of this case, we make no order as to costs of this appeal.

(5) Excepting for the fact that the premium amount and the balance amount in A. S. No. 847 of 1950 are different from the corresponding amounts involved in A. S. No. 846 of 1950, the terms and directions in the decree in this case i.e., in O. S. 37 of 1117, are similar to those in O. S. No. 36 of 1117 and which have already been construed. The decree in O. S. No. 37 of 1117 will also be construed and given

effect to in the manner indicated above in respect of the decree in O. S. No. 36 of 1117. By thus construing the decree, the lower Court will make a revised calculation of the amount due to the appellant defendant in this case also and fix the amount after calling for statements from both sides and hearing them. A. S. No. 847 of 1950 is also thus allowed. In the circumstances we make no order as to costs of this appeal.

(6) A copy of this judgment which is common to both these appeals will be placed among the records of each case.

C/R.G.D. Order accordingly.

A. I. R. 1952 TRAVANCORE-COCHIN 538

KOSHI AND GOVINDA PILLAI JJ.

Sultan Pillai, Appellant v. Ayyappan Pillai and others, Respondents.

Second Appeal No. 768 of 1950, D/- 23-7-1951.

Civil P. C. (1908), O. 41 R. 23 — High Court remanding petition for further enquiry with observation that it is maintainable — Lower Court cannot criticise conclusions of High Court.

Where the High Court in appeal holds setting aside the decision of the lower Courts, that the appellants' petition under O. 21 R. 94 was maintainable and not barred and remands the petition for fresh inquiry, the order is conclusive between the parties, even if it were wrong. It is not within the province of the Courts below to comment on the same and to hold against the conclusions arrived at by the High Court. (Para 1)

Anno: C. P. C., O. 21 R. 23 N. 29.

K. P. Abraham, for Appellant; T. K. Narayana Pillai, for Respondents Nos. 1 to 6.

JUDGMENT: The 8th defendant is the appellant. The plaintiffs and defendants 1 to 6 were members of an undivided tarwad. That tarwad became divided by executing Ext. II, partition deed, on 4-12-1098. Survey Nos. 88 and 89, which constituted item No. 9 in the plaint schedule, fell to the share of defendants 1 to 6. This property was then outstanding on mortgage and it had been redeemed by the fourth defendant, on 28-11-1094. This was mentioned in the partition deed, and it was provided that the mortgage amount of 2550 fanams should be paid to the fourth defendant by the other members who got this property. At the time of the partition, there was a suit, O. S. 1073 of 1093, to set aside another decree in O. S. 792 of 1089, which had created a charge on the tarwad properties. The provision in Ext. II was that this suit, O. S. 1073 of 1093, was to be conducted properly and that, in the event of that suit going against the tarwad, the money due under the previous decree was to be paid equally by the branches of the plaintiffs and defendants 1 to 6. O. S. 1073 of 1093 went against the tarwad and, so, the plaintiffs were obliged to discharge the whole debt. The present suit was for contribution and, in that, all the properties obtained by defendants 1 to 6 in the partition were scheduled. Before the date of the suit, the fourth defendant had conveyed item No. 9, which fell to her share, to the eighth defendant. He was, therefore, impleaded in the case. He remained ex parte and the suit was decreed against all the properties mentioned in the schedule. The eighth defendant, on coming to know of this decree, applied to set aside the ex parte decree. But he was unsuccessful both, in the trial court and in the appellate court.

Then he filed O. S. 915 of 1117 for a declaration that he was entitled to a prior charge, in any event, over item No. 9 to the extent of the mortgage debt discharged by the fourth defendant. He had also applied for an injunction to restrain the execution of the decree against item No. 9. His petition for injunction was dismissed, and his appeal, C. M. A. 287 of 1117, filed in the High Court, was dismissed with the observation that, if the eighth defendant was not barred by res judicata, by the reason of the decision in this case, it would be open to him to file a petition under Order XXI rule 95 C. P. C. After this the eighth defendant did not conduct his suit. The properties were sold in execution of this decree and when the plaintiff applied for delivery of possession, the eighth defendant intervened and objected to the actual delivery of possession of item No. 9. He stated that the mortgage right, which the fourth defendant had even before the date of the partition, was in no way affected by the decree in the case and that, therefore, he was entitled to retain possession of the property till the mortgage amount was paid to him. The execution court and the lower appellate court had found that, since the eighth defendant was a party to the decree, he was bound by the terms thereof, and that he was not entitled to intervene in execution and object to the delivery of possession of the property. He filed S. A. No. 420 of 1120 before the High Court. This Court allowed the appeal and remanded the petition for fresh enquiry with the following observations and findings:

"The 8th defendant's obstruction petition under Order 21 rule 94 C. P. C. has been thrown out on the ground that he is bound by the decree and that the effect of the decree was to declare the sale deed executed in his favour cancelled. The opinion taken by the lower courts is wrong. In the first place the suit was filed after the partition. In the second place no issue was raised with regard to the validity or otherwise of the sale of item No. 9 in favour of the 8th defendant. The plaint did not contain a prayer for the cancellation of the sale deed. It has therefore to be held that there is no bar by way of estoppel or res judicata in the way of the petition of the 8th defendant under Order 21 Rule 94 C. P. C."

Even after remand, the courts below held that the petition was not maintainable. The lower appellate court went a step further and attempted to criticise the order passed in S. A. 420 of 1120. Even if the decision of the High Court in S. A. 420 of 1120 was wrong, it was conclusive as between the parties in that case and it was not within the province of the courts below to comment on the same and to hold against the conclusions arrived at by the High Court. The learned appellate Judge certainly went out of his way in making such comments and it is necessary to mention that his conduct could not in any way be justified. As mentioned already, even taking that the decision in S A. 420 of 1120 was wrong in principle, the parties to the same are bound by that order. It is not for us to canvass the correctness of that decision. That decision held conclusively that the original decision in this

case was no bar, by way of estoppel or res judicata for the eighth defendant's petition under Order XXI Rule 94 C. P. C. The respondents' learned Advocate attempted to explain the finding in S. A. 420 of 1120 by stating that the question, whether the eighth defendant could set up a prior charge, had not been considered in that decision and that, therefore, the decision in S. A. 420 of 1120 was no bar, so far as that question was concerned. The appellate court judgment in A. S. No. 18 of 1119, from which S. A. 420 of 1120 arose, would show that the petition was dismissed mainly on the ground that, as the ex parte decree stood, the eighth defendant was bound by it, that item No. 9 was clearly liable for the debt and that it was not open to the eighth defendant to challenge the validity of the decree in execution. It was in view of these findings that it was held in S. A. 420 of 1120 that the eighth defendant was not in any way barred in setting up his prior charge. So it has to be held that the eighth defendant is entitled to agitate and establish his prior charge over the property.

Since all the evidence in the case is before us, it has to be seen whether there was a prior charge, as mentioned by the eighth defendant, and whether that prior charge was also included in the partition deed, Ext. II. The provision in Ext. II had already been referred to and there it was stated that the money used by the fourth defendant for redeeming the prior mortgage belonged exclusively to her, and that the parties, who got this property in partition were to pay the same to the fourth defendant. Evidently, therefore, the mortgage charge had not been extinguished by the partition deed, Ext. II. The plaintiffs could get a charge only on the properties divided and included in the partition deed as belonging to the tarwad. The tarwad had only the equity of redemption over item No. 9 then, so that the mortgage right was not included and partitioned under Ext. II.

The eighth defendant, in view of the decision in S. A. 420 of 1120, is entitled to claim a subrogation to that right.

It is, therefore, declared that the eighth defendant is entitled to retain possession of the property till he is paid the mortgage amount charged on this item of property. In reversal of the orders passed by the courts below his petition is, therefore, allowed. The plaintiffs can ask only for symbolic delivery of possession of the equity of redemption over item No. 9. The eighth defendant is allowed all his costs, in the three courts, incurred by him after the decision in S. A. 420 of 1120.

C/R.G.D. Order accordingly.

A. I. R. 1952 TRAVANCORE-COCHIN 539

KOSHI AND GOVINDA PILLAI JJ.

Avera Kurian, Appellant v. Vengu Ammal and another, Respondents.

A. S. No. 310 of 1951, D/- 22-10-1951.

T. P. Act (1882) S. 100 — Partition decree — Some alienations by sharers declared invalid — D, an alienee in possession of certain property on declaration of alienation to be invalid directed to surrender property to plaintiff — Sharer — Price paid for property made charge on property — D can use her possession as shield against plaintiff's attempt to get possession — Before D is compelled to deliver possession, she can claim refund of her charge. (Para 4)

Anno: T. P. Act S. 100 N. 17.

M. George, for Appellant; P. Narayana Pillai, for Respondents.

REFERENCE ..... /Para
36 Cochin 362 4

JUDGMENT: The assignee-decree-holder is the appellant. This is a partition decree, by which the plaintiff was allowed a 5th share in the properties, after declaring some alienations or portions thereof as invalid and not binding on the plaintiff's share. The plaintiff had also been allowed mesne profits. The debts proportionately chargeable on the property that would fall to the plaintiff's share as well as the mesne profits which each of the defendants had to pay to the plaintiff were directed to be determined at the time of the final decree.

(2) By a final decree, passed on 22-7-1950, it was found that the debt, which the plaintiff had to pay, on the property in the possession of the 8th defendant, was Rs. 341-8-0. The mesne profits due from each defendant were also determined. While the plaintiff took out execution for the mesne profits there was a contention by the defendants Nos. 8 and 9 that no interest on the mesne profits had been provided for in the decree and that the plaintiff was not entitled to the same. The 8th defendant contended in addition that a sum of Rs. 341-8-0 was due from the plaintiff to her and that this amount has to be set off against the amounts due from her to the plaintiff. Both these contentions were accepted by the lower Court; and the appeal by the decree-holder is against this order.

(3) In passing the final decree, the Court below determined the annual amount due from each defendant and multiplied it by the number of years for which the plaintiff was to get mesne profits. The product thus arrived at was mentioned in the final decree to be the amount of mesne profits due from the several parties to the plaintiff. The final decree did not, therefore, provide for any interest on the mesne profits. On the other hand, it would be seen that, by the process adopted by the Court below, no interest was ever intended to be paid. So, the plaintiff was not entitled to get any interest on the mesne profits, as contended by him.

(4) The 8th defendant was in possession of the property which she was directed to surrender to the plaintiff. This was under a sale deed from the other sharers, so that her possession was not wrongful. Besides, it was found that the 8th defendant was entitled to a charge to the extent of Rs. 341-8-0 on the portion of the property allotted to the plaintiff. It was perfectly competent for the 8th defendant to use her possession as a shield against the plaintiff in the attempt to get possession. Being so, it was perfectly open to the 8th defendant to claim refund of the charge declared in her favour before she was compelled to surrender possession of the property. The ruling in — 'Manicka Menon v. Chakkunni Variath', 36 Cochin 362 is a proper authority for this position. It was seen that the 8th defendant was dispossessed of the property on 29-1-1125 through the intervention of Court at the instance of the plaintiff. Strictly speaking, the Court should not have allowed delivery of possession until the plaintiff deposited in Court the amount due to the 8th defendant. Since she had been already dispossessed of the property and since she was

satisfied that a set off of the amount due to her against the sum due from her to the plaintiff, the lower Court was right in allowing the same. We do not see anything wrong in the order of the Court below. We confirm the same and dismiss the appeal with costs.

C/R.G.D. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 540

KOSHI AND GOVINDA PILLAI JJ.

Parameswararu and others, Appellants v. Narayanaru and others, Respondents.

A. S. No. 570 of 1124(T), D/- 11-1-1952

Travancore Arbitration Act (11 of 1115), S. 11 — Arbitration without intervention of Court — Award — Application under repealed provisions of O. 39 R. 20, Tr. C.P.C. for filing award in Court and passing decree thereon — Petition can be treated as a suit for passing decree in terms of award — S. 11 does not affect such right — (Arbitration Act (1940), Ss. 14(2) and 17).

In an arbitration without the intervention of the Court an award was made by the Arbitrator and it was accepted by all the parties. Subsequently, however, one of the parties raised objections to the award and thereupon the petitioner filed an application under O. 39 R. 20 Tr. Civil P.C. for giving notice to the arbitrator for filing the award in Court and then passing a decree thereon. This application was made when the provisions of O. 39, Rr. 17 to 21 had been repealed by S. 3 Travancore Arbitration Act 11 of 1115. The petition was tried as a suit and at the stage of argument the defendants contended that as the petition was filed under O. 39 R. 20, C.P.C. which was repealed it was not maintainable and that under S. 11(2) of the Arbitration Act (11 of 1115) the plaintiff had no right to approach the Court in the first instance to cause the award to be filed in Court and to enforce it without first requesting the arbitrators to file the award. The Court accepted the contention and dismissed the suit. The plaintiff appealed.

Held that when an award is produced in Court under S. 11, the Court has only to hear objections as provided for in the subsequent sections and pass an order to have it filed in Court. No decree on the same need be passed and the award itself could be executed as if it is a decree; but the provisions in Act 11 of 1115 do not take away the rights of a party to file a suit to enforce the award, so that a decree could be passed by the Court on the basis of the award. 1947 Trav. LR 799 and AIR 1926 Cal. 938, Rel. on. (Para 3)

Virtually, the plaintiffs' petition was to have a decree passed on the award, which the Court could have done, even if it found that the petition filed quoting the repealed provisions of the Civil Procedure Code was not maintainable. The plaintiffs must, therefore, be allowed to treat their petition as a plaint and continue the suit after paying the necessary court fees in the Court below. (Para 3)

Anno: Arbt. Act S. 14 N. 2; S. 17 N. 8, 10.

N. Varadaraja Iyengar, for Appellants; T. N. Subramonia Iyer, Advocate General, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('26) AIR 1926 Cal 938: (53 Cal 65) 3
('47) 1947 Trav LR 799 3

GOVINDA PILLAI J.: Plaintiffs 2 to 4 are the appellants. Plaintiffs 1 to 4 and defendants 1 to 3 were members of an undivided Namboodiri Illom of which the 1st plaintiff was the Karnavan. There are three branches in the Illom. The 1st branch is represented by the 1st plaintiff, the second branch by plaintiffs 2, 3 and 4, and the third branch by defendants 1 to 3. The plaint schedule properties belonged to the Illom. There were disputes between the plaintiffs and defendants regarding the management of the Illom properties and to settle them the matter was referred to an arbitration by executing an agreement by all the adult members on 17-7-1119. The arbitrators were Messrs. M. R. Madhava Warrier, a senior Advocate of the Mavelikara Bar and K. N. Nilakanta Kaimal and P. Narayana Pillai, Vakils of the Thiruvella Munsif's Court. They considered the question referred to them and passed an award on 17-8-1119 after giving notice to the parties. Copies of the award were also given to the plaintiffs 1 and 2 and the 1st defendant. The copy given to the 2nd plaintiff was produced along with the plaint. All the parties accepted the award and agreed to abide by its terms and accordingly the shares in the money mentioned in schedule E to the award were received by them from the arbitrators by passing the receipts. Under this award the A schedule properties were allotted to the 1st plaintiff, C and D schedule properties to the plaintiffs 2 to 4 and portion of F schedule to plaintiffs 1 to 4. The rest went to the defendants.

Subsequently the 1st defendant at the instigation of the interested parties sent notice to the arbitrators objecting to the award. He was attempting to act against the provisions of the award. The petitioners therefore filed a petition purporting to act under rule 20, Order XXXIX C.P.C. Their prayer was to give notice to the arbitrators to file the original award and then to pass a decree thereon and also to allow them their costs from the first counter-petitioner. The lower court registered this petition as an original suit No. 98 of 1119 and issued summons to the counter-petitioners treating them as defendants. The 1st defendant opposed the plaintiffs. He stated that the points referred to in the arbitration agreement had no due consideration at the hands of the arbitrators, that no evidence was taken or called for, that the contentions of the parties were not heard, that Sarwaswadanom properties were not included in the agreement, that the self-acquisitions of Krishnaru the father of the 1st defendant were not intended to be included in the arbitration proceedings, that the passing of the award was not notified to all the members of the Illom, that the award was vague and indefinite and was not written according to law, that it was made without the knowledge and consent of the 1st defendant, that he had repudiated the same at the earliest possible opportunity and that the award was not to be accepted. The plaintiffs denied all these statements made by the 1st defendant, by filing a replication.

(2) On the contentions raised by the parties, issues were settled and the court took also evidence by examining the witnesses and accepting the documents. When the case was taken up for argument the defendants raised a contention that the petition filed by the plaintiffs

to cause the award to be filed was not maintainable, for the same was done under rules 17 to 21 of Order XXXIX of the C.P.C., that those rules were repealed and Arbitration Act XI of 1115 had been passed, and that under clause 2 of section 11 of this Act the parties to the arbitration had no right to put in a petition to cause the award to be produced. The petition was therefore impeached to be not maintainable. The court below accepted the defence contentions raised at the final stage of the case and dismissed the suit without costs. The plaintiffs have come up in appeal.

(3) The petition by the plaintiffs 2 to 4 which was filed as a plaint & numbered as an original suit had been filed on 13-11-1119 when rules 17 to 21 of Order XXXIX of the C.P.C. had been repealed by section 3 of Act XI of 1115. Act XI of 1115 provided for arbitration except through the intervention of the court. Section 11 there provided for the procedure to be followed when the arbitrators had passed the award. It laid down that the award was to be filed by the arbitrators in court at the request of the parties who referred the matters to the arbitration. It was therefore contended that no party could approach the court in the first instance to cause an award to be filed in court and to ask for its enforcement. Opinion is divided as to the propriety of the party approaching the court for an order for the production of the award by the arbitrators without first requesting the arbitrators to file the award. When an award is produced in court under section 11, the court has only to hear objections as provided for in the subsequent sections and pass an order to have it filed in court. No decree on the same need be passed and the award itself could be executed as if it is a decree. But the provisions in Act XI of 1115 do not take away the rights of a party to file a suit to enforce the award, so that a decree could be passed by the court on the basis of the award. The rulings in — 'Chanda Pilfai v. Chacko', 1947 Trav LR 799 and — 'John Batt & Co. v. Kanoolal & Co', AIR 1926 Cal. 938, support this position. Virtually, the plaintiffs' petition was to have a decree passed on the award, which the court could have done, even if it found that the petition filed quoting the repealed provisions of the Civil Procedure Code was not maintainable. The appellants' learned Advocate, when asked, stated that he was prepared to proceed as if the petition itself was a plaint in a suit to enforce the award and for passing a decree. This would necessarily make them liable to pay additional court fees. In order to advance substantial justice to the parties we think that the plaintiffs must be allowed to treat their petition as a plaint and continue the suit after paying the necessary court fees in the court below. The decree now passed by the lower court is set aside. The case is sent back for disposal in the light of the directions given above. The costs hitherto incurred by the parties will abide the final result of the suit.

B/K.S. Case remanded.

A. I. R. 1952 TRAVANCORE-COCHIN 541

KOSHI AND GOVINDA PILLAI JJ.

Joseph, Appellant v. Kunhiraman, Respondent.

Second Appeals Nos. 193 and 364 of 1951, D/- 11-7-1951.

(a) Debt Laws — Travancore Holdings (Stay of Execution Proceedings) Act (VIII (8) of 1950), S. 2 — Act does not extend to a person who is at best licensee or squatter.

The provisions of Travancore Act VIII of 1950 cannot be extended to a person who is at best a licensee or a squatter. Though he is there on the property only by sufferance his interest can by no stretch of imagination be brought under the definition of the term "Holding" in S. 2 of the Act. (Para 4)

(b) Debt Laws — Travancore Holdings (Stay of Execution Proceedings) Act (VIII(8) of 1950), S. 3 (c) — Lands with buildings thereon are excluded from purview of Act. (Para 4)

T. S. Venkiteswara Iyer, for Appellant; K. Narayana Panicker, for Respondent.

KOSHI J.: These two appeals arise from an appellate order of the District Judge, Parur, who modified an order passed by the temporary District Munsiff of Perumpavoor in proceedings in execution of the decree in O. S. 739 of 1107 on the file of his court. S. A. No. 193 is by the decree-holder and S. A. 364 by defendant 11. The decree is for eviction. The suit property belonged originally to the father of defendants 11 and 12 who sold it to the plaintiff's Illom. The Illom leased out the property with the building thereon to the predecessor-in-interest of defendants 1 to 9 and the suit in which the decree under execution was passed was to evict the successors-in-interest of the original lessee from the holding. Defendants 11 and 12 were impleaded as they were found to be in possession under the lessor or his heirs. Defendant 11 contested the suit and even disputed the title of the lessor on the ground that his father by himself was incompetent to sell the property. He also set up independent possession. But these contentions were repelled in all the courts and a decree was passed in favour of the plaintiff for surrender together with arrears of pattom.

(2) Now when execution was sought to be taken out by an assignee-decree-holder defendant 11 opposed it for various reasons but the execution court repelled all the objections. In these second appeals we are only concerned with one of the objections viz., whether the holdings (Stay of Execution Proceedings) Act VIII of 1950 or Act XXII of 1124, the Travancore Prevention of Eviction Act would preclude the decree-holder from taking possession of the property. It may here be mentioned that defendant 11 also disputed the assignee-decree-holder's title. That matter has now been settled in favour of the assignee and the only question for decision is what has been stated above viz., whether eviction can be allowed. The execution court overruled the objection and directed the property, the land as well as the building to be delivered to the assignee-decree-holder. Defendant 11 preferred an appeal against that order to the lower appellate court and the learned Judge there while confirming the Munsiff's order so far as the land was concerned set aside the remaining part of the order relating to the building. The decree-holder (assignee) appeals against the District Judge's order refusing eviction of defendant 11 from the building while the latter has appealed from that part of the District Judge's order which confirms the Munsiff's decision namely, that relating to the land.

(3) The question for our decision is whether the lower appellate court's order calls for any interference at our hands. Paragraph 5 of that

order expressly states that it was conceded that Act XXII of 1124 has no application to the case and we need therefore only consider whether Act VIII of 1950 has any application. We find two objections to apply the provisions of that Act to the present case.

(4) In the first place defendant 11 had not obtained any title or interest in the lease-hold in favour of the predecessor-in-interest of defendants 1 to 9. He was at best only a licensee or a squatter and we find no reason to extend the provisions of the Act to him. Though he was there on the property only by sufferance and (sic) his interest can by no stretch of imagination be brought under the definition of the term "holding" in S. 2 of the Act. Secondly S. 3 (c) expressly excludes from the purview of the Act buildings rented out including houses, shops or warehouses and the site thereof together with the gardens or lands appertinent thereto. As mentioned earlier the lease here was of a land with building thereon. The Act cannot therefore be applied.

(5) In view of the above. S. A. 193 has to be allowed and S. A. 364 dismissed.

(6) In the result the modification introduced by the learned District Judge to the Munsiff's order is set aside and the Munsiff's order will stand restored in toto. S. A. No. 193 is allowed with costs and S.A. 364 dismissed with costs.

C/R.G.D. Orders accordingly.

A. I. R. 1952 TRAVANCORE-COCHIN 542

SANKARAN AND GANGADHARA MENON JJ.

Chandy Devassya, Appellant v. Kuriayakko Varkey and others, Respondents.

A. S. No. 355 of 1951, D/- 5-12-1951.

(a) Debt Laws — Travancore Debt Relief Act (II (2) of 1116) Ss. 8, 9, 11 and 15 — Petition for payment of debt in instalments — Order must show what the debt was. (Para 2)

(b) Debt Laws — Travancore Debt Relief Act (II (2) of 1116) Ss. 8, 9 — Debt coming within scope of Act — Debt in existence prior to 23-5-1112 — Fact that final decree was passed on 20-12-1120 does not take debt outside scope of Act. (Para 2)

(c) Debt Laws — Travancore Debt Relief Act (II (2) of 1116) S. 11 — One decree passed — Amount of debt how calculated.

Where there has been no appellate decree but only one decree and that is the trial Court's decree, and it was passed long after the date of the Debt Relief Petition, even if the amount of the debt is to be calculated on the basis of that decree under Section 11 of the Debt Relief Act the principal amount together with one-half of the same can alone be claimed up to the date of the decree. If the debtor had offered to pay the debt under the provisions of Ss. 8 and 9 of the Debt Relief Act even before the passing of the decree the amount of the debt for the purpose of such payment has to be fixed in a similar manner by taking into account the principal amount together with one-half of the same by way of interest. After thus fixing the amount it has to be seen whether the total amount of the instalment payments made by the defendant is sufficient to cover the debt as reduced under Ss. 8 and 9 together with the future interest due on the reduced amount. 1948 Trav LR 244 Distinguished. 1943 Trav LR 509 Relied on. (Para 2)

The debtor can claim the benefit of the concessional payment under Ss. 8 and 9 only in respect of the debt mentioned above. The costs awarded under the decree in the case is certainly outside the scope of the Act and hence he is liable to pay the whole amount of such costs. (para 3)

N. Padmanabha Panicker, for Appellant; T. K. Joseph, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('43) 1943 Trav LR 509 2

('48) 1948 Trav LR 244 2

SANKARAN J.:' The decree-holder in O. S. 931/1112 on the file of the Vaikom Munsif's Court has preferred this appeal against the order passed by the execution Court striking the decree off the file. The suit was for defaulted subscriptions due under a chitty hypothecation bond. The 1st decree in the case was passed on 16-7-1114. On the application of the plaintiff himself the trial Court reviewed that decree and set it aside and restored the suit to the file. Subsequently a fresh decree was passed on 20-12-1120.

The defendant in the case had filed a petition under sections 8 and 9 of the Debt Relief Act for payment of the debt in instalments. He has also been paying the instalments regularly. The debt due on 31-1-1116 as per the calculations made by the defendant has been completely wiped off according to him with the instalment payments already made. On 30-6-1950 the decree holder filed a petition for a review of the order passed on the Debt Relief Petition and for permitting him to take out execution for realising the balance amount due to him under the decree. The defendant also had filed a petition on 7-2-1125 praying that the decree may be struck off the file. After considering the petitions in the light of the statements filed by both sides, the lower Court passed the order under appeal.

(2) Apart from the question as to whether the lower Court's order is substantially correct or not, it has to be stated that the order as it stands does not show that the points of dispute between the parties have been judicially considered by the lower Court. The order does not even show the amount of the debt that was due on 31-1-1116 for purposes of payment under sections 8 and 9 of the Debt Relief Act. In view of the disputes between the parties the Court was bound to fix the amount of the debt due on 31-1-1116 as contemplated by Section 15 of the Act. The question whether the defendant is entitled to an order of discharge in respect of the debt in question has to be considered in the light of the amount thus fixed. It is now not disputed by the decree-holder that the debt is one coming within the scope of the Debt Relief Act. The debt undoubtedly came into existence prior to 23-5-1112. The fact that the final decree in the case happened to be passed only on 20-12-1120 cannot and will not take the debt beyond the scope of the Debt Relief Act.

On behalf of the decree holder it is contended that the amount of the debt has to be calculated on the basis of the first decree that was passed on 16-7-1114. Such a contention is put forward obviously with the intention of getting the benefit of the interest accruing due from 16-7-1114 up to 31-1-1116 for the purpose of making a calculation under Section 11 of

the Debt Relief Act. But the contention put forward by the decree-holder cannot prevail in view of the fact that the decree that was passed on 16-7-1114 was set aside and the suit restored to the file. When the Debt Relief Petition was filed by the defendant there was no decree in the case. The decree in the case was ultimately passed only on 20-12-1120.

The ruling reported in 1948 Trav. L.R. 244 is relied on by the learned Advocate for the appellant in support of his contention that for the purpose of calculation under Section 11 of the Debt Relief Act the date of the decree to be taken into account is the date of the first decree in the case. The distinction that was drawn in that case was between the date of the first Court's decree and the date of the appellate Court's decree & it was pointed out that the decree that is passed by the appellate Court is only the decree which should have been passed by the trial Court and that therefore the date of the trial Court's decree should be the basis for making calculations under Section 11 of the Debt Relief Act.

The principle laid down in that case has no application to the facts of the present case. Here there has been no appellate decree. There is only one decree and that is the trial Court's decree, and it was passed long after the date of the Debt Relief Petition. Even if the amount of the debt is to be calculated on the basis of that decree, it is clear that under section 11 of the Debt Relief Act the principal amount together with one-half of the same could alone be claimed up to the date of the decree. Since the debtor had offered to pay the debt under the provisions of the Debt Relief Act even before the passing of the decree the amount of the debt for the purpose of such payment has to be fixed in a similar manner by taking into account the principal amount together with one-half of the same by way of interest. The Full Bench decision in 1943 Trav. L.R. 509 is to that effect. All the same it is seen that the principal amount of the debt is not what is stated in the statement filed by the defendant. From the decree passed in the case on 20-12-1120 which is binding on both parties, it is seen that the principal amount is Fs. 8508 Chs. 3. The amount of the debt for the purpose of the Debt Relief petition will be fixed on this basis, that is, by adding to this principal amount one-half of the same by way of interest. After thus fixing the amount it has to be seen whether the total amount of the instalment payments made by the defendant is sufficient to cover the debt as reduced under sections 8 and 9 together with the future interest due on the reduced amount.

(3) The defendant can claim the benefit of the concessional payment under sections 8 and 9 of the Debt Relief Act only in respect of the debt mentioned above. The costs awarded under the decree in the case is certainly outside the scope of the Debt Relief Act and hence the defendant is liable to pay the whole amount of such costs. On behalf of the respondent it is argued that the decree-holder is not entitled to raise this question in view of a prior order passed by the execution Court on 3-7-1950 which was to the effect that on deposit of Fs. 64 Chs. 2, over and above the payments which had already been made by the defendant, the liability under the decree inclusive of the liability for costs would be wiped off. No doubt the records in the case show that such an order had been passed by the execution Court. But a perusal of the execution diary in the case shows that such an order was passed on a date to which the case was not posted for any purpose whatever. Thus the order of 3-7-1950 has to be taken to have been passed without hearing the decree-holder and without notice to him. The application put in by the decree-holder for a review of the order passed on the debt relief petition was already pending consideration by the Court and until that matter was disposed of and the amount of the debt was fixed after a due consideration of the statements filed by both sides, there was no occasion to pass the above mentioned order of 3-7-1950.

Under these circumstances, it cannot be said that the decree-holder is concluded by that order. As already stated, the costs covered by the decree in the case cannot be treated as part of the debt paid in instalments under the Debt Relief Act.

What the lower Court has to do is to fix the amount of the debt for the purpose of the Debt Relief Petition in the manner already indicated and then to see if that debt has been completely wiped off by the instalment payments already made by the defendant. If it is found that any balance is still due from him, he may be allowed to pay up such balance within a reasonable time to be fixed by the Court in case the defendant has not already become a defaulter resulting in a forfeiture of his right to the benefit of the payments under sections 8 and 9 of the Debt Relief Act. If there is any excess in the instalment payments made by him, such excess will go in reduction of the amount of costs due from him under the decree. If even after satisfying the amount of such costs, there is still a balance, the defendant will be entitled to get a refund of such balance. If on the other hand anything more is due to the decree-holder either out of the amount of the debt or out of the amount of the costs, he will be entitled to realise that amount from the defendant.

(4) In the result the order of the lower Court is set aside and the case is sent back to the lower Court for fresh disposal of the applications filed by the decree-holder and the judgment-debtor, in accordance with law and in the light of the observations made above. Under the circumstances of the case, we make no order as to the costs in this appeal.

C/R.G.D. Case remanded.

A. I. R. 1952 TRAVANCORE-COCHIN 543

KOSHI AND GOVINDA PILLAI JJ.

Magalli, Appellant v. Poulose Varghese and another, Respondents.

A. S. No. 791 of 1950, D/- 13-7-1951.

Limitation Act (1908), Art. 182 — Revival of execution petition — Execution petition for delivery of properties and for sale of defendant's other properties for realisation of mesne profits and costs — After delivering certain items of property Court striking off application without any direction as to remaining reliefs — Disposal held purely for ministerial purposes — There was no judicial disposal of execution petition which must therefore be deemed pending — Subsequent application seeking enforcement of unspent relief is one for revival of previous application. (Para 3)

Anno: Lim. Act Art. 182, N. 143 Pt. 1.

K. P. Ittyerah, for Appellant; P. Narayana Pillai, for Respondents.

KOSHI J.: This is an execution appeal. Defendant 10 in O. S. No. 49 of 1099 on the file

of the Parur District Court has preferred this appeal against the order passed by the learned District Judge of that court on 5-10-1950 that the execution is not barred by limitation. The decree is one for partition and the question of limitation was one of the objections raised in the court below by the appellant. The learned Judge overruled all the objections raised but before us only the question of limitation was pressed.

(2) The learned Judge's decision that there was no bar of limitation is based on a prior order passed on 10-3-1950. On an objection by another defendant the court then held that the execution was not barred. It was however pointed out that that order was passed in a proceeding of which the present appellant had no notice. The progress diary shows the appellant had refused to accept notice. In the circumstances we thought it proper to look into the question of limitation on the merits and our conclusion is that the learned Judge's order dated 10-3-1950 is perfectly right.

(3) The present execution which has since been allowed to be amended was filed on 25-12-1123. That purports to be one to revive some earlier execution applications the last of which alone viz., that dated 8-12-1111 need be noticed here. That petition asked for delivery of the properties already divided by metes and bound and for the sale of the defendant's properties for realisation of mesne profits and costs. After effecting delivery of certain items the decree-holder was entitled to, the court struck off that application on 28-1-1113. The view the lower court took about that disposal was that it was purely for ministerial purposes and that there was no judicial disposal of the execution petition. We are of opinion that the learned Judge is right. There remained other properties yet to be delivered and no step whatever was directed to be taken pursuant to the prayer for sale of the properties set apart for realisation of mesne profits and costs. The learned Counsel for the appellant contended that so far as the latter prayer was concerned the execution application was an invalid one in that it was not accompanied by the schedule of the properties to be proceeded against as enjoined by the rules. The answer to it is that the court did not reject the petition on that ground nor did it call upon the decree-holder to furnish the necessary schedule. In these circumstances we cannot help thinking that there are still unspent reliefs in the application dated 8-12-1111 and that the disposal cannot be treated as valid or proper. That must be deemed to be pending when the present execution petition was filed and the latter is in order when it seeks only for the enforcement of the unspent prayers in the earlier application of 8-12-1111. But the execution court will see that reliefs not asked for in it are not sought to be introduced during the course of the present execution. The court will also call upon the legal heirs of the decree-holder to furnish a schedule of properties they seek to proceed against.

(4) The appeal is therefore without merit and we dismiss it with costs.

C/G.M.J. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 544

KOSHI AND GOVINDA PILLAI JJ.

Aiyappan Krishnan, Appellant v. Narayanan Krishnan and another, Respondents.

Second Appeal No. 400 of 1951, D/- 8-11-1951.

Debt Laws — Travancore-Cochin Holding (Stay of Execution) Act (VIII (8) of 1950) — Sub-kanom — Chitty hypothecation by unregistered deed in favour of C and D — Redemption decree — C and D held entitled to price of redemption and not possession of property.

Originally the sub-kanom was in favour of A who transferred his rights under it to B, who in his turn executed an unregistered chitty hypothecation bond in favour of C and D charging the same. Subsequently a redemption suit was brought and decreed and possession was given to decree-holder. C and D applied for re-delivery under Act 8 of 1950.

Held that C and D had not completely become possessed of right of B and that such a transfer could not be effected without a registered instrument. All that they were entitled to was not the re-delivery of the property to them, but they got the right to receive from the court the amount, the decree-holder had to pay as the price of redemption. C and D did not hold any lease-hold right in the property, even assuming that the sub-kanom constituted a holding within the meaning of Holding (Stay of Execution Proceedings) Act 8 of 1950. (Para 3)

P. Vasu, for Appellant; K. Narayana Panicker, for Respondents.

REFERENCE..... Para.

('51) 1951 Ker LT 73: (AIR 1951 Trav-C 190) 2

JUGDMENT: This second appeal arises from an order in execution passed by the temporary District Munsiff, Shertallai which was confirmed on appeal by the learned District Judge of Alleppey. The decree was one permitting the redemption of what was styled a kanapattom. It was really a sub-kanom. Pursuant to the decree the decree-holder obtained delivery of the property through court. But on an application filed by Defendants 3 and 4 purporting to be made under Act VIII of 1950 the learned Munsiff directed re-delivery to be made to them. This order was passed after over-ruling the decree-holder's objection and his appeal from the order was, as stated above, unsuccessful. Hence this second appeal by the decree-holder.

(2) Originally the so-called sub-kanom was in favour of defendant 1. He transferred his rights under it to defendant 2 who executed a chitty hypothecation bond in favour of defendants 3 and 4 charging the same. The suit was brought subsequent to these events. The question whether the demise in favour of defendant 1 would fall within the purview of Act VIII of 1950 is really debatable, particularly in view of the decision reported in — 'Ouseph Ouseph v. Rama Iyer', 1951 Ker L T 73. We do not however think it necessary to examine the question here.

(3) Defendants 3 and 4 who applied for re-delivery have not in our opinion become completely possessed of the rights of defendant 2. They had at first a hypothecation over it but after the decree by a joint application filed by defendants 2 to 4 on 6-10-1124 they got the right to receive from court the amounts the decree-holder had to pay as the price of redemption. Though that petition sets out that all rights defendant 2 had over the property are transferred over to defendants 3 and 4 such a transfer cannot validly be effected without a

registered instrument. Secondly though possession would also seem to have passed to defendants 3 and 4 the arrangement appears to us to be in the nature of machinery for the purpose of realising the amounts due under the hypothecation bond. As such assuming (without deciding) that the so-called sub-kanom constituted a holding within the meaning of Act VIII of 1950 we are unable to persuade ourselves to hold that a lease-hold right in the property is owned or possessed by defendants 3 and 4. This second appeal must hence succeed and we decide accordingly. The appellant will have his costs throughout from the respondent.

(4) Order accordingly.

C/R.G.D. Appeal allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 545

KOSHI AND GOVINDA PILLAI JJ.

Lonan, Appellant v. Varghese, Respondent.

C. M. Appeal No. 19 of 1951, D/- 8-1-1952.

Civil P. C. (1908), S. 136 — "District Court" in S. 108, Cochin Civil P. C. includes "District Court" in erstwhile Travancore State in view of Ss. 6 and 9 of United State of Travancore and Cochin Administration and Application of Laws Act — (Cochin Civil P. C. (29 (XXIX) of 1111), S. 108) — (United State of Travancore and Cochin Administration and Application of Laws Act (6 (VI) of 1125), Ss. 6 and 9).

Even though the Cochin Code of Civil Procedure was intended to have operation only within the confines of the Cochin State, in the light of the express provisions of Sections 6 (2) and 9 of the Administration and Application of Laws Act 1125, the term 'District Court' occurring in S. 108 of the Code has to be held to embrace every District Court in the Travancore-Cochin State. In view of this it is idle to contend that a District Court in the erstwhile Travancore territory cannot after the integration be treated as a District Court within the meaning of S. 108 of the Cochin Civil Procedure Code. Consequently a Court in the erstwhile Travancore territory can carry out a precept under S. 108 for attachment before judgment issued by a Court in the erstwhile Cochin State or 'vice versa'.

Held however, that the question had only academic interest in view of the fact that the Civil P. C. 1908 has since been applied to the Travancore-Cochin State. (Paras 3, 4)

Anno: Civil P. C., S. 136 N. 6, 7.

T. N. Sundara Iyer, for Appellant.

KOSHI, J: This Civil Misc. appeal is directed against an order of the Additional District Judge, Anjikaimal annulling an attachment before judgment effected under Section 108 of the Cochin Civil Procedure Code (a provision corresponding to section 136 of Civil Procedure Code Act V of 1908) on the ground of want of jurisdiction. On 3-4-1950 the appellant instituted a suit against the respondent before the Anjikaimal District Court and on the self-same day applied to that Court for attachment before judgment of certain immovable properties belonging to the respondent situate within the jurisdiction of the Parur District Court. The Court in allowing the application directed a conditional attachment to be made. In due course the Parur Dist. Court effected the attachment in accordance with the provisions contained in Section 108.

On notice of the attachment being served on the respondent he entered appearance before the lower court and contended 'inter alia' that the Anjikaimal District Court had no jurisdiction to cause attachment before judgment of properties lying within the jurisdiction of the Parur District Court. The basis of the contention was that the District Court contemplated by Section 108 (Cochin Civil P. C.) through whose medium the attachment was to be effected was a District Court within the jurisdiction of the erstwhile Cochin State and that notwithstanding the integration of the states of Travancore and Cochin, a Court situate within the territory of the erstwhile state of Cochin cannot cause attachment to be effected of the properties situate in the territory of the erstwhile State of Travancore. The contention was found acceptable with the learned Judge in the Court below & he accordingly directed the attachment to be lifted. The plaintiff has hence brought this appeal.

(2) We have no hesitation to hold that the view taken by the learned Judge is clearly wrong. The learned Judge placed reliance upon section 4 of the United State of Travancore and Cochin Administration and Application of Laws Act, 1125 to hold that the term 'District Court' in section 108 cannot have any extended meaning on account of the integration of the two States & that until the laws are intergrated that term should continue to have the same import as it had before 1st July 1949 when the integration of the States took place. Section 4 of the said Act like the corresponding provision in the United State of Travancore and Cochin Administration and Application of Laws Ordinance, 1124 which it replaced, provides that the existing laws in Cochin should continue to be in force in the territory of Cochin. Section 3 contains a similar provision that the existing laws in Travancore should continue to be in force in the territory of Travancore. The learned Judge however omitted to notice the provision in S. 6(2) of the Administration and Application of Laws Act, 1125. Sub-section 2 of the Section 6 is as follows:

> "All Civil Courts constituted, appointments made, limits fixed jurisdiction and powers conferred under the Travancore and Cochin Civil Courts Act prior to the appointed day shall be valid and effective for all purposes as if the Civil Courts were constituted, appointments were made, limits were fixed and jurisdiction and powers were conferred by the Government of the United State."

In view of this express provision it is idle to contend that a District Court in the erstwhile Travancore territory cannot after the integration be treated as a District Court within the meaning of Section 108 of the Cochin Civil Procedure Code. The integrated Travancore-Cochin State has a common executive, a common legislature and a common High Court and to hold that a Court in the erstwhile Travancore territory cannot carry out a precept issued by a Court in the erstwhile Cochin State or vice versa is to take a thoroughly unrealistic view on the question.

(3) Further, section 9 of the Administration and Application of Laws Act, 1125 enacts that in the application of the existing laws of Travancore or the existing laws of Cochin by virtue of the operation of Section 3 or Section 4, the Courts of the United States shall have power for the removal of difficulties, if any, arising out of or in connection with such application, to interpret such laws so as to effectuate the purposes intended by the Act.

Even though the Cochin Code of Civil Procedure was intended to have operation only within the confines of the Cochin State, in the light of the express provisions (Sections 6(2) and 9) of the Administration and Application of Laws Act, 1125 referred to above the term 'District Court' occurring in Section 108 has to be held to have the extended meaning sought to be given to it by the appellant. It must now embrace every District Court in the Travancore-Cochin State.

(4) Except for the present case the question can have only an academic value. The Civil Procedure Act V of 1908 has since been extended to the Travancore-Cochin State. We have therefore not thought it necessary to consider the question at any great length. The appeal had to be heard ex parte as the respondent failed to enter appearance though he was personally served with the notice issued from this Court regarding the institution of the appeal.

(5) For reasons stated above we allow the appeal with costs, set aside the lower Court's order and direct that Court to pass a final order in the matter after considering the respondent's objections, if any, to the attachment before judgment on the merits.

C/R.G.D. Appeal allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 546

KUNHI RAMAN C. J. AND SUBRAMANIA IYER J.

Madhavan Pillai Sivarama Pillai, Appellant v. Narayana Pillai Krishna Pillai, Respondent.

Second Appeal No. 74 of 1125, D/- 12-11-1951.

Limitation Act (1908) Art. 120 — Travancore Limitation Act, Art. 109 — Applicability — Suit against surety for recovery of money withdrawn by him from Court — Starting point.

A brought a suit for specific performance of an agreement to sell against B and C, a mortgagee from B. Along with the suit A deposited the consideration for the sale and prayed that the sum of Rs. 346 which represented the mortgage money might be paid to B therefrom only on his giving security for its redeposit in Court in case the mortgage in favour of C was found to be binding on the property. The suit was decreed by the trial court after finding that the mortgage was not binding on the property. A appealed against the decree in respect of costs only. After the disposal of the appeal B executed a sale deed in A's favour in accordance with the decree. K who had stood surety for B had in the meanwhile withdrawn the amount of Rs. 346 from the Court. B then instituted a suit against K for recovery of the amount withdrawn by him from the Court. The question was whether the suit was barred by limitation.

Held that the proper article applicable to the suit was the residuary Art. 109, Travancore Limitation Act (corresponding to Art. 120, Limitation Act) and the starting point of limitation was the complete exoneration of K from the obligation undertaken by him under the security bond executed by him to Court. Until the disposal of appeal filed by A it could not be said that the decree of the trial Court had become absolutely final and that K was exonerated from the liability under the bond. The suit having been filed within 6 years from such date was not barred by limitation. (Para 2)

Anno: Lim. Act Art. 120 N. 14, 26.

V. G. Sankaranarayana Pillai, for Appellant; P. Kochukrishna Pillai, for Respondent.

JUDGMENT: Second defendant is the appellant in this second appeal. Defendants 1 to 6 are the wife and children of deceased Kunhan Pillai. The suit is filed against them as the legal representatives of the deceased for recovery of Rs. 346-14-8 with interest thereon which is the amount drawn by the deceased Kunhan Pillai from court in O. S. No. 427 of 1106. That was a suit filed against the plaintiff in this case who was the first defendant there, for specific performance of an agreement to sell immovable property. The first defendant there had executed a mortgage in favour of the second defendant and another person who was a minor a few days before the suit. Along with that suit the plaintiff deposited in court Rs. 500/- which was the consideration agreed to be paid for the sale but prayed that Rs. 346-14-8 thereout may be paid to the first defendant only on his giving security to the court for its redeposit whenever demanded by the court should the mortgage in favour of the second defendant and the minor happen to be found to be binding upon the property.

The trial court found that the mortgage was not binding as it was unsupported by consideration. The decree of the trial court is dated 21-5-1112. The plaintiff filed an appeal against that decree in respect of costs. The appeal was finally disposed of on 30-12-1114. After the disposal of the appeal the present plaintiff executed sale deed in favour of the plaintiff in the earlier suit pursuant to the decree passed, on 23-12-1115. That brought to a close the controversies in O. S. No. 427 of 1106. The first defendant therein thus discharged all his obligations in respect of the property, agreement to sell which occasioned the suit and he became entitled to get the money which was drawn out on security by Kunhan Pillai. He accordingly applied on 26-2-1116 in the execution department in O. S. No. 427 of 1106 for recovery of the money from defendants 1 to 6 here as legal representatives of the deceased Kunhan Pillai. They contended that the relief was not to be granted in execution and that contention was upheld by the court dismissing the application on 16-8-1117. This suit results.

The only contention that is raised before us by the learned counsel for the appellant is that the claim is barred by limitation. Both the courts below found against this plea on the ground that calculated from the date of the decree in appeal and excluding the period taken for the prosecution of the claim in the execution department the suit will be within time if the period of limitation be three years. Learned counsel for the appellant contends that the period of limitation is three years but that period ought to be calculated from the date of the decree of the first court because the controversy in appeal related only to the costs awarded and the period taken for prosecuting the matter in execution department cannot be excluded because that proceeding was not prosecuted bona fide.

(2) It seems to us that the proper article to apply in this case is the residuary article

which is Art. 109 of the Travancore Limitation Act corresponding to Art. 120 of the Indian Limitation Act. Here was a case where Kunhan Pillai drew money out of court and gave a security bond undertaking to bring back the money to court whenever demanded should the contention of the mortgagee be found in his favour. Until Kunhan Pillai's obligation undertaken by him under the bond executed to court was discharged finally the plaintiff in the present case who was the first defendant there and the vendor of the properties had no cause of action to ask for the money from Kunhan Pillai. It cannot be said that the relationship between Kunhan Pillai and the present plaintiff was that of debtor and creditor in the sense contemplated by the articles relating to debts in the Limitation Act. It was a peculiar relationship for which no special provision is made in the Limitation Act. As such, the applicatory article is 109 and the starting point of limitation is the complete exoneration of Kunhan Pillai from the obligation undertaken by him under the security bond executed by him to court.

It cannot be said that until the date of the decree in appeal the obligations of Kunhan Pillai to the court had terminated. Though the appeal was presented by the plaintiff it was competent for the second defendant and the minor who were the mortgagees to present a memorandum of objection which could be tried as part of the appeal and in which event notwithstanding the decree passed by the trial court declaring the mortgage to be unsupported by consideration there could very well have been a decree upholding the mortgage and the consideration therefor. So that until the disposal of the appeal though presented by the plaintiff it cannot be said that the decree of the trial court declaring that the mortgage is unsupported by consideration has become absolutely final and that Kunhan Pillai had been exonerated from liability undertaken by him under the security bond. If the real article applicable is the residuary article it has not been and cannot be contended that the suit is out of time. The view taken by both the courts below that the suit is not barred by limitation is, therefore, correct, but the article applicable is not an article according to which the period is three years but the residuary under which the period is six years. The second appeal is accordingly dismissed with costs.

C/K.S.

Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 547

KUNHI RAMAN C. J. AND SUBRAMANIA IYER J.

Gouri Amma, Appellant v. Parameswara Kurup, Respondent.

Second Appeal No. 139 of 1125, D/- 16-11-1951.

(a) Decree — Construction — Civil P.C. (1908), Ss. 47 and 38.

There was a decree for money passed against a Nayar tarwad of which defendants 1 and 11 to 18 formed a branch whereof the 1st defendant was the karnavan. In the year 1095 there was a partition in that tarwad under which 29/45 of the decree debt was allotted to this branch. Under that partition assets were specially made over to the 1st defendant sufficient to satisfy not merely the fraction of the decree debt for which the branch was made responsible but the entire decree. The 1st defendant thereafter executed a promissory note in favour of the decree holder and satisfied the decree. The payee under the promissory note filed the suit claiming relief against the 1st defendant as also against the sub-tarwad of himself and defendants 11 to 18. The District Judge granted a decree against the sub-tarwad of defendants 11 to 18 to the extent of 29/45 of the claim made by the plaintiff because that was the fraction of the liability under the original decree which had been allotted to this sub-tarwad.

There was second appeal on behalf of the sub-tarwad which was aggrieved by the decree of the Dist. Judge granting relief against it to the extent of 29/45 of the claim made by the plaintiff. There was no memorandum of objection filed by the plaintiff in respect of the remaining portion of the claim that had been disallowed by the District Judge. The High Court found that the assets that were made over to the 1st defendant for purpose of discharging liability under the decree against the tarwad were realised by him and were used for his own personal purposes and that no part thereof had been used for the purposes of his sub-tarwad. They could not however find their way to exonerating the sub-tarwad from the fractional liability that was fastened upon them by the decree of the District Judge but granted an equitable relief to them and directed that the plaintiff should, in the first instance, proceed against the 1st defendant and could proceed against the sub-tarwad of defendants 11 to 18 only if satisfaction could not be had from those assets.

Held that the High Court did not grant any new decree to the decree-holder but was only making an inroad upon his rights to the extent of conferring an advantage by directing the sequence in which the assets of the 1st defendant and of the sub-tarwad were to be proceeded against in execution of a decree which he had already obtained. The quantum of the liability of the respective parties as fixed therein was not interfered with. The liability of the sub-tarwad was only to the extent of 29/45 of the amount of the decree. (Paras 6 & 8)

Anno: C.P.C., S. 47 N. 76, 77, S. 38 N. 9.

(b) Decree — Construction — Decree ambiguous — (Civil P.C. (1908) Ss. 38 and 47).

When a decree is ambiguous in its terms, the construction to be put upon it must be such as to make it, where it is possible, in accordance with law and within the jurisdiction of the court passing it. 19 All 174 and 21 All 361 (FB) Rel. on. (Para 6)

Anno: C.P.C., S. 38 N. 9, S. 47 N. 76, 77.

(c) Civil P. C. (1908) O. 23 R. 3 — Power of Court to impose compromise.

The Court cannot impose a compromise upon the parties however much it may suggest the desirability of parties entering into a compromise. (Para 5)

Anno: C.P.C., O. 23 R. 3 N. 2.

(d) Civil P.C. (1908) S. 11 — Execution proceedings — Omission to raise plea in objection.

Where on an earlier occasion when execution was taken out against the sub-tarwad for the entire amount covered by the decree, the sub-tarwad did not question the quantum of the liability in their written objection, the mere omission to raise a plea in the objection will not bar the raising of the plea in subsequent proceedings in execution. 6 All 269 (PC) Ref. (Para 7)

Anno: C.P.C., S. 11 N. 23.

R. Nilacanta Kartha, for Appellant; T. N. Subramonia Iyer, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras
('84) 6 All 269: (11 Ind App 37 PC) 7
('97) 19 All 174: (1897 All WN 9) 6
('99) 21 All 361: (1899 All WN 91 FB) 6

SUBRAMANIA IYER J.: The 15th defendant in O. S. 813 of 1102 on the file of the Munsiff's Court, Shertallai, is the appellant in this second appeal. The question raised is whether the properties of the sub-tarwad of defendants 11 to 18 can be proceeded against in execution of this decree only to the extent of 29/45 of the decree amount or to the full extent.

(2) The facts have to be briefly stated. There was a decree for money passed against a Nayar tarwad of which defendants 1 and 11 to 18 formed a branch whereof the 1st defendant was the karnavan. This was in the year 1095. In the year 1096 there was a partition in that tarwad under which 29/45 of the decree debt was allotted to this branch. Under that partition assets were specially made over to the 1st defendant sufficient to satisfy not merely the fraction of the decree debt for which the branch was made responsible but the entire decree. The 1st defendant thereafter executed a promissory note in favour of the decree holder and satisfied the decree. Subsequently he executed a mortgage in favour of the defendants 2 to 10 reserving from out of the consideration a sum sufficient to discharge the liability under the promissory note. The mortgagees defaulted in discharging the debt pursuant to the said reservation.

The payee under the promissory note filed the Suit (O. S. 813 of 1102) claiming relief against the 1st defendant as also against the sub-tarwad of himself and defendants 11 to 18. Defendants 11 to 18 disclaimed liability under the promissory note. Their contention was that it was beyond the competence of the 1st defendant to execute the document though he was the karnavan of the sub-tarwad. The trial court dismissed the claim as against the sub-tarwad upholding their contention. In appeal, however, the learned District Judge modified the decree of the District Munsiff and granted a decree against the sub-tarwad of defendants 11 to 18 to the extent of 29/45 of the claim made by the plaintiff because that was the fraction of the liability under the original decree which had been allotted to this sub-tarwad; The 14th defendant on behalf of the sub-tarwad filed a second appeal before the erstwhile Travancore High Court claiming complete immunity from liability for the sub-tarwad, that is to say immunity from the fractional liability fastened upon the sub-tarwad by the District Judge and seeking restoration of the decree of the trial Court.

The learned Judges of the High Court found that the assets that were made over to the 1st defendant for purpose of discharging liability under the decree against the tarwad were realised by him and were used for his own personal purposes and that no part thereof had been used for the purpose of his sub-tarwad. They could not however find their way to exonerating the sub-tarwad from the fractional liability (that is, to the extent of 29/45 of the decree debt) that was fastened upon them by the decree of the District Judge but granted an equitable relief to them and directed that the plaintiff should, in the first instance, proceed against the assets of the 1st defendant (who appears to have been dead by that time) in the hands of his legal representatives and can proceed against the sub-tarwad of defendants 11 to 18 only if satisfaction could not be had from those assets.

(3) The decree-holder attempted to execute the decree against the assets of the 1st defendant but could recover nothing. He, therefore sought to proceed against the properties of the sub-tarwad of defendants 11 to 18 for the entire money due under the decree. Various objections were raised by the sub-tarwad but the only one that is raised before us in the second appeal, is as already stated, as to the quantum of the liability of the sub-tarwad under the decree. The courts below found against the sub-tarwad.

(4) Mr. Kartha, learned counsel for the appellant contends that the decree passed in second appeal by the High Court of Travancore is not very clearly worded and has therefore to be construed with reference to the circumstance under which that decree happened to be passed. The second appeal was on behalf of the sub-tarwad which was aggrieved by the decree of the District Judge granting relief against it to the extent of 29/45 of the claim made by the plaintiff. There was no memorandum of objection filed by the plaintiff in respect of the remaining portion of the claim that had been disallowed by the District Judge. The plaintiff had therefore a decree against the sub-tarwad to the extent of 29/45 of the claim. It was this decree that was sought to be set aside in the second appeal. That decree was not set aside and the sub-tarwad was not declared to be free from liability under that decree. The High Court, however, granted to the sub-tarwad a smaller relief by directing the decree-holder to proceed against the sub-tarwad only on default of his realisation of the decree amount by proceeding against the assets of the 1st defendant in the first instance.

The question is whether this decree passed by the High Court fastens liability upon the sub-tarwad to a larger extent than there was at the time the second appeal was filed. It was open to the High Court in the second appeal to allow it wholly or in part or to dismiss it. It was beyond their competence, by their decision, to render the position of the appellant worse than what it was before the second appeal was filed in the absence of any memorandum of objections filed in that behalf by the decree-holder.

(5) The learned Advocate General appearing on behalf of the decree-holder-respondent contends that the direction made by the High Court in the decree in the second appeal appears to be a direction to recover the entire amount of the decree from the sub-tarwad and that the judgment of the High Court itself discloses the justification for the fastening of this larger liability on the sub-tarwad which is a concession granted to the sub-tarwad in that the decree-holder was directed to proceed against it only in default of his not recovering

from the assets of the 1st defendant, whereas the decree-holder could have, under the decree of the District Judge, proceeded against the sub-tarwad to the extent of 29/45 of the decree even before proceeding against the assets of the 1st defendant. In other words, his contention is that the decree passed by the High Court is a kind of compromise decree. The argument is ingenious and plausible but cannot be accepted. The Court cannot impose a compromise upon the parties however much it may suggest the desirability of parties entering into a compromise.

(6) The judgment of the High Court was read before us. It discusses the question as to the total liberation of the sub-tarwad from liability as claimed by the appellant but does not find its way to granting that relief. Assets more than sufficient were made over to the karnavan of the sub-tarwad. That karnavan was therefore competent to execute the promissory note sued upon so as to fasten liability upon the sub-tarwad. The immunity from liability that was claimed by the appellant could not, therefore, be granted. In view however, of the fact which was found by the High Court that the assets made over to the 1st defendant were realised by him and used for his own personal purposes and no part of it was used for purposes of the sub-tarwad they felt it only equitable to direct the decree-holder to proceed against the assets of the 1st defendant in the first instance and only in default of recovery, against the sub-tarwad in execution of "his decree".

It is thus clear that the High Court did not grant any new decree to the decree-holder but was only making an inroad upon his rights to the extent of conferring an advantage on the appellant by directing the sequence in which the assets of the 1st defendant and of the sub-tarwad are to be proceeded against in execution of a decree which he had already obtained. The quantum of the liability of the respective parties as fixed therein was not interfered with; Under the above mentioned circumstances to construe the decree as one conferring a larger benefit upon the decree-holder than what he had under the decree of the District Judge would be to render the decree passed by the High Court one beyond its competence and opposed to law.

On the other hand to understand the direction given by the High Court to the decree-holder to proceed against the assets of the 1st defendant first and in default of recovery against the sub-tarwad as granting a relief to appellant's sub-tarwad very much smaller than what was claimed in the appeal would make the decree of the High Court perfectly legal and within its competence. When a decree is ambiguous in its terms, the construction to be put upon it must be such as to make it, where it is possible, in accordance with law and within the jurisdiction of the court passing it. See — 'Amolak Ram v. Lachmi Narain', 19 All 174 and — 'Bakar Sajjad v. Udit Narain Singh', 21 All 361 (FB). In our judgment, the appellant's is the just and correct construction of the decree and judgment of the High Court.

(7) The learned Advocate General contended that on an earlier occasion when execution was taken out against the sub-tarwad for the entire amount covered by the decree, the sub-tarwad did not question the quantum of the liability in their written objection and that not having so contended, their present plea cannot be entertained. The mere omission to raise a plea in the objection will not bar the raising of the plea in subsequent proceedings in execution. Had the question of the construction of the decree of the High Court arisen on a previous occasion and the executing Court had decided upon a mode of construction, that order might conclude the parties for the purpose of execution. See — 'Ram Kripal v. Mt. Rup Kuari', 6 All 269 (PC). But no such order appears to have been or is contended to have been passed in this case. There is, therefore, no obstacle to the appellant urging this plea in the present proceedings.

(8) In the result the second appeal is allowed and the orders passed by both the courts below are set aside and the case remanded to the trial court for proceeding with the execution in the light of this judgment that is on the basis that the liability of the sub-tarwad of the appellant before us is only to the extent of 29/45 of the amount of the decree. The respondent will pay the costs of the appellant here and in both the courts below.

C/D.H. Appeal allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 549

KOSHI AND GOVINDA PILLAI JJ.

Ameen Pillai Ayidross, Appellant v. Maluk Muhammed Abdul Kadir and others, Respondents.

Second Appeal No. 545 of 1123, D/- 16-11-1951.

Travancore Ezhava Act 1099 (III(3) of 1100) S. 22 — Consent of major members — Objection by third person.

What Section 22 provides is that the mortgage with possession, or lease with premium for a period of twelve years or less would be valid only if it was executed for consideration and tarwad necessity and with the consent of all the major members of the tarwad. But the members of the tarwad need not express their consent in writing. Besides, a stranger to the tarwad could not raise this contention. If karnavan of the mortgagor's tarwad is a party to the mortgage deed he represents the tarwad so far as the outside world is concerned and it has to be taken that the mortgage deed is executed by competent persons and that a stranger to the tarwad cannot invoke the provisions of S. 22. Case law rel. on. (Para 4)

P. Govindan Nair, for Appellant; S. Bhoothalingom Iyer, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

15 Cochin LR 143 4
15 Cochin LR 244 4
37 Cochin LR 96 4
37 Cochin LR 556 4
4 Trav LJ 134 4
29 Trav LJ 1375 4

GOVINDA PILLAI J.: The plaintiff whose name is Ameen Pillai Ayidross is the appellant. The plaint property belonged to one Thevan of Poottakuzhi house. He mortgaged it to two ladies by name Kali Kali and Kali Bhagavathi on 25-5-1067. In 1081, Kali Kali sub-mortgaged her one-half right to the 2nd defendant's father for 700 fanams. Kali Bhaghavathi also sub-mortgaged the remaining one-half in 1086 to the identical party for the same amount. After the death of the 2nd defendant's father,

the 2nd defendant was in possession of the property, and that was leased out to the plaintiff on 20-10-1109 with a stipulation, that in case the sub-mortgage right was assigned, it would be in favour of the plaintiff. An agreement was also executed on 15-12-1109 to this effect. Thus the plaintiff was in possession of the property as lessee. While so, on 21-4-1111, he took a mortgage Ext. A from the members of Thevan's tarwad with a recital to redeem the mortgage of 1067. The suit is for the same. In the suit, he had also asked for the settlement of accounts with the 2nd defendant.

(2) The 1st defendant, one Abdul Kadir, contended that after the expiry of the term in the sub-mortgage in favour of the 2nd defendant's father, the 2nd defendant had no right to execute any fresh document in favour of the plaintiff, that the superior mortgage relied on by the plaintiff was not executed by all the adult members of the Jenmi's tarwad, that it was not supported by consideration and tarwad necessity, that it was a void document, and that he, as the assignee of the mortgage right of 1067, had filed O. S. 456 of 1111 for redemption of the sub-mortgage from the 2nd defendant. It was therefore stated that the plaintiff's suit was not actuated by bona fides. The 3rd defendant who had taken an assignment of the sub-mortgage right in 1110 contended that the agreement to assign the sub-mortgage right to the plaintiff had not come into operation and that the plaintiff was not entitled to any relief.

(3) The first court found that the plaintiff was in possession of the property as lessee of the 2nd defendant and his father, that the lease deed, and the agreement Ext. B were executed fraudulently and collusively, that Ext. A superior mortgage was opposed to Sec. 22 of the Ezhava Act and as such, it was invalid, and that this suit was to be dismissed. O. S. 456 of 1111, the suit filed by the first defendant in the present case, was tried along with this case and decreed, allowing him to recover possession of the property on payment to the 7th defendant in that case (3rd defendant in O. S. 626 of 1112) the sub-mortgage amount of 1409 fanams and value of improvements coming to 1355 fanams 1 Ch. 1 cash. He was also ordered to deposit 540 fanams 2 ch. 5 cash as value of improvements due to the 2nd defendant (plaintiff in O. S. 626 of 1112) :

(4) O. S. 626 of 1112 was dismissed on the ground that Ext. A superior mortgage taken by the plaintiff from the original mortgagor's tarwad was void. The ground alleged was that all the adult members of that tarwad had not joined in executing the Melotti. What Section 22 of the Ezhava Act would provide was that the mortgage with possession, or lease with premium for a period of twelve years or less, would be valid only if it was executed for consideration and tarwad necessity and with the consent of all the major members of the tarwad. The previous section which dealt with the sale or mortgage with possession or lease for more than twelve years provided that the consent must be in writing. But, under section 22, the members of the tarwad need not express their consent in writing. Besides, the 1st defendant who was a stranger to the tarwad could not raise this contention, and the law on the point is also well settled.

It is admitted that the Karnavan of the mortgagor's tarwad is a party to the deed. A similar case came up for consideration in — 'Krishna Paikkar v. Bhargavi Amma', 29 Trav. L.J. 1375 and it was held that as the Karnavan had executed the deed and as he represented the tarwad so far as the outside world was concerned, it had to be taken that the sale deed impeached in that case was executed by competent persons and that a stranger to the tarwad could not invoke the provisions of S. 25 of the Nair Act which was in force then, to defeat a purchaser whose right would be indefeasible in the absence of those provisions. That was the dictum laid down in an earlier case — 'Krishnan Krishnan v. Raman Nilakantan', 4 Trav. L.J. 134. The above Sec. 25 of the Nair Act corresponds to Sec. 22 of the Ezhava Act.

The corresponding provisions in the Marumakkathayam Act of the Cochin State had also come up for consideration and it was held that the strangers to the tarwad were incompetent to question the validity of transactions entered by the tarwad or by some members of the tarwad including the Karnavan. — 'Velayudhan Nair v. Balakrishna Menon', 37 Cochin L.R. 556; — 'Pareeth v. Alavi', 37 Cochin L.R. 96; — 'Meera Rawthen v. Kamakshi Amma', 15 Cochin L.R. 143 and — 'Muthukumaraswami v. Kuppuswami', 15 Cochin L.R. 244 lay down these general principles. We are therefore of opinion that the views expressed by the Courts below are wrong. They are to be set aside. It is held that the plaintiff is entitled to redeem the mortgage of 1067 from the 1st defendant and from the sub-mortgagee the 2nd defendant, after settling the accounts with them. These accounts are not settled in the Courts below, and so, after recording the finding that Ext. A is valid, we set aside the decrees of the Courts below and remand the case for fresh disposal.

(5) This would necessarily lead us to hold that the decision in O. S. 456 of 1111 has also to be set aside and the case sent back for trial and disposal along with the present suit. In that case the plaintiff and defendants 1 to 3 are respectively the 2nd defendant, plaintiff and defendants 1 and 7. A copy of this judgment will be appended to with the judgment in that case and form part of that. The costs incurred by the parties so far will be the costs in the cause.

C/D.H. Order accordingly.

A. I. R. 1952 TRAVANCORE-COCHIN 550

KOSHI J.

State v. Nadankutty Nadar, Counter -Petitioner.

Criminal R. P. No. 75 of 1950, D/- 10-11-1950.

Travancore Prohibition Act (7 of 1123) — Offences under — Punishment — Criminal P. C. (1898), S. 32.

Unless deterrent sentences are awarded for those found guilty of contravening the provisions of the Prohibition Act, the successful working of the Act will be seriously hampered. The High Court expects the Magistracy to take note of this and act accordingly. (Para 1)

Anno: Cri. P. C., S. 32 N. 3.

Government Pleader, for the State.

ORDER: These are two applications by the State for enhancement of the sentences the Stationary First Class Magistrate of Kuzhithura passed against the accused in C. C. Numbers 113 and 117 of 1125. Both the cases arise under

the Prohibition Act and the accused in either case pleaded guilty. In C. C. No. 113 the Magistrate imposed a fine of Rs. 15/- and in C. C. 117 a fine of Rs. 25/-. These sentences are grossly inadequate when the punishments prescribed by the Act for the offences concerned are taken into account and the State was therefore perfectly justified in making these motions. I would however think that the State's purpose in making these motions would be served by this Court pointing out to the Magistrates functioning in the prohibition areas of the State that unless deterrent sentences are awarded for those found guilty of contravening the provisions of the Prohibition Act, the successful working of the Act will be seriously hampered. This court expects the Magistracy to take note of this and act accordingly.

(2) With these observations both the revision applications will stand dismissed.

B/D.H. Revison petitions dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 551

KOSHI AND GOVINDA PILLAI JJ.

Subramonian Arumugham and another, Appellants v. Savarimuthu Nadar Vaidhian Nadar, Respondent.

A. S. No. 263 of 1123 (T), D/- 17-10-1951.

(Travancore) Revenue Recovery Act (I(1) of 1068) S. 39 — Sale for tax due on property sold and on other properties of defaulter.

A sale held for arrears of revenue is valid and would extinguish prior encumbrances even though it was held for recovery of arrears due on the land sold as well as other lands belonging to the defaulter. If more amount than that actually due to the State, on account of arrears of tax and incidental expenses in connection with the realisation of the same, is realised by the sale, the effect of the provision under S. 39, that the sale will be free of all encumbrances, will not be taken away. The excess amount thus realised is directed to be paid to the Thandaper holder. Instead of paying that, if the Government appropriated that towards tax from that Thandaper holder on account of other properties belonging to him, the right and the immunity conferred on the auction purchaser would not be taken away because the sale was for something more than what was actually due from the land sold. Thus if the several revenue auctions were for tax due also on the property sold, the sales would wipe away all prior encumbrance on the property. 28 Trav. LJ 226 Rel. on. (Para 1)

N. Varadaraja Iyengar, for Appellants; T. R. Subramonia Iyer, for Respondent.

REFERENCE ..... /Para 1
28 Trav LJ 226

GOVINDA PILLAI J.: Plaintiffs 2 and 3 are the appellants. The suit was on Ext. A chitty security bond, executed by defendants 1 and 2 in favour of the plaintiffs. For the subscriptions due from the fifth drawing, the suit was instituted and defendants 3 to 15 were impleaded as subsequent charge-holders. The 10th defendant's contention was that the whole of plaint items 1 and 2 had been sold in revenue auction, before the institution of the suit, and that the plaintiffs were not entitled to a decree against that property. The trial Court first overruled these contentions. The 10th defendant took up the matter in appeal to the High Court in A.S. 583 of 1116. The findings of the trial court on issues Nos. 7 and 9 and 10 were set aside and the suit was remanded for re-trial and disposal of those issues. Those issues related to the questions, whether items 1 and 2 had been sold in revenue auction, whether the revenue auctions were valid and binding on the plaintiffs, whether the plaintiffs were entitled to the decree charged on items 1 and 2, and whether the 10th defendant was entitled to priority over the plaintiffs' claim.

After remand, the Court below found that the plaint items 1 and 2 were sold in revenue auction by four sales, that the whole of the property had thus been sold and that the plaintiffs were not entitled to a decree as regards items 1 and 2 in the plaint schedule to the extent covered by the sale sannads, Exts. IV, VI, VIII and X. Items 1 and 2 are portions of the same survey No. 1010 of Kadiapattanam Pakuthy. Its extent is 7 acres and 3 cents in all. It consists of two lekkams. Item 1 is lekkam 244 and item 2 is lekkam 252. Items 1 and 2 would, therefore, cover the rights of defendants 1 and 2 over survey No. 1010. It was this survey No. 1010 that had been sold in revenue auction for arrears of tax due to the State.

There were four revenue sales. The first was on 17-8-1110, for tax due for Medom 1109. 2 acres in survey No. 1010 had been sold. Ext. XIII(a) is the auction list, Ext. XVII the demand notice, Ext. IV the sale sannad, Ext. V the delivery list and Ext. XVIII the proclamation, in connection with that sale. The second sale was on 6-11-1111 for arrears of tax due in 1110. 75 cents out of survey No. 1010 had been sold. Exts. XIV is the auction list, VI the sale sannad and VII the delivery list. The third sale was for another 75 cents in survey No. 1010 on 21-5-1113 for the arrears of tax due in 1111. Exts. XIII is the auction list, VIII the sale sannad and IX the delivery list. The fourth sale was for the remaining portion of survey No. 1010 on 7-7-1113 for arrears of tax due in 1112. Exts. XV(a) is the demand notice, XVI the proclamation, XIV(a) the auction list, X the sale sannad and XI the delivery list, in connection with this sale.

Exts. XVII, XIV, XIII and XV(a) would show that the revenue auctions were on account of arrears of tax due on survey No. 1010 and survey No. 1039 covered by patta No. 2428 of Kadiapattanam Pakuthy. Thus it would be clear that these sales were conducted for arrears of tax due also on the property sold. The argument of the appellants' learned Advocate was that, since those sales were also for arrears of tax due on some other property, the sales would not free the property sold from all prior encumbrances. According to him, a proper reading of Ss. 2 and 39 of the Revenue Recovery Act would indicate that prior charges would be wiped off only if the sales were for the arrears of State dues on the property sold. This question had come up for consideration before a Full Bench of the Travancore High Court in — 'Narayanan v. Nayina Muhammathu', 28 Trav. L.J. 226. It was decided that a sale held for arrears of revenue was valid and would extinguish prior encumbrances even though it was held for recovery of arrears due on the land sold as well as other lands belonging to the defaulter. It was contended that this decision was not correct and that it required reconsideration. It does

not appear to be necessary. It was proved beyond doubt that the four sales were for arrears of tax due on the property sold as well as for arrears on another property.

Section 39 of the Revenue Recovery Act, I of 1068, provided that all lands, brought to sale on account of arrears of revenue due thereon, should be sold free of all encumbrances and that, if any balance remained after liquidating the arrears, interest and the expenses of attachment and sale and other costs due in respect of such arrears, it should be paid over to the defaulter. So, if more amount than that actually due to the State, on account of arrears of tax and incidental expenses in connection with the realisation of the same, is realised by the sale, the effect of the provision under Section 39, that the sale will be free of all encumbrances, will not be taken away. The excess amount thus realised is directed to be paid to the Thandaper holder. Instead of paying that, if the Government appropriated that towards tax from that Thandaper holder on account of other properties belonging to him, the right and the immunity conferred on the auction purchaser would not be taken away because the sale was for something more than what was actually due from the land sold. Since it was seen that the several revenue auctions were for tax due also on the property sold, the sales would wipe away all prior encumbrances on the property; and, so, there was no necessity to doubt the proposition laid down in — 'Narayanan v. Nayina Muhammathu', 28 Trav LJ 226.

We affirm THAT DECISION AND HOLD THAT THE FOUR REVENUE SALES ARE VALID and that the plaintiffs are not entitled to a decree charged on survey No. 1010. No other point was urged in appeal. We, therefore, confirm the decree of the Court below and dismiss the appeal with costs.

C/D.H. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 552

GOVINDA PILLAI AND VITHAYATHIL JJ.

Kurien Chacko, Appellant v. Ramakrishna Iyer Subramonia Iyer and others, Respondents.

A. S. No. 137 of 1951, D/- 26-9-1951.

(a) Transfer of Property Act (1882) S. 63 — Accretion to mortgaged property.

By a partition in the mortgagor's tarwad and by sale deed executed by the different members who got shares in mortgage property i.e. plaint item 1, the defendant mortgagee obtained the Jenmon right over 3/8 of the whole property and the plaintiff got the right over 5/8 share of the same. Plaint item 2 was land lying adjacent to item 1. This was Sirkar Puramboke land and was obtained on registry by the mortgagee by virtue of his position as mortgagee of the neighbouring land, that is, plaint item 1.

Held that the plaintiff was entitled to redeem 5/8 share and the defendant to the remaining 3/8 share of this property. Neither of them could claim exclusive right over this property. (Para 5)

Anno: T. P. Act, S. 63 N. 2.

(b) Transfer of Property (1882) S. 61 — Contract to the contrary.

Held that the mortgagee was debarred from claiming the amounts under the four different documents before the expiry of 48 years from the date of the first document. As by agreement of parties, these four documents were allowed to be consolidated. The mortgagee was allowed to treat all the four transactions as one and it was, therefore, competent for him to decline to be redeemed as to any unless he was redeemed as to all. He could thus treat all the four transactions as component parts of the same mortgage so that the relationship that would govern the parties would be one of mortgagor and mortgagee, and not of mortgagor and mortgagee as to one of the component parts. When those mortgages were consolidated, the consolidated mortgage took the form of an anomalous mortgage. (1881) 6 A.C. 698 and 28 All. 225 (PC) Rel. on. (Para 7)

Anno: T. P. Act, S. 61 N. 5.

(c) Transfer of Property Act (1882) S. 76 — No limitation for accounts.

No question of limitation arises as between mortgagor and mortgagee when accounts are taken at the time of redemption. AIR 1915 Mad. 1215 and 1950 Ker. L.T. 356 Rel. on. (Para 7)

Anno: T. P. Act, S. 76 N. 13.

(d) Travancore Civil P. C., S. 31 — Accounting between mortgagor and mortgagee.

Section 31 cannot be applied in matter of accounting between mortgagor and mortgagee. 21 Bom. 815 Ref. (Para 7)

T. K. Joseph, for Appellant; R. Nilakanta Kartha, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('06) 33 Ind App 42: (28 All 225 PC) 7
('97) 21 Bom 85 7
('15) 28 Mad LJ 184: (AIR 1915 Mad 1215) 7
('50) 1950 Ker LT 356 7
(1881) 6 AC 698: (51 LJ Ch 129) 7

GOVINDA PILLAI J.: The plaintiff is the appellant. The plaint item 1 which was 5 acres and 20 cents in extent belonged to one Areepurathu tarwad. This tarwad mortgaged the property to one Cherian Chacko for 5201 rasees. The document is Ext. A dated 13-10-1052. It was for a term of 24 years and it provided for the payment of Michavaram to the Jenmi at the rate of 1 Para and 1½ edangalies of paddy annually. Then a purakkadam was executed by the mortgagor's tarwad to the said Cherian Chacko on 5-2-1057 under Exhibit B on receipt of 1450 paras of paddy. This allowed the mortgagee to enjoy the property for a further period of 12 years. After the term fixed in the mortgage of 1052, the excess Michavaram provided for in Ext. A was set off against the interest due on Ext. B amount and the mortgagor promised to pay 71 paras and 3½ Edangalies of paddy to the mortgagee on account of the excess interest.

Another purakkadam Ext. 1 was executed on 6-4-1072 to the successor-in-interest of the original mortgagee on receipt of 900 paras of paddy for which 2½ per cent interest had been agreed to be paid. On 18-4-1082, a third Pura vaipa was executed to the mortgagee for 601 Rasees with an agreement to pay interest of 3/16 Edangaly of paddy per Rasi. This allowed the mortgagee a further term of 12 years after the expiry of the term fixed in Ext. B

Puravaipa. One Venkitachalam Iyer, the brother of the 1st defendant took an assignment of all the mortgage and Puravaipa rights on 29-12-1106 for Rs. 3740.

Under the partition deed between Venkitachalam Iyer and the 1st defendant this right devolved on the 1st defendant and accordingly he was in possession of the plaint property. By a partition in the mortgagor's tarwad and by sale deed executed by the different members who got shares in this property, the 1st defendant mortgagee obtained the Jenmom right over 3/8 of the whole property and the plaintiff got the right over 5/8 share of the same. Plaint item 2 is a plot of 16 cents of land lying adjacent to item 1. This was Sirkar Puramboke land and was obtained on registry by the mortgagee by virtue of his position as mortgagee of the neighbouring land, that is plaint item 1. The registry holder of the said 16 cents of land then sold his right to the 1st defendant's brother. Possession of plaint item 2 was very essential for the beneficial enjoyment of item 1 and so according to the plaintiff he was entitled to redeem the whole of this property along with item 1.

(2) The plaintiff's case was that for the paddy portion of the debt, the mortgagee was entitled to get interest only up to the principal and for the money portion interest up to a moiety of the principal. The amount thus due for the 5/8 share of the plaintiff would be 30097/5/8 fanams on the date of the suit. The mesne profits from plaint item 1 would be 750 paras of paddy in Kalloorkadan Measure and the plaintiff was entitled to get 5/8 share of this with 20 per cent interest from the date of the suit for his share of the properties as he was depositing in court the whole amount due to the 1st defendant for the 5/8 share.

The 1st defendant admitted the plaintiff's title to redeem 5/8 share of the plaint item 1. He denied the plaintiff's title to any portion of plaint item 2. The statement in the plaint that the mortgagee was entitled to get interest on paddy up to the principal and on money up to one-half the principal was contended to be wrong for this was not a suit for money but one for redemption of a mortgage on settlement of accounts. In such circumstances, it was contended that he was entitled to get interest from the date of the deed up to the time of redemption irrespective of any restriction relating to interest. Paddy was to be valued at Rs. 1½ per standard Para and the plaintiff was not entitled to get any mesne profits. The mesne profits from the whole of item 1 would not be more than 400 paras of paddy according to the Kalloorkadan measure. The 3rd defendant contended that he was an unnecessary party to the suit as he was not in possession of any of the properties.

(3) The lower court held that the amount due to the 1st defendant would be 5/8 of the amounts covered by Exts. A, B, 1 and 11 and interest provided for in Exts. B, 1 and 11 from their respective dates till the date of redemption, that plaint item 2 was an accretion to item 1, that the plaintiff was therefore entitled to recover 5/8 share of item 2 as well, that the paddy was to be valued at Rs. 1½ per standard para, that after depositing all the amounts due to the 1st defendant, the plaintiff would be entitled to mesne profits at 375 paras of paddy in standard measure, that a readjustment of the several plots apart from the provisions made in the partition deed in the original mortgagor's tarwad could not be allowed, and that the 1st defendant was entitled to get his costs. A decree was passed consistently with the findings recorded by the Judge.

(4) The plaintiff's appeal related to the interest on Exts. B, 1 and 11 amounts decreed over and above that admitted by him in the plaint. He also stated that the finding that the commutation rate of paddy was to be Rs. 1½ per para was wrong. He had also raised a contention that he should have been allowed the whole of item 2 though he had not paid any court fees for the disallowed 3/8 portion of the property. The 1st defendant filed a cross-appeal objecting to any portion of plaint item 2 being allotted to the plaintiff. He also wanted a readjustment of the plots allotted to the plaintiff and the 1st defendant so that each party might get in lieu of his share the contiguous plots.

(5) Plaint item 2 was obtained on registry by the mortgagee by virtue of his position as the party in possession of the adjoining land. The evidence also points to this conclusion so that the finding of the court below that the plaintiff is entitled to 5/8 share and the 1st defendant to the remaining 3/8 share of this property is correct. Neither of them could claim exclusive right over this property so that there is no substance in the contentions advanced by both sides relating to item 2.

(6) As regards the adjustment claimed by the 1st defendant respondent, it has to be mentioned that the division of plaint item 1 is made by the commissioner in accordance with the provision in the partition deed of the original mortgagor's tarwad. The plaintiff and the 1st defendant who had taken sale deeds from the different sharers in the original mortgagor's tarwad could not now be heard to say that the allotment made there was not to be accepted.

They could do that only by mutual consent and since they did not agree to this we do not see our way to help the parties in this direction even though allotment of the contiguous plots to the parties would have been more advantageous to both of them. The 1st defendant's learned Advocate then stated that the demarcation of the several plots marked in Ext. H plan could have been in such a way as to include portions of plaint item 2 in each of the plots mentioned in the partition deed. This too would be against the provisions in the document so that we are unable to help the 1st defendant in this respect as well.

(7) The main contest between the parties related to the interest decreed by the court below on the amounts mentioned in Exts. B, 1 and 11. As regards these amounts the plaintiff stated that the defendant had only the position of a creditor so far as the mortgagor's tarwad was concerned so that the provisions of section 31 of the Civil Procedure Code were to be attracted in settling the accounts between the parties. Under Ext. A dated 13-10-1052, the mortgagor let the mortgagee into possession of the mortgaged property and allowed the latter to appropriate the major portion of the usufruct towards the interest on the mortgage amount, leaving a balance of 1 para 1½ Edangalies with the mortgagee for being paid to the mortgagor as Michavaram. The term fixed in Ext. A was 24 years. Then on 5-2-1057 a puravaippa on receipt of 1450 paras of paddy was executed. The interest fixed was 72 paras 5 Edangalies of paddy a year and the Micha-

varom of 1 para 1½ Edangalies reserved in Exhibit A was allowed to be appropriated towards the interest and the balance of 71 paras 3½ Edangalies was agreed to be paid when Ext. A mortgage was redeemed after the expiry of 36 years from the date of Ext. A.

The additional period of 12 years was that allowed under Ext. B. A second Purakkadam Ext. 1 was again taken by the mortgagee on 6-4-1072 on payment of an additional consideration of 900 paras of paddy for which interest was agreed to be paid at 2½ per cent. per annum. Here also the stipulation was that the principal and Ubhayam would be paid when the mortgage was redeemed. A Third purakkadam Ext. 11 dated 18-4-1082 was executed for 601 rasees providing for annual interest at 3/16 Edangalies for every Rassee. This allowed a further period of 12 years from the date on which the 36 years provided under Exts. A and B expired. This amount and Ubhayam were also agreed to be paid when the mortgage was redeemed. Thus the property mortgaged under Ext. A remained with the mortgagee and the entire usufruct of the mortgage holding went to discharge the interest on Ext. A amount and a portion of Ext. B amount.

The balance interest due under Ext. B as well as on amounts advanced under Exts. 1 and 11 was agreed to be paid by the mortgagor. The mortgagee was however debarred from claiming the amounts under these four documents before the expiry of 48 years from the date of Ext. A. Thus by agreement of parties, these four documents were allowed to be consolidated. The mortgagee was, therefore, allowed to treat all the four transactions as one and it was, therefore, competent for him to decline, as held in — 'Jennings v. Jordan', (1881) 6 AC 698 to be redeemed as to any unless he was redeemed as to all. He can thus treat all the four transactions as component parts of the same mortgage so that the relationship that would govern the parties would be one of mortgagor and mortgagee, and not of mortgagor and mortgagee as to one of the component parts. When these mortgages are consolidated, the consolidated mortgage takes the form of an anomalous mortgage.

In — 'Jawahir Singh v. Someshar Dat', 33 Ind App 42 (PC), there was a mortgage with possession and (1) a stipulation for interest and the appropriation of the usufruct to the interest and (2) a clause that if the rent and profits do not cover the interest the mortgagor would make good the deficiency out of his own pocket. The Privy Council held that under the latter clause the mortgagor was personally liable to the mortgagee for principal and interest. This was an anomalous mortgage and the mortgagee's right to claim the principal and interest was in no way fettered. At the time of redemption of the mortgage, accounts between the parties are to be taken and as pointed by Sadasiva Iyer J., in — 'Raman v. Manakkal Karanavan', 28 Mad LJ 184, no question of limitation arises as between mortgagor and mortgagee when accounts are taken at the time of redemption. This ruling was quoted with approval by this court in — 'Madhavan Pillai v. Sankararu', 1950 Ker LT 356.

The appellant's learned Advocate attempted to apply the principle of Section 31 of the Civil P. C. (Travancore) in order to show that the maximum interest that can be claimed by the mortgagee under Exts. B, 1 and 11 is that provided for in that section. Reference was made to some Bombay cases such as—'Ali Saheb v. Sahabji', 21 Bom 85 where the rule of damdupat was applied so as to draw an analogy with the principle in section 31, Civil P. C. and then to apply that principle to the case in hand. Section 31, Civil P. C. could not be applied in matters of accounting between mortgagor and mortgagee. The accounting adopted by the lower court without applying the provisions of Section 31, C. P. C. appears to be the proper one particularly when the mortgagors in Exts. B, 1 and 11 had stated that they would be liable to pay the principal sums and interest due thereunder only after the expiry of the total period of 48 years covered by Exts. A, B and 11. The decree of the court below is, therefore, confirmed and this appeal and cross appeal are dismissed with costs.

C/D.H. Appeal and cross appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 554

KOSHI AND GANGADHARA MENON JJ.

Manakatt Andi and another, Appellants v. Manath Kunhayyappan, Respondent.

Second Appeal No. 131 of 1124 (C), D/- 25-6-1951.

Limitation Act (1908) S. 1 — Period of limitation — No vested right in.

The rules of limitation are prima facie rules of procedure. Therefore no one has a vested right in a period of limitation unless the contrary follows from the rules themselves. The rule of limitation that applies to a suit is, therefore, the rule which is in force on the date of the institution of the suit, notwithstanding the fact that the cause of action has arisen before the Act came into force. Thus even though a cause of action has arisen before the Cochin Limitation Act, 1112 to which Art. 119 of the Act II of 1079 was applicable, the suit will be governed by Art. 121 of the Act of 1112 and not by Art. 119 of Act of 1079 which is repealed by the later Act. AIR 1940 PC 116 Relied on. (Para 4)

Anno: Lim. Act, S. 1 N. 15 Pt. 10, 12.

M. Raman Pillai, for Appellants; K. Rama Iyer, for Respondent.

REFERENCE ..... /Para

('40) AIR 1940 PC 116: (ILR (1940) Lah 493) 4

JUDGMENT: The defendants are the second appellants. The plaintiff who under Ext B obtained an assignment of Ext A chitty security bond executed by the defendants in favour of one Dharmaprakasini Yogam has brought the present suit for the recovery of the amounts due under that document. The defendants contended that Ext B is not valid as it was executed by one who was not competent to execute it and that the suit was barred by limitation. The trial court found that the suit was within time. However it dismissed the suit on the ground that there is no reliable evidence in the case to establish that P. W. 2 who executed Ext B had any authority to execute it on behalf of the Yogam.

(2) In appeal the lower appellate court reversed the above finding of the trial court and decreed the suit.

(3) It is seen from the evidence that P. W. 2 was functioning as foreman of the chitty on behalf of the Yogam. He swears that the Yogam in its general body meeting authorised him to conduct the kuri and manage all the affairs in respect

of it on behalf of the Yogam. Exts E to E 6 are documents taken by P. W. 2 closing several transactions connected with identical kuri. These documents clearly establish that P. W. 2 was managing the affairs of the kuri on behalf of the Yogam. Nobody in the Yogam appears to have questioned the authority of P. W. 2 to enter into the transactions evidenced by Exts E to E 6. In these circumstances we do not think that the lower appellate court was wrong in having accepted the evidence of P. W. 2 and that of the plaintiff that P. W. 2 was authorised by the Yogam to conduct the kuri and manage the affairs in connection therewith. We agree with the lower appellate court in its conclusion that P. W. 2 was competent to execute Ext B. Moreover the lower appellate court has amply safeguarded the interest of the defendants in the direction in its judgment that the plaintiff will be allowed to draw the decree amount from court only on executing an indemnity bond as enjoined therein.

(4) Next it is contended that the suit is time-barred. The present suit is filed on 8-2-1122. The learned Advocate admits that under Article 121 of the Cochin Limitation Act (XII of 1112) the suit is within time. But what he contends for is that the Article that is applicable to the present suit is Article 119 of Act II of 1079 which is repealed by Act XII of 1112. It is not his case that the suit had already become barred under the provisions of the repealed Act before Act XII of 1112 came into force. But what he contends for is that his client had acquired a vested right under the period of limitation fixed under Article 119 of the repealed Act and that the right so acquired will not be taken away by the new Act and that therefore the provisions of Article 119 of Act II of 1079 must govern the present case in spite of the fact that the Act is repealed. The rules of limitation are prima facie rules of procedure. Therefore no one has a vested right in a period of limitation unless the contrary follows from the rules themselves. As observed in — 'Masjid Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee, Amritsar', AIR 1940 P. C. 116,

"the rules of limitation that apply to a suit are the rules in force at the date of institution of the suit, limitation being a matter of procedure."

This is so notwithstanding the fact that the cause of action may have arisen before such Act came into force.

(5) We are therefore clearly of the view that there is no substance in the plea of limitation raised by the appellant.

(6) The appeal is groundless and is dismissed with costs.

C/D.R.R.

Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 555

GOVINDA PILLAI AND VITHAYATHIL JJ.

Oommen Chacko and others, Appellants v. Avira Varghese and another, Respondents.

A. S. No. 561 of 1951, D/- 14-2-1952.

Civil P.C. (1908) O. 21 R. 16 — Assignee of suit property during pendency of suit is not assignee of decree.

A transfer of property which is the subject-matter of suit will not make the transferee an assignee of the decree which is subsequently passed in the suit so as to entitle him to apply for execution of the decree under O. 21, R. 16. For entitling a person to apply for execution under O. 21, R. 16 the decree must have been transferred in his name by assignment in writing or by operation of law. (Para 4)

Anno: Civil P.C., O. 21 R. 16 N. 1a.

P. I. Simon, for Appellants; T. K. Joseph, (for No. 1) and N. V. Chacko (for No. 2), for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('51) 1951 Ker LT 787: (AIR 1952 Trav-C 254) 4
25 Trav LJ 1125 4
12 Trav LT 1341 4

JUDGMENT: The additional plaintiffs in O. S. No. 818 of 1112 of the Thiruvella Munsiff's Court are the appellants in this case. The appeal relates to a matter in execution. The decree was obtained by the Travancore Federal Bank Ltd., against the 1st defendant. The additional 2nd plaintiff was the manager of the Bank when the suit was filed. The suit was at first decreed on 15-10-1115. On the application of the 1st defendant it was restored to file and was again decreed on 30-3-1120. The present execution petition was filed by the additional plaintiffs 2 and 3 on 2-9-1950. It was alleged in the petition that the plaintiff bank had ceased to exist, that for the amount due to the additional plaintiffs from the bank the right to the amount covered by the decree has been assigned in their favour on 14-4-1939 and that they are therefore entitled to execute the decree. In the objection filed by the 1st defendant it was contended that the additional plaintiffs were not entitled to execute the decree, that the plaintiff bank was still functioning, that the allegation in the execution petition that the right to the amount covered by the decree has been assigned in favour of the additional plaintiffs was false, and that, even if it is true, it would not amount to an assignment of the decree.

(2) The additional plaintiffs then filed C. M. P. 6765 on 26-6-1951 for amending the execution petition by deleting the statement therein that the plaintiff bank had ceased to exist on the date of the execution petition and that it had been wound up. Another petition also was filed on the same day, namely, C. M. P. 6842, for issuing notice of the execution petition to the present manager of the plaintiff bank. The first defendant filed objections to these petitions also. The court below disposed of C. M. Ps. 6765 and 6842 and the execution petition by its order on C. M. P. 6765. The court held that since the plaintiff bank is still functioning and the additional 2nd plaintiff is admittedly not the present manager of the bank, and since the alleged assignment in favour of the additional plaintiffs was before the date of the decree, they were not entitled to execute the decree. As the execution petition would not be maintainable even if the amendment sought for was allowed the petition for amendment as also the petition for issuing notice to the present manager of the bank were dismissed. The execution application also was struck off. The appeal is from this order.

(3) The present manager of the Federal Bank was also impleaded as additional 2nd respondent in this appeal and notice was issued to him. It is argued for the appellants that the court below has gone wrong in striking off the execution petition, in not allowing the amendment of the petition and in not issuing notice to the present manager of the plaintiff bank.

(4) It is admitted that the additional 2nd plaintiff is not the present manager of the plaintiff bank although he was the manager when the suit was filed. He cannot therefore represent the bank and execute the decree on behalf of the bank. The other question for consideration is whether he

and the additional 3rd plaintiff can execute the decree as assignees thereof. The allegation in the execution petition is that the right to the amount covered by the decree has been assigned in favour of the additional plaintiffs on 14-4-1939 corresponding to 1-9-1114. This was before the suit was decreed. It is well established that a transfer of property which is the subject-matter of suit will not make the transferee an assignee of the decree which is subsequently passed in the suit so as to entitle him to apply for execution of the decree under Order 21 rule 16 C. P. C. For entitling a person to apply for execution under Order 21 Rule 16 the decree must have been transferred in his name by assignment in writing or by operation of law. It was so held by the erstwhile Travancore High Court in — 'Ramalinga Nadan v. Krishnan', 25 Trav. L. J. 1125 in which the question was elaborately discussed with reference to the ruling of the other Indian High Courts. This decision was followed in — 'Dominic v. Thomas' 12 Trav. L.-T. 1341. The same view was held by this Court in — 'Chempakutty Pillai v. Rajaian Nadar', 1951 Ker. L. T. 787. We are, therefore, of opinion that even if the allegation in the execution petition regarding the assignment of the right to the amount covered by the decree is true the additional plaintiffs cannot apply for execution of the decree under Order 21 rule 16 C. P. C. The execution petition also cannot amount to an assignment of the decree so long as the additional 2nd plaintiff cannot represent the bank and assign the decree. The execution petition has therefore to be held to be not maintainable.

(5) The amendment sought for is for deleting the statement in the execution petition that the plaintiff bank had ceased to function and that it had been wound up. We do not think that any useful purpose will be served by allowing this amendment. Even if the amendment is allowed the execution petition will not be maintainable so long as it is admitted that the additional 2nd plaintiff does not represent the bank. Similarly no purpose will be served by the issuing of notice to the present manager of the bank. It is left to the bank to execute or not to execute the decree. Learned counsel who appeared for the bank in this appeal submitted that the appellants are not entitled to execute the decree.

(6) In the circumstances we find no reason to interfere with the orders passed by the court below dismissing the execution petition and the other petitions filed by the additional plaintiffs. The appeal is therefore dismissed with costs.

C/R.G.D. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 556

GOVINDA PILLAI J.

Mathai Manjuran, Petitioner v. State.

Criminal M.P. No. 192 of 1950, D/- 7-8-1950.

Criminal P.C. (1898), S. 403 — Proceedings under S. 107 — Petitioner imprisoned for his failure to give security — Subsequent trial for same acts for which security proceedings were started — Trial is not barred — (Criminal P.C. (1898) S. 107) (Constitution of India, Art. 20) (Cochin Cr. P.C., Ss. 92 and 317).

Proceedings under S. 107 are not trials for offences though they may result in the imprisonment of the offender in case he does not give security as ordered by the Court. In the proceedings under S. 107 the person against whom the proceedings are started is not accused in the strict sense of the term, for he is not accused of any offence and he is not tried for any offence committed by him. The enquiry is started to see whether he is to be prevented from doing any act tending to a breach of the peace. The detention provided for in S. 107 cannot also be regarded as a term of imprisonment, for if he did not give security, and if he was not in custody, he was taken to custody and committed to prison until the expiry of the period for which security was ordered, or until such period he gave the security to the court which made the order requiring it. It is not a term of imprisonment though he is kept in custody. Consequently S. 403, which embodies the principle of autre fois acquit does not apply to proceedings for taking security under S. 107 or S. 110 as there is no conviction of any offence. Where therefore upon failure to furnish security the person proceeded against is directed to undergo imprisonment, it does not bar his subsequent trial for offences constituted by the same acts for which the proceedings under S. 107 were taken. AIR 1942 Lah. 84 Relied on. AIR 1928 Rang. 135 Dissented from. (Para 5)

Moreover under S. 107 person is not tried for what he did in the past. His previous acts are taken into account only to make an inference as to what his future conduct would be and to say that he is tried for the offence said to have been committed on account of these acts cannot be correct. Art. 20 of the Constitution and S. 304 Cr. P.C. would not therefore stand in the way of the person being tried for the acts done by him which were taken into account in proceedings under S. 107. (Para 4)

Anno: Cr. P. C., S. 107 N. 2; S. 304 N. 3, 7, 9.

Petitioner in person; Public Prosecutor, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('30)	AIR 1930 All 408: (31 Cri LJ 710)	4
('05)	2 Cri LJ 554: (9 Cal WN 898)	4
('38)	AIR 1938 Cal 583: (39 Cri LJ 992)	4
('31)	AIR 1931 Lah 191: (32 Cri LJ 1207)	4
('42)	AIR 1942 Lah 84: (43 Cri LJ 564)	5
('28)	AIR 1928 Rang 135: (30 Cri LJ 630)	5

ORDER: The accused in C.C. 111 of 1125 of the second class Magistrate's Court, Mattancherry has filed this petition for an order to the Magistrate to drop the proceedings against him in that case. He stated that the Ernakulam Town Police had started two proceedings against him for demonstration which took place on 27th Kanni 1123, one under Secs. 92 and 93 (a), Cochin Criminal P. C., and another under secs. 129, 133, 135, 333, 427 and 484, Cochin Penal Code. The case under Sections 92 and 93 (a) Cochin Criminal P. C. had been registered as M. C. 32 of 1123 in the Court of the Anjikaimal First Class Magistrate's Court. He was directed to give security for one year for keeping peace. As he did not do so, he was directed to undergo imprisonment for one year. The Second case is now pending before the Mattancherry Court as mentioned. According to him the incidents that led to the two proceedings were the same and he stated that he could not be tried twice for the same offence.

(2) The prosecution case in C.C. 111 of 1125 was that at about 3-30 P.M. on 27th Kanni 1123, this petitioner and others coming to about 150 persons formed themselves into an unlawful assembly and trespassed into the court-yard of the Legislative Council, Ernakulam and assaulted

the head-constable on duty there. The member of the jatha rioted in the said court-yard insulting the honourable ministers and the honourable members of the Legislative Council with the intention to provoke a breach of peace and with the object of coercing the assembly from not considering the bill called the "Criminal Law Amendment Bill". The petitioner was the leader of the jatha. For this he is being prosecuted now. Some other members of this jatha had been tried and convicted and the appeals by them had also been disposed of. Miscellaneous proceedings were started because this petitioner was stated to have delivered four seditious speeches so as to incite the people to disobey law. One of those speeches was on 27th Kanni 1123 in the Rajendra Maidan. Mentioning these speeches and also the part played by the petitioner in leading Jatha and creating trouble in the Legislative Council premises the police requested the Magistrate to start proceedings against him for an order to the petitioner to give security for keeping peace for one year. It is a fact that the security proceedings before the Magistrate ended in a direction to the petitioner to give security. In order to substantiate the order thus passed, it was true that the happenings on 27th Kanni 1123 had also been taken into account after taking evidence on the same.

(3) The petitioner's case was that he had been tried for what took place on 27th Kanni 1123 in the security proceedings so that he was not to be tried once again for what took place that day. He stated that under Art. 20, Constitution of India, no person could be prosecuted and punished for the same offence more than once. This is the principle laid down in Sec. 403 of the Indian Code. It had been laid down that a person who had once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remained in force, not be liable to be tried again for the same offence, nor on same facts for any other offence for which a different charge from the one made against him might have been made Sec. 212 or for which he might have been convicted under Sec. 213, Cochin Criminal P.C. If it is taken that in the security proceedings the petitioner had been tried for the offences said to have been committed by him on 27th Kanni 1123, then he could not be tried again for offences arising out of the same occurrence.

(4) The proceedings under Sec. 92 would not constitute a trial for what was done by the offender. The object of the provisions of Sec. 92 corresponding to Sec. 107 of the Indian Code is prevention and not punishment of offences. It is not intended to punish persons for anything that they have done in the past, but to prevent them from doing in future something that might occasion a breach of the peace. The wording of the section is clear on this point and it has been so laid down in — 'Srikantha Nath v. Emperor', 2 Cri. L. J. 554 (Cal), — 'Emperor v. Jivan Singh', AIR 1930 All 408, — 'Shadi Lal v. Emperor', AIR 1931 Lah. 191 and — 'Sukhlal Karnani v. Emperor', AIR 1938 Cal 583. What was done by the counter-petitioner in the security proceedings in the past was taken into account only for the purpose of determining what his future course of conduct would be so that in case he is likely to create a breach of the peace, he was to be prevented from doing so by appropriate proceedings. It is seldom practicable to give evidence to show that a person is intending to commit a breach of the peace or to do an unlawful act that may probably occasion a breach of the peace unless the person concerned chooses to give previous intimation of what he is proposing to do. In these circumstances what the prosecution does is to give evidence to show that the acts committed by the person proceeded against under the section are of such a nature that the continuity of these acts or the Commission of similar acts by him is apprehended as tending to a breach of the peace. When this is so it is incumbent on the Magistrate who deals with the security proceedings, to find in the first place as to whether these past acts are true or not, in order that he may be enable to draw the inference that the commission of similar acts will occasion a breach of the peace. This would necessarily indicate that in the security proceedings under Sec. 92, the person proceeded against was not tried for what he did in the past and so it could not be held that he had been tried for the offences committed. His previous acts were taken into account only to make an inference as to what his future conduct would be and to say that he is tried for the offence said to have been committed on account of those acts could not be correct. In this view it would be clear that in the security proceedings the petitioner had not been tried for what was said to have been done by him on 27th Kanni 1123. The provisions of Art. 20, Constitution of India and of section 317, Cochin Criminal P. C., would not therefore stand in the way of the petitioner being tried for what he did on 27th Kanni 1123. This petition is therefore not sustainable.

(5) Proceedings under Sec. 92 are not trials for offences though they may result in the imprisonment of the offender in case he does not give security as ordered by the Court. There was the view expressed by a single Judge in — 'Nga Mya Gyi v. Emperor', AIR 1928 Rang. 135 that where accused persons were sent to jail for failure to furnish security under Sec. 108, Criminal P. C. (Indian) on a charge of sedition they were not to be subsequently convicted under Sec. 124 (A) for the same offence. With all respect I cannot agree with the view expressed or the reasoning adopted. The object of Sec. 107 and the procedure adopted, in proceedings started under that section were wholly lost sight of by the Learned Judge who decided that case and so I do not follow the same. In the proceedings under Sec. 92, Cochin Criminal P. C. the counter petitioner against whom the proceedings are started is not accused in the strict sense of the term, for he is not accused of any offence and he is not tried for any offence committed by him. As already mentioned the enquiry is started to see whether he is to be prevented from doing any act tending to a breach of the peace. The detention provided for in Sec. 107 could not also be regarded as a term of imprisonment, for if he did not give security, and if he was not in custody, he was taken to custody and committed to prison until the expiry of the period for which security was ordered, or until such period he gave the security to the court which made the order requiring it. It is not a term of imprisonment though he is kept in custody. Thus in proceedings under Sec. 92, the person against whom the proceedings are started is not considered to be an accused charged with any offence, nor is he tried for any offence said to have been committed by him. The ruling in — 'Subeg Singh v. Emperor', AIR 1942 Lah 84 is also helpful in this respect. It was pointed out there that Sec. 403, Indian Criminal P. Q. which embo-

dies the principle of Autre Fois Acquit would not apply to proceedings for taking security under Sec. 107 or Sec. 110 as there was no conviction of any offence. It is therefore my view that the proceedings taken in M. C. 32 of 1123 against the petitioner in the Anjikaimal First Class Magistrate's Court would not bar the Mattancherry Magistrate in proceeding with the case before him. The petition is therefore dismissed.

C/ R. G. D. Petition dismissed.

A. I. R. 1952 **TRAVANCORE-COCHIN** 558

GANGADHARA MENON
AND VITHAYATHIL JJ.

Narayanan Thampi Krishnan Tampi, Appellant v. Parukutty Amma Ponnamma, Respondent.

A. S. No. 711 of 1950, D/- 7-8-1951.

Travancore Nayar Act (2 (II) of 1100), S. 7 — Dissolution of marriage by agreement — Matters to be taken into consideration in awarding compensation.

Where on an application for dissolution of marriage on ground of wife's legal cruelty (wilful desertion), the wife denies the allegations but agrees to the dissolution and the marriage is declared as dissolved, the Court while determining the compensation to be awarded to the wife should confine itself to the consideration of the position, means and circumstances of the parties and is not entitled to equire into the truth or otherwise of the allegations in the petition. The expression "as would be proper under the circumstances" in Section 7 (3) (a), Nayar Act is not wide enough to justify an enquiry in the truth of the allegations in the petition for the purpose of awarding compensation 'except' in cases where adultery or change of religion of the respondent is pleaded.

(Para 4)

P. Govindan Nair, for Appellant; G. Velu Pillai, for Respondent.

JUDGMENT: This appeal is directed against the order of the Additional District Munsiff of Trivandrum in N. S. 4 of 1124 awarding compensation of Rs. 500/- to the counter petitioner on the dissolution of her marriage with the petitioner. The petitioner prayed for the dissolution of the marriage on the ground that the counter-petitioner refused to live with him and that it amounted to legal cruelty. The counter-petitioner while denying the allegations in the petition agreed to the dissolution of the marriage and claimed compensation. The court below declared the marriage dissolved and awarded Rs. 500/- as compensation to the counter-petitioner. The appeal is directed against the order awarding compensation.

(2) The learned advocate for the appellant contends that even though the counter-petitioner while denying the allegations in his petition has agreed to the dissolution of the marriage the circumstances that led to the dissolution of the marriage are matters which ought to have been taken into consideration by the court in decreeing compensation in favour of the wife. According to him the court ought to have enquired into the truth of the allegation in his petition that his wife had wilfully deserted him and ought to have brought its finding on that question also, to bear on its decision regarding the compensation to be decreed in her favour.

(3) Section 7 (2) of the Nayar Act provides:

"Three months after the service of the copy as aforesaid, if the petition is not withdrawn in the meantime, and

(a) If the petition is not opposed with respect to any of the grounds mentioned in Section 5, or if the respondent, while denying the allegations contained in the petition, agrees to the dissolution, the Court shall, without going into the grounds alleged declare in writing the marriage dissolved.

(b) if the respondent does not agree to the proposed dissolution and denies the allegations in the petition the Court shall enquire into the allegations in the petition and, after considering the evidence adduced by the parties, shall order the dissolution of the marriage if the grounds set forth in the petition are made out, and shall dismiss the same in case they are not made out"

and section 7 (3) (a) enacts:

"(3) At the time of passing the order referred to in sub-section (2).

(a) if the petitioner is the husband and his prayer is granted, the Court shall, except where the respondent lives in adultery or has changed her religion, award to the wife such compensation not exceeding Rs. 5000/- or such monthly allowance till her remarriage as would be proper under the circumstances, having regard to the position, means and circumstances of the parties."

(4) It is argued that the expression "as would be proper under the circumstances" before the words "having regard to the position, means and circumstances of the parties" in sub-section (3) (a) would justify the court in taking into consideration the truth or otherwise of the allegations in the petition in determining the compensation that may be decreed in favour of the wife. We are unable to agree with this contention. Section 7 (2) (a) clearly provides that if the wife while denying the allegations contained in the petition agrees to the dissolution, the court shall without going into the grounds alleged declare in writing the marriage dissolved and section 7 (3) (a) enjoins that at the time of passing that order the court shall except where the respondent lives in adultery or has changed her religion award to the wife such compensation not exceeding Rs. 5000/- or such monthly allowance till her remarriage as would be proper under the circumstances having regard to the position, means and circumstances of the parties. Therefore, even if the ground alleged in the petition, viz., wilful desertion, is established, and dissolution of marriage is granted on that ground, still, the wife will be entitled to compensation as provided for under the Act. That being the case, we do not think that the expression "as would be proper under the circumstances" in Section 7 (3) (a) is wide enough to justify an enquiry in the truth of the allegations in the petition for the purpose of awarding compensation except in cases where adultery or change of religion of the respondent is pleaded. Reading Section 7 as a whole, we do not think that it was the intention of the Legislature that except where the respondent lives in adultery or has changed her religion the grounds mentioned in the petition of the husband justifying dissolution of marriage should be taken into consideration in deciding the question of the compensation to the wife. The court below was, therefore, right in having confined itself to the consideration of the position, means and cir-

cumstances of the parties in determining the compensation to be awarded to the wife.

(5) The petitioner has 59 cents of paddy field and 26 cents of garden land in Mavelikara Taluk as well as a small pension. The learned Munsif estimated the value of the properties between Rs. 2500/- and Rs. 3000/-. We cannot say that his estimate is wrong. Having regard to the position, means and circumstances of the parties, we do not think that the compensation awarded by the court below is excessive. We see no proper grounds to interfere with this award by the learned Munsiff. Therefore, in confirmation of the order appealed against we dismiss the appeal. In the circumstances of this case we direct the parties to suffer their costs in this Court.

C/K.S. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 559

KOSHI C. J. AND GANGADHARA MENON J.

Aravala Madan & another, Appellants v. Ramayi Nagami, Respondent.

A. S. No. 73 of 1124, D/- 18-3-1952.

Trusts Act (1882), S. 82 — Benami Transactions — Purchase of property in name of wife — Doctrine of advancement — Tests — Source of consideration — Transaction held real and not benami — (Advancement) (Benami) — (Husband and wife — Advancement).

It is true that the doctrine of advancement does not apply to the parties who are Indian Christians. Still the relationship of the parties and the motive that operated at the time of the acquisitions of the properties are factors which have to be taken into consideration in determining the question whether the transactions were real or were only benami, for after all the question really is one of intention. The source from which the consideration has come, no doubt, furnishes a valuable test but it is wrong to regard it as the sole or conclusive criterion.

Where the motive for acquisition of property by the husband in the name of his 2nd wife was that she should have property for herself, which property would be out of reach of the sons from the deceased first wife, who were on terms of enmity, the transaction cannot be called benami for the husband but a real transaction, even if it is shown that the funds for acquiring the properties were supplied by the husband. 33 Cal 773; AIR 1934 Mad 671; AIR 1938 Mad 8, Rel. on. (Para 2)

Anno: Trusts Act, S. 82 N. 3.

T. R. Subramonia Iyer, for Appellant; M. Madhavan Nair, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('06) 33 Cal 773: (33 Ind App 86 PC) 2

('34) AIR 1934 Mad 671: (153 Ind Cas 478) 2

('38) AIR 1938 Mad 8: (ILR (1938) Mad 220) 2

JUDGMENT: This is an appeal by the plaintiff from the judgment and decree of the learned District Judge of Nagercoil in O. S. 101 of 1117 of his court. After the filing of the appeal the appellant died and one of his sons by his 1st wife was brought on record as his legal representative. The 1st defendant was the 2nd wife of the deceased plaintiff. The suit was for a declaration that Exts. I, II, III, and VIII sale deeds in respect of the plaint items standing in the name of the 1st defendant were taken benami for the plaintiff and that the beneficial interest in the properties vested in the plaintiff. Plaintiff also prayed for an injunction restraining the 1st defendant from entering the properties. The trial court dismissed the suit. The plaintiff has therefore come in appeal.

(2) The learned Judge on a consideration of the evidence in the case, has found that the plaintiff has not proved that he advanced funds for the above four sale deeds. This finding is very seriously challenged in appeal. It is contended that the plaintiff has adduced clear evidence to establish that he had ample means for the acquisitions of the properties, while 1st defendant has not been able to show by any positive evidence that she had any means or income worth the name from which the properties could have been acquired. The learned advocate for the appellant therefore argues that even though his client was not able to prove the particular fund from which the consideration for each of the sale deeds has proceeded, it has in the circumstances of the case to be inferred that the plaintiff supplied the funds necessary for the documents in question. But even assuming that the plaintiff supplied the funds for taking Exts. I, II, III and VIII, we do not think, that in itself, is conclusive on the question of ownership. The source from which the consideration has come, no doubt, furnishes a valuable test but it is wrong to regard it as the sole or conclusive criterion. It is true that the doctrine of advancement does not apply to the parties who are Indian Christians. Still the relationship of the parties and the motive that operated at the time of the acquisitions of the properties are factors which have to be taken into consideration in determining the question whether the transactions were real or were only benami, for after all the question really is one of intention. In this case the plaintiff whose first wife died early and who had also children by her, married the first defendant a young woman while he was somewhat advanced in age. He had four children all daughters by the 2nd marriage. It is also seen that some time after his marriage with the 1st defendant the plaintiff's children by the 1st wife quarrelled and fell out with him. They asserted rights over the properties standing in his name and threatened trespass into those properties. This is admitted in paragraphs 5 and 6 of the plaint. In the position in which he was placed it was only natural that the plaintiff should have thought of making some provision for the 1st defendant. In fact it is clearly averred in paragraphs 5 and 6 that the motive for the acquisitions in the name of the first defendant was the hostility of the plaintiff's sons by his first wife. Evidently the plaintiff wanted his wife to have some properties for herself which would be out of reach of his sons who were on terms of enmity. Thus the motive alleged for the transactions itself suggests that the purpose in view could be served only by genuine transactions and not by benami ones. In these circumstances the reasonable inference is that the sale deeds far from being benami were intended to be real. The decision reported in — 'Ismail Mussajee Mookerdum v. Hafiz Boo', 33 Cal 773 is in point. In that case their Lordships of the Judicial Committee observe as follows:

"The fact, therefore, remains that the properties purchased by the sale proceeds were

purchased no doubt in Hafiz Boo's name, but were purchased out of funds emanating from her mother's estate. This circumstance no doubt, if taken alone, affords evidence that the transaction was benami, but there is, in their Lordships' opinion, enough in the facts of the case to negative any such inference. It seems clear that what was done in 1889 was prompted by hostility to the son and was with the purpose of excluding him from inheritance, an object which could not have been attained by any benami transaction."

See also the decisions in — Thulasi Ammal v. Official Receiver, Coimbatore', AIR 1934 Mad. 671 and — 'Sitamma v. Sitapatirao', AIR 1938 Mad 8.

(3) Therefore in the circumstances of this case we are clearly of the view that even if the funds for taking the sale deeds in question were supplied by the plaintiff, they are not benami transactions as contended for and that the beneficial interest in the plaint properties vested absolutely in the first defendant.

(4) It follows that the decree of the lower court does not call for any interference. We confirm the decree and dismiss the appeal with costs

C/R.G.D. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 560

SUBRAMANIA IYER
AND VITHAYATHIL JJ.

Kunjan Ittiathi, Appellant v. Raman Padmanabhan and others, Respondents.

Second Appeal No. 459 of 1124, D/- 20-6-1951.

(a) Civil P. C. (1908), O. 41 R. 27 — Lower appellate Court issuing commission for local investigation — No grounds for taking of additional evidence in appeal made out — Successor Judge can refuse to look into the report of the Commissioner. AIR 1951 SC 193, 31 Bom 381 (PC), AIR 1931 PC 143, Rel. on. (Paras 4 and 5)

Anno: Civil P. C., O. 41 R. 27 N. 8.

(b) Civil P. C. (1908), S. 100, O. 20 R. 4 — Lower Courts considering material points and relevant evidence — Though brevity of judgment is a virtue to be commended, the fact that judgment gives more details and is more lengthy, is no ground for interference. (Para 6)

Anno: Civil P. C., S. 100-101 N. 11 O. 20 R. 4 N. 9.

N. Devaresa Kammath, for Appellant; T. R. Subramania Iyer, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('31) AIR 1931 PC 143: (10 Pat 654) (PC) 4
('51) AIR 1951 SC 193: (1951 SCR 258 (SC) 4
('07) 31 Bom 381: (34 Ind App 115 PC) 4

JUDGMENT: The plaintiff in O. S. 264 of 1120 on the file of the District Munsiff of Shertallai is the appellant before us. The suit was brought by him for a declaration that an item of property to which he obtained title under Ex. A of the year 1119 being a deed of transfer executed in his favour by the 3rd defendant and one Raghavan, was his. The occasion for the suit was this. The 2nd defendant obtained a decree for money against the said Raghavan who, it may be mentioned, and the 3rd defendant are the children of two sisters. The 2nd defendant assigned the decree in favour of the 1st defendant. In execution of that decree, there was an attachment of certain immovable properties in the year 1118. The properties attached were stated to belong to Raghavan on account of the deed of gift executed by the 3rd defendant in his favour in the year 1111. The document of gift is marked Ex. 1. The plaintiff brought the suit for a declaration that the property attached as belonging to Raghavan under the gift deed Ex. 1, is not the property that is purchased by him under Ex. A and that the property purchased by him under Ex. A is not liable to be attached in execution of the decree obtained against Raghavan.

(2) The only question for the consideration of the courts below was, therefore, the identity of the property comprised in Ex. 1 which admittedly is the property attached with the property comprised in Ex. A. There was a partition in the family of the 3rd defendant evidenced by Ex. B or Ex. 11 in the year 1088, at which the 3rd defendant and her brother were allotted two items of property. The brother died and the 3rd defendant became the sole owner of both these items. Of these, there is no dispute about one item. The transfer in favour of the plaintiff by way of sale and that in favour of Raghavan under Ex. 1 by way of gift was stated to be of the other property obtained at the partition. In describing the properties, however, different descriptions were given in the two deeds, with the result that if you consider the question of identity based upon the details of description given, it will be a difficult task indeed, but going by the root of title which is the partition deed in both, at which the 3rd defendant got only two items of which there is no dispute about one item, there remains but one item available for being conveyed by the 3rd defendant to any other party either as a gift or as a sale. One such transfer having been made in the year 1111 in favour of Raghavan, there remains nothing for her to convey to the plaintiff in the year 1119 under Ex. A. Under these circumstances, the courts below, upon this question of fact, came to the conclusion that the property attached is the property that was gifted to Raghavan under Ex. 1 and that the identical property is comprised in Ex. A and for that reason Ex. A cannot operate to convey any title to the plaintiff and dismissed his suit and appeal.

(3) There being thus concurrent findings of fact recorded by the courts below, learned counsel for the appellant had to find out points of law to induce this court to interfere with the decision arrived at by the courts below. One point urged by him in this regard was that the lower appellate court at his instance issued a commission for local investigation and that a report was submitted by the commissioner. At the hearing, however, the lower appellate court, which appears then to have been presided over by another learned Judge, refused to look into that evidence, viz., the evidence supplied by the commissioner's report. The complaint is that, when a commission is issued and a report submitted, it will, in law, be evidence and therefore, it is erroneous on the part of the lower appellate court not to have regarded that evidence. The appellant however does not appear to have made out a case before the lower appellate court for the reception of additional evidence. When a trial court takes all the evidence tendered by the parties and dispose of the case, unless good grounds are shown for the receipt of additional evidence in appeal, no

party is entitled nor is the court competent to accept and use additional evidence.

(4) The provision contained in O. 41. Rule 27 of the Civil P. C. which enables an appellate court to accept additional evidence, provides that such acceptance can only be upon the grounds shown in clauses (a) and (b) of that rule. In this case, there is no ground at all alleged why additional evidence should have been accepted by the lower appellate court. In a very recent case in — 'Arjan Singh v. Kartar Singh', AIR 1951 S. C. 193, the Supreme Court had occasion to consider the circumstances under which additional evidence can be accepted by a court of appeal and it has been laid down, following the decisions of the Privy Council upon that point in — 'Kessowji v. G. I. P. Railway', 31 Bom 381 (P. C.) and in — 'Parsotim v. Lal Mohar', AIR 1931 P. C. 143 that except in cases where good grounds are shown additional evidence should not be received in appeal. That was a case in which the appellate court received additional evidence without good ground, acted upon that evidence and came to a certain conclusion on the basis thereof. The Supreme Court condemned the act of the appellate court in having received additional evidence and disregarded that evidence and the conclusion of the lower appellate court based thereon, though the conclusion come to by the appellate court in that case happened to concur with that come to by the trial court. The Supreme Court regarded the finding not as concurrent, because the conclusion of the appellate court was based upon additional evidence which, in the estimate of the Supreme Court, should not have been accepted.

(5) The lower appellate court is therefore right in not having looked into the report of the commissioner submitted in the case, the commission having been issued by the lower appellate court without there being any reason and none having been brought to the notice of that court why additional evidence should have been accepted in appeal.

(6) Another ground urged at the argument by the learned counsel for the appellant is that the courts below have not given sufficient reasons for their conclusions. The judgments were read before us and we find the courts have given sufficient reasons for their conclusions, though it may be said that they might have given more details and written more lengthy judgments. The material points and the relevant evidence having been considered by the courts, in their judgments, brevity is a virtue to be commended.

(7) There is thus no ground made out for interference in Second Appeal which is hereby dismissed with costs.

C/R.G.D.

Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 561

SANKARAN AND VITHAYATHIL JJ.

Narayana Pillai Raman Pillai and another, Appellants v. Godavarma Valia Raja Avergal, Respondent.

A. S. No. 54 of 1124, D/- 14-1-1952.

Civil P. C. (1908), O. 21 R. 2 — Decree in favour of Idavaka — Executability — Proclamation of remission — Effect — Evidence Act (1872), S. 115.

The dues payable to the Idavaka by the tenants fell into arrears and the decree was obtained by the Chief of the Idavaka for recovery of such arrears for the period from 1095 to 1101. On 22-3-1115 the Idavaka Chief issued a proclamation remitting in favour of the tenants the arrears of tax due from them up to the close of the year 1108.

Held that the position of the Chief of the Poonjar Idavaka, who was the plaintiff decree-holder, was only that of a feudal landlord. He had no sovereign powers and hence the Proclamation issued by him could not have any legislative sanction attached to it just as in the case of a Proclamation or Ordinance issued by a sovereign authority. It was only a unilaterial declaration by the Chief stating that he was giving up in favour of the tenants under him the right to recover the arrears of tax due from them up to the end of the year 1108. Such a declaration by itself could not have the effect of extinguishing or superseding the decree passed by Civil Courts for the recovery of such dues. The best that could be said in favour of such a declaration was that it amounted to an adjustment and satisfaction of the decree as contemplated by Order XXI Rule 2. But in order that the executing Court may give effect to such an adjustment and satisfaction, the same must have been certified by the decree-holder or the judgment-debtor must have applied to the executing Court within the period prescribed by law to have such adjustment and satisfaction recorded as certified. It cannot also be said that the proclamation operated as an estoppel against the decree-holder's right to execute the decree. The right to execute the decree is controlled by the provisions of Order XXI of the Code of Civil Procedure and there can be no estoppel against the right conferred by such statutory provisions. (Paras 2, 3)

Anno: C.P.C., O. 21 R. 2 N. 2, 15, 21, 28; Evidence Act, S. 115 N. 50.

P. Govindan Nair, for Appellants; P. Narayana Pillai, for Respondent.

SANKARAN J.: The executability of the decree obtained by the plaintiff in this case is the question raised by the appellants who are the legal representatives of the 1st defendant. The properties involved in this case are situated within the Poonjar Idavaka and they were demised on lease from the Idavaka to the defendants in the case. The dues payable to the Idavaka by the tenants fell into arrears and the present decree was obtained by the Chief of the Idavaka for recovery of such arrears for the period from 1095 to 1101, from the defendants and as a charge on the value of their improvements in the suit properties. On 22-3-1115 the Idavaka Chief issued a Proclamation remitting in favour of the tenants the arrears of tax due from them up to the close of the year 1108. Exhibit I is copy of that Proclamation. When the plaintiff decree-holder took out execution for bringing the suit properties to sale for realising the decree amount, the 1st defendant raised the objection that in view of Ext. I Proclamation the decree-holder is not entitled to proceed with the execution of the decree. That objection was overruled by the executing Court and hence this appeal.

(2) The decree as it stands, is an executable decree. The question for consideration is whether the Proclamation Ext. I has the effect of superseding this decree or whether it amounts

to an adjustment and satisfaction recognisable by the executing Court. The position of the Chief of the Poonjar Idavaka, who is the plaintiff decree-holder in this case, is only that of a feudal landlord. He has no sovereign powers and hence the Proclamation Ext. I issued by him cannot have any legislative sanction attached to it just as in the case of a Proclamation or Ordinance issued by a sovereign authority. It is only a unilateral declaration by the Chief stating that he was giving up in favour of the tenants under him the right to recover the arrears of tax due from them up to the end of the year 1108. Such a declaration by itself cannot have the effect of extinguishing or superseding the decrees passed by Civil Courts for the recovery of such dues. The Courts are not bound to take cognisance of such declarations and to give effect to them. The best that can be said in favour of such a declaration is that it amounts to an adjustment and satisfaction of the decree as contemplated by Order XXI Rule 2 of the Code of Civil Procedure.

(3) But in order that the executing Court may give effect to such an adjustment and satisfaction, the same must have been certified by the decree-holder or the judgment-debtor must have applied to the executing Court within the period prescribed by law to have such adjustment and satisfaction recorded as certified. In the present instance the decree-holder has not certified in the execution Court that the decree has been adjusted and satisfied. On the other hand, he is maintaining that there was no such adjustment and satisfaction in respect of the decree in this case and that the Proclamation Exhibit I was not intended to cover claims for which decrees had already been obtained. The judgment-debtors did not also care to apply to the executing Court to have the alleged adjustment and satisfaction of the decree recorded as certified within the time prescribed by law i.e., within 90 days from the date of adjustment and satisfaction as prescribed by Article 174 of the Limitation Act.

The contention that there has been an adjustment and satisfaction of the decree by virtue of the Proclamation Ext. I, has been put forward by the 1st defendant for the first time before the execution court only on 12-8-1118 when he filed his objections to the execution of the decree. Such a belated contention cannot be recognised by the executing Court and the provision to that effect contained in clause (3) of R. 2 of O. XXI of the Code of Civil Procedure is mandatory. To get over the effect of this provision, it was argued by the learned advocate for the appellants that Ext. I did not really amount to an adjustment and satisfaction of the decree as contemplated by O. XXI, R. 2 of the Code of Civil Procedure, but that it was an agreement between the Chief of the Poonjar Idavaka and the defendants in this case that the claim against them will not be enforced. Ext. 1 on the face of it does not lend support to this contention. As already stated, Ext. I contains only a unilateral declaration by the Idavaka Chief and as such it cannot be said that it amounts to an agreement between the Chief and his tenants. The judgment-debtors cannot put forward Ext. I, even as an agreement, as a bar to the execution of the decree.

The decree is a valid decree and so long as it remains in force, the executing Court is bound to enforce it unless it is shown that the right to execute the same has become barred by limitation or that there has been an adjustment and satisfaction of the decree. There is no contention in this case that the decree has become barred by limitation. Even construing Ext. I as amounting to an adjustment and satisfaction of the claim under this decree also, it is seen that there has been no certification or recording of such adjustment and satisfaction as required by the provisions of Order XXI, rule 2 of the Code of Civil Procedure. It cannot also be said that Ext. I operates as an estoppel against the decree-holder's right to execute the decree. The right to execute the decree is controlled by the provisions of Order XXI of the Code of Civil Procedure and there can be no estoppel against the right conferred by such statutory provisions. There is no scope for the judgment-debtors to avail of such a plea of limitation on the basis of an adjustment and satisfaction not recorded or certified as required by the Code. Thus in any view of the case it is clear that the objections to the executability of the decree in this case are unsustainable. The lower court was therefore right in overruling those objections. In this view of the matter, the points raised in the objection memorandum filed on behalf of the decree-holder respondent do not arise for consideration.

(4) In the result this appeal fails and it is accordingly dismissed with costs. The objection memorandum is also dismissed.

C/D.H. Appeal dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 562

VITHAYATHIL J.

Narayanan Neelakantan, Petitioner v. Amini Narayani and another, Respondents.

Criminal R. P. No. 313 of 1951, D/- 20-9-1951.

(a) Criminal P. C. (1898) S. 488 — Wife applying for separate maintenance — Husband's offer to maintain her if she lived with him — Burden is on wife to show sufficient reason for her refusal to live with him. (Travancore Criminal P. C., S. 399).

Under S. 399 sub-section (4) of the Travancore Criminal P.C. a wife is not entitled to get a separate maintenance from her husband under the section if without any sufficient reason she refuses to live with him. Where she admits that she is not living with the husband and the husband offers to maintain her if she would live with him, it is for the wife to prove that there is sufficient reason for her refusal to live with her husband. A wife is not entitled to refuse an offer by the husband to maintain her if she would live with him and to claim separate maintenance unless she is able to make out that there is sufficient reason for her refusing to live with him. AIR 1943 Lah. 59 and AIR 1941 Nag. 175 Rel. on. (Para 1)

Anno: Cr. P. C., S. 488 N. 19, 21.

(b) Criminal P.C. (1898) S. 488 — Unfounded imputation of unchastity — Wife can refuse to live with husband — (Travancore Criminal PC., S. 399).

An unfounded imputation of unchastity about the wife by her husband and reiteration of the same in his evidence in proceeding under S. 399, Tr. Cr. P. C. is sufficient reason for her refusing to live with him apart from the fact whether such imputation amounts to legal cruelty or not. In such a case court will be justi-

fied in awarding separate maintenance.
Case law Ref. (Paras 2a, 2b)

Anno: Cr. P.C., S. 488, N. 21.

C. K. Sivasankara Panicker, for Petitioner; Joseph Augustine, for Counter-Petitioners.

REFERENCES: Courtwar/Chronological/ Paras
('75-77) 1 Bom 164 2(a)
('29) 30 Cri LJ 261: (117 Ind Cas 903 Lah) 1
('43) AIR 1943 Lah 59: (44 Cri LJ 425) 1
('50) AIR 1950 Mad 385: (51 Cri LJ 907) 2(a)
('50) AIR 1950 Mad 394: (51 Cri LJ 931) 2(a)
('41) AIR 1941 Nag 175: (42 Cri LJ 647) 1
16 Trav LJ (SN) 151 2(a)
9 Trav LT (SN) 18 2(a)

ORDER: The counter petitioner in M. C. No. 60 of 1124 on the file of the Division First Class Magistrate's Court, Kottayam, is the Revision petitioner in this case. The Miscellaneous case is one filed by the wife and minor daughter of the Revision petitioner under section 399 of the Travancore Criminal Procedure Code for maintenance. The petition was filed on the ground that the counter petitioner in the lower court refused to maintain the petitioners and they claimed a monthly allowance of Rs. 30 for the 1st petitioner and Rs. 10 for the 2nd petitioner. The counter petitioner in the lower court admitted that he was not maintaining the petitioners but contended that the 1st petitioner refused without any sufficient reason to live with him and offered to maintain the petitioners if they would live with him. The lower court took the view that the burden of proving that the 1st petitioner refused to live with the counter-petitioner without sufficient reason was on the counter petitioner and that since he did not discharge that burden he is liable to maintain the petitioners. I do not think that this view of the learned magistrate is correct. Under Section 399 sub-section (4) of the Travancore Criminal Procedure Code a wife is not entitled to get a separate maintenance from her husband under the section if without any sufficient reason she refuses to live with him. In view of the admission of the 1st petitioner that she is not living with the counter petitioner and of the offer of the counter petitioner to maintain her if she would live with him, it is for the 1st petitioner, to prove that there is sufficient reason for her refusal to live with her husband. A wife is not entitled to refuse an offer by the husband to maintain her if she would live with him and to claim separate maintenance unless she is able to make out that there is sufficient reason for her refusing to live with him (Vide — 'Mt. Roshanbanu v. Azim', AIR 1943 Lah. 59, — 'Emperor v. Shambai', AIR 1941 Nag. 175 — 'Tota v. Mt. Durgi', 30 Cri. L. J. 261 (Lah.).

(2a) Apart from the question of burden of proof there is sufficient material in this case for holding that there is good reason for the 1st petitioner for refusing to live with the counter-petitioner. In the written statement filed by the counter-petitioner he has imputed unchastity to his wife. He has reiterated that accusation when he gave evidence in the case. He has not however attempted to adduce any independent evidence to prove this accusation. I am of opinion that an unfounded imputation of unchastity about the wife by her husband, is sufficient reason for her refusing to live with him. There is difference of opinion on the question as to whether such an imputation would amount to legal cruelty. In 16 Trav. L. J. (S. N.) 151 the Travancore High Court held that where in the written statement filed by the husband in proceedings under section 366 of the Travancore Criminal Procedure Code, Act V of 1067 corresponding to section 399 of Act VIII of 1117 he imputes incontinence to the wife such imputation constitutes sufficient reason for her refusing to live with him. But in 9 Trav. L. T. (S. N.) 18 it was held that the allegation of immorality against the wife made by the husband in the course of proceedings under section 366 is not a sufficient reason to entitle the wife to live away from the husband. In —'Yamuna Bai v. Narain Moreshwar' 1 Bom. 164 it was held that unfounded imputation of wife's unchastity would not amount to legal cruelty. But in —'Kamala Gangalamma v. Venkatarami Reddi AIR 1950 Mad. 385 it was held that deliberate accusation of immorality of the wife would fall under the definition of legal cruelty and would entitle the wife to live separate from the husband and to claim separate maintenance. His Lordship Panchapakesa Aiyar observed thus in that case:

"Chanakya, the great Prime Minister of the Mauryas, has proclaimed this more than 2200 years ago in his Artha Sastra. In India, this kind of thing has always been considered legal cruelty though not small beatings of wife, cessation of conjugal relations with her for long periods of Dooksha etc."

In —'Subbama v. Venkata Reddi', AIR 1950 Mad. 394 the same view was held.

(2b) Whether an unfounded imputation of unchastity about the wife will amount to legal cruelty or not I have no doubt that it is sufficient reason for the wife to refuse to live with the husband. Section 399 (4) only requires that there must be sufficient reason for the wife to refuse to live with her husband. Under the old Indian Criminal Procedure Code a wife could refuse to live with her husband only for two reasons namely (1) the husband living in adultery and (2) his habitual cruelty to her. But the present Code empowers the Magistrate to award separate maintenance to a wife who refuses to live with her husband if there is sufficient reason for doing so. I am of opinion that in this case the 1st petitioner has sufficient reason for refusing to live with the counter-petitioner. The lower court was therefore justified in awarding the petitioners separate maintenance.

(3) The rate of maintenance fixed by the lower court does not appear to be unreasonable. I therefore confirm the order of the lower court and dismiss this revision petition.

C/R.G.D. Revision dismissed.

A. I. R. 1952 TRAVANCORE-COCHIN 563

KUNHI RAMAN C. J. AND SANKARAN J.

Raman Govindan and another, Appellants v. Lakshmi Chellamma and others, Respondents.

Second Appeal No. 104 of 1123(T), D/- 18-7-1951.

Travancore Ezhuva Regulation (III of 1100) S. 30 — Suit for partition by sub-tavazhi, when Tarwad is intact without any partition being effected by collateral tavazhi.

A, the common ancestress had three daughters, the youngest of whom was B, the maternal grandmother of the 1st plaintiff. These three daughters or their children had not effected partition of their tavazhies. B in her turn had three daughters of whom D, the mother of the 1st plaintiff was the youngest. These three daughters or their descendants had not effected a partition of their separate tavazhies. The 2nd plaintiff was the 1st plaintiff's daughter. The 3rd and 4th plaintiffs were the daughters of the 2nd plaintiff. The plaintiffs filed a suit for partition.

The main tarwad was not partitioned. At the time of the suit A, the common ancestress was dead, but B, the maternal grandmother of 1st plaintiff was alive. B was the 28th defendant.

Held that the suit was not maintainable because it was not a suit by a collateral tavazhi as defined in the Travancore Regulation III of 1100 which alone was competent to maintain a suit for partition among the members of the community to which that Regulation applied. 1947 Trav LR 167 Rel. on. (Para 2)

K. Parameswaran Pillai, for Appellants; M. Madhavan Nair, for Respondent No. 1.

REFERENCE ..... /Para

('47) 1947 Trav LR 167 2

KUNHI RAMAN C. J.: Defendants 3 and 4 are the appellants. Plaintiffs who are four in number are the contesting respondents. The suit was for partition. The parties are Ezhuvas and are governed by the Travancore Ezhuva Regulation III of 1100. The genealogical table which is to be found in the judgment of the trial court at page 6 shows that the common ancestress of the parties to the litigation was one Bhagavathi Arathi. She had four sons and three daughters. The youngest of these daughters Bhagavathi is the maternal grand-mother of the 1st plaintiff. The 2nd plaintiff is the 1st plaintiff's daughter. The 3rd and 4th plaintiffs are daughters of the 2nd plaintiff. The mother of the 1st plaintiff is the 28th defendant. On the date of suit the 1st plaintiff's maternal grand-mother Bhagavathi was dead, but the 1st plaintiff's mother, the 28th defendant, was alive. The suit is framed on the basis of partition of a collateral tavazhi, the plaintiff's contention being that their tavazhi descended from the common ancestress the 28th defendant as a collateral tavazhi with respect to the other tavazhies of the tarwad. In the trial court there was a contention urged that prior to the suit, by conduct of parties a partition of the tarwad properties was effected as a result of which the descendants of the three daughters of the common ancestress Bhagavathi Arathi had become separated from each other. If this position is correct then the tavazhi of the plaintiffs could be described as a collateral tavazhi as defined in Regulation III of 1100. According to this Regulation collateral tavazhies are tavazhies of families who though descended from a common ancestress do not stand in the direct line of ascent or descent from one another. According to section 30:

"After the death of the lineal ascendant referred to in section 29, or with her consent,-

(1). each collateral tavazhee represented by the majority of the adult members thereof, or

(2). the male children or female children without issue of such lineal ascendant and who are not included in the tavazhee referred to in clause (1), may claim an outright partition of property over which the tarwad has the power of disposal."

The learned District Munsiff found that on the date of the suit the common ancestress, the 28th defendant, was alive and that it was not proved that she had given her consent to the partition as required by section 30 read above. For that reason the suit was dismissed. The plaintiffs appealed and the learned District Judge of Trivandrum when he was hearing the appeal admitted in evidence a document which was proved to be a will executed by the 28th defendant three years after the filing of the suit, in which she had made express reference to the fact that her consent was obtained for the partition of the collateral tavazhi of the plaintiffs. This document which was admitted in evidence by the lower appellate court established that the 28th defendant who was alive when the suit was filed had given her consent. The reason for which the suit was dismissed was therefore, not correct and the lower appellate court passed a preliminary decree for partition and directed the District Munsiff to continue the subsequent proceedings in the suit for partition.

(2) In second appeal it is contended by the learned counsel for the appellants that one essential feature of the case which turns upon a question of law was not considered by the lower appellate court. Learned Counsel argues that the plaintiffs' tavazhi cannot be described as a collateral tavazhi which alone has the right of filing a suit for partition. It will come under the category of a sub-tavazhi in view of the fact that the lower appellate court has found that the partition by force of conduct which was relied on by the District Munsiff, did not take place. According to the lower appellate court the tarwad of the descendants of Bhagavathi Arathi remains intact without having effected any partition of any tavazhi belonging to the tarwad and the plaintiffs' suit should be regarded as a suit for partition of the tarwad properties in which the plaintiffs as a tavazhi claimed shares. We notice from the records that this point was not specifically taken in the lower appellate court when the appeal filed by the respondent in this court was argued there and therefore, it is not a matter for surprise that the learned Judge did not apply his mind to this important legal question which must be considered in dealing with the suit for partition. The appellants' learned counsel places reliance on the decision of the erstwhile Travancore High Court reported in — '1947 Trav. L. R. 167. There, the facts were almost identical. There also the suit was for partition instituted by a sub-tavazhi and not a collateral tavazhi, within the meaning of the definition contained in Regulation III of 1100. In the judgment of Mr. Justice Sankaran, who was a party to that decision it is stated as follows:

"But the suit is for partition of common tarwad properties and so long as the 14th defendant's tavazhi has not become separated or claimed to become separate from the common tarwad, plaintiff's sub-tavazhi by itself is not entitled to claim separation by partition from the tarwad. Such a suit is not permitted by section 30. Plaintiff's sub-tavazhi cannot be said to be a collateral tavazhi as contemplated by section 30 (1) among the several tavazhies in the tavazhi. It follows, therefore, that the suit in its present form is not maintainable".

The position of the plaintiffs in the present case seems to us to be exactly identical with the position of the plaintiffs in that reported decision. Here as in that case, the common tarwad remains intact. Bhagavathi Arathi the common ancestress, as already stated had three daughters, the youngest of whom was Bhagavathi, the maternal grand mother of the 1st plaintiff. These three daughters or their children had not effected partition of their tavazhies. Bhagavathi in her turn had three daughters of whom the 28th defendant, the mother of the 1st plaintiff was the youngest. These three daughters or their descendants had not effected a partition of their separate tavazhies and therefore, for the reason given in the judgment already quoted we take the view that the suit is not maintainable because it is not a suit by a collateral tavazhi as defined in the Travancore Regulation III of 1100 which alone was competent to maintain a suit for partition among the

members of the community to which that Regulation applies. The Second Appeal must, therefore, be allowed. But in view of the facts that the point that is raised in this Court was not specifically taken in the lower appellate court which has consequently led to the lower appellate court overlooking this question we do not consider that the appellants are entitled to costs.

(3) The second appeal is allowed. The decree of the lower appellate court is set aside and the suit dismissed. The appellants shall have their costs in the trial court but shall bear their own costs in the lower appellate court and in this Court.

C/R.G.D. Appeal allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 565

KOSHI AND GOVINDA PILLAI JJ.

Kassim Pillai Assnaru Kutty and others, Appellants v. State.

Criminal Appeals Nos. 88 to 94 of 1950, D/- 6-10-1950.

(a) Criminal P.C. (1898) S. 367 — Eight accused charged under S. 301/28 I.P.C. and Ss. 140 and 141 I.P.C. — Sessions Judge convicting them under S. 301/28 — No remark regarding Ss. 140 and 141, as to whether they are guilty or not, under these sections — Similarly judgment containing no remark as to whether he accepted or rejected confessions of accused on which prosecution relied — Judgment held very unsatisfactory. (Para 19)

Anno: Cr. P. C., S. 367 N. 5 and 6.

(b) Penal Code (1860) S. 34 — Common intention — It can be inferred from character of attack — It can develop in course of events — (Travancore Penal Code S. 28).

A common intention required by S. 34 (S. 28, Tr. Penal Code) can be inferred from the conduct of the assailants or their participation in the commission of the crime and from circumstances such as the character of the attack or the nature of the injuries inflicted or from the nature of the weapons employed. The common intention can be developed in the course of events though it may not have been present to start with. The question whether there was such an intention or not will in most cases depend on inferences to be drawn from proved facts and not on any direct evidence about a pre-arranged plan which may seldom be available. Where upon seeing the deceased one of the accused said, "Here comes the murderer of our uncle" and immediately the deceased was surrounded by all the accused armed with deadly weapons of one form or another and each of them used the weapon in his hand against the deceased, against the background of the animosity of the assailants towards the deceased their conduct in attacking him so mercilessly regardless of the consequence held could not be interpreted in any other light than that they all acted with the common intention of causing his death or causing him such bodily injury as they knew to be likely to cause death. AIR 1945 P.C. 118 Explained. AIR 1947 Mad. 259; AIR 1936 All. 437 and AIR 1925 P.C. 1 Relied. (Paras 22, 27 & 29)

It was not necessary that the assailants should have intended to cause the death; if they knew death to be the likely consequence of their acts that was sufficient to make them liable for murder. 4 Suth WR Cr 33 Relied. (Para 28)

Anno: Penal Code, S. 34 N. 1.

(c) Penal Code (1860), Ss. 34 and 149 — Scope — (Travancore Penal Code, Ss. 28 and 141).

Section 28 and S. 141 of the Travancore Penal Code corresponding to Ss. 34 and 149 respectively of the Indian Penal Code deal with constructive liability under Penal Law. While S. 28 limits itself to the furtherance of the common intention, S. 141 goes further, inasmuch as it renders every member of an unlawful assembly guilty of the offence when it is likely that such an offence might have been committed in prosecution of the common object. The latter section is certainly wider in its scope and amplitude. (Para 22)

Anno: Penal Code, S. 34 N. 3 S. 149 N. 5.

M. K. Govinda Pillai and T. K. Narayana Pillai, for Appellants; Govt. Pleader M. Kumaran Achan, for the State.

REFERENCES: Courtwar/Chronological/ Paras
('25) 52 Cal 197: (AIR 1925 PC 1: 26 Cri LJ 431) 30, 31
('45) AIR 1945 PC 118: 1945 Mad WN 69a: (46 Cri LJ 689) 22, 23, 29, 30
('36) AIR 1936 All 437: (37 Cri LJ 864) 29
('65) 4 WR Cr 23(2) 28
('65) 4 WR Cr 33 28
('47) AIR 1947 Mad 259: (48 Cri LJ 123) 23, 29

KOSHI J.: These seven Criminal Appeals arise from Sessions Case No. 19 of 1950 on the file of the Quilon Sessions Court. The appellants were accused Nos. 1 to 5 and 7 and 8 in that case and together with accused No. 6 they were committed by the First Class Magistrate, Karunagappally, to stand their trial before the Quilon Sessions Court for commission of offences punishable under Sections 140 and 301 of the Travancore Penal Code read with sections 28 and 141. The occurrence complained of took place at Kulasekharapuram. The case against the accused is that on the fore-noon of 21st Meenam 1123 at about 10 A.M. they formed themselves into an unlawful assembly armed with deadly weapons and that in furtherance of the common object of that assembly they caused the death of one Hydrose Kunju by beating him with deadly weapons like iron rod, wooden sticks, etc. and by cutting and stabbing him with sharp and deadly instruments like chopper, dagger, and pen-knife. The learned Additional Sessions Judge who conducted the trial while acquitting accused 6 convicted the remaining seven accused under section 301 read with section 28 and sentenced each of them to undergo rigorous imprisonment for life. These appeals are by the seven convicted persons. In Referred Trial No. 19 the sentences passed by the learned Judge came up for confirmation.

(2) Some twenty years prior to the occurrence Hydrose Kunju had caused the death of Kasim Pillai, the father of accused 1 and 2. There was a case against Hydrose Kunju and P. W. 17 in this case, in respect of that occurrence. Both of them were convicted. Hydrose Kunju was sentenced to undergo rigorous imprisonment for six years while P. W. 17 was awarded a sentence of four years' rigorous imprisonment. Since Hydrose Kunju came out of the jail after serving out his sentence his relationship with Kasim Pillai's people was anything but cordial. He lived in constant dread of them. In 1117 he had sent petitions to the District Magistrate,

Quilon and the District Superintendent of Police that accused 1 and 2 and some of their relations and friends were making plans to end his life. He was originally living at Thazhava, a place not far away from the residence of Kasim Pillai's people. The evidence in this case suggests that he sold away that property and came and settled down at Kulasekharapuram to be away from his enemies. It would appear Kasim Pillai's death at the hands of Hydrose Kunju and his companion P. W. 17 took place on a day fixed for the circumcision ceremony of accused 1 and 2. The prosecution case, as put forward in the Courts below, is that on 21st Meenam 1123 Hydrose Kunju had arranged his daughter's marriage to take place and that the accused party, composed mostly of Kasim Pillai's sons and nephews, chose that day to avenge the death of Kasim Pillai. As already mentioned accused 1 and 2 are Kasim Pillai's sons. Accused 3, 4, 5 and 7 are his nephews and accused 6 and 8 are said to be friends and companions of the remaining accused. They all live at a place known as 'Vellamanal' 4 miles away from Kulasekharapuram. According to the prosecution, on the morning of the date of the occurrence, with the common object of avenging Kasim Pillai's death, the accused came to Kulasekharapuram, armed with weapons such as those mentioned above and on their meeting Hydrose Kunju in front of P. W. 2's shop then and there they done (sic did) him to death by beating him with an iron rod and wooden sticks and cutting him with a chopper and also stabbing him with knives and daggers. The accused left the place when they found Hydrose Kunju was dead.

(3) Within two or three hours the Inspector of Police, Karunagappally (P. W. 39), who got information about the occurrence while he was attending Court work at the Karunagappally First Class Magistrate's Court arrived at the place of occurrence and saw the dead body. Three-quarters of an hour or so afterwards he commenced to hold the inquest and the report thereof was finished by about 6 P.M. The Inspector remained there till next evening conducting further investigation. Strangely enough the first information report was drawn up and sent to the Court and to other authorities only after he returned to his head-quarters at Karunagappally on the evening of the 22nd. The inquest report was also sent along with it. These two records show that the investigation conducted so far disclosed that among the eight persons who were subsequently arraigned as accused six of them, viz., accused 1 and 2 and 4 to 7 had actively participated in the commission of the crime. The F. I. R. and the inquest report describe the 8th accused as a fair-complexioned long haired person whose name was not ascertained. These documents describe the third accused as one 'Chura' Kasim belonging to Kolluvila and who had married from Pynammoodu. Subsequently on 25th Meenom 1123 a further report was sent to the Court mentioning the 8th accused by name and also giving further particulars regarding the names and addresses of accused 3, 5 and 6. It has however transpired that the person charged as 3rd accused is not the person whose name occurs in the F. I. R., the inquest report or the report dated 25th Meenom 1123.

(4) It is unnecessary for the purpose of these appeals to pursue the course of investigation by referring to the different dates on which the several accused were arrested or the recoveries made pursuant to confessions alleged to have been made to the police or to the several material objects said to have been produced by the accused or even to the judicial confessions the accused would seem to have made soon after their arrest. The learned trial Judge has not chosen to act upon those confessions nor did the learned Public Prosecutor invite us to pronounce upon their acceptability or otherwise. If in the view of the prosecution or of the trial Court the confessions the accused made to the Magistrate are not even worthy to be considered by this Court, we do not think it safe or even fair to the accused to place any reliance on their production, or of the recoveries alleged to have been made pursuant to information supplied by them, of the weapons used for the commission for the crime. Moreover the weapons produced are not such as could not be provided 'ad hoc' so much so the article produced or recovered do not add any corroborative piquancy to the conduct of the accused in producing some weapons or to their confession leading to the discovery of some others. Chemical examination showed that there were traces of human blood only on two of them. No knife or dagger or chopper produced had any blood stains. The learned Judge has chosen to place some reliance on the production or the recovery of these weapons, but in our opinion the prosecution must stand or fall on the evidence of the eye-witnesses to the occurrence. The fact that the principal accused in this case—Kasim Pillai's sons & nephews —had reason to harbour strong feelings of animosity towards the accused is a factor to be taken into account in appraising the worth of that evidence. Before proceeding to discuss the evidence of the eye-witnesses we shall first see how, according to the prosecution the occurrence actually took place and what tangible proof the acts of the assailants left behind in the shape of injuries on the person of the deceased.

(4) As for the first, that is, a brief outline of the occurrence, it would suffice for our purpose if we quote here paragraph 2 of the judgment of the learned Additional Sessions Judge; some portion of it would now no doubt look like repetitions of what we have already said, but in fairness to the learned Judge, we shall quote that paragraph as it is without attempting to mutilate it.

(5) Para 2 of the learned Judge's judgment reads as follows:

"The marriage of the deceased Hydrose Kunju's daughter was arranged to take place on the night of the 21st Meenom 1123. The accused wanted to murder Hydrose Kunju on the eve of his daughter's marriage as Kasim Pillai, the father of A-1 and A-2 was murdered by him and P. W. 17 on the eve of the circumcision ceremony of A-2. With the common object the accused conspired together, armed themselves with deadly weapons like chopper, dagger, knife, iron rod, sticks, etc., formed themselves into an unlawful assembly and lay in ambush in the compounds east and south east of the place of occurrence in this case. The deceased Hydrose Kunju accompanied by P. W. 1 his nephew, went out at about 10 A. M. to invite P. W. 2 and P. W. 7 for his daughter's marriage, take a mat from the house next to P. W. 7's, get a tobacco box

from P. W. 2's shop and purchase some sugar. They went to P. W. 11's tea shop situated west of the place of occurrence and took tea from there. A-5 was also in that tea shop. After taking tea and inviting P. W. 7, the deceased Hydrose Kunju accompanied by P. W. 1 went towards P. W. 2's provision shop on the northern side of the road, east of P. W. 11's tea-shop. These shops are on either side of the public road that goes from Puthentheruvu to Thurayil Kadavoo in the Karunagapalli Taluk. P. W. 2's shop is situated at the south east corner of P. W. 3's compound and has a front on the street on the southern side as well as towards the east. A-5 also followed the deceased Hydrose Kunju and P. W. 1. The deceased Hydrose Kunju went to the eastern front of P. W. 2's shop and asked the latter whether he had a tobacco box to spare. P. W. 2 said that he had none. After inviting P. W. 2 also for the marriage the deceased Hydrose Kunju turned to the east and went two or three steps forward, when accused 1, 2 & 4, who were hiding behind an uninhabited hut in the compound east of P.W. 2's shop came towards him. Almost simultaneously accused 3, 6, 7 and 8 also emerged out of the compound on the opposite side of the road and joined accused 1, 2 and 4. Accused 1 was armed with M. O. 1 chopper, accused 2 with M. O. V iron rod, accused 3 with M. O. 11 dagger, accused 4 with another dagger, accused 5 with M. O. VII "Kanjavu Vadi", accused 6 with an "Alaku Vadi", accused 7 with M. O. IV dagger like knife, and accused 8 with M. O. III pen knife and M. O. VI bamboo stick. As the accused approached the deceased Hydrose Kunju accused 5 exclaimed, "Here is the man who murdered our uncle; Kill him". So saying he himself struck the first blow with the "Kanjavu Vadi" on the face of the deceased Hydrose Kunju. Before he could strike a second time the deceased caught hold of him round his body. At that moment accused 1 gave a cut with the chopper on the right shoulder of the deceased. When accused 1 raised the chopper to strike again, the deceased knocked the chopper down with his hand and bent down to take it. Accused 2 thereupon tried to wrest it out of the hand of the deceased and in the tug injured his own hand. When accused 2 and the deceased were engaged accused 3, 4, 7 and 8 stabbed the deceased on his back. Then accused 2 and 3 caught him and threw him down flat on his back. Accused 3, 4 and 7 again gave several stabs on his chest and face. Not satisfied with all this accused 1 got the iron rod from accused 2 and gave a few more blows on the chest, face and shoulder of the deceased. The victim was dead by that time. Having thus inflicted all over the body and head of the victim as many as 45 injuries including 20 incised wounds, 10 cuts, one contused wound and a number of blows the accused left the place."

The post-mortem certificate, marked at the trial as Ext. K, and the evidence of the medical witness, P. W. 28, who conducted the autopsy show that the deceased had sustained as many as 45 external injuries and seven internal injuries. This estimate is in fact an understatement in that many of the injuries noted as simple are really multiple injuries. Of the 45 external injuries, 1 to 35 were mostly incised wounds or cuts caused with sharp instruments like chopper, dagger or knife and in some instances there are bone fractures as well. Injuries 36 to 45 are mostly stripe marks and there are one or two contused wounds also. The seven internal injuries consisted of one injury to the heart, three injuries to the lungs, two to the right lung and one to the left, two injuries to the liver, one on either lobe and several injuries to the smaller intestines. The victim is said to have died from syncope due to shock and haemorrhage. Ext. K makes it clear that no part of the body was spared and the injuries leave unmistakeable proof that deadly weapons have been used and that the man has been mercilessly handled regardless of the consequence. External injury No. 17 and internal injury No. 1 would seem to have been caused by a single stab with a sharp instrument and according to P. W. 28 those injuries were fatal. The witness is also definite that cumulatively the internal injuries could have caused death. He has not said that any one injury external or internal was necessarily fatal.

(6) P. W. 39, the Inspector of Police, who as mentioned earlier arrived at the scene of occurrence within two or three hours after the incident, saw Hydrose Kunju lying dead in a pool of blood in front of P. W. 2's shop. The occurrence witnesses are P. Ws 1 to 6 and 8 to 12. Of these, the learned Judge has not chosen to place any reliance on P. Ws. 9 and 12 and we, therefore, discard that evidence completely. (His Lordship reviewed the evidence of the remaining witnesses and proceeded:) The learned Judge who had the advantage of seeing all the witnesses in the box and hearing their evidence, has chosen to believe them and we cannot in the circumstances of the case find sufficient justification to brand their evidence as untrue. In other words we agree with the decision of the Court below that the prosecution has made out its case that Hydrose Kunju was done to death by his assailants on the morning of 21st Meenom 1123 in front of P.W. 2's shop and that his assailants had used all kinds of deadly weapons such as chopper, dagger, knife, wooden sticks, iron rod etc., against him.

(7-8) There is no reason either to doubt who those assailants are. The prosecution evidence is fairly clear about it, but regard being had to the fact that we are administering a system of criminal law which would rather countenance the escape of nine guilty persons than the conviction of one innocent individual we think it may not be absolutely safe to hold accused 3 or accused 8 to have participated in the occurrence. We are not saying that the prosecution evidence is not true as against them, but the early records create some doubt in our minds as to their complicity. (His Lordship went through the records against these accused and gave them the benefit of doubt and allowed their Criminal Appeals Nos. 90 and 94 respectively.)

(19) We have next to consider whether the conviction of the remaining 5 accused under Section 301, T. P. C. read with section 28 is right. Though all the 8 accused in the case stood charged under sections 140 and 141 as well, the learned Judge has not said a word in his judgment about the criminal responsibility or otherwise of the accused persons under these sections. When the learned Judge had found that more than five persons had participated in the day's occurrence, all of them

are armed with deadly weapons, we are unable to appreciate how the learned Judge could with propriety have remained silent as to whether a case of rioting armed with deadly weapons has or has not been made out on the prosecution evidence in the case and whether all or any of the accused persons should constructively be made liable under section 141. To use mild language, it is a very unsatisfactory feature of the judgment that it should not state whether the accused are guilty or not, under either or both of these sections. It is not only in this respect that the learned Judge omitted to record a finding relevant to the case. Though the prosecution had placed confessions made by the accused before the Magistrate as part of its evidence the learned Judge has not chosen to commit himself either way with respect to them i.e., whether he is accepting or rejecting those confessions. We wonder why the learned Judge should shirk responsibility in this fashion. If he is satisfied that the confessions in the case form good pieces of evidence he ought to say that; on the other hand if he had the least doubt about their voluntary character or their admissibility or reliability for any other reason, he ought to have said it.

(20) Whatever that be, we are at present concerned with the question whether the conviction under section 301, read with section 28 can be sustained. For a proper appreciation of the arguments urged on behalf of the appellants on this aspect of the case it is necessary to examine the circumstances under which the party composed of the accused happened to meet Hydrose Kunju on the fore-noon of 21st Meenom 1123. The prosecution evidence has been mentioned earlier is that with the common object of avenging the murder of Kasim Pillai, his sons and nephews chose the day fixed for Hydrose Kunju's daughter's marriage to do away with his life and with that common object they came to Kulasekharapuram armed with deadly weapons. There is considerable difficulty in accepting that case. Admittedly Hydrose Kunju lived more than a mile away from the scene of offence. The prosecution case as seen from the extract of the judgment of the lower Court quoted earlier is that the accused were lying in ambush in two uninhabited huts in the compound belonging to P. W. 3. We fail to see what made the accused think that Hydrose Kunju would come to that place that day. The learned Public Prosecutor saw the difficulty of supporting this case and he did not hesitate to concede that it was really a case where the clash occurred when by chance or accident the accused party happened to meet the murderer of Kasim Pillai when they happened to be fully armed and that for a totally different purpose. (His Lordship reviewed the evidence and continued.)

(21) We have noticed earlier the extent or enormity of the injuries caused to the deceased. The evidence does not definitely show which injury really proved fatal or as to who caused it, though the medical witness has designated some injuries as fatal. The effect of the evidence of the medical witness, as indicated earlier, is that Hydrose Kunju died as the result of the cumulative effect of the injuries sustained by him and the question for our decision is whether the lower Court went wrong in convicting all those who participated in the occurrence of the offence of murder making one and all of them liable for the said offence by applying the provisions of S. 28.

(22) That section is in the following terms:

"When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

Section 28 and S. 141 corresponding to Ss. 34 and 149 respectively of the Indian Penal Code deal with constructive liability under Penal Law. While Section 28 limits itself to the furtherance of the common intention, Section 141 goes further, inasmuch as it renders every member of an unlawful assembly guilty of the offence when it is likely that such an offence might have been committed in prosecution of the common object. The latter section is certainly wider in its scope and amplitude. On account of this and in view of the absence of definite evidence as to who caused injuries which according to medical opinion may have proved fatal it was contended that as the learned Additional Sessions Judge had not chosen to find any unlawful assembly or rioting the learned Judge could have convicted the persons whom he found to have participated in the occurrence only of the offence of causing hurt with deadly weapons and not for any graver offence. With reference to the applicability of section 28 the main argument was that in the absence of evidence as to a prearranged plan to attack Hydrose Kunju, much less to cause his death, the section cannot be invoked to bring home the commission of the offence of murder to those who participated in the occurrence that resulted in his death, or rather that so long as there is no proof that the accused acted in concert pursuant to a pre-arranged plan no common intention within the meaning of the section can be attributed to the accused so as to make them liable for the offence of murder. Reliance was placed for this position on the Privy Council decision reported in — 'Mahbub Shah v. Emperor', AIR 1945 P. C. 118. It was contended that that case ruled out the possibility of the principle of the joint liability in the doing of a criminal act being extended to cases like the present where the attack is sudden and unpremeditated. We are afraid the decision does not justify the argument. In our opinion their Lordships do not rule out the possibility of a common intention being inferred from the conduct of the assailants or their participation in the commission of the crime and from circumstances such as the character of the attack or the nature of the injuries inflicted or from the nature of the weapons employed. Nor do their Lordships say that a common intention cannot be developed in the course of events though it may not have been present to start with. The question whether there was such an intention or not will in most cases depend on inferences to be drawn from proved facts and not on any direct evidence about a pre-arranged plan which may seldom be available.

(23) We feel fortified in taking the above view about the decision — 'Mahbub Shah v. Emperor', AIR 1945 PC 118 by the opinion two learned Judges of the Madras High Court expressed about it in — 'In re Nachimuthu Goundan', AIR 1947 Mad 259. In that case Chandrasekhara Ayyar, J., (now a Judge of the Supreme Court of India) said as follows:

"The Privy Council decision reported in '1945 Mad W N 69: AIR (32) 1945 P. C. 118 Cr.'

was pressed into service by the learned counsel for the appellant to support the argument that as it could not be predicated in this case that there was any common intention on the part of the five accused to kill the police constable and as the learned Sessions Judge has only found that they must be fixed with knowledge that what they were doing was so immiently dangerous that it must in all probability cause death, the appellants cannot be held guilty of murder as there was only one injury namely the fracture of the forehead which alone according to the doctor, was necessarily fatal and it might have been caused by a stone hit. The decision of the Judicial Committee is warrant only for the proposition that it is not enough to attract the provisions of S. 34, Penal Code, that there was the same intention on the part of several people to commit a particular criminal act or a similar intention but it is necessary before the section could come into play that there must be a pre-arranged plan in pursuance of which the criminal act was done. Their Lordships do not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with, nor do they say that the intention cannot be inferred from the conduct of the assailants. As my learned brother has pointed out the question whether there was such an intention or not will have to depend in many cases on inferences to be drawn from the proved facts and not on any direct evidence about a preconceived scheme or plan which may not be available at all. The question, therefore, is whether on the facts proved in this case we can say that there was such a common intention. If we accept the first information report, Ext. P. 18, corroborated by the testimony of P. W. 10 who gave the information and who was driving the bandy when it was set upon by accused 3, 4 and 5, and also what is stated by Nachimuthu Goundan (accused 3) in his confessional statement (Ext. P. 4) where he tells us that accused 4 exclaimed as soon as they reached the cart "Beat the policeman and do away with him", there can be no difficulty in saying that the subsequent act of brutal beating administered to the constable, not only when he got down from the cart but after he was pursued to a distance of about 100 yards, was due to a common intention on the part of all to "kill him". In taking this view we give full effect to the interpretation given in the judgment of the Privy Council to the words "common intention" in section 34, Penal Code, and steer clear of it."

(24) The leading judgment in the case was by Kuppuswami Ayyar, J. and to understand the full implications of the comments Mr. Justice Chandrasekhara Ayyar made about the Privy Council decision we should know the facts of the case.

(26) The head-note to the case sets out the same thus:

"On a complaint being made that violence and even murder was feared at the hands of A and B, a constable went in a cart to the village where A and B resided in order to fetch them to the police station. The constable took A and B in his cart, C, D and E intervened but in vain. The cart proceeded towards the police station. C, D and E got very much annoyed at their not being able to retain A and B and started towards the cart and overtook it. One of them when they reached the cart said that they will have to give a sound thrashing to the constable and even finish him and it was after this was said that C, D and E along with A and B who got out of the cart beat the constable and inflicted 27 injuries in consequence of which the constable died on the spot. One of the injuries namely on the head was found to be necessarily fatal. A and B were given the sentence of transportation for life by the Sessions Judge and C, D and E were sentenced to death by him. In appeal before the High Court it was argued that as there was no common intention on the part of the accused to kill the constable and no evidence as to which of them caused the fatal blow section 34 could not be availed of and none of the accused could be said to be guilty of murder."

These contentions were repelled and the Court held that:

"1. The question as to whether there was a common intention was a question of fact and had to be decided with regard to the facts of each case;

2. The words "finish him" uttered by one of the accused were indicative of the fact that he wanted to kill the constable and as it was only after his statement that they will have to give a sound thrashing to the constable and even finish him that all the accused did the acts which resulted in his death the accused must be taken to have acted in pursuance of a common intention to kill and beat the constable in furtherance of that common intention and therefore section 34 could be availed of and all the accused were guilty of murder. under section 302 read with section 34."

(27) In the case on hand evidence is not uniform that accused 5 exclaimed "kill him"; some say instead what that accused said was "beat him" and others do not say either way. To us it would appear that in all the circumstances of the case it makes no difference whether accused 5 said "kill him" or "beat him". It is clear on the evidence that he said "Here comes the murderer of our uncle". Immediately Hydrose Kunju was surrounded by his assailants, all armed with deadly weapons of one form or another and each of them used the weapon in his hand against the deceased. Against the back-ground of the animosity of Kasim Pillai's sons and nephews towards the deceased, their conduct in attacking him so mercilessly regardless of the consequence cannot be interpreted in any other light than that they all acted with the common intention of causing his death or causing him such bodily injury as they knew to be likely to cause death. Previous animosity together with the character of the weapons and the nature of the attack make the above the only reasonable conclusion possible.

(28) It was argued that none of the accused could be presumed to have intended to cause the death of Hydrose Kunju. In answer to it we need only say that it is not necessary that they should have so intended; if they knew death to be the likely consequence of their acts that is sufficient to make them liable for murder. A very early decision reported in — 'Queen v. Pooshoo', 4 W. R. Cr. 33 (Cal)

vantage be cited in this context. In that case Kemp, J. observed:

"It is clear that the deceased was cruelly beaten by the four prisoners, and that his death was caused by that beating..... When four men set upon another, and beat him unmercifully,..... it must, I think be admitted they must be presumed to have known that by such acts they were likely to cause death. Now the offence of culpable homicide is not reduced to that of culpable homicide not amounting to murder by the absence of intention to cause death. There is, as observed by Mr. Justice Loch (in the case of — 'Queen v. Bhadow Poramanick', 4 W R Cr. 23 (Cal)) no such exception amongst the five exceptions appended to the S. 300 of the Indian Penal Code as "want of intention".

"In this case, the acts of prisoners show that they knew that they were likely to cause death; they have, therefore, committed the offence of culpable homicide as defined in section 299 of the Indian Penal Code..... .....There is.....really nothing to reduce the crime for culpable homicide amounting to murder to culpable homicide not amounting to murder."

(29) The learned Counsel for the appellants invited our attention to several decided cases which purport to follow — 'Mahbub Shah v. Emperor', AIR 1945 P. C. 118. We have given our own interpretation as to the meaning and effect of that decision and our view finds support in the Madras case cited namely, — 'In re Nachimuthu Goundan', AIR 1947 Mad 259. As has been repeatedly held it is a question of fact whether common intention within the meaning of S. 28 can be imputed to a group of assailants, and each case must depend upon its own facts. Not much useful purpose will, therefore, be served in attempting to analyse the facts of the various cases cited by the defence. With great respect we have to state that some of those cases have interpreted the Privy Council Ruling in a very narrow sense and we cannot agree with the view that there can be no common intention within the meaning of the section unless a pre-arranged plan and concerted action pursuant thereto are proved. Common intention may be conceived of, immediately before or at the time of the offence. The precise intention of several persons acting in concert is a matter of inference from their conduct. See — 'Jaimangal v. Emperor', AIR 1936 All 437. In that case it was held that where it is proved that the accused attacked with lathis a person belonging to a party with whom they were on inimical terms, as soon as they sighted him, and all of them used their lathis, it can be inferred that all of them became of one mind when they suddenly saw that person and entertained the common intention of beating him with lathis. It was also pointed out there that every one is supposed to intend the probable consequences of his acts. This Allahabad case was, no doubt, decided long before the decision in — AIR 1945 P. C. 118 but in our opinion the rules enunciated do not run counter to the principle of the Privy Council ruling.

(30) A few salient facts of the case in — 'Mahbub Shah v. Emperor AIR 1945 P. C. 118 may conveniently be noticed here. The appellant Mahbub and his cousin Wali Shah (the absconder) arrived at the scene of offence hearing the cries for help of Ghulam, another cousin. Ghulam had the worse of an encounter with the deceased Allah Dad and his party and when the appellant and Wali Shah heard Ghulam's cries they were out "game shooting." They arrived at the scene with guns in their hands. The deceased and Hamidullah belonging to the party that had the encounter with Ghulam attempted to escape; but the appellant and Wali Shah came in front of them and Wali Shah fired at the deceased who fell down dead and the appellant fired at Hamidullah causing injuries to him. Ghulam, Wali Shah and the appellant were all charged for murder and attempt to murder as active offenders or by virtue of the provisions of section 34. Wali Shah was not available for trial; Ghulam who was convicted by the trial Court under Sections 302 and 307 read with section 34 was acquitted by the High Court. The appellant's conviction under section 307 and that under section 302 read with section 34 were confirmed. The only question raised on the appeal before the Privy Council was whether the conviction of the appellant under section 302 read with section 34 was right. Their Lordships pointed out that on their arrival at the scene the appellant and Wali Shah, both no doubt wanted to rescue Ghulam if need be by using the gun and that, in carrying out this intention each did a criminal act of his own. The appellant picked out Hamidullah, for dealing with him and Wali Shah, Allah Dad. The one had no part or lot in the criminal act committed by the other and their Lordships held, there was no common intention within the meaning of the section proved against the appellant with respect to Wali Shah's killing Allah Dad. The position would certainly have been different had they both aimed their shots at one and the same person even if that person was hit by a bullet from one alone. See — 'Barendra Kumar v. Emperor', 52 Cal 197. Likewise had Wali Shah and the appellant both attacked one of the victims of that incident with clubs or knives and had that victim died of the attack, to us it appears it would have been a clear case where common intention to kill or to cause bodily injuries as were likely to cause death could have been attributed to both even though it was unknown who inflicted the fatal injury. But the facts were otherwise; the appellant attacked one & Wali Shah another. Each attack constituted a criminal act in itself and one did his part unaided by the other. In our opinion that is the ground on which their Lordships held that the appellant Mahubub cannot be convicted or punished for Wali Shah's act in killing Allah Dad. In that case the argument that an inference as to common intention should be drawn from the conduct of the two accused persons during the course of the occurrence was negatived not because law did not permit such an inference being drawn from the facts and circumstances of a particular case, but on the ground that the facts of that case did not warrant it. The last paragraph of the judgment of their Lordships makes this aspect of the matter clear. From the mere conduct of the appellant and Wali Shah in coming in front of Allah Dad and Hameedullah to prevent their running away their Lordships were not prepared to draw the inference that the appellant and Wali Shah had the common intention to commit the crime that formed the subject of the appeal before them. Their Lordships also say that this piece of conduct on the part of the accused was not relied upon at all by the learned Judges of the High Court.

(31) While referring to the law of constructive liability under section 34, Indian Penal Code, reference to certain passages in the judgment in — 'Barendra Kumar v. Emperor',. 52 Cal 197, a case already referred to, may not in our opinion be out of place. At page 206 of the report Lord Sumner who delivered the judgment of the Board said:

"The doing to death of one person at the hands of several by blows or stabs, under circumstances in which it can never be known which blow or blade actually extinguished life, if indeed one only produced that result, is common in criminal experience and the impossibility of doing justice, if the crime in such cases is the crime of attempted murder only, has been generally felt. It is not often that a case is found where several shots can be proved and yet there is only one wound, but even in such circumstances it is obvious that the rule ought to be the same as in the wider class, unless the words of the Code clearly negative it."

Again at pages 210 and 211 in discussing the scope and applicability of the section His Lordship stated as follows:

"As soon, however, as the other sections of this part of the Code are looked at it becomes plain that the words of section 34 are not to be eviscerated by reading them in this exceedingly limited sense. By section 33 a criminal act in section 34 includes a series of acts and, further, "act" includes omission to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By section 37, when any offence is committed by means of several acts, whoever intentionally co-operates in the commission of the offence by doing any one of those acts, either singly or jointly with any other person commits that offence."

"Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things "they also serve who only stand and wait". By section 38, when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for "that act" and "the act" in the latter part of the section must include the whole action covered by "a criminal act" in the first part, because they refer to it. Section 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. Section 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other."

The result of the foregoing discussion is that we hold the lower Court acted rightly in applying section 28 to the facts of this case and finding all those that Court found to have participated in the occurrence guilty of the offence of murder. We have however allowed the appeals by accused 3 and 8 (Criminal Appeals Nos. 90 and 94) as in our opinion the evidence does not conclusively show that they participated in the occurrence, and acquitted them. We have further found that no such doubt exists concerning the remaining accused viz., accused 1, 2, 4, 5 &7. Their appeals (Criminal Appeals Nos. 88, 89, 91, 92 and 93) are accordingly dismissed and we confirm the convictions and sentences passed against them by the trial Court. The answer to the reference (Referred Trial 19 of 1950) will follow the decision of these appeals (Criminal Appeals Nos. 88 to 94).

C/R.G.D. Criminal appeals Nos. 90 and 94 allowed: Criminal appeals Nos. 88, 89, 91, 92 and 93 dismissed and Reference answered accordingly.

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SUBRAMANIA IYER
AND VITHAYATHIL JJ.

Thommi Anthony, Appellant v. Kesavan Vizhnu Namboori and another, Respondents.

A. S. No. 667 of 1123 (Tr.), D/- 26-6-1951.

(a) Co-owners — Grant of patta in name of one — Rights of others — (Trusts Act (1882), S. 90).

The grant of patta to a co-owner even in respect of kandukrishi lands would not deprive the other co-owners of their right over the properties and the transferee from the other co-owner of his interest gets the rights conveyed by the transfer. The case comes within the operation of S. 90 of the Trusts Act. (Paras 3, 4)

Anno: Trusts Act, S. 90 N. 2.

(b) Co-owners — Properties held in oodukur right — Patta of properties in name of one co-owner — Properties not partitioned in metes and bounds — Other co-owner transferring specific item of property — What was conveyed held was only oodukur right, that is right to be in joint possession with other co-owners and to be recipient of proportionate advantage arising from joint possession proportionate to the extent of his interest in properties — Transferee held was not entitled to exclusive possession. (Paras 5 and 6)

(c) Civil P. C. (1908), S. 35 — Costs in appeal — Neither party sure of his grounds and both feeling their way — Court getting no assistance from parties — Appeal partly allowed and cross-objections found without merits — Each party directed to bear its costs in appeal and court below. (Para 10)

Anno: Civil P. C., S. 35 N. 5.

Mathew Muricken, for Appellant; C. I. Parameswaran Pillai, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
(1951) 1 Times LR 238 3
1 Trav LJ 358 3
22 Trav LJ 813 3
22 Trav LJ 916 3

SUBRAMANIA IYER J.: The 1st defendant is the appellant. The suit was for recovery of possession of a specific property shown in the schedule to the plaint measuring 13 acres and 68 1/4 cents on foot of Ext. J dated 28-1-1112, a lease deed executed by the 2nd defendant in favour of the 1st. The plaintiff sought the relief for recovery also for arrears and future rent

at an enhanced rate as transferee of the reversion from the 2nd defendant under the sale deed, Ext. B dated 20-12-1116. The claim of the plaintiff was resisted and it was contended that the sale deed relied upon by the plaintiff is not valid, that the exclusive possession asked for in the suit cannot be granted because the properties are being held in what is known as 'Oodukur' right, and that there are no grounds for granting the enhanced rent claimed. The 2nd defendant was ex parte. The written statement filed by the 1st defendant does not clearly bring out the several contentions as now adumbrated before us by the learned counsel for the appellant. It is a long document consisting of 25 paragraphs. Nevertheless the points on which reliance was placed before us in appeal are not seen stated there clearly nor were those points for that matter stated clearly before the lower court in evidence or even at the time of argument. Several documents were filed on both sides and 4 witnesses were examined on each side. The judgment passed by the court below does not also give any real assistance in the matter of deciding the points that arise in this appeal. Learned counsel appearing for both sides helped us by reference to the documents and the other available evidence.

(2) The points that are pressed before us by Mr. Moothethu learned counsel for the appellant are two (1) that the suit is not maintainable because the sale deed in favour of the plaintiff is not valid and (2) that the exclusive possession claimed in the suit cannot be allowed. These are the two matters which were decided against the 1st defendant by the court below. The claim for enhanced rent that was made by the plaintiff was disallowed by the court below and the plaintiff has, therefore, filed a memorandum of cross objections.

(3) So far as the maintainability of the suit which is point No. 1 is concerned learned counsel for the appellant contended that the properties in question are what are called 'Kandukrishi' lands which are lands belonging to His Highness the Maharaja of Travancore and which are held by tenants under what may be called "Tenancies at will". The contention urged is that subsequent to the lease deed sued upon, the patta in respect of these properties has been granted to the 1st defendant even before the date of Ext. B the sale deed given by the 2nd defendant in favour of the plaintiff. It is contended that the legal effect of the grant of patta for Kandukrishi lands is to extinguish all anterior title to and possession of the properties comprised in the patta. Therefore, it is contended that though the 1st defendant having accepted Ext. J may be estopped from questioning the title of the lessor on the date of that document when the lease is granted, the lessee is not estopped from contending that subsequent to the lease, the lessor lost his title, either by the title having vested in some third party or in the lessee himself. Reliance is placed on three decisions of the erstwhile Trav. High Court, one reported in — 'Narayanan Sankaranarayana v. Narayanan Kunjoo', 1 Trav L J 358 (FB) and (2) decision reported in — '22 Trav L J at page 813' and (3) — '22 Trav L J 916'. It is not necessary in this case to canvass the correctness of the decisions relied upon by the learned counsel for the appellant. Those decisions are inapplicable to the facts of the present case. The present is not a case where patta is granted to a certain person in antagonism to others who are rival claimants to the title. It is rather a case where the patta is held by one on his own behalf as also on behalf of the others who are co-owners of the properties with him. The properties in question form part of the properties dealt with under Ext. F of the year 1093 which is a deed of partition in the family of the parties who are christians. See — 'Langdon v. Horten', (1951) 1 Times L R 238 as to the meaning of "family". We use the word in the wider and popular sense. The 2nd defendant was executant No. 2 and the father of the 1st defendant was executant No. 5. It appears from the evidence that on the date of that Udampadi, the patta in respect of the properties stood in the name of four members of the family. Those properties were divided among the five members who comprised the family on the date of the document. All the five could not have been pattadars because, as already stated, the patta stood only in the name of four. Notwithstanding the fact that the patta stood in the names of four, the division was among five persons. After this partition, the contention of defendant 1 is (and there is also evidence to that effect) that notwithstanding the fact that the partition purports to make separate allotments of parcels to various sharers, there was in fact no division by metes and bounds and that the properties were being enjoyed as a whole and were in the possession of one member on behalf of all of them. The first defendant is seen to be the person who has been in possession of the entire property on behalf of the co-owners including himself. When therefore the first defendant applied and obtained patta in his own name it was not as against the other co-owners as it could not be, because there was absolutely no reason why the first defendant should be given the patta in exclusion of the other co-owners who were admittedly entitled to and were in possession of the properties. The circumstance that patta was granted to one of them may have been due to the fact that it may facilitate management, payment of tax or otherwise. So far as possession is concerned it is the case of the 1st defendant that he is in possession of the entire property covered by Ext. F notwithstanding the fact that he is not the owner of the entire extent of the property and even before he got patta in his name in respect of the properties. It also appears from the evidence that except that the 2nd defendant wanted to get patta in his name for a slice of property that was allotted to him under Ext. F, no other party objected to the grant of patta in the name of the 1st defendant, and in the papers produced in the case appertaining to the change of patta, there is nothing to indicate that the 1st defendant wanted the patta in his name in order that he may become the exclusive owner of the properties. It is therefore a case coming within the operation of S. 90 of the Indian Trusts Act which provided that when a co-owner or other persons mentioned therein availing himself of his position as such gained an advantage he will hold the advantage for the benefit of all the persons interested.

(4) It is not necessary to dilate more upon this matter as the learned counsel for the appellant has not been able to cite any authority for the position that the grant of patta to a co-owner even in respect of Kandukrishi lands would deprive the other co-owners of their right over the properties. The decisions cited are not cases where a co-owner got patta in his name of

the properties subject to the co-ownership. They are all cases where strangers got patta in their names and the question arose whether the grant of patta had the effect of extinction of the title or possession in so far as strangers are concerned. Upon the 1st point therefore we are of the opinion that merely on account of grant of patta in the name of the 1st defendant the title of the 2nd defendant has not been extinguished. It is only on the basis that the title of the 2nd defendant has been extinguished by the grant of patta in the name of the 1st defendant before the date of Ext. B that it is contended that the plaintiff has got nothing as transferee because the 2nd defendant had nothing to convey. We, therefore, hold that the plaintiff has obtained the rights that have been conferred upon him under the terms of Ext. B.

(5) This leads to the consideration of the second point urged on behalf of the appellant which relates to the question as to whether the plaintiff is entitled to get exclusive possession of the properties that is sought in the plaint. Learned counsel for the appellant relies upon the fact that the very sale deed, Ext. B which is relied upon by the plaintiff, expressly recites that the properties conveyed thereunder and the other properties belonging to the other co-owners are lying as one block in what is called Oodukur holding. In the partition deed Ext. F as also in the lease deed, Ext. J the description of the properties seem to lend colour to the contention especially in the absence of the word 'Oodukoor' therein that what is dealt with is specific parcels, the properties having been divided by metes and bounds. There are, however, no indications excepting the mention of specific extents in these documents and indicating generally the lie of the various parcels that an actual division by metes and bounds had been effected. But whatever that may be, it is competent for the 2nd defendant to assume the status of and constitute himself an Oodukur owner of the properties even though he might have claimed a division by metes and bounds of specific parcels as indicated in Ext. F. The recital in Ext. B will go to show that such a demarcation and separate allotment has not been done and before that was done if the 2nd defendant accepts the position that the lands are being held Oodukur and the other co-owners agree thereto, it cannot be contended that the transferee under Ext. B got anything more or other than what is purported to be conveyed thereunder and that is only an Oodukur right in other words the right to be in joint possession with the other co-owners and to be the recipient of the proportionate advantages arising from the said joint possession proportionate to the extent of his interest in the properties. There is also evidence in the case to show that there has in fact been no actual division by metes and bounds of the various parcels shown in Ext. F.

(6) We therefore consider that what the plaintiff has got is only an Oodukur right, that is to say a right to be in joint possession with the other co-owners of the extent that he is entitled to under the sale deed in his favour, which his assignor got under the partition deed in the family. The relief that is claimed by the plaintiff is for exclusive possession to which under the terms of Ext. B he is not entitled. He is, anyway entitled to relief by way of joint possession with the 1st defendant, which relief is smaller than the one that is claimed and therefore can be granted in this very suit as it would come under the general prayer for granting "such further or other relief as the circumstances may justify".

(7) We, therefore, grant relief to the plaintiff for joint possession with the 1st defendant who is now in possession of the entire properties to the extent of 66 acres odd comprised in the partition deed Ext. F.

(8) So far as the memorandum of cross objections filed by the plaintiff is concerned, we are not able to find any merit in it. Learned counsel for the respondent-plaintiff referred to the fact that the consideration of the lower court of this question is not correct because the proportionate rent that is fixed upon 13 acres odd which is the subject-matter of this suit, is based upon the assumption that Ext. J takes in, besides the above extent, an extent of 2 acres and 36 cents. It is contended that if you look into the survey numbers comprised in Ext. J they comprise only an extent of 86 cents over and above the 13 acres odd which is the subject-matter of this suit. It is seen however from Ext. C which was a suit filed by the present plaintiff also based upon Ext. J but which was returned on account of the fact that it was not accompanied by the sanction of the State that was required for filing suits regarding Kandukrishi lands, that besides 13 acres odd comprised in this suit and the 86 cents an extent of 1 acre 70 1/4 cents is also included in Ext. J. If this is right, the learned Judge is also right in his statement that besides the 13 acres odd which is the subject-matter of this suit, an extent of 2 acres odd is included in Ext. J. In paragraph 5 of the plaint the plaintiff admits that besides the property in question an extent of 2 acres odd is also included in Ext. J. Under the circumstances we are of the opinion that the proportion struck by the Court below is right and that the plaintiff is entitled to recover by way of proportionate rent 363 paras of paddy as found by the Court below. So far as the claim for enhancement is concerned, we agree with the Court below in its conclusion that there is no acceptable evidence for the enhancement of the pattom. There is only the evidence of the plaintiff. Learned counsel for the respondent, however, relies upon the evidence of the 1st defendant wherein he has stated that the rate of rent per para in that locality is 'generally' five-fold. This statement does not carry us to any extent because, that may indicate an average rent in that particular locality but so far as these properties are concerned, even in the extent comprised in Ext. P it is admitted that various blocks are of unequal fertility and the yield from one is different from the yield from the other and this difference in the yielding capacity it is stated, accounts for the unequal extent of the properties allotted to the various sharers in Ext. F. In the absence of any reliable evidence we are not able to find our way to granting the plaintiff any decree for enhancement of pattom.

(9) The appeal is accordingly allowed in part and the decree of the lower court modified in the manner and to the extent above indicated.

(10) As regards costs from what we stated in the early portion of this judgment it is clear that neither party was sure of his grounds and both parties were feeling their way. The Court also did not get that assistance which the parties should have given. Under the circumstances it

appears to us proper that we direct each party to bear his costs here and in the courts below.

C/R.G.D. Appeal partly allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 574

KOSHI AND GOVINDA PILLAI JJ.

Thavunny, Appellant v. Iyyappen, Respondent.

Second Appeal No. 32 of 1124, D/- 8-6-1951.

(a) Debt Laws — Cochin Agriculturists' Relief Act (18 (XVIII) of 1114 ME) S. 9 — Exception — Scope.

Exception to section 9 of the Agriculturists' Relief Act only states that pattom on a lease back of the mortgaged properties shall be treated as interest for purposes of Ss. 8 and 9 and not of any other section or for other purposes. 37 Cochin 147, Ref. to. (Para 4)

(b) Civil P.C. (1908), O. 34 R. 7 — Costs.

Except for exceptional reasons a mortgagor suing for redemption cannot get his costs, the usual rule being that the mortgagee is entitled to the costs of a suit for redemption. Where, however, the contention raised by the mortgagee is absolutely untenable, that is sufficient misconduct in the eye of the law to disentitle him to costs of the litigation. (Para 5)

Anno: C.P.C., O. 34 R. 7 N. 6 Pt. 1.

V. Sankara Menon and V. Narayana Menon, for Appellant; T. S. Venkiteswara Iyer and C. S. Ananthakrishna Iyer, for Respondent.

REFERENCE ..... /Para

(1121) 37 Cochin 147 5

JUDGMENT: This second appeal, preferred by the defendant, is directed against the terms of a decree for redemption of a usufructuary mortgage.

(2) In O. S. No. 363 of 1120 on the file of the Court of the District Munsif of Vadakancherry the plaintiff as the assignee of the suit properties sued for redemption of an outstanding usufructuary mortgage thereon and the sole defendant in the case was a son of the original mortgagee to whom the mortgage right was allotted in the family partition. On the same date as the mortgage, the mortgagor had taken the properties back on lease and the assignment in favour of the plaintiff comprised not only the equity of redemption over the properties but also the interest in the said lease. The plaintiff, therefore, obtained possession of the properties when he took the assignment and that state of affairs still continues. The mortgage was in the sum of Rs. 650 and the lease provided inter alia that the mortgagor lessee should pay an annual pattom of Rs. 57-8-0 to the mortgagee lessor. The lease deed contained a provision that the equity of redemption shall be a charge for arrears up to Rs. 200 interest and costs, if any, the mortgagee incurs for redemption. Prior to the institution of the suit the plaintiff tried to redeem the mortgage by depositing the principal amount of Rs. 650 together with the amount of Rs. 200 specified in the lease deed in Court under section 85 of the Cochin Transfer of Property Act, but the mortgagee refused to accept the same as according to him the deposit did not cover the proper price of redemption he was entitled to receive. His case was that in addition to the principal amount he was entitled not only to the amount of Rs. 200 specified in the lease deed but the entire arrears due by the mortgagor-lessee. Soon after the Court dismissed that application the mortgagee-lessor instituted O. S. No. 282 of 1120 to recover possession of the properties together with arrears of rent. That suit was soon followed by O. S. 363 giving rise to this second appeal and the trial Court disposed of the two suits together by a common judgment. The mortgagee felt aggrieved by the decision and he filed two independent appeals. A. S. 110 of 1122 was the appeal from the redemption suit and A. S. 109 the appeal in the other suit. The District Judge like the Munsif passed a common judgment and this second appeal is against the decree passed in A. S. 110. S. A. No. 31 is the second appeal from the decision in A. S. 109.

(3) Both the second appeals were heard together by us but we do not propose to follow the example of the two Courts below by pronouncing a common judgment. Two points alone arise for decision here and they are: (1) Whether the price of redemption has been properly fixed by the Courts below and (2) Whether the decision of the Courts below regarding costs is proper.

(4) As to the first question the trial Court's decision that the defendant was entitled to receive only Rs. 350 as the price of redemption was confirmed by the appellate Court. Before us, however, the learned Counsel for the plaintiff-respondent readily conceded that under the terms of the lease deed the equity of redemption was charged not only for arrears up to a maximum of Rs. 200 but for interest thereon and if need be for costs as well. As the question of costs forms the subject of point (2) we shall here deal with only the question regarding interest on this Rs. 200. By virtue of the explanation to section 9 of the Cochin Agriculturists' Relief Act pattom payable by the mortgagor to the mortgagee on a lease back of the mortgaged properties as from 1-1-1107 to the commencement of the Act (1-1-1115) is to be treated as interest and such interest cannot exceed 6 per cent simple interest. Here arrears begin from 1109 and by 1-1-1115 more than Rs. 200 had become due. To be exact Rs. 234 had accrued due by that date. We are, however, concerned only with the interest on Rs. 200 and it was not disputed that the plaintiff was liable to pay interest on the said sum from the commencement of the Agriculturists' Relief Act. As for the rate, Ext. B, no doubt, provides 12 per cent interest, but regard being had to the state of the pleadings in the two cases we do not think that more than 6 per cent simple interest need be allowed. The respondent's Counsel agreed before us that his client may be made liable for interest at that rate and the appellant's Counsel did not demur that the rate was low or that his client was entitled to any higher rate. The plaintiff has deposited in Court Rs. 850, but as that does not cover all the amounts due to the defendant the latter is entitled to interest on Rs. 200 till the balance due as per this decision is made good and notice of it given to him. That is to say, the plaintiff is and shall remain liable for simple interest on Rs. 200 at the rate of 6 per cent per annum from 1-1-1115 until such date as the defendant gets notice that the deficit towards the price of redemption has been made good by payment into Court. This disposes of point (1) above and the decisions of the Court below regarding the price of redemption shall stand modified accordingly. The effect of the provision in the lease deed creating a charge on the

equity of redemption for arrears up to a maximum of Rs. 200 is to virtually convert such arrears into principal mortgage money. There cannot, therefore, be any valid objection to interest being allowed for the period covered by the litigation. Exception to section 9 of the Agriculturists' Relief Act only states that pattom on a lease back of the mortgaged properties shall be treated as interest for purposes of sections 8 and 9 and not of any other section or for other purposes. See (1121) 37 Cochin 147.

(5) As for the costs, the trial Court directed the parties to bear their respective costs. The appellate Court, however, on a memorandum of objections preferred by the plaintiff varied that direction to the prejudice of the defendant and held that the plaintiff should get his entire costs in both the Courts from the defendant. The ground on which the lower appellate Court founded its order as to costs, viz., that the recalcitrance of the defendant was responsible for the litigation, disappears in view of our decision regarding the price of redemption. Until the argument in the appeal before us the plaintiff's position was he need pay only Rs. 850 towards redemption. Except for exceptional reasons a mortgagor suing for redemption cannot get his costs, the usual rule being that the mortgagee is entitled to the costs of a suit for redemption. Here, however, the mortgagee took the extreme position that he should get not only Rs. 650 plus Rs. 200 and the interest on the latter sum but the entire arrears due under the lease arrangement. That contention is absolutely untenable in the light of the express limit fixed in the lease deed and in our opinion that is sufficient misconduct in the eye of the law to disentitle the appellant to his costs in this litigation. We would, therefore, while setting aside the order regarding costs made by the lower appellate Court in Plaintiff's favour direct that the parties shall bear their respective costs throughout.

(6) Mr. T. S. Venkiteswara Iyer pointed out that there was no express prayer in the memorandum of appeal to this Court to set aside the lower appellate Court's decision on the memo of objections and that we cannot, therefore, interfere with it. We regret we cannot accede to the argument. On the second appeal the defendant has paid court fee on the entire valuation of the suit and claimed that the decree in the suit should be one accepting his contentions. No doubt we are not able to give effect to all of them. But there is nothing preventing us from passing such just and equitable a decision as we deem fit regarding costs in any of the courts through which the litigation has passed. The scope of the appeal warrants no such limitation as the learned Counsel for the respondent desires to put upon it. The objection that the memorandum of appeal to the lower appellate Court was also defective in this respect is equally untenable.

(7) In the result the second appeal is allowed to the extent indicated in the preceding paras of this judgment and the decisions of the courts below shall be modified accordingly.

C/V.R.B. Appeal partly allowed.

A. I. R. 1952 TRAVANCORE-COCHIN 575

KOSHI C. J. AND VITHAYATHIL J.

Kesavan Parameswaran and another, Appellants v. Krishnan Sreedharan and others, Respondents.

A. S. No. 249 of 1950, D/- 1-4-1952.

Civil P. C. (1908) O. 21 Rr. 10 and 15 — Joint application — Decree for separate amounts to several persons — Competency of single application for execution.

When a decree is passed severally in favour of more persons than one they can file a joint execution petition. Rule 15, O. 21 empowers one joint decree-holder to execute the whole decree for the benefit of the other joint decree-holders also but this does not mean that when there are more than one decree-holder in a case who are not joint decree-holders they cannot apply for execution of the whole decree by a joint execution petition. There is nothing in the Code of Civil Procedure to show that when separate amounts are awarded under the same decree to more than one decree-holder they are bound to file separate execution petitions for the realisation of the amounts due to them. Although separate amounts are awarded to the different decree-holders there is only one decree in the case. AIR 1935 All 402 Rel. on. (Paras 3 & 4)

Anno: Civ. P. C., O. 21 R. 10 N. 2; R. 15 N. 3.

T. S. Krishnamoorthi Iyer, for Appellants; K. Narayana Panicker and R. Nilakanta Kartha, for Respondents (Nos. 1 and 2 respectively).

REFERENCE ..... /Para

('35) AIR 1935 All 402: (157 Ind Cas 429) 4

JUDGMENT: The auction purchaser in O. S. 19/1105 of the District Court of Alleppey is the appellant in this case. In execution of the decree in that case properties belonging to the judgment-debtors were sold in court auction and purchased by the appellant. The 9th defendant put in a petition to set aside the sale on the ground of material irregularity. The court below allowed the petition and set aside the sale. The appeal is from that order.

(2) The reason given by the learned District Judge for setting aside the sale is that the sale was held in contravention of the terms of the decree. The decree was in favour of plaintiffs 1 and 2 and separate amounts were awarded to the two plaintiffs under the decree. The first plaintiff was awarded Fs. 8222½ and interest and the 2nd plaintiff Fs. 1014 3/8 and interest. Both the plaintiffs filed a joint execution petition for the amounts due to them. Though the amounts were separately mentioned in the execution petition, the properties were proclaimed for the consolidated amount and the sale took place for that amount. The learned Judge held that the procedure adopted was contrary to the provisions of the Code of Civil Procedure and that, therefore, the sale was invalid. The learned Judge, therefore, did not go into the other allegations in the petition viz., material irregularity and fraud in publishing and conducting the sale and gross under-valuation.

(3) According to the learned District Judge the decree in this case is not a joint decree, and it is only in the case of joint decrees can a joint execution petition be filed under Or. 21 rule 15 C.P.C. Order 21 rule 15 provides that where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may apply for the execution of the whole decree for the benefit of them all. That rule only empowers one joint decree-holder to execute the whole decree for the benefit of the other joint decree-holders also. That does not mean that when there are more

than one decree-holder in a case who are not joint decree-holders they cannot apply for execution of the whole decree by a joint execution petition. There is nothing in the Code of Civil Procedure to show that when separate amounts are awarded under the same decree to more than one decree-holder they are bound to file separate execution petitions for the realisation of the amounts due to them. Although separate amounts are awarded to the different decree-holders there is only one decree in the case.

(4) This question came up for consideration in — 'Ratnakar Singh v. Rudra Pratab Singh', AIR 1935 All 402. In that case a decree was passed in favour of three persons awarding them separate costs. They filed a joint execution petition for the separate amounts due to them. It was held that such a petition was maintainable. Bennet J. observed thus in that case :

"Turning to the provisions in the Civil Procedure Code I find under Section 2(2) 'decree means the formal expression of an adjudication which so far as regards the court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in that suit.' There is, therefore, one decree in each suit and there are not two decrees in one suit. In the present suit there was actually one formal decree drawn up. Order 21 Rule 10 lays down: 'Where the holder of a decree desires to execute it he shall apply to the court which passed the decree .....' that is, for the execution of one decree there should be one application made by the holder. The singular imports the plural and where there are more holders than one of a decree the language implies that the holders of the decree should make an application. It is obviously more convenient for the purposes of attachment and sale that for the execution of a single decree there should be a single application and a single procedure of attachment and a single procedure of sale, otherwise if there were a multiplicity of applications and attachments and sales there would be considerable confusion."

If two decree-holders under the same decree apply separately for the sale of a property belonging to the judgment-debtor, it will be difficult to conduct the sale unless the property is divided and separate portions sold for the separate amounts. In order to avoid such difficulties it is always better that the property is sold for the whole decree amount.

This is what was done in the present case, and we find no reason to hold that the procedure is opposed to any provision in the Code of Civil Procedure. Learned counsel for the respondent referred to certain rulings which lay down that in the case of decrees of this nature the decree-holders cannot be said to be joint decree-holders. It is true that the decree in such a case cannot be said to be one passed jointly in favour of more persons than one and an execution application by one will not enure to the benefit of the others so far as limitation is concerned. But we are not concerned with that question in this case. Here we are only concerned with the question whether when a decree is passed severally in favour of more persons than one they can file a joint execution petition or whether they are bound to file separate execution petitions. We are of opinion that there is nothing in law to prevent them from filing a joint execution petition.

(5) The learned District Judge has clearly gone wrong in holding that the decree-holders in this case were not entitled to file a joint execution petition and that the sale held persuant to that joint execution petition was invalid. We, therefore, set aside the order of the court below and remand the petition to that court for fresh disposal according to law. We make no order as to costs.

B/M.K.S. Case remanded.

END

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TRIPURA JUDICIAL COMMISSIONER'S COURT

1952

JUDICIAL COMMISSIONER :

The Hon'ble Shri Laxmi Narain.

STATE ADVOCATE :

Shri Priyanath Banerjee.

LEGAL REMEMBRANCER :

Shri Charubhuson Deb Choudhury, M.A., B.L.

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LAKSHMI NARAIN J. C.

P. K. Subbiah, Convict-Petitioner v. The State.

Criminal Revn. No. 1 of 1952, D/- 10-6-52.

(a) Criminal Procedure Code (1898), Ss. 156 and 537—Accused, an Executive Engineer serving under Indian Government working at Agartala (Tripura State) before merger — Investigation of corruption charge against accused by Superintendent of Police of Special Police Establishments under Government of India — Permission of Dewan of State and Magistrate obtained — Local Superintendent of Police with the party at time of investigation — Investigation held was legal — Even if there was irregularity it was cured by S. 537, when accused was not prejudiced. (Para 7a)

Anno: Cr. P. C. S. 156 N. 3a; S. 537 N. 14.

(b) Criminal P. C. (1898), S. 190 — Case of bribery made cognizable by Prevention of Corruption Act, S. 3 — Case investigated by Police — Police filing complaint of prosecution witnesses and other relevant documents filed — Complaint held came within purview of Section 190 (1) (b) — Whether it was in form of complaint or report made no difference. (Para 8)

Anno: Cr. P. C., S. 190 N. 21.

(c) Criminal P. C. (1898), S. 200 (1) (aa) — Complaint filed by Superintendent of Police, Special Police Establishment Centre, before Magistrate in Tripura when State had already merged in Centre — Superintendent of Police being a public servant for purposes of filing complaint, is exempt from any examination under S. 200(1)(aa). (Para 11)

Anno: Cr. P. C., S. 200 N. 18.

(d) Criminal P. C. (1898), S. 342 — Detailed examination of accused is not necessary in every case.

The nature of the questions to be put to the accused depends on the circumstances of each individual case. It would be sufficient compliance of the provision of the Code if the Court gives the accused an opportunity by questioning him generally on the case to explain the circumstances appearing in the case against him. The failure of the Magistrate to put explicit questions beyond asking a general formal question does not vitiate the trial, more specially when the accused is not prejudiced by such examination.

Where at the close of the prosecution case the accused was asked "have you anything to say against the evidence appearing in the prosecution story?" and the answer was "false, I am innocent and I have been falsely implicated", and again (probably after the re-cross examination of the prosecution witnesses) the accused stated, "I am not guilty, I did not accept any bribe. Ex. F. contains my true statement", and the Ex. F. was the written statement of the accused submitted to his officer and produced at the instance of the accused:

Held that under the circumstances it could not be said that provisions of S. 342, Criminal P. C. had not been complied with; that the detailed examination of the accused is not essential in every case and specially it was not essential in this case. (Para 13)

Held also that it was not shown that the accused was prejudiced in the case. (Para 14)

Anno: Criminal P. C., S. 342 N. 14, 15, 35.

(e) Criminal P. C. (1898), Ss. 537 and 165 — Search illegal — Other sufficient evidence to convict accused — Accused not prejudiced by illegal search — Trial is not vitiated. AIR 1925 All 434; AIR 1929 All 937; AIR 1924 All 214 (1), Rel. on. (Para 15)

Anno: Criminal P. C., S. 537 N. 9.

(f) Criminal P. C. (1898), Ss. 164, 364 and 533 — Magistrate recording statements of accused — Magistrate acting neither under S. 164 nor under S. 364 — Oral evidence of Magistrate is not admissible. AIR 1936 PC 253 (2), Relied on. (Para 17)

Anno: Criminal P. C., S. 533 N. 2; S. 164 N. 2; S. 364 N. 1.

(g) Criminal P. C. (1898), S. 164 — Statement of accused recorded by Magistrate — Verification report by him not addressed to any one is not admissible.

Verification report of the confessional statement of the accused made by a Magistrate not addressed to any authority and without any endorsement of despatch or receipt, is evidently of a doubtful character and has no probative value and is, therefore, not admissible in evidence so far as the confessional statement of the accused is concerned.

(In this case the confessional statement of the accused recorded by the Magistrate, and of whose verification the report was, was itself inadmissible). (Para 19)

Anno: Criminal P. C., S. 164 N. 2.

(h) Evidence Act (1872), Ss. 133 and 114 — Evidence of bribe giver — Very little corroboration is required where bribe giving is not voluntary.

According to S. 133 conviction can be based on the uncorroborated evidence of an accomplice if the Court is satisfied as to its veracity. In cases where the payment of bribe has not been voluntary very slight corroboration would be sufficient to make the evidence of the accomplice admissible against the receiver of the bribe. Even according to S. 4 of the Prevention of Corruption Act, 11 of 1947 the onus on prosecution has been made much lighter. (Recovery from the accused of the marked Government currency notes in the shape of which the amount of the bribe was alleged to have been given held was sufficient corroboration). (Paras 21, 23, 24)

Anno: Evi. Act, S. 133 N. 2, 7; S. 114 N. 4.

(i) Prevention of Corruption Act (1947), S. 6 — Accused appointed Executive Engineer for Tripura State Road by order of Governor of Assam — Accused later on put in charge of certain Division, by order of Governor — Since generally power to appoint carries power to dismiss, in the absence of power to dismiss, Governor of Assam had power to dismiss accused — Sanction given by the Governor under signature of Chief Engineer and Secretary, P. W. D., Assam for prosecution of accused for taking bribe held legal and the prosecution held valid. (Para 27)

S. S. Mukherji with N. C. Ghosh, for Petitioner; P. N. Banerjee, State Advocate with B. C. Dev Barma, for the State.

REFERENCES: Courtwar/Chronological/ Paras.

('36) AIR 1936 PC 253 (2): (37 Cri LJ 897) 17
('24) AIR 1924 All 214 (1): (26 Cri LJ 220) 15
('25) AIR 1925 All 434: (26 Cri LJ 1112) 15
('29) AIR 1929 All 937: (31 Cri LJ 35) 15
('35) AIR 1935 Bom 230: (36 Cri LJ 968) 21
('44) AIR 1944 Cal 374: (46 Cri LJ 94) 23
('48) AIR 1948 Nag 342: (49 Cri LJ 529) 22

ORDER: The petitioner has come to this Court on the Revision Side against the order of the Sessions Judge, Tripura, dismissing his appeal from an order of trial Magistrate convicting the petitioner under S. 161, Penal Code and sentencing him to 18 months' rigorous imprisonment and to pay a fine of Rs. 500/-; in default of payment of fine the petitioner was to undergo a further period of 4 months' rigorous imprisonment.

(2) The prosecution case against the petitioner who was Executive Engineer of Assam Agartala Road Project (with Head quarters at Agartala), was that he accepted a bribe of Rs. 5100/- from one Sushil Kumar Ghosh (P. W. 2) a contractor under him. It is suggested that in the beginning when the contractor applied for work, the Engineer told him that the work would be given to him if he would agree to pay 5 per cent of the bill dues. To this the contractor agreed. His name was entered as a B Class contractor with an understanding that he would be promoted to A Class afterwards. Some advance for the 5 per cent. was demanded which was paid on getting the work. This 5 per cent. was afterwards raised to 10 per cent. by the Executive Engineer when time for payment of bills arrived. This percentage on the bill dues by that time would come to about to Rs. 7600/- out of which Rs. 2500/- had already been paid. Rs. 5100/- were to be paid after encashing the last cheque for Rs. 63000/-.

This cheque is said to have been encashed at Calcutta. After that the contractor Shri Ghosh went to P. W. 1 Shri K. N. Mukherji S. P. of Special Police Establishment which was brought into being to check bribery, corruptions etc.; apprised him of the situation and gave his written statement Ex. 1. It appears that Sri Mukherji was already known to the contractor. Shri Mukherji along with his Assistant Shri Dutta, D. S. P. accompanied by the contractor came down to Agartala. It is alleged that Shri Mukherji went to the then Dewan of the State and got his verbal permission to investigate into the matter with the help of Shri Jyotilal Dev Barma Magistrate, P. W. 6. The petition to the Magistrate for giving permission to investigate and to depute a Magistrate to watch it, is Ex. 2. The required permission was ordered on the application and also that the Magistrate was himself to accompany the party. A trap was arranged. 51 hundred-rupee G. C. notes which were supplied by the contractor and a list of them Ex. 3 were handed over to the Magistrate who compared the numbers on the notes and the list and gave his certificate on it.

The party started for the office of the Executive Engineer. The local S. P. was not to go with the party for fear of disclosure of the trap as he was known to almost everybody. On reaching the gate of the office the Magistrate handed over the bundle of G. C. notes to the contractor for paying to the Executive Engineer if he would demand as bribe. The party waited at a little distance so as to watch the giving and taking of G. C. notes. It was arranged that the contractor after paying the notes to the Executive Engineer would come out and put off his spectacles as a signal. This was done. The party (i. e., Shri Mukherji, his D. S. P. Shri Dutta and the Magistrate) thereafter rushed to the office, disclosed their identity and demanded the money from the Executive Engineer, which was accepted by him. It is alleged that the Executive Engineer got the envelop containing the bundle of notes out of the right-handside drawer of his table and handed it over to the party. The numbers were compared and found correct. The seizure list Ex. 4 was duly prepared on the spot, a copy of which was given to the accused. The local S. P. also by that time arrived. Ultimately the occurrence and investigation resulted in a complaint Ex. 7 made on 21-2-50 by Shri Mukherjee, S. P. of Special Police Establishment, after getting the necessary sanction for prosecuting the Executive Engineer from the Governor of Assam under the signatures of the Chief Engineer and Secretary, P. W. D., Assam, which is Ex. P. 7(i).

(3) In support of its case the prosecution presented only 7 witnesses, viz.,:

1. Shri K. N. Mukherji, S. P., Special Police Establishment.

2. Shri S. K. Ghosh, the contractor (P.W. 1).

3. Shri B. C. Dutta, D.S.P., Special Police Establishment (P.W. 2).

4. Shri Kamalapati Roy Superintending Engineer, Assam Agartala Road Project. (P.W. 3).

5. Shri Abinash Bhattacharyya, Accountant, Assam Agartala Road Project. (P.W. 4).

6. Shri Hrishikesh Dev Barma, S.P., Agartala. (P.W. 5).

7. Shri J. L. Dev Barma, Magistrate 1st Class, Tripura State (P.W. 6).

(4) The accused stated that he was innocent and that he had been falsely implicated by means of the trap. He also stated on 7-11-1950, that his written statement to his Superintending Engineer on the date of occurrence was his true statement. He pleaded not guilty to the charge and produced 3 witnesses in defence.

(5) I have not been led through the evidence of this case by the parties and rightly so, as this Court would not ordinarily interfere with finding of facts based on evidence.

(6) The learned counsel for the petitioner has addressed this Court on the following points:

(a) That there is no legal basis for the case in as much as the S.P., of the Special Police Establishment has had no jurisdiction and authority to investigate at Agartala (Tripura State) in April 1949, when the State was not merged but was independent; and also that no complaint could be filed in the case which was made cognisable by means of Prevention of Corruption Act, Act 11 of 1947.

(b) That the statement of the accused is not in accordance with Section 342, Cr. P.C.

(c) That the search for the bribe-money was not in accordance with law.

(d) That the statement of the accused purported to be recorded under Section 164, Cr. P.C., is not valid and therefore not admissible.

(e) That the signatures on the seizure list Ex. 4 do not signify that the accused admitted the contents of the document to be correct.

(f) That the report Ex. 8 of the Magistrate as it is, is very suspicious and, therefore, should not be taken into account against the accused.

(g) That the contractor is an accomplice and as such his evidence should be corroborated in material particulars by other good evidence.

(h) That the sanction for prosecution is not valid.

(7) The points may be taken one by one.

(7-A) (a) 'Jurisdiction or authority of the Special Police Establishment to investigate the matter': It is argued by the learned counsel for the petitioner that Shri Mukherji being Superintendent of Police of the Special Police Establishment which was directly under the Home Ministry, Government of India, had no authority to investigate the matter in Tripura State which then had an independent status. The department was brought into being to check immorality like bribery, corruption in services etc. The petitioner was serving under the Indian Government as an Executive Engineer for Assam Agartala Road Project which was undertaken by that Government. The petitioner was therefore serving under the Indian Government, working at Agartala (Tripura State) when there was an allegation of bribery against him, as (?) there was nothing wrong if the S.P., of Central Police Establishment took up the investigation in the matter. All that required (?) is that permission of the State should be obtained before doing so. It is in the evidence of Shri Mukherji that he went to the then Dewan and apprised him of the situation. The Dewan directed the witness to go to Shri J. L. Dev Barma, Additional Magistrate and seek his help. The local S.P., was also with the party at that time. A regular application Ex. 2 for permission to investigate the matter was made to the Magistrate who granted it and agreed to accompany the party himself. There is nothing wrong therefore in the investigation by (?) the complaint. Even if there is any, it is curable under Section 537, Cr. P.C.

(8) There is no material irregularity if a complaint is filed instead of submitting a charge-sheet in a case investigated by the police. A complaint attended by schedule of prosecution witnesses and other relevant documents, if any, comes within the purview of Section 190 (1) (b) of the Criminal Procedure Code. It makes no difference whether it is in the form of a report or a complaint. A magistrate is competent to take cognisance on such a complaint.

(9) Irregularity if any made in investigation of a case by different police other than the local police is also curable when it does not prejudice the case of the accused. In the present case, it is to be noted that permission to investigate was duly obtained which is proved by the evidence.

(10) It is argued that Shri K. N. Mukherji, S.P., of the Special Police Establishment ought to have been examined before issue of process by the trial Court taking cognisance on the complaint. The reply from the other side is that he is exempted from any such examination under Section 200 (1) (aa), Cr. P.C., as he is a public servant.

(11) There is no dispute that he is a public servant. The dispute is whether he is such for filing the present complaint. The complaint was filed by him on 21-2-1950, when the State had already merged in the Centre on 16-10-1949. "The Tripura State Adoption of Indian Laws Act 1359 T.E.: 1-10-1949 A.D." came into operation on or from 1-10-1949 by means of which Indian Penal Code and Criminal Procedure Code were adopted. The "Existing Laws" were to continue — vide Tripura Administration Order — as published in the Tripura State Gazette Extraordinary on 15-10-1949. The State Merger (Chief Commissioner's Province) Order 1950 came in force on 23-1-1950 A.D., by means of which the State of Tripura was created as a new Province. The Tripura State was made a Part C State by the Indian Constitution which came into force on 26-1-1950 A.D. It is, therefore, quite clear that the complainant in this case was a public servant for the purpose of Section 200 (1) (aa) of the Criminal Procedure Code and as such exempted from examination on receipt of the complaint.

(12) (b) It is argued that the statement of the accused is not in accordance with the provision of Section 342 of the Criminal Procedure Code and on that account the trial is vitiated. In this I do not agree with the learned counsel for the petitioner. At the close of the prosecution case the accused was asked on 1-6-1950, "Have you anything to say against the evidence appearing in the prosecution story?" The answer was, "False, I am innocent and I have been falsely implicated." Again on 7-11-1950 (probably after the re-cross examination of the prosecution witnesses) the accused stated, "I am not guilty, I did not accept any bribe. Ex. F contains my true statement." It is to be noted here that Ex. F is the written statement of the accused submitted to his officer the Superintending Engineer on the day of occurrence. It was produced at the instance of the accused and runs as follows:

"This morning some contractor without permission, came in and left a long envelope addressed to the Executive Engineer, Division 1 and disappeared. Before I had time to open and find out what documents it contained, three un-

known officers rushed in and took the envelope from me and on their opening it, found a bundle of 100/- notes. All these persons jointly appear to have played this dirty trick on me, with a view to blackmail me. I have had no hand in any money transaction with anyone. Please enquire into this and give me the necessary protection against such frauds, calculated to disgrace and blackmail officials of the Project for nothing. This happened at about 9-45 a.m. today. I have already reported to you personally about this."

(13) Under the circumstances it cannot be said that provisions of Section 342, Cr. P.C., have not been complied with. Detailed examination of the accused is not essential in every case and specially it was not essential in this case.

(14) The nature of the questions to be put to the accused depends on the circumstances of each individual case. It would be sufficient compliance of the provision of the Code if the Court gives the accused an opportunity by questioning him generally on the case to explain the circumstances appearing in the case against him. The accused in this case has been represented by more than one counsel. The failure of the Magistrate to put explicit questions beyond asking a general formal question does not vitiate the trial and more specially when the accused is not prejudiced by such examination. It is not explained how the accused was prejudiced by such a statement.

(15) (c) It is contended on behalf of the petitioner that the proceedings for search of the bribe-money were not in accordance with law. The reply of the Government Advocate is that it was production and not a search; and that even if it was a search, conviction is not bad if evidence to support the conviction is ample. On the face of it, it is a case of production and not of search. Even if it be a search and an irregular one, its illegality or irregularity unattended by prejudice to the accused does not vitiate trial. It has not been shown that there was any prejudice caused to the accused in this respect. In 'EMPEROR v. KUTROO', AIR 1925 All 434, it has been held that "Although the search is illegal a person can be convicted where the evidence against him is conclusive." Further "Any irregularity or illegality in the search can neither vitiate trial nor affect the conviction of the accused where the accused has not been prejudiced by the defect." 'RURE MAL v. EMPEROR', AIR 1929 All 937 at p. 938. It has also been held in 'AIR 1924 All 214 (1) that "Where the discovery of articles showing the guilt of the accused and found in the search is proved by direct evidence any irregularity or illegality in the search can neither vitiate the trial nor affect the conviction." This contention is therefore ineffectual.

(16) (d) 'Statement of the accused dated 7-4-1950 under Section 164, Cr. P.C.

(17) It is Ex. 17 recorded by the Magistrate who was present when the bribe-money was produced by the accused immediately after the occurrence to the police party. I have gone through this statement. It does not appear from this document that the Magistrate has acted or purported to act under Section 164 or Section 364, Cr. P.C. Oral evidence of the Magistrate under such circumstances is not admissible. Following 'NAZIR AHMAD v. KING EMPEROR', AIR 1936 P.C. 253, "If oral evidence be allowed in such a case, all the precautions and safe-guards laid down by Sections 164 and 364 would be of such trifling value as to be almost idle." This statement Ex. 17 is therefore of no value.

(18) (e) 'Seizure list.': It appears that the seizure list Ex. 4 is signed by the accused with a note, "received a copy of this list." It is not denied that a copy of the same was given to the accused forthwith. The learned counsel for the petitioner wants the Court to draw conclusion that his client did not know the contents of the seizure list which particularly contains the words "the following hundred-rupee G.C., notes inside the official cover addressed to the Executive Engineer, Division 1 were produced from inside the right-hand-side drawer of Mr. P. K. Subbiah by him etc." This may be because the learned counsel for the accused has now urged that the bundle of G. C. notes was collected from above the table by the Police and not given by the petitioner after taking it from the right-hand-side drawer of the table. To contradict this the learned Government Advocate has drawn attention of the Court to document Ex. F which is a written statement of the accused in his own hand, given to his Superintending Engineer the same day. In that statement of the accused it is written "and took the envelope from me." From this the learned Government Advocate argues that the envelope containing the G. C. notes was taken by the police from the possession of the accused and the statement given about it in the seizure list is correct. On the basis of this it is pressed on behalf of the respondent that the accused was well aware of the contents of the seizure list Ex. 4 which was prepared in his presence and a copy of which was handed over to him. Otherwise, he argues, that the accused who is well-educated and holding a very high office would have created a row or at least protested as to the incorrectness of the contents of the seizure list and more specially when his Superintending Engineer was sitting in an adjacent room.

Under the circumstances the presumption can be fairly drawn that the accused knew the contents of the seizure list at the time of his signing it with the above said note. Further Ex. H a letter of the accused dated 11-5-1950, addressed to the Chief Engineer does not leave any room for doubt that he knew the contents of the seizure list when he signed it. The relevant portion of the above letter produced at the instance of the accused himself runs as follows:

"Then they made out a seizure list in which they stated that they found the cover from inside the right-hand-side drawer of my table which was wholly incorrect. Later they compelled me to sign the seizure list. To this I strongly objected and protested and refused to sign it as it contained deliberately wrong, distorted and incorrect statement of actual facts and then they requested me to sign it in token of receiving a copy of the seizure list, which I did and received a copy from them."

This letter is proved by the statement of P.W. 3 Superintending Engineer in cross-examination by the accused.

(19) (f) 'Verification Report': It is objected that Report Ex. 18 signed by the Magistrate P.W. 6 to the higher authority is inadmissibe in evidence. This report is proved by the Magistrate himself in this case (though objected to by the other party) as the same which he wrote and sent on the same day, i.e., 7-4-1949, to the Dewan of the State. The prosecution has urged that this is the verification report by the Magistrate in connection with the confessional statement of the accused recorded by him on that day. On perusal of the report it is evident that it is addressed to nobody; it is also received by nobody. It bears no endorsement of despatch or receipt. I need not discuss it at length

here in view of the fact that the very statement for whose verification this report is relied upon by the prosecution, has already been held inadmissible. Verification report made by a Magistrate not addressed to any authority and without any endorsement of despatch or receipt, is evidently of a doubtful character and has no probative value and is, therefore, not admissible in evidence so far as the confessional statement of the accused is concerned.

(20) (g) 'Bribe giver as an accomplice': It remains to be determined now how much corroboration if any required, is needed of the statement of a bribe giver who is an accomplice and whether other evidence in this case is a sufficient corroboration of the same.

(21) It would be helpful to quote some of the rulings of different High Courts on the subject:

"In cases where the payment of bribe has not been voluntary very slight corroboration would be sufficient to make the evidence of the accomplice admissible against the receiver of the bribe. The rule of the Court which requires corroboration of the evidence of an accomplice as against each accused, if it applies at all, applies with very little force to a case in which the accused is charged with extorting a bribe from other person. The objection which usually arises to the evidence of an accomplice does not really apply where the alleged accomplice, that is the person who pays the bribe, is not a willing participant in the offence, but is really a victim of that offence. 'KAMAL KHAN v. EMPEROR', AIR 1935 Bom 230.

(22) In this case it is evident that 10 per cent. amount of the bill dues was being extorted and the contractor Shri Ghosh was not a willing participant to it. The same view as in the case cited above has been taken in 'NARAYAN PRASAD v. EMPEROR', AIR 1948 Nag 342.

(23) According to Section 133 of the Evidence Act conviction can be based on the uncorroborated evidence of an accomplice if the Court is satisfied as to its veracity. In the present case, the marked G. C. notes have been recovered from the possession of the accused and that in itself is a corroboration of the accomplice's evidence. It is laid down in 'K. H. BHATTACHARJEE v. EMPEROR', AIR 1944 Cal 374 that:

"no doubt in a sense the person who pays the bribe is an accomplice of the person who receives the bribe, but the position is essentially different from that of one dacoit deposing regarding the dacoity against his fellow dacoits. There is no hard and fast rule regarding the corroboration of an accomplice. The legislature has left the Court free to act on the uncorroborated testimony of an accomplice if the Court believes that evidence."

(24) Reliance can be placed on the uncorroborated evidence of an accomplice who acts under a form of pressure which it would require firmness to resist.

(25) There is nothing in this case to doubt the veracity of the 3 eye-witnesses, i.e., the S. P. Special Police Establishment, D.S.P., of the same department and the Magistrate of the State. The learned counsel for the petitioner found it difficult to colour these 3 witnesses with any animus against the accused and explain as to why and how they should have joined hands against him.

(26) Full reliance has been placed on the evidence of these 3 witnesses by the Courts below, apart from the accomplice in the case. There is thus not only sufficient corroboration of the bribe-giver but that the case is also fully proved against the accused. It is also to be noted that according to Section 4 of the Prevention of Corruption Act Act 11 of 1947 the onus on prosecution has been made much lighter.

(27) (h) An objection is also raised that there was no proper sanction in the case to prosecute the petitioner. It is to be seen that sanction of the Governor of Assam to prosecute the petitioner in this case was obtained on 9-1-1950, under the signatures of Chief Engineer and Secretary, P.W.D., Assam. It is duly signed and sealed. This order Ex. P-7 (1) was filed along with the complaint. It is contended that the Governor of Assam could not sanction the prosecution as it is not proved that he had any authority to remove the petitioner from his office. The petitioner was appointed as an Executive Engineer for the Tripura State Road from February 24th 1948 by an order of the Governor of Assam No. 104, E dated 24-3-1948, as published in Assam Gazette of the 31st March, 1948 at page 265. The petitioner was later on placed in charge of Division No. 1 with Head Qquarters at Agartala by an order of the Assam Governor No. 109-E dated 30-3-1948, published in the Assam Gazette of April 7, 1948 at page 287. There is nothing to show that he had no power to dismiss. It is general common law rule that a power to appoint carries with it in the absence of any other provision a power to dismiss. It goes clear, therefore, that the Governor of Assam had also power to dismiss the petitioner and as such he was authorised to sanction the prosecution. The prosecution is thus found valid.

(28) The learned counsel for the petitioner has not addressed the Court on the point of sentence.

(29) In view of the above discussions this petition is dismissed. The petitioner is to surrender to his bail bond.

R.G.D.

Petition dismissed.

A. I. R. 1952 Tripura 5

LAKSHMI NARAIN J. C.

Haku Mia and others, Appellants v. The State of Tripura, Opposite Party.

Cri. Revn. No. 20 of 1951, D/- 2-4-52.

(a) Criminal P. C. (1898), S. 439 — Applicant in contempt.

When a convict comes to Court on the revision side under S. 439, Cr. P. C. after the rejection of his appeal by the Sessions Judge, for setting aside his conviction without surrendering to his bail granted till the disposal of appeal he has no right to be heard through his counsel. (Para 2)

Anno: Cr. P. C., S. 439 N. 11.

(b) Criminal P. C. (1898), S. 439 — Revisional jurisdiction — High Court when will interfere.

The revisional powers of the High Court under S. 439, Cr. P. C. should not be exercised lightly but should be exercised only in exceptional cases, where the interest of justice required interference for the correction of manifest illegalities or the prevention of gross miscarriage of justice.

Where the trial is only irregular and no prejudice is shown to have resulted thereby to the accused the High Court would refuse to interfere in revision. (Para 3)

Anno: Cr. P. C., S. 439 N. 1.

Kali Prasanna Dutta, for Appellants; A. K. Shyam Chowdhury, Government Advocate, for the State.

ORDER: This is a petition for revision filed on behalf of Haku Mia, Chalim, Kutub Ali and Mustak Ali accused who were convicted and sentenced by Shri J. L. Dev Barma, B. L., Magistrate first class, Dharmanagar to 4 months' R. I. under S. 379/429, Penal Code on 11-4-51. Their conviction and sentences were confirmed by the Sessions Judge, in appeal on 22-6-51.

(2) The learned Sessions Judge released these petitioners on bail of Rs. 200/- each till the disposal of the appeal. I am told by the learned counsel for the State that the petitioners have not yet surrendered to their bail bonds in spite of the fact that their appeal was rejected on 22-6-51. The petitioner's counsel has admitted this fact. Without surrendering to their bail bonds after the rejection of their appeal as stated above, they have come to this Court on the revision side under S. 439, Criminal P. C. for setting aside the order thus passed and confirmed in appeal. They are still at large and not present in this Court at the time of hearing the petition. In fact they never presented themselves in this Court. On 13-8-51, after filing the present petition through their counsel, they were ordered to file an affidavit as required by the rules of this Court immediately. This was not done by them, but by one Taleb Ali who is not a petitioner himself. The way in which the petitioners have been behaving and avoiding so far to surrender to their bail bonds after the rejection of their appeal does not entitle them to be heard. They have not acted with bona fides and have not come to this Court with clean hands. When a convict comes to this Court on the revision side under S. 439, Criminal P. C. after the rejection of his appeal by the Sessions Judge, for setting aside his conviction without surrendering to his bail granted till the disposal of appeal, he has no right to be heard through his counsel. Under the circumstances this Court will not be justified in exercising its discretionary powers in favour of the petitioners.

(3) On facts, both the Courts below have concurred. It has been recently held by their Lordships of the Supreme Court, that the revisional powers of the High Court should not be exercised lightly. It could be exercised only in exceptional cases, where the interest of justice required interference for the correction of manifest illegalities or the prevention of gross miscarriage of justice. I find there is none of the kind in the present case. Even if it be said that the trial of this case was irregular in some way, no prejudice is shown to have resulted to the accused. This petition is rejected.

(4) The convict-petitioners are to surrender to their bail bonds immediately, and undergo their sentences.

Petition rejected.

K.S.

A. I. R. 1952 Tripura 6

LAKSHMI NARAIN ADDL. J. C.

Banka Chandra Laskar, Petitioner v. Shyama Chandra Chowdhury, Opposite Party.

Criminal Revn. No. 18 of 1950, D/- 17-9-51.

Criminal Procedure Code (1898), S. 439 — Concurrent finding of fact — Interference in revision.

While exercising revisional powers under Section 439, Cr. P. C. the Court will not interfere with concurrent finding of fact of the two lower Courts and set aside the conviction when no material error in proceeding or error in decision of fact or law which has ended in failure of justice has been shown to exist. (Paras 5, 6)

Anno: Cr. P. C., S. 439 N. 15.

Nani Gopal Paul, for Petitioner.

ORDER: This revision petition has arisen from the rejection of the accused's (Banka Chandra Laskar) appeal filed against his conviction and sentence for offences committed under Ss. 325/447, Penal Code, by the Sadar Magistrate on 29-12-58 T. E. The High Court of Tripura was then the Court of first Appeal only; second Appeal or Revision used to lie to the Judicial Committee of the Privy Council which stands abolished and the Judicial Commissioner's Court is now vested with such powers.

(2) This petition was filed on 5-8-50. The appellate Court's Judgment rejecting the appeal was announced on 11-3-59 T. E. The delay is explained in para 5 of the petition as due to the delayed decision of the application for permission to file a second Appeal to the Judicial Committee of the Privy Council which was required to be obtained according to R. 19(c)(d) of the Rules relating to Tripura Rajya Raj Sabha Bichar Committee (Judicial Committee of the Privy Council). It appears that the above application was filed on 18-3-59 T. E. in the appellate Court soon after the rejection of the appeal on 11-3-59 T.E. that is, within a week's time. In the meantime constitutional changes happened and the State was merged with the centre, resulting in the abolition of the Privy Council and the establishment of the Judicial Commissioner's Court. That application was rejected on 20-7-50 with the following remark:

"(Under the provisions of the Tripura (Courts) Order, 1950, the appellate Judgment of the old High Court is now to be treated as a Judgment of the Sessions Judge's Court. The only remedy that the petitioner can ask for is probably by way of a revision, in the light of the altered circumstances)".

(3) The above order was communicated to the Advocate of the petitioner on 25-7-50. The present petition for revision was filed on 5-8-50. Thus there is no unreasonable delay in filing the petition. The time spent in the disposal of the application for permission to file a second Appeal as required by the Rules then prevailing is not due to the petitioner's fault. He was proceeding into the matter diligently and with care. This petition is therefore filed within reasonable time and without undue delay. It is held accordingly.

(4) It is complained that on or about the 11th of Falgoon of 1357 T. E. Shri Shyama Charan Chowdhury, the complainant, was given beating by the accused and his companions after trespassing into his field where the complainant was ploughing, with an intention to drive him out from there. According to the prosecution Banka Chandra Laskar the present petitioner gave a stick blow on the head of the complainant resulting in its fracture. The above blow was given to the complainant after he had fallen down on receiving a stick blow from Suraj Mea co-accused. The injury on the head is proved to be a grievous hurt.

(5) During the course of arguments the learned Counsel of the petitioner has admitted that his client has given the blow as alleged, but has contended that it was done in the exercise of his right of private defence inasmuch as the complainant had trespassed into his land and would not leave his land. The matter is thus simplified to a great extent. The only point to be seen is whether the complainant was in his own land or on the land

of the accused when the alleged beating was given to him. Both the trial as well as the appellate Courts have found out that the place of occurrence was the land in possession of the complainant. There is nothing palpably wrong in this finding. I am unable to hold that it is erroneous. On the revision side there is little to interfere with the concurrent conclusion arrived at by both the trial and the appellate Courts on finding of fact. In the face of the above, the question of the exercise of right of private defence does not arise at all.

(6) No prejudice is shown to have resulted to the accused. It is not pointed out to the satisfaction of this Court that any material error in proceeding or error in decision of fact or law was committed which has ended in failure of justice.

(7) In the result this petition for revision is rejected. The petitioner shall surrender to his bail.

K.S. Revision petition rejected.

A. I. R. 1952 Tripura 7

LAKSHMI NARAIN ADDL. J. C.

Promode Chandra Dey, Petitioner v. State.

Criminal Appeal No. 9 of 1950, D/- 22-9-51.

(a) Tripura (Courts) Order (1950), Ss. 8 and 43 — Petition pending in Judicial Committee before commencement of Order — Abolition of Judicial Committee — Petition transferred to Court of Judicial Commissioner — Petition is entertainable by that Court. (Para 5)

(b) Penal Code (1860), S. 302 — Motive — Absence of.

In a murder case it is not obligatory on the prosecution to prove adequate motive for the crime. At the same time the absence of an apparent motive on the part of the accused in committing a murder is material when the question of sentence is concerned. The failure of the prosecution to establish motive is not sufficient to disbelieve eye-witnesses. AIR 1941 Mad 326, Ref. (Para 12)

Anno: Penal Code, S. 302 N. 14 Pt. 1.

(c) Penal Code (1860), S. 34 — Common intention — Question of fact — Proof — Inference.

Common intention is a question of fact. Proof of intention is matter of inference from circumstances. Direct evidence to prove the intention of any individual is very difficult, if not impossible. It has to be inferred from his action and conduct or other relevant circumstances of the case. (Para 13)

Anno: Penal Code, S. 34 N. 1.

Nibaran Chandra Ghosh, for Petitioner; Nagendra Nath Das Gupta, for the State.

REFERENCES: Courtwar/Chronological/ Paras.
('41) AIR 1941 Mad 326: (42 Cri LJ 558) 12

ORDER: This revision petition in the form of a second appeal has been filed by the petitioner Promode Chandra Dey, against the rejection of his appeal on 18-5-58 T. E. by their Lordships of the High Court of Judicature at Tripura. The appeal was filed against his conviction and sentence of R. I. for life under S. 302/34 Penal Code passed by the Sessions Judge of Agartala on 10-2-58 T. E.

(2) An objection was raised by the Government Advocate that this petition was not entertainable by this Court on the ground that the Judicial Committee of the Privy Council to which the petition laid and filed then, has already been abolished. On 6-3-50 the Hon'ble Judicial Commissioner for Tripura passed the order on this petition as follows:

"This has now been taken up by this Court with the corresponding jurisdiction."

and ordered it to be registered.

(3) The petition was filed in the Judicial Committee on 16-8-58 T. E. That Committee was abolished on 25-1-1950 A. D. S. 43 of the Tripura (Courts) Order reads as follows:

"43. Pending proceedings: (1) "Any proceeding pending in a Court immediately before the commencement of this Order shall, upon the commencement of this Order, be deemed to be transferred to the Court exercising the jurisdiction under this Order which corresponds as far as may be, to the jurisdiction of the Court in which the proceeding was pending, and the Court to which the proceeding is transferred shall proceed to try, hear and determine the matter as if it had been pending in that Court."

(2) "Any appeal from a decree, sentence or order passed by a Court and not appealed against before the commencement of this Order shall lie to the Court exercising the jurisdiction under this Order which corresponds, as far as may be, to the jurisdiction of the Court to which such appeal would have lain if this Order had not been made."

(3) "Any decree, sentence or order passed before the commencement of this order by any Court shall be deemed for the purpose of execution to have been passed by a Court constituted by this order which corresponds as far as may be to the Court which passed the decree, sentence or order, as the case may be."

Provided that nothing contained in sub-para. (1) of the sub-para. (2) shall be construed as extending the period of limitation to which any suit, appeal or application may be subject."

(4) Section 8 of the above Act (order?) runs thus:

"Civil and Criminal jurisdiction of the Court of the Judicial Commissioner save as otherwise provided by this order or any other law for the time being in force, the Court of the Judicial Commissioner shall be the highest Civil and Criminal Court of appeal and revision for Tripura."

(5) It follows therefore that this petition which was pending in the Judicial Committee, which was then the highest authority (Court) in Civil and Criminal matters, has been transferred to the Court of the Judicial Commissioner which has corresponding jurisdiction by virtue of S. 43 read with S. 8 of the Tripura (Courts) Order, 1950. The learned counsel for the petitioner has also drawn the attention of the Court to S. 6(b) (c) of the General Clauses Act which was also helpful. It is thus entertainable by this Court.

(6) The prosecution story is briefly as follows: Adjacent to the house of Abhimanyu Manya, co-accused in this case, there is a plot of land belonging to Rabindra (now deceased). It was cultivated by others on settlement basis. Abhimanyu's father also had occupied that land once before on the basis of Bandobast (settlement). Before the occurrence took place Rabindra had decided to cultivate himself from the month of Baisakh 1357 T. E. Abhimanyu Manya also wanted to take the 'Bandbast' of this land from Rabindra as non-resident tenant, but could not succeed in his effort. When Rabindra ploughed the land for a day, Mahendra made a proposal a day before the

occurrence, and offerred Rs. 400/- for 3 'kanis' of land. This was also refused. Mahendra threatened Rabindra with dire results by saying that he would teach him a good lesson. He instigated Abhimanyu whose house was adjacent to the land and who was also refused bandbast.

On the date of occurrence at about 8 a.m., or so, Rabindra accompanied by his younger brother Birendra and a relation Jogendra, went to till the land with plough etc. Immediately after Manya armed with a 'Jatha', Promode the present petitioner with a 'dao', and one Wazid with a 'lathi', reached the spot and forbade Rabindra to plough and commanded him to grant 'paikasta' (non-resident) settlement of the land to Manya. This was refused; altercation ensued resulting in Manya's striking the head of Rabindra with the handle of his 'jatha' and then scuffle followed between the two. Jogendra attempted to separate, in the meantime Promode struck him at the waist with the rod which had fallen from the hands of Manya. When Birendra proceeded to help his brother Rabindra, Promode removed him forcibly.

From Manya's house which was nearby, Mahendra and Raman shouted "Shalara Maria fala." Raman also said, "I shall pay whatever amount of money is required." They asked Manya's mother Gunamani Sil to provide a 'Jatha' to Manya for the purpose and threatened all others who had assembled, not to enter the land. Manya's mother approached him (Manya) with a 'Jatha', who was then sitting tight on Rabindra. Manya took the 'Jatha' from his mother and struck Rabindra on the chest. Rabindra wanted to rise grasping the thrusted 'Jatha', but could not. He fell down again. Promode and Wazid immediately reached him and pressed the 'jatha' deeper, then took it out and fled away. The other accused also took to their heels. People who assembled nearby reached Rabindra who was dying after receiving the fatal thrust.

(7) The prosecution in this case has produced about 9 eye-witnesses corroborating each other. Both the Courts (Trial and Appellate) have their full reliance on the testimony of the witnesses. It is not proved that they were in any way inimical to the accused or friendly with the deceased party. Out of these P. W. Surendra Ch. Dey is said to be a relative of Promode. The present petitioner Promode pleaded alibi, but did not produce any witness to prove it.

(8) The deposition of the investigating officer in this case has been discarded by both the trial and the appellate Courts. While discussing his evidence, the trial Court in his judgment has remarked as follows:

"In spite of the complainant's clear charge against Mahendra and Raman in the 'ejahar' (Mahendra's directions or ordering Manya to kill Rabindra, and his asking Manya's mother to supply Manya with the 'Jatha' were mentioned in the 1st information), the Sub-Inspector of Police having not arrested Mahendra after recording of 'ejahar', though he was present in the police station, it leads to the only conclusion that the Sub-Inspector of Police committed such a serious breach of duty, being gained over by offer of Mahendra's money. The most surprising fact is this that in spite of the complainant's aforesaid serious charge against Mahendra and Raman, the Sub-Inspector of Police stated in his deposition, "excepting the complainant, nobody told me about Mahendra and Raman having been present under the jack-fruit tree." This statement of the Sub-Inspector of Police is being falsified by the examination of the sketch, made by him, marked Ex. 13. In the sketch, the jack-fruit tree of Manya's house has been marked 'kha' and the distance of that place has been shown from the place of occurrence. In the 1st information, the complainant told about this jack-fruit tree."

(9) The comments on his evidence made by their Lordships of the High Court in the appellate Judgment run thus:

"Only P. W. 14 requires to be criticised. He is the Officer-in-Charge of the Kailasahar Police Station. The learned Sessions Judge has passed serious opinion about the evidence of this witness. It transpires from the evidence that immediately after the occurrence Mahendra went to the Police Station and had some secret consultation with him. It is also found that in spite of serious allegation against Mahendra and Raman, he showed much partiality to them. He did not at first, arrest Mahendra and even after the subsequent arrest of Mahendra this witness enlarged him on bail in an irresponsible manner. In the circumstances it cannot be expected that the investigation was conducted impartially and the evidence, properly recorded. Under the circumstances, the statements of the independent witnesses contradict the statement of the Thana Officer."

(10) As discussed above in the 2 judgments the evidence of this investigating officer in the case could not be relied upon and it has been rightly discarded.

(11) It has been pointed that in the F.I.R., there is no mention of the pressing of the 'jatha' into the chest of the deceased by Promode and that it was an afterthought. In the first place a F.I.R., need not be in detail. It is also not to be overlooked that Jogendra who made the report was himself injured and on that account was unable to remember or recite all the events in detail. The Sub-Inspector's attitude pointed out as above also comes to the forefront. Under the circumstances the absence of this detail in F.I.R., is not of help to the petitioner in the face of the overwhelming evidence of so many eye-witnesses whose impartiality is not challenged.

(12) It is argued by the learned counsel of the petitioner that Promode had no motive for the murder. In a murder case it is not obligatory on the prosecution to prove adequate motive for the crime. At the same time the absence of an apparent motive on the part of the accused in committing a murder is material when the question of sentence is concerned. In re 'SANKAPPA SHETTY', AIR 1941 Mad 326. The failure of the prosecution to establish motive is not sufficient to disbelieve eye-witnesses. In this case direct evidence of crime as deposed by the P.Ws. is quite strong and credible. Promode is a nephew of Mahendra and has been in quite cordial terms with Manya.

(13) The learned counsel of the petitioner has also pointed out some minor discrepancies between some statements of P.Ws. Suffice it to say that such minor discrepancies in matters of details do not count at all. It is but natural that they arise. Some comments are made on the use of the word 'common object', at some places in the judgment of the trial Court in place of 'common intention.' Such technicalities used not to be very much cared for in those days and specially during the time when the I.P.C. and Cr. P.C., were not in vogue in this State. Any way that does not affect the merits of the case.

'Common intention' is a question of fact. Both the Courts (trial and appellate) have reached the conclusion that the crime has been committed in furtherance of the 'common intention' of all the

accused, and that Section 34, I.P.C., applied to the case. Proof of intention is matter of inference from circumstances. Direct evidence to prove the intention of any individual is very difficult, if not impossible. It has to be inferred from their action and conduct or other relevant circumstances of the case. The appellate Court has concurred with the trial Court on the finding of fact. Nothing of any importance has been urged before this Court why that finding should not be upheld. It is upheld accordingly. It is proved that Promode pressed the spear further into the chest of Rabindra which accelerated his death. He has rightly been convicted for committing an offence under Section 302, I.P.C.

(14) Lastly the counsel for the petitioner has raised a point that a sentence of R.I., for life passed against his client is illegal and is not in conformity with the provision of Secton 302, I.P.C., and that no such sentence as R.I., for life is provided. It appears that the sentence under question was passed by the learned Sessions Judge at the time when another Penal Code of the State called 'Chalat Danda Bidhi' was prevailing. Indian Penal Code was then not in vogue. According to Section 8 of that Code, a sentence of R.I., for life is provided in case the culprit is ascertained, out of many, in the case of murder.

(15) The translation of the above section is thus rendered by the counsel of the petitioner.

"Section 8: If by such a wound one is killed, and if the culprits number many, then if the culprit whose blow had caused the death be not ascertained, then the accused will be sentenced to R.I., for years not exceedng 14, and if the culprit be ascertained then he will be sentenced to R.I. for life."

(16) Although Section 302/34, I.P.C., is quoted in the charge and order, still the sentence of R.I., for life cannot be ruled out in view of Section 8 of the 'Chalat Danda Bidhi' of the State then prevailing. So it cannot be said that there is any illegality in the sentence. But in view of the altered circumstances brought about by the advent of the new Constitution and application of the Indian Penal Code and Cr. P.C., to the State, it is but proper that the sentence should now be, in conformity with the provision of Section 302, I.P.C., under which the petitioner was charged and stands convicted. The sentence is, therefore, altered from R.I. for life to transportation for life.

(17) The petition is otherwise rejected.

V.R.B. Sentence altered.

A. I. R. 1952 TRIPURA 9

NARENDRA NATH SEN GUPTA J. C.

Dinesh Chandra and another, Appellants v. Janaki Nath, Respondent.

Second Appeal No. 6 of 1950, D/- 4-8-1950.

Civil P. C. (1908), O. 41, Rr. 17 and 30 — Appellant's advocate present in Court without instructions — Disposal of appeal.

When the appellant's advocate is merely present in the Court room without being prepared for arguing the appeal and without any instructions to proceed with the appeal, the appellant cannot be said to be present for the purpose of hearing of the appeal. In such a case the appeal can be disposed of only under the provision of O. 41, R. 17. An appeal can be disposed of on merits under R. 30 of O. 41 only after hearing he arguments of both the parties. The disposal of the appeal on merits in the absence of the appellant and without hearing the arguments for the appellant is not warranted by the provisions of the Code and is therefore illegal. (Para 5)

Anno: Civil P. C., O. 41, R. 17 N. 4 Pts. 2 to 6; R. 30 N. 1.

Nepal Chandra Roy, for Appellants; Nibaran Chandra Ghose, for Respondent.

JUDGMENT: This is an appeal against the appellate decree of the District Judge of Agartala, confirming a decree for 'khas' possession passed by the Additional Munsif of Agartala against the Detendant-Appellants.

(2) In the original suit out of which this appeal arises, the plaintiff sued the Defendants for 'khas' possession on the allegation that he had purchased the suit lands from one Chandra Mohan and that the defendants were mere licensees in possession refusing to vacate in spite of requests. The defence was a denial of the plaintiff's title over the suit lands with the further assertion that the defendants were the rightful owners of the suit lands by purchase from the same Chandra Mohan.

(3) The trial Court decreed the suit in favour of the plaintiff and the defendants preferred their appeal. On the date fixed for hearing of the appeal the Appellants applied for time on the ground that their Advocate was not prepared to argue the case. The learned District Judge rejected the prayer and heard the advocate for the respondent and dismissed the appeal on merits, giving rise to the present appeal.

(4) One of the grounds taken in this appeal was that the procedure followed by the learned District Judge at the disposal of the appeal was illegal and has prejudiced the appellants.

(5) It appears that the advocate for the appellants was in Court when the appellants' petition for time was rejected. It does not however appear that the appeal was "called on for hearing" after rejection of the prayer. When the appellants' advocate was merely present in the Court-room without being prepared for arguing the appeal and without any instructions to proceed with the appeal, the appellant cannot be said to be present for the purpose of hearing of the appeal. In such a case the appeal can be disposed of only under the provision of O. 41, R. 17 of the Code of Civil Procedure. An appeal can be disposed of on merits under R. 30 of O. 41 of the Code only after hearing the arguments of both the parties. The disposal of the appeal on merits in the absence of the appellants and without hearing the arguments for the appellants was not warranted by the provisions of the Code of Civil Procedure and is therefore illegal.

(6) It further appears that on 10-4-50, the appellants applied for the stay of execution of the decree but on the 11th of April 1950, the learned District Judge passed an order on the petition itself—"I see no ground for rehearing the appeal." Such an order could have been justified only after consideration of the merits of an application for readmission of the appeal under the provision of R. 19 of Order 41 of the Code of Civil Procedure. The order of the

learned District Judge was therefore clearly illegal and has clearly prejudiced the appellants.

(7) This Court cannot also fail to observe that the appeal was disposed of in a rather unusual haste. Cases are expected to be taken up normally according to their chronological order, as far as practicable, except of course when there is any special reason for taking up a case out of its turn. No such special reason is available on the record. Expedition in the hearing and disposal of cases is always to be encouraged but any special treatment must have strong grounds to support it.

(8) From what has been stated above the decree appealed against is liable to be set aside and it is not necessary to consider the other grounds taken in this appeal or the merits of the case.

(9) The appeal is allowed. The decree of the first appellate Court is set aside. The case will now go back to the learned District Judge, on remand, for disposal of the appeal according to law after giving the parties reasonable opportunities for arguments. Costs of this appeal will follow the result of the suit.

V.R.B. Appeal allowed.

A. I. R. 1952 TRIPURA 10

SEN GUPTA J. C.

Govt. of Tripura v. Abdul Gofur, Opposite Party.

Criminal Revn. No. 11 of 1951, D/- 20-3-1951.

Penal Code (1860), S. 302 — Sentence — Age of accused or distress to accused's family if extenuating circumstances — Criminal P. C. (1898), Ss. 367 and 439.

The accused, a young man of 21 years, committed a premeditated and cold-blooded murder of an aged man manifestly for having rendered assistance in the investigation of crimes. The accused was sentenced to transportation for life.

'Held' that the only punishment contemplated by law for such a case of deliberate and diabolical murder is the extreme penalty of death. The accused had attained sufficient maturity to understand the gravity of the offence and its normal consequences. Age alone is not, therefore, an extenuating circumstance. The possible distress in the family of the offender resultant on the execution of a legal sentence passed on him is not a matter which a Court of law is expected to consider in passing the sentence prescribed by law. (Sentence enhanced to one of death) 'AIR 1931 Lah 536, AIR 1934 Lah 786, AIR 1941 Lah 220; AIR 1943 Lah 89 Ref. (Paras 5, 10, 11)

Anno: Penal Code, S. 302, N. 6, 26.
Cri. P. C. S. 367 N. 14; S. 439 N. 29.

Priya Nath Banerji Govt. Advocate, for the State; Babu Chand Singha, for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras
('31) AIR 1931 Lah 536: (32 Cri LJ 645) 7
('34) AIR 1934 Lah 786: (36 Cri LJ 313) 7
('41) AIR 1941 Lah 220: (42 Cri LJ 614) 7
('43) AIR 1943 Lah 89: (44 Cri LJ 552) 7

ORDER: This Rule was issued upon the Opposite Party to show cause why the sentence of his transportation for life passed by the Sessions Judge of Agartala under Section 302, Penal Code,. in Sessions case No. 17 of 1950, should not be enhanced to one of death.

(2) The matter came to the notice of this Court on an appeal being filed by the opposite party against his conviction and sentence and the rule was issued during the pendency of the appeal. The appeal having been dismissed, the rule was heard after further notice to the opposite party and the State. The opposite party was represented by an Advocate of this Court, who had also conducted the appeal on his behalf. The State Advocate appeared to support the rule.

(3) Grounds put forward by the opposite party were, (1) that he was innocent, (2) that he was only 22 years of age and (3) that his family would be in distress if the sentence against him is executed. This cause was shown before the disposal of the appeal. The opposite party did not file any further application after the dismissal of his appeal.

(4) No argument was advanced in support of the first ground. The opposite party was convicted by the Sessions Judge agreeing with the majority of the assessors. His conviction was upheld on appeal. Nothing further could be said about the innocence of the opposite party.

(5) With regard to the second ground, it appears that the learned Sessions Judge inflicted the lesser sentence under Section 302, I.P.C. on the ground of the youth of the opposite party, although he held that the extreme penalty was the only punishment for the offence. The age of the opposite party is said to be 22 years in the cause shown but it appears from his statement before the Committing Magistrate, which was also made a part of the evidence of the Sessions Record, that he gave his age as 22 on 15-1-50. He was thus over 21 years at the commission of the offence. This is an age at which a normal man of this country and of the class to which the opposite party belongs attains sufficient maturity to understand the gravity of the offence committed by him and to know the normal consequences of his action. Age alone is not therefore an extenuating circumstance in this case.

(6) My attention was drawn to another circumstance on record. There are some materials to show that the opposite party had some companions when he committed the offence. It was argued that the opposite party might have committed the offence under their influence or at their instigation. There is however no material for coming to such a conclusion. On the other hand, there is evidence that no other person took any part in the actual commission of the offence and when Abdul Sobhan was stabbed the other men were at some distance from the opposite party.

(7) Several Rulings of the Lahore High Court were placed before me on behalf of the opposite party. These were 'SIKANDAR v. EMPEROR', AIR 1931 Lah 536; 'CHIRAG DIN v. EMPEROR', AIR 1934 Lah 786; MAGHAR SINGH v. EMPEROR', AIR 1941 Lah 220; NASIB SINGH v. EMPEROR', AIR 1943 Lah 89.

(8) It will be seen that in each of these cases the young accused was accompanied by elderly relations or others under whose influence the accused seems to have acted and, therefore, a more lenient view was taken in

awarding him the punishment of transportation for life instead of death.

(9) The present case stands on an altogether different footing and the rulings can have no effect on the decision of this case. Besides in two of the cases the accused were only 17 years, in one 18 or 19 years and in the fourth case 19 or 20 years of age. On account of the absence of any influence of the nature found in the reported cases and on account of the mature age of the opposite party, the principle applied in those cases cannot be followed here.

(10) In the present case, the opposite party, Abdul Gofur, has been found to have murdered an aged man, manifestly for having rendered assistance in the investigation of crimes. The murder was also premeditated and cold-blooded. The only punishment contemplated by the law for such a case of deliberate and diabolical murder is the extreme penalty provided by Section 302, I. P. C.

(11) The possible distress in the family of the offender resultant on the execution of a legal sentence passed on him is not a matter which a Court of Law is expected to consider in passing the sentence prescribed by law.

(12) The Rule is therefore made absolute. The sentence of transportation for life passed on the opposite party, Abdul Gofur, by the Sessions Judge of Agartala in Sessions case No. 17 of 1950, under section 302, Penal Code, is enhanced to one of death.

(13) Abdul Gofur, opposite party, shall be hanged by the neck till he is dead.

(14) Let this decision and order be certified to the Court of Sessions Judge, Agartala, for necessary action under Section 442 of the Code of Criminal Procedure.

C/ K.S. Sentence enhanced.

A. I. R. 1952 TRIPURA 11

SEN GUPTA J. C.

Smt. Eakubjan and others, Appellants v. Bidhu Bhusan and others, Respondents.

First Appeal No. 17 of 1950, D/- 2-7-1951.

(a) Tenancy Laws — Tripura Tenancy Act (1296 T. E., as amended in 1355 T. E.), S. 5 — Jote or rayati right — Section does not confer the status on Madhyabarti Proja.

A person who enjoys the income by settling his lands with others is designated Madhyabarti Proja (which seems to be similar to that of a tenure holder) in S. 7 of the Act; such a tenant has not the status of a jotedar or rayat under S. 5. (Para 12)

(b) Tenancy Laws — Tripura Tenancy Act (1296, T. E. as amended in 1355 T. E.), S. 6 — "Kole Jote' tenancy — Nature of.

The section does not intend that the "Kole jote" must be a tenancy under a cultivating tenant or a rayat. It is immaterial whether the Proja under whom it is held is a rayat or a Madhyabarti. (Para 15)

(c) Tenancy Laws — Tripura Tenancy Act (1296, T. E., as amended in 1355 T. E.), S. 6 — 'Korfa' — Incidents of tenancy — Liability of tenant for eviction — Burden of proof — (Bengal Tenancy Act (VIII (8) of 1885), Chapter VII) — (Evidence Act (1872), Ss. 101-103.)

The Tripura Tenancy Act does not define either the status or incidents of the Korfa tenancy. There is also no authority from the decisions of the old Tripura High Court to show that the tenancy is one at will and that the tenant can never acquire an occupancy right or on the other hand that he cannot be evicted on any account. Since no specific legal rights are provided by the Act itself they are to be governed by the agreed terms of the tenancy and the tenant can be evicted according to those terms. (Paras 15, 16, 17)

The plaintiff who alleges that the settlement of the land was taken on certain definite conditions should establish those conditions of the tenancy and the liability of the tenant to eviction under those conditions. When the conditions of the tenancy are not established, there can be no eviction for the breach of them. (Paras 18, 19)

When the plaintiff seeks to evict alleging that the tenancy is one at will according to a long established custom the onus would be on him to prove the custom and that heavily when the tenant sought to be evicted had admittedly been in long possession. (Para 20)

Where the local law is silent on any point the practise in the Tripura State permits the law in West Bengal being followed. The Korfa tenant would under the Bengal Tenancy Act (VIII (8) of 1885) be an under-rayat when the plaintiff seeking his eviction is a rayat but not when he is found to be otherwise. Nevertheless where the plaintiff claims rayati right the nearest approximation of the Korfa's right would be that of an under-rayat under Chapter VII of the Bengal Tenancy Act. He cannot be evicted, by the plaintiff who can claim no better right than that of a rayat under the Act, when there is nothing on record to show that he had rendered himself liable on any of the grounds on which an under-rayat can be evicted under the Bengal Act. (Paras 21, 22, 23)

Anno: Evidence Act, Ss. 101-103, N. 37.

(d) Tenancy Laws — Tripura Tenancy Act (1296 T. E., as amended in 1355 T. E.), S. 6 — Korfa Tenancy — Heritability — (Tenancy Laws — Bengal Tenancy Act (VIII (8) of 1885), S. 48 G (2)).

The Tripura Tenancy Act itself is silent on the question of the heritability or otherwise of a Korfa tenancy. Therefore when a contract or custom is not proved either way, a Korfa tenancy with an occupancy right must be held heritable, following the provisions of S. 48 G (2), Bengal Tenancy Act, by virtue of which the tenancy of an under-rayat with an occupancy right is inherited by his heirs exactly as the heirs of a rayat inherit under S. 26 of that Act. (Para 25)

(e) Tenancy Laws — Tripura Tenancy Act (1296 T. E., as amended in 1355 T. E.), Ss. 53, 68 to 76 — Right to acquire tenancy land. (Bengal Tenancy Act (VIII (8) of 1885), S. 84).

Under Ss. 68 to 76 of the Tripura Tenancy Act it is only the Sirkar or Bhumyadhikari who can acquire the lands of any tenancy. A

person who, within the definition of S. 4, is neither, has no right to acquire the tenancy land unless he can prove a contract or custom in support of his claim. Section 84, Bengal Tenancy Act, (VIII (8) of 1885) also cannot help when he has not framed his plaint in accordance with the provisions of that section and has also not obtained the necessary certificate from the Collector. (Para 26)

He cannot also invoke the provisions of S. 53, Tripura Tenancy Act, because that section authorises only a Bhumyadhikari to evict a non-occupancy tenant and he is not a Bhumyadhikari. (Para 27)

Nagendra Nath Roy and Manoranjan Chowdhury, for Appellants; Nibaran Chandra Ghose and Ramesh Chandra Bhattacharyya, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
A. No. 11 of 1354 T. E. (Tripura) 16
('50) S. A. No. 11 of 1950 (Tripura) 16, 27

JUDGMENT: This is an appeal by two of the defendants against a decree for their eviction passed by the Hon'ble Judge, Original Side, of the old High Court of Tripura which now corresponds to the Court of the Subordinate Judge of Agartala.

(2) Normally, the appeal would have been heard by the District Judge of Agartala but as the present incumbent had himself tried the original suit out of which this appeal arises, it was withdrawn to this Court for disposal.

(3) In the original suit, the plaintiff sought to evict the original defendant, husband of the present appellant No. 1, and grandfather of appellant No. 2, on the grounds: (1) that the plaintiff had jote or raiti right over the suit lands which the original defendant held in Korfa right—tenancy at will — under him but did not vacate in spite of verbal notice, (2) that the defendant had taken settlement of the lands from the plaintiff on condition (a) that he would keep the boundaries of the lands intact, (b) that he would effect improvements thereof, (c) that he would pay rents regularly, (d) that he would not alter the nature of the land, and (e) that he would vacate on demand, and that he had broken all the conditions of the tenancy; (3) that the plaintiff now required the lands for his own use for construction of houses and for growing fruits and vegetables thereon.

(4) The defence of the original defendant was that the plaintiff was a tenure-holder — Madhyabarti Proja — and the defendant having cultivated the lands on payment of rents for over 40 years had acquired all the rights of an occupancy rayat, that he did not take settlements of the lands on the conditions alleged and did not break any of such conditions and that he was not liable to eviction on verbal notice like a tenant-at-will.

(5) On the death of the original defendant, his successors-in-interest, including the present appellants were brought on record and a fresh claim for the eviction of the substituted defendants was added by amendment of the plaint, alleging that the tenancy not being heritable, was liable to automatic termination, and a decree for eviction was not sustainable on any account.

(6) The trial Court held that the plaintiff had rayati right over the lands over which the defendants had Korfa right only and as such they were tenants-at-will and liable to eviction without notice. The suit was therefore decreed and the defendants were allowed some time to take away the standing crops and remove their houses, and this has led to the present appeal.

(7) The main contention of the appellants before this Court was that the appellants had occupancy right over the suit lands although their tenancy is designated Korfa as the plaintiff-respondent was only a Madhyabarti Proja and not a cultivating rayat according to the evidence on record. They further claimed that the tenancy was heritable and the heirs of the original Korfa tenant were not therefore liable to eviction on the materials before the Court.

(8) With regard to the status of the plaintiff the observation of the trial Court is as follows:

"It appears on an examination of the evidence of the parties and their witnesses and the documents filed—Khatians, Rent-receipts and counterfoils thereof that the plaintiff is Krishijibi (one who lives on agriculture) and he has jote right over the lands."

(9) Quite a number of witnesses appear to have been examined by the parties in this case. It is unfortunate that there is not a more detailed analysis of the evidence which is always expected from a Court of first instance that sees the witnesses and is in a position to carry an impression about their reliability or otherwise.

(10) A Jote right, meaning a Rayati right, was nowhere defined in the Tripura Tenancy Act of 1296 T. E., the first enactment of the State relating to the relationship of landlords and tenants. "Chashi Proja" was defined in S. 5 of the Act as "a tenant who cultivates his own land and pays rent either to the 'Sarkar' (State) or a 'Bhumydhikari." A tenant must till his own land to come within the definition of 'Chashi Proja' under S. 5. Under S. 8 of this Act a 'Chashi Proja' acquired occupancy right by continuous possession for seven years on regular payment of rent.

(11) The Act of 1296 T. E. was amended in 1355 T. E. By this amendment, S. 5 was expanded and the following words were added to the old Section, viz., "and he will be deemed to have acquired jote or Rayati right over the land in his possession." Simultaneously with the expansion of S. 5, the old S. 8 was omitted with retrospective effect along with some other sections. The amendment did not alter the position that one must be a cultivator in order to acquire the status of a 'Chashi Proja' who alone has jote or Rayati right under s. 5 of the amended Act.

(12) It should be noted in this connection that a member of any of the higher classes of the society (viz., the Bhadralok class) who enjoys the income by settling his lands with others was designated Madhyabarti Proja (which seems to be similar to that of a tenure holder) in S. 7 of the Tripura Tenancy Act and apparently such a tenant has not the status of a Jotedar or Rayat within the meaning of S. 5 of the Act.

(13) Coming now to the evidence about the Plaintiff's tenancy, the Plaintiff states that he is 'Krishijibi', i.e., he lives on agriculture, not

that he cultivates his own land; his witness, Kali Prosanna Bhattacharyya states that the plaintiff belongs to the Bhadralok class, meaning thereby that he does not cultivate his land and his witness, Bepin Behari Mojumdar admitted that the plaintiff never cultivated any land. The defence witnesses also state that the plaintiff is not a cultivating tenant, and never cultivated any land. The oral evidence is therefore clearly against the finding that the plaintiff is a 'Chashi Proja.'

(14) In the settlement records, the plaintiff's tenancy has been recorded as a Jote. But these records are dated 1348 T. E. At that time 'jote' was used practically for indicating any tenancy. The special significance of jote as a Rayati was for the first time introduced by the amending Act of 1355 T. E. That jote was used without any special significance is also available from the rent receipts and counterfoils filed on behalf of the plaintiff in which the tenancy of the original defendant was described as jote or Korfa jote. The documentary evidence is not therefore of any use in finding the status of the plaintiff in this case.

(14a) The oral evidence already discussed shows that the plaintiff is a 'Madhyabarti Proja' and not a cultivating tenant or a Rayat and as the documentary evidence or circumstances do not run counter to this I hold that the plaintiff is not a Rayat but only a 'Madhyabarti Proja.'

(15) Coming now to the status of the original defendant, it is admitted that his tenancy was designated as a 'Korfa' or 'Korfa' Jote. A 'Korfa' is defined in S. 6 of the Tripura Tenancy Act as a cultivating tenant holding 'Kole Jote' under another tenant or Proja. It is immaterial whether such Proja is a Rayat or Madhyabarti Proja. The expression 'Kole Jote' has not been defined anywhere in the Act. As the expression 'jote' itself was vague under the T. T. Act of 1296 T. E., it is also not possible to hold that a 'kole jote' must be held under a Rayat. If it was intended that a 'kole jote' must be tenancy under a cultivating tenant or Rayat we would have expected the expression 'Kono Chashi Proja' instead of 'Anya Proja' in S. 6. It will thus appear that as the mere fact that the original defendant was a 'Korfa' tenant or a 'kole jotedar' under the plaintiff does not lead to the conclusion that the status of the plaintiff is that of a Rayat, so also the mere fact that the original defendant held under a 'Madhyabarti Proja' does not make his 'Korfa' right a Rayati. In fact the status of a 'Korfa' tenancy is nowhere defined in the Act and its incidents must be gathered from other sources.

(16) The trial Court relied on the decision of the appellate side of the old High Court of Tripura in Appeal No. 11 of 1354 T. E. 'ASWINI KUMAR v. SURENDRA CHANDRA', in holding that a 'Korfa' was a tenancy-at-will. The original suit out of which that appeal arose was for recovery of arrears of rent and for eviction of the tenant on ground of non-payment of rent under the old S. 67 of the T. T. Act, 1296 T. E. which was renumbered S. 52 by the amendment of the Act in 1355 T. E. It will appear from this section that it is applicable to all classes of tenants irrespective of their status. So the only question that could be decided in that appeal was whether the defendant in that suit was protected by reason of his having been in long possession of the land. No doubt the defendant in that instance was a 'Korfa' tenant but the observation would be equally applicable to all classes of tenants with or without occupancy right. The question about the right or status of a Korfa tenant was therefore unnecessary for the decision of that appeal. The decision in that appeal cannot, therefore, be an authority in holding that a 'Korfa' tenant can never acquire occupancy right in the land cultivated by him.

This view was also expressed in a ruling of this Court in the case of 'ABDUL KHELEQUE v. TIKENDRA CHANDRA', Second Appeal No. 11 of 1950 and apparently this ruling must prevail over the obiter dictum in the decision of the old High Court in 'ASWINI KUMAR SARKAR'S CASE'. The decision in 'ABDUL KHALEQUE'S CASE' is not however an authority for holding that a Korfa tenant is not liable to eviction on any account but only an authority for holding that he is not liable to eviction except by a suit specially framed for the purpose according to the provisions of law.

(17) There can be no doubt that in the absence of any specific legal right provided in the Tripura Tenancy Act, a Korfa tenant is liable for eviction according to the agreed terms of the tenancy.

(18) The plaintiff in this case alleged that the Korfa tenant took settlement of the lands under certain definite conditions. This was however denied in defence. The onus is thus upon the plaintiff to establish the conditions of the tenancy and also the liability of the tenant's eviction under those conditions. There is no discussion in the judgment of the trial Court about the existence of any such terms. But this is obviously because there is absolutely no evidence on the point on behalf of the plaintiff.

(19) Conditions of tenancy not having been proved there can be no eviction on ground of breach of any of the alleged conditions.

(20) Attempt was made to establish a custom under which 'Korfa' tenants are held to be tenants-at-will liable to eviction without notice. Here also, as the tenants have admittedly been in long possession of the land, for about 25 years according to the plaintiff and for about 40 years according to the defendants, the onus of proving the custom lay heavily upon the plaintiff. The plaintiff has however produced only some witnesses who have 'Korfa' tenants under them and are interested in the decision in support of the plaintiff. Their evidence is challenged by an equally interested set of 'Korfa' tenants who are naturally keen on establishing their own rights. The evidence of custom is in the circumstances considered inadequate for a decision in support of the plaintiff's contention.

(21) It has been argued on behalf of the respondents that as the local law is silent on the point, the corresponding law prevailing in West Bengal should be followed, according to the long standing practice prevailing in this State, in determining the incidents of 'Korfa' tenancy held by them.

(22) There can be no objection to the acceptance of the long standing practice but it is difficult to find an exact counterpart of a 'Korfa' tenancy of Tripura in Bengal Tenancy Act.

(23) It was argued that a 'Korfa' tenancy should be held as identical with an under-

rayat of Bengal. But while a 'Korfa' in Tripura can be a tenancy under any kind of tenant an under-rayat in Bengal is a tenant who holds only under a rayat, mediately or immediately. In the present case, the defendants would be under-rayats according to the Bengal Tenancy Act if the plaintiff was a rayat or an under-rayat himself but he does not, according to the finding already arrived at, come under any of these categories. Nevertheless, as the plaintiff claims rayati right, the nearest approximation of the right of the defendants would be those of under-rayats. The plaintiff cannot on any account appear to be entitled to claim any better right over the defendants than a rayat in Bengal has over an under-rayat under him. The incidents of an under-rayati in Bengal are available in Chapter VII of the Bengal Tenancy Act, 1885. Accepting that these incidents are attached to the 'Korfa' tenancy in Tripura, there is nothing on the record to show that the defendants have rendered themselves liable to eviction on any grounds on which an under-rayat is liable to eviction from his lands, in Bengal.

(24) On a careful examination of the evidence on record and also after anxious consideration of the legal implications, this Court is clearly of the opinion, that the plaintiff has failed to make out a case for eviction either according to any legal provision, custom or contract.

(25) The last point that remains to be determined is whether a 'Korfa' tenancy is heritable and whether the defendants could inherit the 'Korfa' from the original tenant. Here also the Tripura Tenancy Act is silent, and no custom or contract has been proved either way. We have therefore to fall back, again for inspiration upon the Bengal Tenancy Act. Under that Act, an under-rayat with occupancy right, has, as regards his immediate landlord, all the rights and liabilities of a rayat with a right of occupancy, as set forth in Sub-s. (2) of S. 48-G of the Act. Under this provision the heirs of an under-rayat inherit the tenancy exactly as the heirs of a rayat does by virtue of the provision in S. 26 of the Act. Following the provisions of the Bengal Tenancy Act therefore the 'Korfa' tenancy in suit must be held to be heritable. The plaintiff-respondents cannot, therefore, claim to evict the present defendants on the ground of non-heritability of 'Korfa' right.

(26) The next question to be considered is whether the plaintiff is entitled to make the suit lands khas on the ground that he requires them for the construction of his homestead and orchard. There is no provision in the Tripura Tenancy Act under which anybody other than the Sarkar (the State) or a 'Bhumyadhikari' can acquire the lands of any tenancy under the provisions of Ss. 68 to 76 (old Ss. 83 to 91) and the plaintiff is neither the Sarkar nor a 'Bhumyadhikari' within the definition of S. 4 of the T. T. Act. No custom or contract has also been proved in support of the alleged right to acquire the tenant's land. There is a provision in S. 84 of the Bengal Tenancy Act for acquisition of land of a tenancy for certain purposes, on payment of compensation. But the plaint in this case has not been framed according to that provision nor has the necessary certificate of the Collector been furnished, and the plaintiff cannot, therefore, get his relief by the application of this provision of the B. T. Act.

(27) I may note incidentally that a faint attempt was made in this case for the application of S. 53 (old S. 68) of the Tripura Tenancy Act. But this section authorises only a 'Bhumyadhikari' to evict a non-occupancy tenant, and the plaintiff-respondent is not certainly a 'Bhumyadhikary', as already observed, within the meaning of the Act, and it is not possible to stretch the meaning of 'Bhumyadhikary' for benefit as has been clearly held in the case of 'ABDUL KHELEQUE', Second Appeal No. 11 of 1950 of this Court.

(28) Examining the case from all points of view therefore I do not find it possible to uphold the decision of the trial Court which must therefore be set aside.

(29) Before I conclude I consider it necessary to draw the attention of the appropriate authorities to the extremely unsatisfactory and inadequate provisions of the Tripura Tenancy Act. The Act was brought into operation at a time when cultivating classes had just begun to come to the State for taking up their permanent residence here. During the period of more than sixty years that have passed since then, many complications are showing themselves up and the only short amendments introduced since the promulgation of the Act of 1296 T. E. were insufficient for their removal. The old High Court of Tripura had also drawn the attention of the authorities to the undesirable consequences of the defective legislation but without any effect. It is high time however that the tenancy law of the land is thoroughly revised and put on a satisfactory basis to meet the growing needs, particularly of the cultivating classes and others interested in the use and occupation of the land.

(30) The appeal is allowed and the decree of the trial Court set aside. The suit will stand dismissed with costs to the appellants before both the Courts.

B/ M.K.S. Appeal allowed.

A. I. R. 1952 TRIPURA 14

NARENDRA NATH SEN GUPTA J. C.

Aghor Ch. Dev Barma, Petitioner v. Govt. of Tripura, Opposite Party.

Criminal Revision Case No. 2 of 1951. D/- 5-2-1951.

(a) Criminal P. C. (1898), Ss. 173 (1) (a), 190 (1) (b) and 537 — Police report not conforming to S. 173 (1) (a) — Cognizance of offence cannot be taken by Magistrate.

Where a Magistrate took cognizance on a charge sheet submitted by a Police Officer which merely referred to the first information report but did not contain the statement of facts constituting the offences nor did it conform to the provisions of S. 173 (1) (a), Cr. P. C.:

Held that the taking cognizance of the case on the basis of such a defective charge sheet was illegal and the proceedings were quashed. 37 Cal 49; AIR 1924 Cal 476 and AIR 1930 Bom 372, Rel. on; AIR 1937 Pat 160, dist. (Para 4)

(2) That the defect was not curable under S. 537, Cr. P. C. as it had occasioned failure of justice. (Para 12)

Anno: Cr. P. C., S. 173 N. 7, S. 190 N. 20 Pt. 15.

(b) Criminal P. C. (1898), S. 537 — Irregularity in trial — Wrong practice of court followed in good faith or failure of accused to raise objection — Irregularity is not cured.

The mere fact that a wrong practice is long standing in a Court cannot cure a defect not warranted by law nor can an illegal action be held to be legal because it is done in good faith. (Para 5)

It is a fundamental mistake to consider that a legal defect can be cured if the accused does not point out such mistake to the Court. No principle of the nature of waiver, acquiescence or estoppel can arise against the accused in criminal cases and legal consequence must follow all actions and decisions of the Courts whether the accused does or does not raise objection at an earlier stage. (Para 7)

Anno: Cr. P. C., S. 537 N. 33.

(c) Criminal P. C. (1898), S. 529 — Applicability — Section does not apply where Magistrate is empowered to take cognizance under S. 190, Cr. P. C. **(Para 9)**

Anno: Cr. P. C., S. 529 N. 1.

Nagendra Nath Roy; Lalit Mohan Dev Barma; and Bir Chandra Dev Barma, for Petitioner; Priya Nath Banerji, Govt. Advocate, for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras

('30) AIR 1930 Bom 372: (31 Cri LJ 1142) 11
('10) 37 Cal 49: (11 Cri LJ 145) 11
('24) AIR 1924 Cal 476: (25 Cri LJ 732) 11
('37) AIR 1937 Pat 160: (38 Cri LJ 94) 10

JUDGMENT: This is an application for revision of an order of the Sub-Divisional Magistrate of Agartala taking cognizance of a case against the Petitioner on the ground that the action of the Magistrate was illegal and for quashing the proceedings based on such cognizance.

(2) It appears that the learned Magistrate took cognizance on a charge-sheet submitted by the officer in charge of the Kotwali Police Station, in which there is a reference to a first information—No. 33 dated 17-4-50. The charge sheet does not conform to the provision of Section 173 (1) (a) nor does it contain the statement of the facts constituting the offences indicated by the sections of the Indian Penal Code noted in column 7 thereof, namely:—143, 447, 364, 302/34 I. P. C. as required by section 190 (1) (b), Cr. P. C.

(3) The main contention of petitioner is that the action of the Magistrate was illegal and the proceedings were liable to be quashed.

(4) A Rule was issued and in showing cause why the proceedings should not be quashed the learned Magistrate stated as follows:—

"it is a long standing practice here to submit charge-sheet by the Police, simply quoting the section under which the accused is sent up for trial. In pursuance of that practice the offences stipulated in the charge-sheet have been taken cognizance."

He went on to say that

"it was a legal error, it was done in good faith and as such the defect is curable under Section 529, Cr. P. C."

(5) The mere fact that a practice was long standing cannot cure a defect which is not warranted by the law. The Indian Criminal Procedure Code was brought into operation quite a long time ago and the defect in the practice should have been set right long before the present proceedings started. An illegal action cannot also be held to be legal on the ground that it was done in good faith.

(6) It appears that the petitioner had moved the Sessions Judge of Agartala for a relief but the learned Judge observed as follows:

"On consulting the record, I find that cognizance of the offence was taken by the Magistrate on 8-12-50 when the accused persons were present in the Court. No objection was taken on behalf of the accused on that date that the Magistrate acted illegally by taking cognizance of the offence on the Police-report which contained no statement of facts constituting the offence. I therefore find that this proceeding was taken by the Magistrate and also completed by him erroneously and in good faith on 8-12-50 and want of authority on the part of the Magistrate was not pointed out to the Magistrate though the accused was present before him on that date. This defect was therefore cured according to the provisions of Sub-section (e) of Section 529, Cri. P. C."

(7) The learned Sessions Judge made a fundamental mistake in considering that a legal defect can be cured if the accused does not point out such mistake to the Court. No principle of the nature of waiver, acquiescence or estoppel can arise against the accused in criminal cases and legal consequence must follow all actions and decisions of the Courts whether the accused does or does not raise objection at an earlier stage.

(8) It is also not understood why the aid of Section 529, Cr. P. C., has been invoked by the trial Court and the learned Sessions Judge in seeking to cure the defect in the action of the learned Magistrate. The relevant portion of Sec. 529 Cr. P. C., reads as follows:

"If any Magistrate not empowered by law to do any of the following things, namely:

* * *

(e) to take cognizance of an offence under Section 190, sub-section (1), clause (a) or clause (b);

* * *

erroneously in good faith does that thing, his proceedings shall not be set aside on the ground of his not being so empowered."

(9) In the present case, the Magistrate was unquestionably empowered under Section 190 of the Cr. P. Code to take cognizance under sub-section (1) clause (a) and clause (b). There can, therefore be no question of curing any defect arising out of absence of the requisite power and Sec. 529 cannot therefore be attracted.

(10) That there has been non-compliance with the provisions of Sec. 173 (1) (a) as also of Section 190 (1) (b) is clear on the face of the charge-sheet and is not disputed. The learned State Advocate contended that the F. I. R., the number whereof has been noted on the charge-sheet, should be treated as a part of the charge-sheet. In support of his contention, he has referred to the ruling of the Patna High Court in the case of 'HEMENDRA NATH v. EMPEROR', AIR 1937 Pat 160, at p. 163. It appears from the ruling however that although the facts constituting the offence "were not actually written out in the

document called the charge sheet, they were contained in a document annexed to the charge sheet" and this was, in the opinion of the Hon'ble Judge, a sufficient compliance with the requirements of Sec. 190 (1) (b) of the Cr. P. C. It appears from the record of the present case F. I. R. mentioned in the charge-sheet was not appended or annexed thereto. Further the so called F. I. R. does not contain any statement of facts constituting the offence mentioned in the charge sheet. The ruling is not therefore applicable to the present case. The Magistrate does not also say that cognizance was taken on this or any other information.

(11) The present case seems to be covered by the Ruling in 'LEE v. ADHIKARY', 37 Cal 49; 'NAGENDRA NATH v. EMPEROR', AIR 1924 Cal 476 at p. 479 & in 'RE, SHIVLINGAPPA BHAGAPPA', AIR 1930 Bom 372. The recent amendment of sub-section (1) clause (b) of section 190, Cr. P. C., in 1923 did not alter the spirit of the law in any way. On the authority of the rulings referred to above, this Court is of the opinion that the taking of cognizance of the case against the petitioner on the basis of the defective charge sheet was illegal.

(12) The learned State Advocate contended that the provision of Section 537, Cri. P. C. should apply to the present case. All I need say in this connection is that in none of the rulings referred to above non-compliance with the provisions of S. 173 (1) (a) or S. 190 (1) (b) of the Criminal Procedure Code was held to be a defect curable under the provision of Section 537 of the Code and in all those cases the proceedings were quashed on account of these defects. It is difficult to say also that the illegality has not occasioned any failure of justice. Justice requires that the accused should know the facts constituting the offence of which cognizance is being taken by the Magistrate so that he might be in a position to raise objections at the earliest opportunity and it is for this purpose among others that a mandatory provision has been made in the law for a statement of such facts in the charge sheet or in any other form of report or information. Non-compliance with the mandatory provisions cannot therefore be cured by the provision of Section 537, Cr. P. Code.. so far as the present case is concerned.

(13) From what has been stated above, this Court is clearly of opinion that cognizance taken by the learned Magistrate was illegal and the proceedings based on such cognizance must be quashed.

(14) The proceedings before the Magistrate are therefore quashed and it is ordered that the accused be discharged immediately. Send copies of the order to the subdivisional Magistrate, Agartala and the Superintendent of the Central Jail for immediate compliance.

Rule made absolute.

C/ D.R.R.

A. I. R. 1952 TRIPURA 16

NARENDRA NATH SEN GUPTA J. C.

In re Sona Mia, Convict, Opposite Party.

Criminal Revision Case No. 14 of 1951, D/- 30-4-1951.

(a) **Criminal P. C. (1898), S. 439 — Power to call for additional evidence.**

Where the accused who had the opportunity to adduce evidence in support of his plea of alibi did not adduce any evidence in the Sessions Court in support of the plea nor did he raise the point in the appeal against his conviction he cannot be allowed to call such additional evidence at the late stage of revision against the conviction. (Para 13)

Anno: Cr. P. C., S. 439 N. 1.

(b) Penal Code (1860), S. 302 — Sentence — Accused convicted of murdering an old man of 75 years in cruel manner — Court should state the extenuating circumstances for not imposing the normal punishment of death provided by law — Accused a normal man capable of understanding the gravity of the offence and the consequences of his act — Sessions Judge merely observing that taking into consideration the surrounding circumstances the culture and education of accused a sentence of transportation would meet the requirements of justice — Sentence held inadequate and enhanced to one of death in revision — (Criminal P. C. (1898), Ss. 367, 439). (Paras 21, 22 and 23)

Anno: Penal Code, S. 302 N. 26, 28; Cr. P. C., S. 367 N. 14; S. 439 N. 29.

Priya Nath Banerji, Government Advocate, for State; Abdul Aziz Munshi, for Opposite Party.

ORDER: Sona Mea appealed to this Court against his conviction under Section 302, I. P. C., by the Sessions Judge of Agartala, sentencing him to transportation for life. The appeal was dismissed and a notice was issued upon Sona Mea by this Court, in exercise of its revisional powers under Section 439, Cr. P. Code, to show cause why his sentence should not be enhanced to one of capital punishment.

(2) Cause has accordingly been shown.

(3) At the hearing of the matter, Sona Mea was represented by one of the senior Advocates of this Court. The State Advocate appeared in support of the rule.

(4) The following points were put forward on behalf of the accused who filed a written statement:

(1) That the only witnesses against the convict were the wife and the two sons of the deceased. Of these the first named had a grudge against the convict and her two sons were tutored to implicate him falsely.

(2) That the wife of the deceased, Nur Chehara had herself murdered her husband and implicated the convict with the help of her sons in order to save herself.

(3) That the convict did not get facilities for producing witnesses to prove the alibi set up by him in defence.

(5) Although the first two points were discussed generally at the hearing of the appeal it is desirable to make some further comments thereon.

(6) It has been stated by the convict in his written statement that the deceased was an old man of 75 & his wife Nur Chehara P. W. 2 was aged about 30 years and had a bad character: that they were in the habit of quarrelling with each other and Noor Chehara had on two occasions attempted to murder her husband by throwing him under the Dhenki and on each occasion he was saved by the intervention of the convict and Abdul Hashim and that on each occasion of the quarrel between the husband and the wife the convict had managed to bring about a settlement: That for the

reasons referred to above Noor Chehara had a grudge against the convict and that on account of such grudge, Noor Chehara had falsely implicated the convict with the help of her sons after murdering her own husband.

(7) As was already noted in the appellate judgment, this defence was not taken by the convict himself but was suggested to the witnesses for the prosecution, on his behalf. Noor Chehara and Abdul Gani, her son, flatly denied the allegations. Abdul Odud Munshi P. W. 5 and his son Abdul Hashim P. W. 6 the nearest neighbours of the deceased would normally be the persons to know if there was any difference between the deceased and his wife. The former denied the existence of any such ill feeling. No question was asked to the latter about this point, although according to the written statement of the convict Abdul Hashim was said to have saved the life of Pohorchand from attacks of Noor Chehara with the help of the present convict on two occasions. There is no other witness to prove the story of ill feelings alleged in defence. The story of Noor Chehara having murdered her husband has not been proved and is improbable.

(8) So far as the allegation of the sons of Noor Chehara being tutored witnesses, this Court does not consider this a credible story.

(9) The learned Sessions Judge and the assessors saw the minor sons of Noor Chehara & appear to have relied on them. They must have been found to be intelligent and dependable, in spite of their age being tender. This Court also did not find any material indicating any tutoring as alleged. Besides the evidence of the other witnesses who came to the place of occurrence and were told of the details of the occurrence soon after the happenings shows that there was no time for manipulation or tutoring of the witnesses for getting up a false case for the purpose of implicating the convict falsely.

(10) On an anxious consideration of the allegations of the convict Sona Mea this Court is clearly of opinion that the first two points raised are unsubstantial and unacceptable.

(11) On the third point it appears that a list of witnesses was filed on behalf of the accused before the committing Court. No witnesses for the defence however appeared before the Sessions Court. Nevertheless, there is nothing to show that the accused really intended to examine any witnesses before the Sessions Court or required their attendance in that Court. If the accused wanted to prove alibi, he would have certainly expressed his intention to do so in some form or other before the Sessions Court. Nothing was however done and advantage was taken of the right of reply before the Sessions Court showing thereby that production of evidence was considered useless. It cannot, under the circumstances, be said that the convict had no facilities for production of witnesses for proving his alibi.

(12) It is worthy of note that the accused did not take this point seriously as a ground of appeal. Further, it appears that the convict had in his statement before this Court named persons other than those named by him before the Committing Magistrate. They are Atarjjama Sarder, Mabatali and Abdul Hashim. Their residences have not been given but apparently they are residents of Murapara where the convict stated he was staying during the night of occurrence. One Attarjama of Murapara has already been examined for the prosecution. He was not however asked any question about this plea of alibi. Mahabatali and Abdul Hashim also deposed for the prosecution but they belong to Mogh Puskarini.

(13) This Court is of the opinion that the prayer for calling witnesses at this late stage after the conviction has been upheld on appeal cannot be allowed.

(14) With regard to the plea of alibi, the statement of the convict is that on the night of occurrence he was in his old house at Murapara which was about 4 miles from Mogh Puskarini where the murder was committed. He stated that he had gone there in the evening in search of labourers but as it became late and as the way back lay through jungles and was frequented by wild animals he did not return home that night. That he was absent from his house after the occurrence has been proved by some of the prosecution witnesses but the evidence of Abdul Odud Munshi P. W. 5 is that the accused had come to his house after candle light the same evening. If the way to his old house was jungly and was frequented by wild animals the accused would not have ventured to take the journey after nightfall unless there was some pressing necessity. Search for labourers does not prima facie seem to be such a necessity. On the other hand, running away from his house after commission of the offence seem to fit in with the prosecution evidence which was relied on by the assessors, the learned Sessions Judge and this Court at the hearing of the appeal.

(15) The third point raised by the convict does not thus help him in any way.

(16) While admitting that this point has already been considered in the appellate judgment of this Court, the learned Advocate for the convict thought that the question of correct identification of the convict as murderer is worth re-consideration. He considered that the story of identifiation of the accused as the murderer, by the light of a Bati (lamp) as stated in the First Information Report being in conflict with the evidence about recognition by the light of the Dhuni (burning logs) the entire story of identification should be discarded. This point was discussed at some length in the appellate judgment and no recapitulation of the discussion is necessary. It was clearly found that it was possible for the eye-witnesses to identify the accused under the prevailing conditions. The accused was neighbour of the eye-witnesses. Whoever inflicted the three blows on Pohorchand's head, and struggled with Abdul Gani and Noor Chehara as deposed by them, must have been at the spot for a sufficiently long time to enable identification, by the light of the burning logs. Such identification would normally be much easier if the person to be identified is a neighbour whose features and movements would be well known. Taking all the facts and circumstances into further consideration, I do not find any room for reasonable doubt about the correctness of the identification of the convict as the murderer of Pohorchand.

(17) Coming now to the question of punishment it is necessary to quote the observation

of the learned Sessions Judge in this connection. The observation is as follows:

"Sentence of death is the only punishment according to the provision of the Indian Penal Code for such a case of deliberate and cruel murder. Nevertheless after consideration of the education and culture of the accused and all surrounding circumstances, I think that the prestige of law and justice will not suffer if a sentence of transportation for life is awarded to the present accused instead of a sentence of death. It is therefore ordered that the present accused is sentenced to transportation for life under Section 302 I. P. C., for having committed the offence of murder with knowledge."

(18) It has been pointed out by the learned State Advocate that there is no material on record about the education and culture of the accused.

(19) There is also nothing on the record to show how the education and culture of the accused mitigated the offence and warranted the lesser sentence.

(20) The actual surrounding circumstances which were considered by the learned Sessions Judge, in deciding upon the award of the lesser sentence, have not also been indicated anywhere in the judgment.

(21) After holding that death sentence was the only punishment provided by law for such a deliberate and cruel murder, it was the clear duty of the learned Sessions Judge to be more precise and explicit in stating the facts and circumstances which in his opinion were sufficiently extenuating for avoiding the normal punishment provided by law.

(22) The accused appears to be a normal man capable of understanding the gravity of the offence committed by him and the normal legal consequences thereof. There is nothing to show that any deficiency in education or culture had impaired his understanding in any way. There are no circumstances militating against the atrocious nature of the crime committed by him. Any punishment less than the normal sentence provided by the law was therefore manifestly inadequate. To vindicate the ends of justice therefore the sentence has to be enhanced to one of capital punishment.

(23) The sentence of transportation for life passed on Sona Mia by the Sessions Judge of Agartala in Sessions Case No. 15 of 1950 is therefore enhanced to one of death.

(24) Sona Mia shall be hanged by the neck till he is dead.

(25) Let the decision above be certified to the Sessions Judge of Agartala, under Section 442, Cr. P. Code, for making necessary orders conformable to the decision.

D/K.S. Sentence enhanced to death.

A. I. R. 1952 TRIPURA 18

LAKSHMI NARAIN J. C.

Lal Mohan Paul, Petitioner v. State of Tripura.

Criminal Revn. No. 9 of 1952, D/- 8-9-1952.

(a) Tripura State Cotton Cloth and Yarn Control Order (1358 TE) — Order as amended in 1949 continues to be in force in Tripura — Extension of Essential Supplies Temporary Powers Act, 1946 to Tripura — Effect of — (Merged States (Laws) Act (1950), S. 5 and Schedule) — (Tripura State (Administration) Order (1950), S. 5) — (Part C States Laws Act (1950), Ss. 3, 4) — (Tripura Essential Supplies (Temporary Powers) Act (1358 T.E.).

The Essential Supplies (Temporary Powers) Act, 1946 and the Tripura State Cotton Cloth and Yarn Control Order (1358 T. E.) do not contain any corresponding provision. The former is an enabling Act while the latter is a procedural one. Hence they cannot be said to be corresponding laws within the meaning of S. 5, Merged States (Laws) Act, 1950. (Para 12)

The Tripura State Essential Supplies (Temporary Powers) Act 1358 T. E. was posterior to the Tripura State Cotton Cloth and Yarn Control Order 1358 T. E. The latter Order has not taken its origin from the former one. But it is an independent law by itself. It has not descended from any parent law. (Para 12)

Hence by the introduction of the Essential Supplies (Temporary Powers) Act 1946, the already existing corresponding Act called the Tripura Essential Supplies (Temporary Powers) Act, 1358 T. E. stood repealed by virtue of S. 5 of the Merged States (Laws) Act 1950 and not the Tripura State Cotton Cloth and Yarn Control Order, 1358 T. E. which continues to be in force by reason of S. 5, Tripura State (Administration) Order, 1950. (Para 13)

(b) Penal Code (1860), S. 176—"Intentionally omits to furnish such information etc." — Accused holding a license to sell mill-made cloth at his shop — Licensee bound under the conditions of license to disclose places where he had stocked cloth other than those stated in license — Licensee asked to submit a list of mill-made cloth with him — Licensee omitting to mention cloth which he had stored in a place other than his shop — Accused held had intentionally omitted to furnish information which he was legally bound to furnish to a public servant and therefore committed an offence under S. 176. (Para 17)

Anno: Penal Code, S. 178 N. 1.

N. Dutta Majumder with P. K. Bhattacharyya and A. K. Shyam Chowdhury, for Petitioner; P. N. Banerji State Advocate, for the State.

ORDER: The petitioner Lal Mohan Paul has come to this Court on the Revision Side for setting aside his conviction and sentence passed by Sri C. Singh, Magistrate first class, Sadar, under paragraph 26 (A) read with paragraph 4 of the Tripura State Cotton Cloth and Yarn Control Order 1358 T. E. and Section 176, I.P.C., which was upheld in appeal by the Sessions Judge, Agartala. He has been awarded 6 months' R. I. and Rs. 250/- as fine or in default 1½ month's further R. I. for the aforesaid former offence, and 15 days' simple imprisonment under section 176, I.P.C.

(2) The prosecution case as given in the judgment of the learned Sessions Judge is as follows:

"Accused Lal Mohan Paul is the proprietor of a shop called Ananda Bhander situated in the Bazar in Agartala town. The shop deals in cloths. Accused Monomohan Dey is the employee of Lal Mohan Paul in the shop. Accused Lal Mohan Paul is the holder of a licence for dealing in mill-made and handloom cloths under the Tripura State Cotton Cloth and Yarn Control Order, 1358. In accordance with that licence, Lal Mohan Paul is entitled to carry on

his business and store cloths for sale in his cloth-shop at 48/2, Central Road, Agartala. According to the licence, he was not entitled to store his goods elsewhere without previous intimation to the licensing authority.

On 15-10-50, Lal Mohan Paul was asked by P. W. 2 Jitendra Kumar Sen Gupta of Civil Supplies Department to supply a list with regard to mill-made cloths in his possession. Lal Mohan Paul gave a list accordingly of the cloths kept in his shop at 48/2, Central Road, Agartala. (Ex. 6 is the list). Accused Lal Mohan Paul did not disclose at the time that he kept his goods anywhere else. On 22-10-50, when P. W. 2 Jitendra Kumar Sen Gupta was passing along Motor Stand Road, he noticed 2 big trunks in a shop of a brassware merchant. This aroused his suspicion and he went into the brassware shop and enquired about it. After sometime, accused Monmohan Dey turned up and stated that these two trunks belonged to Ananda Bhander and that the goods were received by post some days before and were kept in his residence near Motor Stand; that he was carrying the goods to the shop (Ananda Bhander) in the afternoon of that day, but owing to rain, he could not carry those goods to the shop, but kept them in the shop of Upendra Chandra Paul the brassware merchant. The key of the trunks was brought after that and the trunks were opened in the presence of witnesses and were found to contain mill-made cloths.

A list of mill-made cloths was prepared at the time (Ex. 7 is the list). Accused Upendra Chandra Paul turned up at the time and submitted a written statement. Accused Monomohan also submitted a written statement. (They have been marked as Exs. 8 & 9). It was 1 A. M. by the time that the statements were taken and the lists were completed. P. W. 2 Jitendra Kumar Sen Gupta suspected that in the first floor of the shop of Upendra Chandra Paul, the brassware merchant, there might be some more cloths; but it was not possible to search the room at that late hour. So he arranged for keeping a watch on the shop throughout the night. On the following morning Santi Ranjan Das Gupta P. W. 3 a clerk of the Civil Supplies Department searched the first floor of the shop in the presence of witnesses as well as accused Lal Mohan Paul, Monomohan Dey and Upendra Chandra Paul and 5 trunks containing mill-made cloths were found there. These were listed and kept in custody of the accused Lal Mohan Paul and Upendra Chandra Paul (Ex. 10 is the list).

(3) The other two accused in this case though punished by the trial Court were acquitted on appeal by the learned Sessions Judge.

(4) There is no dispute on the following points:

"(a) That the accused Lal Mohan Paul is the holder of licence Ex. 16 under the Tripura State Cotton Cloth and Yarn Control Order 1358 T. E. under which he was permitted to carry on his business in mill-made cloth at 48/2, Central Road, Agartala.

(b) That Ex. 6 is the list of goods supplied by him on 15-10-50 demanded by P. W. 2 Jitendra Kumar Sen Gupta, of the Civil Supplies Department.

(c) That two big trunks containing such cloth were seized from the shop of Upendra Chandra Paul, a brassware merchant, which belonged to Lal Mohan Paul and so also 5 other trunks containing mill-made cloth belonging to the petitioner were recovered from the first floor of the same brassware shop next day."

(5) It is contended that the two trunks immediately recovered from the brassware shop of Upendra Chandra Paul were kept there only temporarily on account of rain while the goods were in transit to the shop of the petitioner called Ananda Bhander and that the other 5 trunks recovered from the 1st floor were stored there on account of shortage of space in Ananda Bhander; the room on the first floor of the brassware shop having been hired for the purpose by the petitioner.

(6) The main point for determination on which both the learned counsel of the parties agreed, is, whether The Tripura State Cotton Cloth and Yarn Control Order 1358 T. E. as amended, has been repealed by the promulgation of the "Essential Supplies (Temporary Powers) Act 1946" by virtue of the "Merged States (Laws) Act (Act LIX of 1949)". The other point put forward by the learned counsel for the petitioner is that it is not proved that the petitioner intentionally omitted to furnish the required information to the authority concerned which he was legally bound to do in terms of the condition of his licence.

(7) It is to be noted that the Tripura State Cotton Cloth and Yarn Control Order, 1358 T.E. which came in force in the State on 13-6-1358 T.E. was further amended by another order dated 26-4-1949 A. D. which resulted in the addition of three more clauses i.e., 26 (A), 26 (B), & 26 (C). Even before that there was another Cotton Cloth and Yarn Control Order in the State since 1943 which stood repealed by virtue of the passing of the present Order in 1358 T.E. The Tripura State Essential Supplies (Temporary Powers) Act was promulgated a little later in the same year , i.e., on 7-12-1358 T.E. On the strength of these dates it is argued that the former Order is an independent law not taking its origin from the later Act, i.e., the Tripura State Essential Supplies (Temporary Powers) Act. There is no similarity between the two and both of them are independant of each other. This argument holds good.

(8) Section 5 of the Merged States (Laws) Act, 1949 provides that:

"If immediately before the commencement of this Act, there is in force in any of the new Provinces or merged States an Act, Ordinance, Regulation or other law corresponding to an Act, Ordinance or Regulation specified in the schedule, whether such Act, Ordinance or Regulation is in force by virtue of an order, legislative power, such corresponding law shall upon the commencement of this Act,

(a) in a new Province, stand repealed, and

(b) in a Merged State, stand repealed to the extent to which the law relates to matters with respect to which the Dominion Legislature has power to make laws for a Governor's Province."

The schedule of this Act includes the Essential Supplies (Temporary Powers) Act 1946.

(9) There is no denying that the Tripura State Essential Supplies (Temporary Powers) Act 1358 T.E. which is decidedly a corresponding Act to the "Essential Supplies (Temporary Powers) Act 1946", stands repealed by virtue of

the introduction of the later Act in the State, as two parallel laws cannot stand side by side.

(10) It is argued on behalf of the petitioner that the Tripura State Cotton Cloth and Yarn Control Order 1358 T. E. is also a corresponding law to the Essential Supplies (Temporary Powers) Act 1946 and on that account this too stands repealed by virtue of the introduction of the later Act of 1946. It is to be seen, therefore, whether the Tripura State Cotton Cloth and Yarn Control Order 1358 T. E. can be said to be a corresponding law or not.

(11) It may be of some advantage here to quote Section 5 of the Tripura State (Administration) Order, 1950:

"5. EXISTING LAWS TO CONTINUE—All laws in force in Tripura or any part thereof immediately before the commencement of this Order shall continue in force until repealed or amended by a competent legislature or authority;

Provided that all powers exercisable under the said laws by His Highness the Maharaja or the Government of tne State shall be exercisable by the Chief Commissioner."

With the proviso we have nothing to do in the present case. Section 3 of the Part C States (Laws) Act 1950 (Act No. 30 of 1950) runs thus:

"The Acts and Ordinances specified in the Schedule to the Merged States (Laws) Act, 1949 (LIX of 1949), are hereby extended to, and shall be in force in the States of Tripura and Vindhya Pradesh, as they are generally in force in the territories to which they extend immediately before the commencement of this Act."

Section 4 of the same Act says that

".....any law which immediately before the commencement of this Act is in force in any of the States of Manipur, Tripura and Vindhya Pradesh and corresponds to an Act or Ordinance extended to that State by this Act, is hereby repealed."

The Essential Supplies (Temporary Powers) Act, 1949 is included in the schedule of the Merged States (Laws) Act 1949.

(12) When we go through both, the Act and the Order, viz., the Essential Supplies (Temporary Powers) Act, 1946 and the Tripura State Cotton Cloth and Yarn Control Order, 1358 T.E. it will be found that for all intents and purposes the former is an enabling Act while the latter a procedural one. On that score too they cannot be said to be corresponding to each other. Also both these laws contain no corresponding provision. The Tripura State Essential Supplies (Temporary Powers) Act 1358 T. E. was posterior to the Tripura State Cotton Cloth and Yarn Control Order 1358 T.E. The latter Order has not taken its origin from the former one. The Tripura State Cotton Cloth and Yarn Control Order, 1358 T. E. is an independent law by itself. It has not descended from any parent law.

(13) When one law is similar to another, the one can do without the other, but this is not the case with these two laws under discussion. The test fails on this account also. The result is that by the introduction of the Essential Supplies (Temporary Powers) Act 1946, the already existing corresponding Act called the Tripura State Essential Supplies (Temporary Powers) Act 1358 T. E. stood repealed by virtue of S. 5 of the Merged States (Laws) Act 1950 and not the Tripura State Cotton Cloth and Yarn Control Order, 1358 T. E. which is not a corresponding law.

(14) It is argued that the present case is that of a simple storage and not of storage for sale as contemplated by Sec. 4 of the Tripura State Cotton Cloth and Yarn Control Order 1358 T. E.

(15) One cannot but reach at a natural conclusion that Lal Mohan Paul could not have any other purpose but storage for sale regarding the 5 trunks which were kept by him in the first floor of Upendra Chandra Paul's brassware shop hired by him for the purpose. This is supported by his own statement Ex. 15 to the officer of the Civil Supplies Department just after the recovery when he stated that

"Since about a month as there was no space in my shop, I rented a portion of the 1st floor of the building of Upendra Chandra Paul, brassware merchant, and kept my goods in 5 trunks there....."

(16) In his application dated 15-12-50 to the Chief Commissioner which is Ex. 13, he has stated that

"thinking that there would be a demand during the Durga Pujah, I imported a large quantity of mill-made cloth, but finding the space short in my shop, I hired the 1st floor of Upendra Chandra Paul's shop and made it a godown for storing the cloth there. From there I used to bring some stock to my shop for selling."

On such a data on the record, it can at once be said that it is not a case for simple storage but storage for sale. The petitioner is therefore liable under paragraph 4 read with paragraph 26 (A) of the amended Tripura State Cotton Cloth and Yarn Control Order, 1358 T. E.

(17) Now, the second point regarding "intentionally omitting to furnish the information etc." intention is to be presumed from circumstances which are overwhelming in this case, to prove that the petnr. did intentionally omit to furnish information to the proper authority. He was duly asked to submit a list of the mill-made cloth with him, which he did, omitting to mention the above-said 5 trunks and the place where they were kept. That he was legally bound to give such an information is proved by the condition No. 3 of his licence which runs as follows:

"If the licencee intends to store any cloth or yarn in any place, premises, or godown other than those already mentioned in the licence, he shall, intimate the address of such place, premises or godown to the licensing authority concerned and shall not store any cloth or yarn in such place, premises or godown until the licensing authority has endorsed it on the licence."

The conclusion is clear that the petitioner intentionally omitted to furnish the information which he was legally bound to furnish to a public servant. He has therefore committed the offence under section 176, I.P.C.

(18) In view of the above discussion, I have no reason to differ from the finding arrived at by the learned Sessions Judge that the petitioner has been rightly convicted for offences committed under paragraph 4 read with paragraph 26 (A) of the Tripura State Cotton Cloth and Yarn Control Order, 1358 T. E. and under

section 176, I.P.C. The sentences are not severe either. The rule issued in this petition is discharged.

B/K.S. Rule discharged.

A. I. R. 1952 TRIPURA 21

LAKSHMI NARAIN J. C.

Atul Chandra and another, Petitioners v. The State of Tripura.

Criminal Ref. No. 12 of 1952, D/- 7-8-1952.

Prevention of Corruption Act (1947), S. 6 — Sanction under — Requirements of — Criminal P. C. (1898), Ss. 197, 537.

In a prosecution under S. 161, Penal Code, previous sanction is a necessity, irrespective of the question whether the public servant was acting or purporting to act in the discharge of his official duty. The theory of implied sanction is clearly unknown to law. Sanction for prosecution under S. 161 to be a legal one should be clearly evidenced either from the order granting the sanction or other documentary evidence placed before the Court or even oral evidence that the facts were placed before the officer from whom sanction was sought. No onus lies on the accused to take the objection which should have been taken notice of by the Magistrate on his own initiative. Section 537, Cr. P. C., cannot cure an illegality of this kind which cuts away the basis of the prosecution: AIR 1952 Punj 89 and AIR 1951 Mad 255, Rel. on.

(Paras 3, 4)

Anno: Cr. P. C., S. 197 N. 6, 11; S. 537 N. 6.

REFERENCES: Courtwar/Chronological/ Paras

('51) 52 Cri LJ 29: (AIR 1951 Mad 255) 3

('52) 1952 Cri LJ 316: (AIR 1952 Punj 89) 3

ORDER: On a motion filed by the two accused Atul Chandra Gautam and Manindra Chandra Dev Varma, the learned Sessions Judge, Tripura has referred the case under Sec. 438, Cr. P. C. with recommendation that proceedings against the accused in case No. 77 Chhang of 1950 pending in the Court of Sri S. C. Kar, Magistrate Khowai, be quashed on the ground that the Magistrate could not proceed with the case under section 161, I. P. C. without proper sanction as required by Section 6 of the Prevention of Corruption Act of 1947 (Act II of 1947).

(2) I have gone through the record of the case as also the explanation given by the Magistrate.

(3) The learned Sessions Judge has made the following observation in recommending this motion:

"The petitioners were being charged under Section 161, I. P. C., i.e., for taking illegal gratification. The offence is alleged to have been committed on 16-7-1950. Now, by virtue of Part C States (Laws) Act (Act I of 1950) read with the Merged States (Laws) Act (Act LIX of 1949), certain Acts including the Prevention of Corruption Act 1947, (Act II of 1947) were extended to Tripura with effect from 16-4-50. It appears that there was Tripura State Prevention of Corruption Act, 1359 T. E. (Act 7 of 1359 T. E.) in force in Tripura. It appears that this Act corresponds to the Prevention of Corruption Act, 1947 (Act II of 1947). Under the provisions of Sec. 4 of the Part C States (Laws) Act, 1950 (Act I of 1950), therefore, the old law stood repealed with effect from 16-4-50 and the new law contained in the Prevention of Corruption Act (Act II of 1947) was extended to Tripura with effect from the same date. Now Sec. 6 of the Prevention of Corruption Act, 1947 (Act II of 1947) provides as follows:

'No Court shall take cognizance of an offence punishable under Section 161 or Section 156 of the Indian Penal Code or under sub-section (2) of Section 5 of this Act alleged to have been committed by a public servant except with the previous sanction,

(a) in the case of person who is employed in connection with the affairs of Federation and is not removable from his office save by or with sanction of the Central Government or some higher authority of the Central Government;

(b) In the case of a person who is employed in connection with the affairs of a Province and is not removable from his office save by or with the sanction of the Provincial Government or some higher authority, of the Provincial Government;

(c) In the case of any other person, of the authority competent to remove him from his office.'

It will be seen that there is a distinction between this section and Section 197, Cr.P.C., inasmuch as the significant words "While acting or purporting to act in the discharge of his official duty" in relation to the description of the public servant in Sec. 197, Cr. P. C., are absent from the Sec. 6 of the Prevention of Corruption Act, 1947 (Act II of 1947). The effect is that in a prosecution under Sec. 161, I. P. C. previous sanction is a necessity, irrespective of the question whether the public servant was acting or purporting to act in the discharge of his official duty.

The learned Magistrate in his explanation stated that in view of the language used in Sec. 197, Cr. P. C. "...the provision is not intended to be applied in cases where a public servant does not act in the discharge of his official capacity". That this view is clearly wrong will appear from the decisions reported in 'GURUCHARAN SINGH v. STATE', 1952 Cri L J 316 (Punj).

The learned Magistrate could not have therefore taken cognizance of the complaint and should have dropped the proceedings.

The learned Magistrate in his explanation further stated that the accused persons did not seem to be prejudiced, even if sanction is deemed necessary. This is clearly incorrect as the greatest prejudice has been occasioned to the petitioners by the case against them being dragged from 14-10-50 to uptil 23-5-52, while the case was liable to be dropped in the very beginning because of want of sanction.

The learned Magistrate in his explanation further stated that in view of certain actions of the Home Secretary and S. P., it should be held that implied sanction was given to the prosecution. The theory of implied sanction appears to me to be a novel one. It is clearly unknown to law. It has been held in 'IN RE DEVANUGRAHAM', 52 Cri. L J 29 (Mad) that sanction for prosecution under Sec. 161, I. P. C. to be a legal one should be

clearly evidenced either from the order granting the sanction or other documentary evidence placed before the Court or even oral evidence that the facts were placed before the officer from whom sanction was sought.

The learned Magistrate in his explanation further stated that the petitioners did not take such objection at the earliest opportunity and allowed the case to proceed for more than 5 months and that under Sec. 537, Cr. P. C., also the objection failed. I have elsewhere made the strongest comments on the conduct of the learned Magistrate for dragging the case in this manner from 14-10-50 to 23-5-52. The petitioners could hardly be blamed for allowing the case to proceed with when they were not responsible for either initiating the proceedings or terminating the same. No onus lies on the accused petitioners to take the objection which should have been taken notice of by the learned Magistrate on his own initiative. The learned Magistrate should have made himself conversant with the provisions of Sec. 6 of the Prevention of Corruption Act (Act II of 1947) and acted accordingly.

Section 537, Cr. P. C., cannot in my opinion cure an illegality of this kind which cuts away the basis of the prosecution."

(4) Suffice to say the above observation is on the face of it correct. Accepting the recommendation, therefore, it is ordered that the proceedings taken against the two accused (petitioners) are quashed as they have been taken without the previous sanction for prosecution of the appropriate authority as required by law (Section 6 of the Prevention of Corruption Act 1947 (Act II of 1947)).

B/D.H. Order accordingly.

A. I. R. 1952 TRIPURA 22

SEN GUPTA J. C.

Ibrahim Ali, Defendant-Petitioner v. Smti. Muhibunnessa Khatum, Plaintiff-Opposite Party.

Civil Misc. Case No. 37 of 1950, D/- 20-3-1951.

Civil P.C. (1908), O. 9 R. 4 — Limitation — Dismissal of suit under R. 3 on 18-5-1950 — Application for restoration on 8-7-50 — Application not saved by S. 5A, Limitation Act — (Limitation Act (1908), S. 5A and Art. 163).

Section 5A of the Indian Limitation Act was introduced by Ordinance 31 of 1947 by the Governor General in exercise of the powers conferred on him by S. 42 of the Govt. of India Act of 1935, as adapted by India (Provisional Constitution) Order, 1947, to amend the Limitation Act temporarily due to conditions of unrest then prevailing. The ordinance not having been followed by any legislative enactment ceased to operate at the expiration of six weeks from the re-assembly of the legislature, under the provision of S. 42(2)(a) of the said Act and cannot therefore, operate against the provision of the Indian Limitation Act. Article 163 of the Schedule of the Limitation Act which prescribes the period of limitation for application to restore suits dismissed under O. 9 R. 3 as 30 days from the date of dismissal applies to a case where the suit has been dismissed on 18-5-1952 and the application for the restoration of the suit to file presented on 8-7-1950 is therefore barred by limitation. (Para 6)

Anno: Civil P.C. O. 9 R. 4 N. 10; Lim. Act Art. 163 N. 5, 8.

Tamizuddin Ahmed Choudhury Khan, for Petitioner; Nagendra Nath Roy and Ramanath Chakraborty and Anil Chakraborty, for Opposite Party.

ORDER: The facts of the case leading up to this application for revision are as follows.

(2) The opposite party filed a suit in the Munsif's Court at Dharmanagar but this was dismissed under O. IX, R. 3 of the Code of Civil Procedure in the absence of both the parties on 19-5-50.

(3) On 8-7-50 the opposite party filed a petition for restoration of the case to its original number. The period of limitation for filing such a petition was 30 days but the learned Munsif held that as a riot was going on at Dharmanagar at the time of the dismissal it was impossible for the parties to appear before the Court or to file petitions for restoration earlier than it was done. The Munsif therefore restored the suit in exercise of the powers under S. 151, Cr. P. C. and S. 5 of the Indian Limitation Act. The present petitioner has applied for the revision of this order.

(4) The only grounds taken for revision were that the trial Court had no power to extend the period of limitation by application of S. 151, C. P. C. or S. 5 of the Indian Limitation Act.

(5) While conceding that S. 151 of the C. P. Code and S. 5 of the Indian Limitation Act are not applicable to the facts of the present case, the learned Advocate for the opposite party relied on the provision of S. 5A of the Indian Limitation Act and argued that the present case was covered by this provision and the application was not, therefore, barred by limitation.

(6) Section 5A of the Indian Limitation Act was introduced by Ordinance XXXI of 1947 by the Governor-General in exercise of the powers conferred on him by S. 42 of the Government of India Act of 1935, as adapted by Indian (Provisional Constitution) Order, 1947. The object was to amend the Act temporarily for the conditions of unrest riots or other disturbances—then prevailing. The ordinance was not followed by any legislative enactment. Naturally, therefore, it ceased to operate at the expiration of six weeks from the re-assembly of the legislature, under the provision of S. 42 (2) (a) of the said Act. This ordinance cannot therefore operate against the provision of the Indian Limitation Act. Article 163 of the Schedule of the Indian Limitation Act prescribes the period of limitation for such applications as 30 days from the date of dismissal. The application was, therefore, clearly barred.

(7) The learned Munsif had, therefore, acted without jurisdiction in setting aside the order of dismissal after the period of limitation. The application for revision must, therefore, be allowed and the order passed by the learned Munsif in restoring the original suit vacated.

(8) Parties will bear their own costs of this petition. Advocates' fees Rs. 16/-.

B/M.K.S. Rule made absolute.

A. I. R. 1952 TRIPURA 23

SEN GUPTA J. C.

Sona Mia, Petitioner v. The Govt. of Tripura, Opp. Party.

Supreme Court Appeal No. 2 of 1951, D/- 9-5-1951.*

(a) Criminal P.C. (1898), S. 439 — Appeal of accused dismissed — Subsequent exercise of revisional powers and enhancement of sentence after notice to convict — No illegality — (Cri. P.C. (1898) — S. 423) — (Criminal P.C. (1898) S. 369).

Where while dismissing the appeal by the accused the court leaves the question of sentence open for decision by exercise of revisional powers of the court after issue of notice on the convict to show cause why the sentence should not be enhanced, the court would be acting within jurisdiction if the sentence is enhanced under revisional powers after calling upon the convict to show cause against the enhancement. AIR 1935 P.C. 35 Relied upon. (Para 5)

This revision cannot be said to be revision of its own order by the Court. S. 369, therefore, has no application. (Para 6)

Anno: Cri. P.C. S. 423 N. 1, 33. S. 439 N. 8, 29, S. 369 N. 2.

(b) Criminal P.C. (1898) S. 439 — Notice to show cause against enhancement of sentence — Cause shown — Court can consider points raised even if these were raised and considered before in appeal from conviction by accused — There is no illegality. (It was also held that there was no prejudice caused to accused by such discussion) — (Criminal P.C. (1898) S. 369). AIR 1939 Rang. 392 Ref. (Para 7)

Anno: Criminal P.C. S. 439 N. 32, 46 S. 369 N. 2.

(c) Criminal P.C. (1898) S. 439 — Case under S. 302 Penal Code — Sessions Judge asserting that sentence of death was only appropriate sentence — No extenuating circumstance worth the name — Sentence of transportation for life held could not be called to be in accordance with law — Sentence is open to revision — (Penal Code (1860) S. 302). (Para 8)

Anno: Cr. P. C. S. 439 N. 29 Penal Code S. 302 N. 2, 26, 28.

(d) Criminal P.C. (1898) Ss. 216, 289 and 537 — Committing court is bound to summon witnesses named by accused — Some witnesses not summoned — Accused not desiring to summon witnesses, when asked by Sessions Judge under S. 289 — Accused held not prejudiced by failure of committing court to call witnesses. (Para 11)

Anno: Cr. P. C. S. 216 N. 2 S. 289 N. 9 S. 537 N. 25, 27.

(e) Constitution of India, Art. 134(1)(c) — Certificate of fitness — Principles.

The principle on which a certificate of fitness under Art. 134(1)(c) is expected to be granted is practically the same on which the Supreme Court would normally grant leave of appeal. Generally speaking Supreme Court will not grant special leave to appeal in criminal cases unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against. It would be opposed to all principles and precedents if the Supreme Court were to constitute itself into a third Court of fact and after re-weighing the evidence come to conclusion different from that arrived at by the trial Judge and the High Court. (Case held not fit for granting Certificate). AIR 1946 P.C. 16 and AIR 1950 SC 169 Relied on. (Paras 13 & 15)

Nibaran Chandra Ghose, for petitioner; Priya Nath Banerji, Govt. Advocate, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('35) AIR 1935 PC 35: (36 Cri LJ 482) 5
('46) AIR 1946 PC 16: (47 Cri LJ 489) 14
('50) AIR 1950 SC 169: (51 Cri LJ 1270) 15
('39) AIR 1939 Rang 392: (41 Cri LJ 108) 7

ORDER: The petitioner was convicted under section 302, I. P. C. by the Sessions Judge of Agartala, agreeing with the opinion of the three assessors who aided him at the trial and sentenced to transportation for life. He preferred an appeal against the decision. The appeal against his conviction was dismissed and simultaneously a notice was issued upon him under section 439, Cr. P. C. to show cause why his sentence should not be enhanced to one of death. He showed cause accordingly but the sentence was enhanced.

(2) The petitioner has thereupon applied to this Court for a certificate under Article 134 (1) (c) of the Constitution of India that the case is a fit one for appeal to the Supreme Court.

(3) The grounds put forward in support of the petition are as follows:

(i) That this Court had no jurisdiction to enhance the sentence after having dismissed the appeal.

(ii) That this Court had no jurisdiction at the revision to discuss matters already discussed during the appeal.

(iii) That the sentence passed by the Sessions Judge not being illegal, the enhancement thereof was illegal and ultra vires.

(iv) That the trial before the Sessions Court was vitiated as the witnesses cited by the petitioner before the Committing Magistrate were not summoned.

(v) That the petitioner was prejudiced—

(a) as the post-mortem examination of the deceased had been held in the absence of the Divisional Judicial Officer who was directed by the Sub-Divisional Officer to be present at such examination,

(b) as the blood-stained beddings were not produced before the Court, and

(c) as the investigating officer did not show the 'machang' in the sketch map.

(4) The points will be dealt with seriatim: Point (1): The judgment of this Court dismissing the appeal of the petitioner ended with these words.

" * * * *

The conviction of the appellant by the learned Sessions Judge was therefore justi-

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* Petition for leave to appeal to the Supreme Court under Art. 134(1)(c) of the Constitution of India against judgments dated 2-4-51 and 30-4-51 respectively in Cri. App. No. 2 of 1951 and Cri. Rev. No. 14 of 1951, the latter being reported in AIR 1952 Tripura 16: 1952 Cri. L.J. 1490.

The appeal therefore must stand dismissed.

It appears that the learned Sessions Judge has dealt with the appellant too leniently in inflicting the punishment of transportation for life, in a case of such brutal and inhuman murder of an old man in his sleep. It is not clear what extenuating circumstances led him to do so; all that is available from his judgment is that the lesser sentence was justified by ".....of the appellant .....". There is however prima facie no material for showing that these would amount to any extenuating circumstance. It is therefore necessary to consider whether the punishment of the appellant should be enhanced to one of death, by revision under Section 439, Cr. P. C. This will be done separately.

* * * * "

(5) This meant that the conviction of the petitioner was upheld but the order about sentence was left open for decision by exercise of the revisional powers of this Court, after issue of notice upon the convict under Section 439, Cr. P. C. giving the convict an opportunity for showing cause why the sentence passed upon him should not be enhanced to one of death. This Court cannot in the circumstances be said to have acted without jurisdiction in enhancing the sentence. This view of the case appears to find support from the Ruling of the Privy Council in the case of — 'Chunbidya v. Emperor', AIR 1935 P C 35.

(6) This revision cannot also be said to be a revision of its own order by this Court and S. 369, Cr. P. C. cited by the learned Advocate for the petitioner has therefore no application to this case.

(7) Point (ii): Section 439 (6) gives the accused an opportunity for showing cause against his conviction on a notice to show cause why his sentence should not be enhanced. When such cause is shown, the Court is expected to consider the points raised even if these had been raised before and, therefore, there is no illegality or irregularity as suggested. The learned Advocate for the convict referred to the decision by the Rangoon High Court in the case of — 'the King v. Nga Ba Saing', AIR 1939 Rang 392. Even assuming this decision to be correct the petitioner cannot be said to have been prejudiced in any way when this Court discussed the points raised by himself against his conviction, as it was more to his advantage than what is warranted by the decision in the Rangoon High Court.

(8) Point (iii): The order in the revision case shows why the sentence was enhanced. It was held by the learned Sessions Judge that a sentence of death was the only appropriate sentence. Such an assertion was clearly justified by the facts of the case. When no extenuating circumstances worth the name, could be put forward after such an observation, the lesser sentence passed cannot be said to be according to law and was therefore open to revision. The enhancement of sentence was therefore in order.

(9) Point (v): This point has already been discussed in the judgment of Revision Case No. 14 of 1951.

(10) Under Section 216, Cr. P. C. the Committing Magistrate is bound to summon the witnesses named by the accused.

(11) In reply to the question of the Sessions Court under Section 289, Cr. P. C. however the accused did not want to adduce evidence. Nor did his pleader state that he meant to adduce evidence. If he had wanted to do so, he might have got his witnesses summoned by the Sessions Court. In the circumstances the accused cannot be said to have been prejudiced by his witnesses not being summoned by the Committing Magistrate.

(12) Point (v) (a): The absence of any Magistrate at the post-mortem examination did not by itself vitiate such examination or make the medical evidence about post-mortem examination inadmissible. The accused had full opportunities of challenging his evidence and was not, therefore, prejudiced.

(b) Non-production of blood-stained materials has been discussed in the appellate judgment and no further comment is necessary.

(c) The investigating officer was before the Court and the evidence of the material witnesses showed the position of the 'machang' although this was not shown in the sketch map. The presence of the 'machang' in the sketch map might have simplified the evidence but as it is there was plenty of evidence about the position of the 'machang' and its absence in the map was not, therefore, a very material defect which might have led to a miscarriage of justice.

(13) Now, the principle on which a certificate is expected to be granted is practically the same on which the Supreme Court would normally grant leave of appeal.

(14) The opinion of their Lordships of the Supreme Court has been expressed very clearly in the case of — 'Malak Khan v. Emperor', AIR 1946 P. C. 16.

"The Privy Council will not review, or interfere with the course of criminal proceedings, unless it is shown that, by disregard of the forms of legal process or otherwise, substantial and grave injustice has been done. Where neither of these two things are present the Privy Council will not interfere on the ground that evidence was wrongly evaluated or was not sufficient to justify the conclusion reached. It requires more than an allegation or even proof that a Court might take a different view of the compelling force of the evidence given."

(15) In the Supreme Court case of — 'Pritam Singh v. The State', AIR 1950 S. C. 169, their Lordship held that—

"though the Supreme Court was not bound to follow the decisions of the Privy Council too rigidly, since the reasons, constitutional and administrative, which sometimes weighed with the Privy Council need not weigh with the Supreme Court, yet some of those principles are useful as furnishing in many cases a sound basis for invoking the discretion of the Court in granting special leave."

and it was further held that—

"Generally speaking Supreme Court will not grant special leave to appeal in criminal cases unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against"

and also that—

"It would be opposed to all principles and precedents if the Supreme Court were to constitute itself into a third Court of fact and

after re-weighing the evidence, come to conclusion different from that arrived at by the trial Judge and the High Court."

(16) Following these principles and others hithertofore accepted in the Privy Council and the Supreme Court I find no sufficient material in support of the prayer for granting a certificate that this was a fit case for appeal to the Supreme Court.

(17) The petition is therefore rejected.

B/R.G.D. Petition rejected.

A. I. R. 1952 TRIPURA 25

SEN GUPTA J. C.

Abdul Gafur, Petitioner v. Govt. of Tripura.

Supreme Court Appeal No. 1 of 1951, D/- 30-3-1951. Application for leave to appeal to Supreme Court under Art. 134 (1) (c) of the Constitution of India against the judgments, D/- 16-5-1951 and 20-3-51 in Cri. App. No. 1 of 1951 and No. 11 of 1951, respectively, the latter being reported in AIR 1952 Tripura 10.

(a) Cr. P. C. (1898), Ss. 428 and 287 — Statement by accused before committing magistrate that he was not guilty — Sessions Judge and court of appeal are bound to consider this point in order to arrive at conclusion that the charge was proved beyond doubts — Not tendering statement under S. 428, held did not prejudice accused — This is no ground for certificate under Art. 134 (1) (c) — (Constitution of India, Art. 134 (1) (c)). (Para 5)

Anno: Cr. P. C., S. 428 N. 9; S. 287 N. 1.

(b) Constitution of India, Art. 134 (1) (c) — No adverse inference against prosecution drawn for non-production of witness — Other evidence reliable and sufficient for conviction — No certificate can be granted — (Evidence Act (1872), S. 114). (Para 6)

Anno: Evidence Act, S. 114 N. 11.

(c) Constitution of India, Art. 134 (1) (c) — Appreciation of Evidence — Question of.

The evidence on the material facts relied on by the learned Sessions Judge and two of the three Assessors, as also by the High Court is not really a matter for the Supreme Court to consider, as that Hon'ble Court is not a third Court of appeal on facts and would not, therefore, be prepared to re-weigh the evidence. (Para 7)

(d) Constitution of India, Art. 134 (1) (c) — Principles for granting leave to appeal to Supreme Court, indicated. Case law ref. (Paras 10-18)

Babu Chand Singha, for Petitioner; Priya Nath Banerji, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('14) AIR 1914 PC 155: (15 Cri LJ 326) 10
('32) AIR 1932 PC 234: (34 Cri LJ 18) 11, 17
('41) AIR 1941 PC 132: (43 Cri LJ 1) 13
('43) AIR 1943 PC 211: (45 Cri LJ 241) 14
('46) AIR 1946 PC 16: (47 Cri LJ 489) 15
('48) AIR 1948 PC 216: (49 Cri LJ 712) 14
('39) AIR 1939 FC 43: (40 Cri LJ 468) 12
('50) AIR 1950 SC 169: (51 Cri LJ 1270) 16
('51) Criminal Appeal No. 1 of 1951 (Raj) 4

ORDER: This is an application for a certificate under Article 134 (1) (c) of the Constitution of India that the applicant's case was a fit one for appeal to the Supreme Court.

(2) The petitioner was convicted on a charge under Section 302, I. P. C. by the Sessions Judge of Agartala, agreeing with the opinion of two of the three Assessors who aided him in the trial, sentencing him to transportation for life. The petitioner appealed against his conviction and the appeal was dismissed and on revision by this Court, in exercise of the powers under Section 439, Criminal P. C., the sentence was enhanced to one of death. The present petition is aimed against the dismissal of the appeal as well as the enhancement of the sentence.

(3) The grounds on which the certificate is prayed for are practically the following:

1. that this Court was wrong in admitting in evidence under Section 428, Criminal P. C., the statement of the petitioner which was not tendered, under Section 287, Criminal P. C., by the prosecution and read as evidence before the Sessions Judge.

2. that the Court was wrong in not drawing an adverse conclusion against the prosecution case on account of the non-production of some witnesses, under the provision of Section 114 of the Indian Evidence Act, and

3. that both the Sessions Court as well as this Court were wrong in believing the evidence of the witnesses which led to the conviction of the petitioner.

(4) With regard to point (1) this Court had already discussed the matter in its Order No. 7 dated 16-3-51 in the record of the appeal (Criminal Appeal No. 1 of 1951) where this Court had already noticed that the procedure followed by the Court would not prejudice the petitioner in any way.

(5) The only statements made by the petitioner before the Committing Magistrate and before the Sessions Court were that he was not guilty. Both the Sessions Court and the Court of appeal, were bound to consider this point in order to come to the conclusion that the charge against the accused was proved beyond reasonable doubt. Even assuming therefore that the order of this Court was wrong the ultimate effect could not have been different.

(6) The second point was also thoroughly discussed in the appellate judgment of this Court where it was held that no adverse inference was possible under the circumstances of the case. Here also this Court is clearly of the opinion that the finding of the Court has not resulted in any miscarriage of justice, as the actual evidence before the Courts was found to be reliable and otherwise sufficient for the conclusion that the charge against the petitioner was proved beyond reasonable doubt.

(7) Regarding the third point this Court is of the opinion that the evidence on the material facts, relied on by the learned Sessions Judge and two of the three Assessors, as also by this Court is not really a matter for the Supreme Court to consider, as that Hon'ble Court is not a third Court of appeal on facts and would not therefore be prepared to re-weigh the evidence.

(8) That the deceased died as a result of a stab-wound was not disputed. That the fatal stab was inflicted by the petitioner was proved by one eye witness, who saw the actual infliction of the injury. Two witnesses swore that they saw the petitioner run away from near the place of occurrence immediately after the infliction of the injury on the deceased. Four other witnesses proved the dying declaration of the deceased, almost immediately after the infliction of the injury, naming the petitioner

as having stabbed him. All these witnesses were relied on by two of the Assessors, the learned Sessions Judge, and this Court after due consideration. There are thus no material facts which should go to the Supreme Court for further consideration.

(9) The principles followed in granting leave to appeal to the highest Tribunals, the Privy Council, the Federal Court, and the Supreme Court have been laid down by their Lordships from time to time.

(10) In the case of — 'Ibrahim v. King-Emperor', AIR 1914 PC 155, their Lordships observed:

> "Leave to appeal is not granted except where some clear departure from the requirements of justice exists", and also
>
> "There must be something which deprives the accused of the substance of a fair trial or diverts the administration of law into a course which may be drawn into an evil precedent."

(11) In the case of — 'Mohinder Singh v. Emperor', AIR 1932 PC 234 their Lordships observed:

> "Their Lordships do not sit as a Court of Criminal Appeal," and
>
> "The grounds that a wrong view had been taken of the meaning or effect of a Section of the Evidence Act or that upon a proper reading of the Section there was insufficiency of evidence to warrant the conviction, were merely points for a Court of Criminal Appeal and not for the Board."

(12) In the case of — 'Dr. Hari Ram Singh v. Emperor', AIR 1939 FC 43, their Lordships observed:

> "That the Privy Council may not grant special leave to appeal unless it be shown that by a disregard to forms of legal process or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

(13) In the case of — 'Mahomed Nawaz v. Emperor', AIR 1941 PC 132, their Lordships observed:

> "The Judicial Committee is not a revising Court of Criminal Appeal, that is to say, it is not prepared to or required to re-try a criminal case, and does not concern itself with the weight of evidence or the conflict of evidence or with the inferences drawn from evidence or with questions as to corroboration or contradiction of testimony or as to whether there was sufficient evidence to satisfy the burden of proof."

and also,

> "The Judicial Committee cannot be asked to review the facts of criminal cases or set aside conclusions of facts at which the tribunal has arrived."

(14) Similar principles were accepted by their Lordships in the cases of — 'Otto George Gfeller v. The King', AIR 1943 PC 211; — 'Ernest Prempeh v. The King', AIR 1948 PC 216.

(15) In the case of 'Malak Khan v. Emperor', AIR 1946 PC 16, their Lordships observed:

> "The Privy Council will not review or interfere with the course of criminal proceedings, unless it is shown that, by disregard of the forms of legal process or otherwise, substantial and grave injustice has been done. Where neither of these two things are present the Privy Council will not interfere on the ground that evidence was wrongly evaluated or was not sufficient to justify the conclusion reached. It requires more than an allegation or even proof that a Court might take a different view of the compelling force of the evidence given."

(16) In the Supreme Court case of — 'Pritam Singh v. The State', AIR 1950 SC 169, their Lordships held that

> "though the Supreme Court was not bound to follow the decisions of the Privy Council too rigidly, since the reasons, constitutional and administrative, which sometimes weighed with the Privy Council need not weigh with the Supreme Court, yet some of those principles are useful as furnishing in many cases a sound basis for invoking the discretion of the Court in granting special leave"

and it was further held that

> "Generally speaking Supreme Court will not grant special leave to appeal in criminal cases unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against"

and also that:

> "It would be opposed to all principles and precedents if the Supreme Court were to constitute itself into a third Court of fact and after re-weighing the evidence, come to conclusion different from that arrived at by the trial Judge and the High Court."

(17) It has been laid down by their Lordships in the case of — 'Mohinder Singh v. Emperor', AIR 1932 PC 234, that:

> "For them to interfere with the criminal sentence there must be something so irregular, or so outrageous as to shock the very basis of jurisdiction."

(18) The principles which apply in granting leave in any case to appeal to the Supreme Court have also to be considered by this Court in issuing a certificate that the case is a fit one for appeal to that Court.

(19) On a careful consideration of the materials in the present case this Court is clearly of the opinion that neither the Privy Council nor the Federal Court nor the Supreme Court would entertain an appeal in this case on application of the principles enunciated above.

(20) This Court is not, under the circumstances of the case, in a position to certify that the case is a fit one for appeal to the Supreme Court.

(21) The application is therefore rejected.

B/R.G.D. Application rejected.

A. I. R. 1952 TRIPURA 26

LAKSHMI NARAIN J. C.

Padmanava Bhattacharyya and others, Petitioners v. Bidhu Bhusan Das, Opposite Party.

Criminal Ref. No. 17 of 1952, D/- 10-10-1952.

Criminal P.C. (1898) Ss. 144, 145 — Scope — Dispute relating to possession of land — Likelihood of breach of peace — Proceedings under S. 145 are proper.

Where the dispute between the parties about possession of two plots of land is likely to cause breach of the peace the right course is to take proceedings under S. 145, Cr. P. C. Proceedings under S. 144, Cr. P. C. is a poor substitute for proceedings under S. 145, Cr. P. C. which settles the matter once for all as far as

Criminal Courts are concerned, as ordinarily no order under S. 144 remains in force for more than 2 months from the making thereof. (Para 3)

Anno: Cr. P. C., S. 145 N. 4 Pts. 5, 6.

ORDER: The learned Sessions Judge has recommended this motion with a view of taking action by this Court u/s 439, Cr. P. C. for quashing the proceedings before the Magistrate in case No. 37 of 1952 u/s 145, Cr. P. C. when another application u/s 144, Cr. P. Code has also been pending before him between the same parties.

(2) I have carefully gone through the report of the learned Sessions Judge made to this Court u/s 438, Cr. P. C. and other relevant matter on the record.

(3) Section 144, Cr. P. C. yields, where a special condition of Section 145, Cr. P. C. is fulfilled. A Magistrate is bound to take action u/s 145, Cr. P. C. when he finds that there is a real dispute tending to a breach of the peace. In the present case, the dispute between the parties is about possession of the two plots of land, the learned Magistrate has, therefore, adopted the right course in taking proceedings u/s 145, Cr. P. C. which is to settle the dispute permanently as far as Criminal Court is concerned. Proceedings u/s 144, Cr. P. C. is a poor substitute for proceedings u/s 145, Cr. P. C. which settles the matter once for all as far as Criminal Courts are concerned, as ordinarily no order u/s 144, remains in force for more than 2 months from the making thereof.

(4) I, therefore, find myself unable to accept the recommendation made in the motion by the learned Sessions Judge in this case. It is rejected.

C/D.R.R. Reference rejected.

A. I. R. 1952 TRIPURA 27

SEN GUPTA J. C.

Oyali Mia and another, Petitioners v. Naib Ali, Opposite Party.

Criminal Revn. No. 6 of 1950, D/- 12-7-1950.

(a) Penal Code (1860), Ss. 361 and 363 — Married girl — Minor Muslim girl living in husband's house after marriage — Removal from custody of husband while returning from short visit to mother — Removal not shown to have been at the instance of mother — Subsequent ratification by mother — Effect.

The mother of a minor Muslim girl continues to be her guardian even after her marriage. But when after marriage she goes to live in her husband's house and the natural guardianship appears to have been transferred by the mother to the father of the girl's husband the continuance of that position must be deemed to exist when after a short visit to her mother's and uncle's house she is being taken back to his own house by the husband. He must be then deemed to be the rightful custodian and lawful guardian of the minor wife, within the meaning of S. 361 I.P.C., the mother having nothing to do with her protection at the time. (Para 6)

Where the minor is removed from the custody of the husband while so returning and the removal is proved to have been effected at the instance of or under the instigation of the mother of the minor, such taking would be lawful as in that case the guardianship of the complainant must be deemed to have been terminated by the action of the mother, the normal legal guardian. When she is removed neither at the instance nor under any instigation of her mother an offence under S. 363 Penal Code is committed and a subsequent ratification after the completion of the offence cannot take the case out of the purview of S. 363, I.P.C. (Para 7)

Anno: Penal Code, S. 361 N. 4; S. 363 N. 1.

(b) Criminal P.C. (1898) S. 342 — Non-compliance with section — Effect — Irregularity complained of in recording statement only of nominal nature not prejudicing accused — Defect is curable under S. 533 of the Code. (Paras 8 and 9)

Anno: Cr. P. C., S. 342 N. 35; S. 533 N. 9.

Priyanath Bannerji and Arman Ali Munshi, for Petitioners; Nagendra Nath Das Gupta, for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras

('36) AIR 1936 PC 253(2): (37 Cri LJ 897) 8, 9
('05) 32 Cal 444: (2 Cri LJ 328) 6, 7
('23) AIR 1923 Cal 672: (24 Cri LJ 712) 6
('43) AIR 1943 Pat 212: (44 Cri LJ 590) 6, 7

ORDER: This Rule is directed against an order of the Sessions Judge of Tripura dismissing an appeal against the conviction of the petitioners Oyali Mia and Sona Mia, father and son, under Section 363, I. P. C. by the Saddar Magistrate of Agartala, sentencing each of them to rigorous imprisonment for six months.

(2) The case for the prosecution in brief was that Jahora, a girl of seven years was given in marriage to the Complainant's son and was living in the Complainant's house when she was taken in Naiyar (a causal visit) to her mother's house & from there to the house of an uncle of hers. While returning from there with the complainant, she was forcibly taken away by the Petitioners for giving her in marriage with Sona Mia.

(3) The defence was that Jahora was actually married to Sona Mia, that the complainant was not the lawful guardian of Jahora and that the story of kidnapping was false.

(4) Both the learned Magistrate and the learned Sessions Judge found as a matter of fact that Jahora was married to the Complainant's son and that the Petitioners had forcibly taken her away from the custody of the Complainant while she was accompanying him to his house. It was further found by the Courts that the defence story of Jahora's marriage with Sona Mia was not true and that the mother was, after the occurrence, won over to support the defence version of the case.

(5) The legality of the conviction was challenged before this Court on two grounds viz, that the complainant was not the lawful guardian of the minor Jahora at the alleged occurrence and that the alleged removal of Jahora from the custody of the Complainant was at the instance of her mother. It was argued that the conviction was bad in law on both these accounts.

(6) With reference to the first ground reliance was placed on the rulings in the cases of —'Korban v. King Emperor', 32 Cal 444, — 'Darajuddin Akanda v. Emperor', AIR 1923 Cal 672 and — 'Banamali Tripathi v. Emperor', AIR 1943 Pat 212. It has been held in all these cases that the mother of a minor Muslim girl continues to be her guardian even after her marriage. This general proposition is not challenged. The facts of the

present case however appear to be peculiar. After the marriage of Jahora she went to live in her husband's house and the natural guardianship appears to have been transferred by the mother to the father of the girl's husband, the Complainant. It does not appear that anybody ever challenged the guardianship of the Complainant. Jahora's mother does not appear to have repudiated this. The fact that Jahora came to her mother and then to her uncle in Naiyar, also shows that she was in the ordinary course to go back to the Complainant's house. There is no evidence that either the mother or the uncle disputed this. When the Complainant was bringing Jahora to his house during the continuance of this position he must be deemed to be the rightful custodian and lawful guardian of the minor Jahora, within the meaning of Section 361 I. P. C., the mother having nothing to do with her protection at the time.

(7) If the removal from the custody of the Complainant could be proved to have been effected at the instance of or under the instigation of the mother of the minor, such taking would be lawful as in that case the guardianship of the Complainant must be deemed to have been terminated by the action of the mother, the normal legal guardian. This view has also its support from the opinion expressed in the decisions in Korban's case (32 Cal 444) and Banamali Tripathi's case (AIR 1943 Pat 212) referred to above. None of the Courts below however found that the taking of Jahora was at the instance of or at the instigation of her mother. On the other hand the clear finding of both the Courts is that Jahora's mother was won over after the occurrence. But subsequent ratification after the offence was completed, cannot take the case out of the purview of Section 363, I. P. C.

(8-9) (His honour after examining the evidence and dismissing the second contention of the petitioner as an afterthought and untrue proceeded.) Besides the points referred to above it was argued that the trial Court failed to comply with the provision of Section 342, Cr. P. C. in recording the statement of the petitioners and this was fatal to the prosecution. Reference was made in this connection to the Privy Council Ruling in the case of —'Nazir Ahmed v. King Emperor', reported in —'AIR 1936 P. C. 253(2), where it was observed that "where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all". The comment has reference to an irregular record of confession on which a conviction was based. In the present case however the irregularity is only of a nominal nature and does not appear to have prejudiced the petitioners in any way. The irregularity complained of is thus curable under Sec. 533 Cr. P. C.

From what has been stated above and on a consideration of the other facts and circumstances on record this Court is of the opinion that the Rule must be discharged.

B/M.K.S. Rule discharged.

A. I. R. 1952 TRIPURA 28

SEN GUPTA J. C.

Hara Krisna Dewan and others, Appellants v. Ram Surat Pandey, Respondent.

Second Appeal No. 3 of 1951, D/- 7-5-1951.

T. P. Act (1882), S. 54 — Contract of sale — Conflict between boundary and area — Intention of parties — Non-performance of contract — Remedy of parties — (Evidence Act (1872), Ss. 14, 93 and 95).

Whenever there is any conflict between the boundary and area of any specific land the real intention of the parties can be gathered from the circumstances. AIR 1931 Cal 596, Rel. on.

When there is no vagueness in the boundaries the definite boundaries must prevail and the area must be taken to be approximate. AIR 1934 Cal 851; AIR 1926 Pat 257; AIR 1937 Lah 940 and AIR 1937 Nag 281, Rel. on. (Para 9)

A contract for sale of homestead land, to be transferred after the necessary permission was obtained from the Collector, specified the land by boundary and also mentioned the area. But there was nothing to show that the area mentioned was actually verified by the parties by measurement or that it formed the basis of the price fixed. The land was to be transferred within a specified time and the proposed vendee was to lose his deposit if he failed to perform the terms of the contract while the vendor was to be liable for the return of the earnest money with damages if he failed:

Held (i) that the contract was one for sale of land defined by boundary and not by area and therefore the proposed vendee was not entitled to refuse to complete sale and recover the earnest money with damages on ground that the land offered to be transferred did not correspond with the area mentioned in the agreement and that the other party could not obtain permission to sell the entire area. (Paras 7, 10, 12)

(ii) that he could not also succeed on a vague contention that the necessary permission could not be obtained in respect of certain portion within the boundary without stating which portion and also without showing that the obtaining of such permission for the transfer of any such indefinite and unascertained portion was necessary at all. (Paras 11, 12)

Anno: T. P. Act, S. 54 N. 23; Evi. Act, S. 14 N. 3; S. 93 N. 2; S. 95 N. 3.

Abani Kanta Shyam Choudhury, for Appellants; Nagendra Nath Roy and Anil Chandra Chakravorty, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('31) AIR 1931 Cal 596: (58 Cal 686) 8
('34) AIR 1934 Cal 851: (153 Ind Cas 532) 9
('37) AIR 1937 Lah 940: (175 Ind Cas 424) 9
('37) AIR 1937 Nag 281: (173 Ind Cas 680) 9
('26) AIR 1926 Pat 257: (98 Ind Cas 351) 9

JUDGMENT: This is a second appeal by the plaintiff against the appellate decree of the District Judge of Agartala reversing the decree in his favour passed by the Subordinate Judge of Agartala, in a suit for recovery of the earnest money with damages for non-performance of a contract for sale of certain lands.

(2) Baina-patra Ex. 1 was executed by the defendant for the sale of some home-stead land with huts standing thereon on receipt of an advance of Rs. 1,000/- out of the agreed consideration of Rs. 5,300/-. It was agreed in the Baina-patra that the lands within specified boundaries and with an area of 1 'kani' 1 'Ganda' and odd, would be transferred within a specified time, after taking the necessary permission from the Tripura Collectorate. As there was delay in getting the permission an Ekrarnama Ex. 2 was executed by the defendant with slight amplification of the terms of the baina-patra. It was agreed here that the neces-

sary permission should be obtained & a Kawala executed by the end of Chaitra, 1357 T. E., on the plaintiff's paying the balance of the consideration. There was a further condition in Ex. 2 that in case of non-payment of the balance of consideration by the plaintiff within the specified time, the advance of Rs. 1,000/- would be forfeited and if the defendant failed to execute the Kawala within that time, he would be liable to refund the earnest money with damages.

(3) It is not disputed that the defendant got permission to sell 13 gandas and odd and then about another 4 gandas of the lands and offered to execute the kawala. The plaintiff's contention however was that as the defendant could not secure permission for the sale of the entire 1 kani 1 ganda and odd, as covered by the agreement, he was entitled to the refund of the earnest money with damages, in terms of the agreed condition.

(4) The defence on the other hand was that the agreement was for selling the entire lands within the definite boundaries as given in the documents Exs. 1 and 2 and as the plaintiff was not prepared to take the Kawala on payment of the balance of consideration within the stipulated time, the advance was forfeited and the plaintiff was not entitled to the refund claimed.

(5) The trial Court decreed the suit in favour of the plaintiff but the first Court of appeal held that there being some discrepancy between the area and the boundaries mentioned in the bainapatra and Ekrarnama, the boundaries, on the basis of which the plaintiff had as a matter of fact, entered into the agreement of transfer, must prevail and therefore the plaintiff was not entitled to the decree as passed by the learned Subordinate Judge.

(6) It has been contended before this Court that the areas given in the documents being definite the defendant must be held to have agreed to sell the land by area but as he was not in a position to transfer the entire stipulated area the plaintiff was entitled to the refund claimed.

(7) It appears from the judgment of both the trial Court and first Court of appeal that the parties had, as a matter of fact, agreed upon the transfer of the land within the clear and definite boundaries given in the documents Exs. 1 and 2. It further appears from the evidence adduced that the area noted in those documents were never measured with any accuracy, at the instance of either of the parties. The scribe of the documents stated in his deposition that he noted the area from certain other papers. There is nothing to show that the areas given in those papers were entered after the actual measurement or were attempted to be verified. It is nobody's case that the price was fixed on the basis of the area. The land to be sold was the entire area which was in actual possession of the defendant. On these facts therefore the normal conclusion would be that the plaintiff agreed to purchase the lands as included in the definite boundaries without attaching any special importance to the area.

(8) Whenever there is any conflict between the boundary and area of any specific land the real intention of the parties can be gathered from the circumstances. This view finds support from the decision of the Calcutta High Court in — 'Shailendra Nath v. Girija Bhushan', AIR 1931 Cal 596. In this case the intention as found by the Court of first appeal was that the boundary should prevail over the area.

(9) It has further been held in several cases in the different High Courts that when there is no vagueness in the boundaries the definite boundaries must prevail and the area must be taken to be approximate. The following decisions may be referred to in this connection: — 'Bhola Nath v. Mrityunjay Chattopadhyay', AIR 1934 Cal 851; — 'Raghunandan Thakur v. Kishundeo Narain', AIR 1926 Pat 257; — 'Nandalal v. Ghulam Ahmad', AIR 1937 Lah 940 and — 'Pannalal v. Bhaiyalal', AIR 1937 Nag 281.

(10) The plaintiff-appellants' contention to the contrary cannot therefore be supported.

(11) The appellants' further contention seemed to be that permission of the Collector could not be taken for transfer of a certain portion within the boundary. This contention is however very vague and the exact portion for which permission could not be obtained has not been stated. It has also not been established that there was any necessity for taking any permission for any such indefinite and unascertained portion of land. This could not therefore have possibly stood in the way of transfer which the defendant was prepared to effect.

(12) In the circumstances referred to above, the claim for refund by the present appellants was rightly dismissed by the learned District Judge. The appeal must therefore fail.

(13) Appeal dismissed with costs and Advocates' fees Rs. 30/-.

C/M.K.S. Appeal dismissed.

A. I. R. 1952 TRIPURA 29

LAKSHMI NARAIN J. C.

Suresh Chandra Bhowmik, Petitioner v. Suresh Chandra Kapali, Opposite Party.

Criminal Ref. No. 16 of 1952, D/- 2-9-1952.

Criminal P. C. (1898), S. 145 — Proceedings dropped — Subsequent order for disposal of property.

After the proceedings under S. 145 are dropped by the Magistrate, he becomes functus officio and has no jurisdiction to pass any order relating to the claim of the parties or to the disposal of the property. The parties should be left to settle their rights in a competent Court or in any manner they choose. The attachment order automatically ceases. Where the crops of the attached land are auction-sold during the proceedings, on an application made by the party, the proper course would be to keep the amount deposited in Court until the party entitled to it has established his right in proper proceeding. (Para 3)

Anno: Cr. P. C., S. 145 N. 29, 48.

ORDER: The Sub-Divisional Magistrate, Sadar dropped the proceedings u/s. 145, Cr. P.C., pending in his Court on 15-3-51 and released the disputed property from attachment. The crops of the land having been auction-sold during the proceedings the amount was deposited in Court. On an application made by the second party, the Magistrate, however, ordered that as the second party had grown the paddy, he is entitled to the deposited amount. The learned Sessions Judge has forwarded this Criminal Motion No. 66 of 1952 arising out of the Criminal Case No. 46 of 1950 of the Court of

the Sub-Divisional Magistrate, Sadar, with recommendation u/s. 438, Cr. P. C., that the amount in deposit in Court should be kept intact until the party entitled to it establishes its right in a proper way.

(2) The record of the case shows that the proceedings u/s. 145, Cr. P. C. were dropped on 15-3-51. After about 3 months on 3-6-52, the S. D. M. passed the following order on application of the party.

".....It is reasonable to infer that the second party has grown the paddy and this party is entitled to the deposited amount for the auctioned paddy from the said land. By this order the Court is only deciding the petition who is entitled to the deposited amount."

(3) After the proceedings were dropped by the Magistrate, he became functus officio and had no jurisdiction to pass any order relating to the claim of the parties or to the disposal of the property. The parties should be left to settle their rights in a competent Court or in any manner they choose. The attachment order automatically ceased. On such an application as made by the party, the proper course would be to keep the amount deposited in Court until the party entitled to it has established his right in proper proceeding. The above order passed by the learned Magistrate is, therefore, without authority.

(4) As recommended by the learned Sessions Judge, the above order passed by the S. D. M., Sadar, is set aside. The amount which is in deposit in Court should be so kept until the party entitled to it establishes his right in a proper proceeding.

B/D.H. Order accordingly.

A. I. R. 1952 TRIPURA 30

SEN GUPTA J. C.

Wach Mahammad, Appellant v. Ali Mea and others, Respondents.

Second Appeal No. 19 of 1950, D/- 9-4-1951.

(a) Civil P. C. (1908) O. 32 R. 4 — Appeal by minors — No guardian appointed by Court — Minors' brother acting as their next friend — Brother is competent to conduct appeal on behalf of minors. (Para 8)

Anno: C.P.C., O. 32 R. 4 N. 3.

(b) Limitation Act (1908), Art. 144 — Adverse possession — Adverse possession against mortgagor — Such possession cannot operate against simple mortgagee till he acquires right to possess mortgaged property. (Para 14)

Anno: Limitation Act, Arts. 142 and 144 N. 84 Pt. 1.

(c) Civil P. C. (1908) S. 11 — Mortgage suit by simple mortgagee — Trespasser in possession of mortgaged property impleaded as defendant — Trespasser's name struck out of list of defendants as being unnecessary party — Suit decreed — Subsequent suit against trespasser for possession — Suit held not barred by res judicata. (Para 16)

Anno: C.P.C., S. 11 N. 42, Pt. 4.

Nagendra Nath Roy, Anil Chandra Chakravorty, for Appellant; Nibaran Chandra Ghosh, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('22) AIR 1922 Cal 32: (69 Ind Cas 841) 13
('24) AIR 1924 Cal 600: (79 Ind Cas 520) 13
('28) AIR 1928 Cal 250 13
('23) AIR 1923 Mad 160(2): (99 Ind Cas 831) 13
('41) AIR 1941 Nag 72: (ILR (1942) Nag 145) 13
('29) AIR 1929 Pat 577(2): (121 Ind Cas 471) 13

JUDGMENT: This is a second appeal by the plaintiff-appellant against the decision of the learned District Judge of Agartala setting aside a decree for khas possession and mesne profits passed in his favour by the learned Munsif of Sonamura.

(2) The facts out of which this appeal arises are briefly as follows:

(3) The suit lands, with others, belonged originally to one Reajuddi. Chandraban Bibi respondent No. 20, daughter of Reajuddi, got a share out of Readjuddi's lands by virtue of a will of Reajuddi and also by inheritance from him. While in exclusive possession of the suit lands as such heir of Reajuddi, Chandraban Bibi and her husband Safar Ali respondent No. 19 mortgaged the land to the plaintiff-appellant in Ashar 1337 T.E. for a consideration of Rs. 71/- only. It was a simple mortgage under which the possession of the mortgage debt was not cleared the appellant secured a decree and in execution thereof, took delivery of possession of the suit land through Court in Sravan 1346 T.E. The appellant's case was that the original defendant No. 1 dispossessed him from the suit lands early in 1347 T.E. and he therefore brought the suit in 1352 T. E. out of which this appeal arises, for khas possession and mesne profits.

(4) The main defence in the suit was that the original defendant No. 1 Hashan Ali had purchased some share in 1335 T.E. from Sonai Bibi, a sister and heir of Reajuddi, and another share in 1336 T.E. from Arfan Bibi another daughter of Reajuddi. It was further alleged that Hashan Ali had previously been in possession of the entire lands of Reajuddi as a mortgagee and that both on this account and on account of his subsequent purchase he had been in possession of all the lands of Reajuddi including the suit lands for over 25 years, that the appellant's story of possession by Chandraban Bibi and her husband was false and that the suit was therefore barred by limitation. Hashan Ali had also denied the title of Chandraban Bibi over the suit lands. Another plea of the original defendant was that as he was held to be an unnecessary party in the mortgage suit by the appellant, the present suit was barred by Res judicata.

(5) The trial Court held that Chandraban Bibi had inherited a share of Reajuddi's land and was in actual possession of the lands, which formed the subject-matter of the present suit, at the time she mortgaged them to the appellant and further that the appellant had taken possession of the suit lands through Court in execution of the mortgage decree in 1346 T.E. He held therefore that the suit was not barred by limitation. The suit was therefore decreed for khas possession and mesne profits.

(6) On appeal the learned District Judge held that Hashan Ali had been in continuous possession of the suit lands together with other lands of Reajuddi at least from 1338 T.E. and the appellant's suit was therefore barred by limitation. It was further held that although the appellant had taken delivery of possession of the suit land in 1346 T.E. in execution of the mortgage decree, this was only symbolical possession as Reajuddi's lands were

not partitioned between his heirs and successors, and did not therefore affect the period of limitation which had already commenced from 1338 T.E. The appeal was therefore allowed and the appellant's suit dismissed.

(7) One preliminary point taken on behalf of the appellant was that the decree passed by the learned District Judge was infructuous as some of the minor defendant-respondents before him were unrepresented.

(8) The minor parties referred to above were respondents Nos. 7, 8 and 9, before the first Court of appeal. It appears that in the trial Court the father of these minors was impleaded as their natural guardian and served with notices as such. He did not however appear in Court or give his consent to act as guardian. The minors were therefore unrepresented during the original suit. In the appeal before the District Judge however they were represented by their brother who acted as their next friend. As the Court has not previously appointed any guardian for these minors their brother was competent to conduct the appeal on behalf of the minors. This is in conformity with the provision of order 32 Rule 4 of the Code of Civil Procedure. The appeal before the learned District Judge could not therefore be held to be bad for defect of parties.

(9) I also agree with the learned District Judge that the non-representation of these minors before the original Court did not make the suit defective.

(10) The real point urged on behalf of the appellant was that the suit was not barred by limitation.

(11) It appears that the learned Munsif had in his judgment found that Hashan Ali, the original defendant, had not right, title or interest in the suit lands by purchase from any of the heirs of Reajuddi, that the previous mortgage in his favour by Reajuddi was also redeemed, and that he was only a trespasser. This finding does not appear to have been challenged by the learned District Judge who has also held Hashan Ali to be a pure trespasser.

(12) The learned Munsif appears to have further held that Chandraban Bibi and Safar Ali mortgaged the suit land to the plaintiff-appellant in 1337 T.E. when they were in actual possession thereof. This finding has also not been controverted by the learned District Judge who did not also challenge the title of Chandraban Bibi as an heir of Reajuddi.

(13) Now there is evidence to show that Safar Ali, husband of Chandraban was dispossessed from the suit lands by Hashan Ali while the mortgage in favour of the appellant was subsisting and also that the present appellant acquired the right to possess the land only after he got delivery of possession through Court in execution of the mortgage decree in Sravan 1346 T.E. In these circumstances, although limitation for recovery of possession of the land might count against Safar Ali, from the actual date of his dispossession by Hashan Ali, the adverse possession would be counted, against the present appellant only from the date on which the appellant acquired the right to possess the land, i.e., from 1346 T.E. This view is supported by the rulings in (1) — 'Dwijendra Narain v. Jogesh Chandra', AIR 1924 Cal. 600; (2) — 'Ambika Prasad v. Annada Prosad', AIR 1928 Cal. 250; (3) — 'Umar Haji Karim Shop, Akola No. 15 v. Badridas Ramri Shop, Akola', AIR 1941 Nag. 72; (4) — 'Sital Ch .Majhi v. Parbati Charan Chakrabarty', AIR 1922 Cal 32; (5) — 'Sundaram Iyar v. Thiyagaraja Pillai', AIR 1923 Mad. 160(2); (6) — 'Mohan Bhakat v. Jagadayan Pandey', AIR 1929 Pat 577(2) and other rulings of the different High Courts.

(14) The rulings referred to above clearly laid down that adverse possession against the mortgagor could not operate against simple mortgagee till the latter acquired the right to possess the mortgaged land. No argument has been advanced to show that the principle enunciated in the rulings above was wrong or unacceptable. In the present case the appellant clearly brought the suit within 12 years of the date when he got formal delivery of possession of the lands through the Court. The suit was therefore clearly not barred by limitation.

(15) The next question raised for decision was whether the fact that the lands of Reajuddi were never partitioned between his heirs, would stand in the way of the present appellant's getting exclusive possession of the suit lands. The present respondents before this Court are the heirs of Hashan Ali who was found to be a mere trespasser. They could therefore on no account be treated in the same way as the co-sharers of Chandraban Bibi — who might or might not have resisted the claim for exclusive possession. In the circumstances the appellant appears to be entitled to recover khas possession of the lands which were in the exclusive possession of the mortgagor.

(16) That Hashan Ali's name was struck out from the list of defendants in the plaintiff's mortgage suit did not bar the appellant's suit for khas possession by the way of Res judicata.

(17) In the result the appeal is allowed.

(18) The decree passed by the learned District Judge is set aside and that of the first Court restored.

(19) Appellant will get his costs throughout.

D/V.R.B. Appeal allowed.

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LAKSHMI NARAIN J. C.

Elehus Mia and another, Petitioners v. Ali Ahmed Kazi, Opposite Party.

Criminal Ref. No. 18 of 1952, D/- 10-10-1952.

Criminal P.C. (1898) S. 145(4) — Restoration of possession under — Party in possession within 2 months of the order.

The question of possession has to be determined with reference to a specified point of time, viz. the date of the initial order or in case of forcible dispossession, a date within 2 months next preceding such order. The party complaining disturbance of possession which is likely to give rise to a breach of the peace must show that it was in possession within two months of the initial order required to be passed under S. 145 Cr. P. C. In case of a forcible dispossession more than 2 months prior to preliminary order, possession of the opposite party must be maintained. 32 Cal. 1093, Rel. on. (Para 3)

Anno: Cr. P. C., S. 145 N. 46.

REFERENCE .....

('05) 32 Cal 1093: (2 Cri LJ 679)

/Para 3

ORDER: In proceedings u/s 145 Cr. P. C. which were started by Ali Ahmed Kazi against Elehus Mia and others on 3-10-50, Shri B. Dutta Magistrate, first class, Udaipur on 30-5-51, allowed the application of the first party by lifting the attachment of the land in dispute already made by his order dated 25-11-50, giving its possession to him and directing that he should remain in such possession until legally evicted. It was alleged that the 2nd party was in possession of the land from the month of Pous of that year. The preliminary order in this case was drawn by the Magistrate on receiving the police report called by him on 25-11-50. In his judgment the learned Magistrate has found that the second party had possessed the land forcibly on 12th Sept. 1950 and since then they were in possession from over 2 months before the proceedings were drawn up by him on 27-11-50. It has also been held by him that the 2nd party was trespasser and its possession was not peaceful.

(2) On a motion having been filed by the 2nd party against the above order, the learned Sessions Judge Shri Umadas Gupta, has referred the case to this court u/s 438, Cr. P. C. for setting aside the order of the Magistrate made in favour of the 1st party mainly on the ground that the learned Magistrate was not entitled to pass the above order in favour of the 1st party in view of sub-section 4 of Section 145, Cr. P. C. as the 2nd party, according to his own finding, has already been in possession of the land more than 2 months before the passing of the order on 27-11-50. The explanation of the Magistrate in this connection is far from satisfactory.

(3) From the finding of the learned Magistrate himself it is clear that the 2nd party was in de facto possession of the land in dispute for more than 2 months before the initial order of the learned Magistrate passed on 27-11-50. The question of possession has to be determined with reference to a specified point of time, viz., the date of the initial order or in case of forcible dispossession, a date within 2 months next preceding such order — 'Tarapada Biswas v. Nurul Huq', 32 Cal. 1093. This is the material question for decision. The party complaining disturbance of possession which is likely to give rise to a breach of the peace must show that it was in possession within two months of the initial order required to be passed u/s 145, Cr. P. C. In case of a forcible dispossession more than 2 months prior to preliminary order, possession of the opposite party must be maintained.

(4) As a result, the order of the learned Magistrate in favour of the 1st party directing that the 1st party should be restored to the possession of the land in dispute and restraining the 2nd party from interfering with the possession of the 1st party and ordering that the 1st party should recover the premium of the land leased out by the police during attachment, is set aside. This motion is allowed.

C/D.R.R. Reference accepted.

E N D

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VINDHYA PRADESH

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1952

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(C. N. 1)

A I. R. (39) 1952 VINDHYA PRADESH 1

KRISHNAN J. C.

Ram Dass, Defendant-Appellant v. Mukut Dhari, Plaintiff-Respondent.

First Appeal No. 43 of 1951, D/- 3-10-1951.

(a) *Partnership Act (1932), Ss. 4, 8 — Partnership and single venture — Distinction.*

The distinction between the "single venture" and a "business" as used in S. 4 is that a single venture or transaction finishes immediately after the purchase and the sale. There is no continuity, or "carrying on of the business", in the sense that one or more partners continue to have the responsibility and to apply their discretion, in buying, storing, selling and keeping charge of the moneys over a length of period. If this length of period, and the scope of the business are defined with reference to a particular season or to particular quantities of commodity, then we have a particular partnership. If in the agreement itself the period and the scope are not precisely defined then we may call it a general partnership. Either way, it has to be a business, "carried on" with repetitions of the process of purchasing and selling, and keeping charge of the commodities and the moneys.

Where there was to be continuous business, because different lots were to be purchased on different dates as they came up for sale, even after bidding the money was to be paid on different occasions, and the lots taken over on different dates, sold to the possible customers as they turned up, and the profits ultimately divided, this amounts to partnership. A I R (17) 1930 P-C 300, A I R (27) 1940 All 230, Ref. (Para 8)

Anno : Partnership Act, S. 4, N. 1, 8; S. 8, N. 1.

(b) *Companies Act (1913), S. 4 — Non-compliance — Right of refund of contribution.*

Where the business of the partnership had been carried on for some time, and the contribution by the plaintiff to the business of the association, illegal under S. 4 of the Companies Act, had been applied to the business no refund by the plaintiff can be claimed. But where the agreement has been made and the contribution has been paid by one associate to another, but it has not been started, there is an equitable principle that the associate should get back the money. The principle of pari delicto does not come in here, because the delict though contemplated and agreed to has not yet been committed. A I R (38) 1951 Mad 291, A I R (13) 1926 All 591, A I R (30) 1943 Pat 374, Referred. (Paras 9, 10)

Anno : Companies Act, S. 4, N. 1.

Lal Guru Prasnya Singh, for Appellant; Deep Narain Pathak, for Respondent.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('30) A I R (17) 1930 P C 300 : (126 Ind Cas 429) (Pr 8)

('26) A I R (13) 1926 All 591 : (48 All 735) (Pr 9)

('40) A I R (27) 1940 All 230 : (I L R (1940) All 256) (Pr 8)

('51) A I R (38) 1951 Mad 291 : (I L R (1951) Mad 593) (Pr 9)

('43) A I R (30) 1943 Pat 374 : (22 Pat 334) (Pr 9)

JUDGMENT : This is a first appeal by the defendant in a suit for Rs. 3000/- by 10 persons, claiming a refund of the money advanced by them. The questions for decision are, whether the amounts were actually paid as the plaintiffs' contribution in the joint adventure of purchasing at auction different lots of crude lac and selling them at profit and sharing it. Secondly, whether such a venture was a partnership as defined in Ss. 4 and 8 of the Partnership Act, in which event it would become automatically illegal under S. 4 of the Indian Companies Act. Thirdly, whether even if the association was illegal, the plaintiffs are entitled to a refund of their contribution in the present instance, as it had not been applied to the business of the illegal partnership.

(2) The facts of the case are the following : The plaintiffs, who are ten in number and the pro forma defendants, who are thirteen in number, are all residents of Umaria. The defendant-first-party-appellant is a man of Katni, but he comes from time to time to do business at Umaria. On 7-2-1950 the authorities of the Forest Department were to sell by auction different lots of crude lac. The usual practice is that the crude lac is collected at convenient centres in the forest, and kept in depots. They

are sold by auctions held for several days after wide publicity, at some convenient central place like Umaria or Nowgong. As usual the bidders pay up earnest money, and sqare up accounts after weighing stocks and taking them over. Either to do the business on a large scale, or to reduce the chances of competitive bids, the intending bidders form combines. One of them was a registered company, with which we are not directly concerned here. Another practice was to form ad hoc associations each year, the members contributing a few hundreds, selecting one of themselves for bidding, purchasing, taking charge of the stock, selling at profit and dividing the sale proceeds amongst the contributors in proportion to their contributions.

(3) The plaintiffs' case is that, on 7-2-1950, before the bidding started, these twenty three formed a combine, raised money according to the schedule in the plaint and Ex. 4, and made over the sum total of Rs. 4,500/- to the defendant, who had also come as usual to bid at the auction. The money was actually handed over by Gobardhan Dass at his place in the presence of others. The defendant-appellant was to bid for different lots, and afterwards take the stock, sell it at profit, and divide the profit among these contributors. As it turned out he did not bid on that day or on the next or later on when the bidding was at Nowgong. On 7-2-1950 the defendant left the bunglow, went to station and returned to Katni. Some of the contributors wanted back their money, but the defendant put them off. Some days later, he said that he would return the money after a marriage in his house. For some time the contributors went on pressing and some of them got their money, about 750 being refunded. Most remained unpaid, including the ten plaintiffs whose contribution is detailed in list B attached to the plaint. They also brought on the record as pro forma defendants the thirteen others, who have either got the refund or have not interested themselves in the suit.

(4) The defendant denied that there was any such transaction, or that he received the contributions or refunded. On points of law the defendant argued that the case propounded even if true, is of the formation of a partnership. Such a formation of more than 20 persons is illegal, and in fact punishable under S. 4 (5) of the Indian Companies Act. Under the Partnership Act itself, this being unregistered, the claim by some partners from others is barred by S. 69 of the Partnership Act. Thirdly, viewing it simply as a venture, which in the eyes of law is criminal, the plaintiffs are in pari delicto with the defendant and cannot claim refund.

(5) The learned District Judge accepted the facts pleaded by the plaintiffs, and further held that in the circumstances of the case the money was refundable. The plaintiffs had claimed interest, but the Court passed a decree against the defendant for the payment of the principal only.

(6) 'Point No. 1'. On the facts of the case, I accept the account given by plaintiffs. The evidence shows that these Umaria people have on previous occasions also been trusting the defendant, generally calling him Lalloo Bhai, and giving him money without receipt. But for this trust, the plaintiffs giving him money without receipt would almost be comic, but though on the previous occasion they did not insist on receipts the arrangement seems to have worked smoothly. The oral evidence for the plaintiffs comes from 3 witnesses. The first of them is a pleader, who has for some time interested himself in the lac business. The next is Gobardhan Dass, who says that he paid money into the hands of the defendant. These two witnesses have not been confronted with any happening, or special reason why all of a sudden they should have taken into their heads to make a false claim. The next witness is Jagdulal. He says that he has already received the money he had contributed; and has really no interest in the results of the suit. The oral evidence of this witness appears to me to be very impressive. Moreover, there is a document which is of very considerable, though indirect bearing on this question. The plaintiffs have produced Ex. P-5, a list containing the particulars of the money contributed by each of these 23 men. On the back of it, there are endorsements admittedly by the defendant himself that such and such amounts have been refunded. This is documentary evidence on part of the transaction, and is written by the defendant himself. It was for him to show that his endorsements relate to some other transactions. Actually he gives a vaguest possible explanation. He does not claim to have any full recollection, which itself is suspicious, but suggests one possibility. There is a company registered at Mirzapur, which does purchase and sales of lac at Umaria. May be, the defendant suggests, that these endorsements were of the division of that company's profits. This is an unconvincing explanation, because the defendant is not an office-bearer of the company, nor has he produced the books of that company to justify this. So, I conclude on the facts that the story given by the plaintiffs is true. These amounts were collected from the plaintiffs, and Gobardhan Dass gave the money to the defendant-appellant.

(7) 'Point No. 2'. The purpose of the association has not been reduced to writing, but the three witnesses, who were members of the association have given evidence. It is worth quoting the statements. The first says :

"These amounts were for the earnest money. If more was required for payment of the bid we were to give. The reason why we brought lac in this manner was that it would be better and we would make profit."

P. W. 2 says :

"Our intention was to buy lac and divide the profits. On previous occasions also we used to do so. Once I was a partner with defendant No. 1, then also the lac was purchased and the profits were divided."

P.W. 3 says, "I advised others that they should pay up, if they intended to become partners."

In these circumstances there is no doubt that the association formed was a partnership. Section 4 of the Indian Partnership Act provides that "the intention should be to carry on a business, 'and to share the profits'." Section 8 makes it clear that even for a particular adventure there can be partnership, which can be called a "particular partnership'."

(8) Before me the P. C. ruling in case 'Senaji Kapurchand v. Pannaji Devichand', AIR (17) 1930 PC 300, has been placed by the defendant-appellant to show that a single venture may not amount to a business:

"No doubt a single venture or when a number of articles of a single contract are purchased and sold may not amount to a business. But if a number of articles are purchased at one time and sales are to go on, profits are to be realised and they are to be divided amongst the partners, it is not a single venture. and amounts to a partnership."

This ruling has been followed in the Allahabad Case 'Nathi Lala v. Sri Mal', A I R (27) 1940 All 230. There the phrase used is "single transaction". The facts of the present case show that this was not a single venture, or transaction in the sense in which these two rulings have used these words. Here there was to be continuous business, because different lots were to be purchased on different dates as they came up for sale. Even after bidding the money was to be paid on different occasions, and the lots taken over on different dates, sold to the possible customers as they turned up, and the profits ultimately divided. It is exactly similar to the position described in the latter part of the quotation from the Privy Council decision already noted. To my mind, it appears that the distinction between the "single venture" as mentioned in these two rulings and a "business" as used in S. 4 of the Indian Partnership Act is this. A single venture or transaction finishes immediately after the purchase and the sale. There is no continuity, or "carrying on of the business", in the sense that one or more partners continue to have the responsibility and to apply their discretion, in buying, storing, selling and keeping charge of the moneys over a length of period. If this length of period, and the scope of the business are defined with reference to a particular season or to particular quantities of commodity, then we have a particular partnership. If in the agreement itself the period and the scope are not precisely defined, then we may call it a general partnership. Either way, it has to be a business, "carried on" with repetitions of the process of purchasing and selling, and keeping charge of the commodities and the moneys. By this test the agreement made on 7-2-1950 was for a particular partnership business. There were more than 20 associates, which automatically attracts S. 4 sub-ss. 2 and 5 of the Indian Companies Act. Therefore, one has to accept the contention of the defendant-appellant that the agreement was illegal and the business if carried on would be an illegal business.

(9) 'Point No. 3'. The next question is whether the agreement being one in violation of S. 4 of the Indian Companies Act the plaintiffs are entitled to get a refund. We have to distinguish between two types of cases. Firstly, the ones in which the money collected has already been applied to the business agreed to. The case reported in 'Kumaraswami Chettiar v. Chinnathambi Chettiar', A I R (38) 1951 Mad 291 is an illustration of this type. There the partnership being illegal a member was not allowed to sue for dissolution of partnership and for the taking of accounts.

"Its members have no remedy against one another for contribution or apportionment of partnership dealings and transactions."..... "It is not open to such a partner to claim a refund of his original subscription after participating in the profits for several years and receiving considerable sums of money from the partnership."

Another case of similar type has been reported in 'Mewa Ram v. Ram Gopal', A I R (13) 1926 All 591. There it was held that :

"One member may get a declaration that the association was illegal, but he cannot get the relief of dissolution of accounts as the Court would not assist the plaintiff to have his full share of the profits made by the association."

In this connection it is worth quoting from another ruling placed by the defendant namely 'Hadi Bandhu v. Gopal Sahu and others' A I R (30) 1943 Pat 374. There licensee of an excise shop made it over to a non-licensee in return for certain sums. The licensee suing this transferee for refund of the advance license fee and the price of the stock, it was held that the

"agreement being void and in fact punishable under the excise rules as a crime, the refund was not obtainable even under S. 65 of the Contract Act."

There again it is to be noted that the transferee of the shop had taken over and had carried on the business for sometime. If he had not carried on the business, then of course, the agreement to transfer would have been void and no occasion would have arisen for asking for the advance license fee and stock. The point to note is that in these cases the business of the partnership had been carried on for some time, and the contribution by the plaintiff to the business of the association, illegal under S. 4 of the Companies Act, had been applied to the business.

(10) There is a second class of cases where the agreement has been made and the contribution has been paid by one associate to another, but it has not been applied and the business agreed upon has not been started. The present case is of that nature. The agreement having been made and the money having been collected and placed in the hands of the defendant, he did not bid and purchase any lac. In other words, he had not applied the money as yet. In such a case there is an equitable principle that the associate should get back the money. To put it in another way, the principle of pari delicto does not come in here, because the delict though contemplated and agreed to has not yet been committed. After the agreement, but before the starting of the business, and the application of the money some of the members want a refund. It is difficult to see how it can be refused. I, therefore, hold that in the present case the plaintiffs are entitled to a refund.

(11) The result is that the appeal is dismissed with costs to the plaintiff-respondents and pleaders' fee of 7 per cent.

D.H. *Appeal dismissed.*

A. I. R. (39) 1952 VINDHYA PRADESH 3 (C. N. 2)

CHATAR SINGH PANCHOLY ADDL. J. C.

Bhola Ram Jumramal, Accused-Applicant v. State of Vindhya Pradesh.

Criminal Revn. No. 121 of 1951, D/- 30-4-1951.

Vindhya Pradesh Ordinance No. (XV (15) of 1949) S. 2 — Offence under — Possession of mixture of pure ghee, with vegetable ghee.

A person found in possession of mixture of vegetable ghee and pure ghee is not guilty of an offence under S. 2 of the Ordinance which prohibits import, sale and possession of vegetable ghee only. (Para 8)

Lal Pradyumna Singh, for Applicant — Asst. Advocate General, for the State.

ORDER: Kotwali Police Rewa put up a challan against Bhola Ram under V. P. Ordinance No. XV of 1949 dated 10-4-49.

(2) Prosecution story is that the applicant was found in possession of 33 tins of vegetable ghee, in Venkatganj Rewa. He committed an offence under sec. 2 of the said Ordinance. 33 tins of vegetable ghee were recovered from his possession. The Magistrate, after trial, convicted and sentenced the applicant under section 3 of the said Ordinance and he was sentenced to a fine of Rs. 250/-.

(3) Bhola Ram filed an appeal against this order in the court of the Sessions Judge, Rewa who had disallowed the said appeal. Against that order, he has now come up in revision before this court.

(4) The learned Advocate for the applicant has argued that the said Ordinance is ultra vires as it infringes the right of the citizens under the Constitution of India because every citizen is free to carry on his profession and the restrictions placed by this Ordinance are not reasonable and not in the interest of the public. As this Ordinance is ultra vires, no offence is made out against the applicant and he is entitled to acquittal.

(5) The learned Asstt. Advocate General has maintained that the Ordinance is in the interest of the public and the restrictions placed by it are reasonable. Without discussing this point whether the Ordinance is ultra vires or intra vires, it is to be considered whether the applicant is guilty under the Section charged on the facts as have been alleged by the prosecution.

(6) An Ordinance to prohibit the import of vegetable ghee in the Vindhya Pradesh was passed in 1949 and which is called "The Vindhya Pradesh Ordinance No. XV of 1949". Under section 2 of the Ordinance, the import, sale, and possession of vegetable Ghee in any part of V. P. is absolutely prohibited. From the wording of this section, it is clear that nobody can import, sell and possess vegetable ghee in any part of the V. P. If from the evidence, it is proved that the applicant was found in possession of vegetable ghee in contravention of this Ordinance he is guilty under the said Ordinance.

(7) The facts of the case as proved by the prosecution are that 33 tins of ghee mixed with vegetable ghee were found in the possession of the applicant. Tins of vegetable ghee were not found in the possession of the complainant but the mixture of the two was recovered from his possession. It has not been laid down under the Ordinance that if anybody is found in possession of mixture of vegetable ghee and pure ghee, he has committed an offence under the said Ordinance.

(8) The vegetable ghee was not recovered from the possession of the applicant but the mixture of vegetable ghee and pure ghee was recovered from the possession, and, as there is no prohibition in the said Ordinance regarding the possession of mixture, no offence is made out against the applicant. When no case is made out against the applicant, it is unnecessary to discuss whether this Ordinance is ultra vires or intra vires, and, also it is unnecessary to discuss other points raised during the course of the argument from both the sides.

(9) The revision application is allowed and the order of the Magistrate is set aside. The applicant is acquitted of the offence under section 2 of the said ordinance. Fine, if realized, be refunded to the applicant.

D.R.R. *Application allowed.*

A.I.R. (39) 1952 VINDHYA PRADESH 4 (C. N. 3)

KRISHNAN J. C.

Basant Lal, Plaintiff-Applicant v. Arjundas Khandelwal, Defendant-Opposite Party.

Civil Revn. Appln. No. 26 of 1951, D/- 29-9-1951.

(a) *Civil P. C. (1908), S. 115 — Wrongful inclusion of evidence — Bhopal and Vindhya Pradesh Courts Act, S. 34.*

Wrongful inclusion of evidence would not be a case decided. Further the wrongful inclusion can be remedied, without any further proceeding, by the appellate Court itself or by the subordinate Courts on its direction considering the whole suit after eliminating the evidence held to have been wrongly admitted. When the Court records evidence and allows documents to be tendered it is exercising jurisdiction. Wrongful inclusion of evidence cannot become a material irregularity in exercise of jurisdiction. Hence the Court of Judicial Commissioner is not legally competent under S. 34 of the Bhopal and Vindhya Pradesh Courts Act or under S. 115, C. P. C. to exercise revisional jurisdiction in such a matter. Case law referred. (*Paras 6, 7, 9, 10*)

Anno: C. P. C., S. 115 N. 4, 5, 7, 12.

(b) *Constitution of India, Art. 227 — When can be invoked.*

No doubt Art. 227 empowers the High Court to interfere in judicial as well as in administrative matters. But the wider the powers granted by statute, the more caution is needed in their exercise. Anything like the generous invocation of this article in judicial matters would bring the case work of subordinate Courts to a standstill. These powers are meant to be exercised only where there is a very general question involved or the subordinate machinery entrusted with the administration of justice is collapsing, or the subordinate Courts are moving on lines fraught with great danger to the public in general. This article cannot be invoked simply because a litigant has a very common and oft-recurring grievance with an order of a subordinate Court. (*Para 11*)

A. P. Pandey and A. B. Lal, for Applicant — Lal Pradumn Singh and Lal Guruprasnya Singh, for Opposite Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('49) A I R (36) 1949 P C 156: (I L R (1950) Mad 1) (Pr 8)

('49) A I R (36) 1949 P C 239: (76 Ind App 131) (Pr 8)

('37) A I R (24) 1937 Bom 167: (I L R (1937) Bom 623) (Pr 5a)

('43) A I R (30) 1943 Lah 65: (I L R (1943) Lah 257) (F B) (Pr 5a)

ORDER: This is an application in revision under S. 34 of the Bhopal and Vindhya Pradesh Judicial Commissioner's Courts Act, corresponding to S. 115 of the Civil P. C., by the defendant in a suit before the District Judge, Satna, against his order dated 31-7-1951 admitting into evidence under S. 163 of the Evidence Act, certain memoranda and provisional registers (khachras and kacha rokars). The points for decision are whether: firstly, this Court is legally competent to interfere in revision at this stage for the alleged wrongful admission of evidence; secondly, even if legally competent, revisional

interference is expedient at this stage and, thirdly, this evidence can be admitted as exhibits of both the parties under S. 163 of the Evidence Act.

(2) Such interlocutory matters arise nearly in every suit, and are generally taken up during the arguments in the lower Court, and by the aggrieved party in the appeal from the decree. Here however, this question has been raised and argued at this stage with great keenness and elaboration. As similar applications in revision are made from time to time it is better to consider this question at some length, and lay down the principles by which this Court will be guided in applications in revision from such interlocutory orders.

(3) The facts of the case are these: The suit was filed by the plaintiff-opposite party on 25-7-1950. On 18-9-1950 the plaintiff gave to the defendant copies of the registers (khatas or pakka rokars) on which he was basing his claim. Soon after, the defendant sought to inspect the documents under O. 11 R. 15. No motion or objection upon the alleged refusal was filed at this stage by the defendant, and he gave a further written statement on 30-10-1950, about a fortnight after the request for inspection was made out of Court. A rejoinder was filed, but soon after the defendant began to allege that the plaintiff had not allowed the inspection of documents. The plaintiff asserting all the time that he had shown the document for defendant's inspection, the Court tried to set the controversy at rest by directing the parties to have the inspection done in the presence of the lawyer at the house of the plaintiff's lawyer. Again, there was argument, but now it was found from the petition of the defendant, that he was seeking to examine certain registers and papers of the plaintiff, which he had not referred to either in the pleadings or his affidavits. The latter pointed this out and declined to give the papers for inspection under O. 11, R. 15. The defendant insisted upon this in a petition, as a result of which, the Court ordered on 23-2-1951, that these documents also, not hitherto mentioned in the plaintiff's pleadings or affidavits, should be given to the defendant for his examination. They include inter alia the registers and memoranda which have since been admitted into evidence under S. 163 of the Evidence Act by the Court's order dated 31-7-51. The defendant examined them.

(4) In the meantime the plaintiff was examined; during cross examination the defendant questioned about some of these papers. It appears that in the business of these people incomings and outgoings are noted immediately in provisional registers, or memoranda which are called khachras and kachhi rokars, and later on as early as practicable copied out into regular formal registers. In cross-examination the defendant tried to make out that in regard to two items there was some discrepancy between the khata entries and those in the kachhi rokars. But the latter were not before the Court and the defendant, without getting them exhibited took his chance, as it were, upon the bare discrepancies, material or immaterial. After answering in regard to two entries the plaintiff pointed out that reference was being made to documents not exhibited and which he was not going to tender into evidence. He wanted to protect himself from the answers being misunderstood in the absence of those documents on the record, they being no other than ones which the Court ordered the plaintiff to produce for examination by the defendant, and which the defendant examined, and the contents of which he had put to the plaintiff in cross-examination.

(5) On the next date fixed for cross-examination the plaintiff filed a petition requesting the Court to take into evidence under S. 163, Evidence Act as exhibits of both parties these documents. The defendant objected and after hearing the Court admitted them into evidence. Hence the present application.

(5a) Point No. 1: The first question before this Court is whether at this stage it should interfere at all. The wording of S. 34 of the Bhopal and V. P. Judicial Commissioners Courts Act on this matter is identical with S. 115 of the Civil P. C. The main points that emerge from the considerable quantity of case law are that there should be a decision of the subordinate Court on a 'case', and that it should relate to a jurisdictional fact, and that there should be no appeal or special provision enabling the High Court to interfere with the decision. Much of the conflict of opinion on the amenability of interlocutory orders to revision, arise out of the differences in the nature of interlocutory orders. The widest view is given in the Bombay decision ('Jamuna Dass Brij Lal v. Chandulal Jamuna Dass', A I R (24) 1937 Bom 167:

> "A revision application under S. 115, Civil P. C., in respect of interlocutory orders is competent though the High Court should be very slow to interfere in revisional jurisdiction with orders which are merely interlocutory."

The Full Bench Ruling ('Gurdevi v. Chowdhri Mohd. Bux') reported in 'A I R (30) 1943 Lah 65', tries to distinguish between the interlocutory orders which are and which are not "cases decided".

> "The word 'case' under S. 115 has a very wide import, and means any set of facts judicially concerned. It includes a decision on any substantial question in controversy between the parties affecting their rights. An interlocutory order deciding a question of this kind as distinguished from a purely formal and incidental order is a "case decided". It will be open to revision only if the other conditions expressly laid down under S. 115 are satisfied, and the order has resulted or is likely to result in such gross injustice or irreparable injury as cannot be remedied otherwise than by the exercise of the extraordinary jurisdiction of the High Court at that stage."

(6) It is convenient to understand by a "case" a distinct stage in the suit or other proceeding and by a "decision", an order of the Court (which may be interlocutory), but which must have 'some' finality, not necessarily with reference to the subject-matter of the suit, but certainly with reference to that distinct stage in the proceeding. In other words, by making that order, the Court should be having its last say on the matter in question at that stage, which is either absolutely irrevocable as far as that Court is concerned, or is revocable only after further proceeding and hearing. In such a case when there is no appeal or special provision for the superior Court's revoking this order, it may be held, subject to the other conditions, that there is revisional jurisdiction. Restricting our attention to the taking of evidence,

for example, an order that one of the parties because of laches, is not entitled to call for any witnesses or adduce any evidence at all will be decision in a case. On the other hand, if evidence is being taken, and particular question or questions are allowed or disallowed, or a particular document or documents are admitted or rejected, I would not hold it to be a case decided. From the view point of finality with reference to the question at that stage, the inclusion of evidence is not irrevocable, because it is open to that Court or the superior Court to consider and decide the suit leaving out of consideration the evidence wrongfully admitted. On the contrary, if it is a case of exclusion, it may be argued that the order is irrevocable without there being further proceedings for calling of more witnesses or recalling old witnesses. Thus, as far as evidence is concerned, alleged wrongful inclusion always, and even exclusion most often, would not be a case decided. There may be exceptional instances, where the shutting out 'all' the evidence or 'all' the documents of a party on a material issue becomes a case decided; but this will never arise with inclusion, even if it is wrongful.

(7) The next criterion is whether there is a provision for appeal or other means of the superior Court's interference. As far as the admissibility of evidence is concerned, the question can certainly be raised in appeal from the decree that might ultimately be passed. Here also the wrongful inclusion can be remedied without any further proceeding by the appellate Court itself, or by the subordinate Courts on its direction, considering the whole suit after eliminating the evidence held to have been wrongly admitted. On the other hand, wrongful exclusion can be remedied only by further proceedings for taking the evidence. Thus, there is no legal justification for revisional jurisdiction in the case of alleged wrongful inclusion of evidence, though there may be, in cases of wholesale shutting out, where the remedy after appeal involves lengthy and costly further proceedings.

(8) Coming to the third criterion the order alleged to be wrongful should relate to a jurisdictional fact. Clauses (a) and (b) generally give rise to little difficulty, but (c) has given rise to considerable differences of opinion. Illegality and material irregularity in the exercise of jurisdiction, have been sometimes held to include what the High Court may consider perverse orders. However, these conflicts of opinions have been practically solved by the two Privy Council decisions in 1949, namely in 'Jai Chand Lal v. Kamalaksha Prasad', A I R (36) 1949 P C 239 and more particularly in 'Venkata Ayyangar v. Hindu Endowment Board, Madras', A I R (36) 1949 P C 156. As it was, these rulings were respectively on cases from Calcutta and Madras, the High Courts, which have been, broadly speaking, following wider and more generous principles for exercise of revisional jurisdiction, than certain other High Courts, especially of Allahabad. Be that as it may, these decisions of the P. C., in particular the latter, restrict the scope of revisional powers to what can conveniently be called jurisdictional facts, or in other words :

> "errors of procedure in the course of trial, which are material in that they may have effect on the ultimate decision ... There can be no justification whatsoever for the view that S. 115 (c) was intended to authorise the High Court to interfere and correct gross and palpable errors of subordinate Courts. It would indeed be difficult to formulate any standard by which the degree of error of subordinate Courts could be measured."

(9) When the Court records evidence and allows documents to be tendered it is exercising jurisdiction. It has also to decide in many cases whether or not any document can be admitted into evidence under this or that section of Evidence Act. Even in regard to the belated filing of a party's documents, the Court has in exercise of its jurisdiction to consider whether there is sufficient justification for condoning delay. It is just possible that 'wholesale' exclusion of the nature described above, may become a material irregularity in exercise of jurisdiction, but it is difficult to see how wrongful inclusion can become so.

(10) On this ground I hold this Court is not legally competent under S. 34 of the Bhopal and Vindhya Pradesh Judicial Commissioners Courts Act or under S. 115, Civil P. C. to exercise revisional jurisdiction on this matter at this stage.

(11) 'Point No. 2'. A further point has been urged that even if this Court is incompetent to interfere under S. 115, Civil P. C. or 34 B. & V.P.C. Act it may exercise the powers of supervision given by Art. 227 of the Constitution. There is no doubt that this Article, unlike S. 224 of the Government of India Act of 1935, empowers the High Court to interfere in judicial as well as in administrative matters. But the wider the powers granted by statute, the more caution is needed in their exercise. Anything like the generous invocation of this article in judicial matters would bring the case work of subordinate Courts to a standstill. These are meant to be exercised only where there is a very general question involved or the subordinate machinery entrusted with the administration of justice is collapsing, or the subordinate Courts are moving on lines fraught with great danger to the public in general. I would not invoke this article, simply because a litigant has a very common and oft-recurring grievance with an order of a subordinate Court.

(12) Even under the C.P.C. and the B. & V.P.C. Act great caution should be exercised by High Courts in exercising revisional powers in suits pending before subordinate Courts. Argument about the admissibility of evidence, and the proper stage for receiving it, are of every day occurrence in Courts. Often they are not important, but even when they are, they are always considered when the final order or decree comes up in appeal. It would cause very considerable delay in the disposal of cases, and may even lead to the most undesirable lowering of the self-confidence of the subordinate Courts, if on every point of admission or rejection of a particular piece of evidence, the High Courts were to interfere in revision. That way also, no exercise of revisional powers is indicated at this stage.

(13) 'Point No. 3'. For the reasons given above, it is unnecessary at this stage to consider the merits of the order.

(14) The result is, the application in revision is dismissed with costs to the plaintiff-respondent. As this case has been very keenly contested, the applicant should pay the opposite party pleaders' fee of Rs. 100/- or the certified amount whichever is less. The record

should be returned to the lower Court for proceeding with the suit as expeditiously as possible.

D.H. *Revision dismissed.*

A. I. R. (39) 1952 VINDHYA PRADESH 7 (C. N. 4)

KRISHNAN J. C.

Bhaiya Lal Singh, Accused-Applicant v. State of Vindhya Pradesh, Opposite-Party.

Criminal Revn. No. 86 of 1951, D/- 10-7-1951.

(a) Criminal P. C. (1898), Ss. 162, 172 — Non-observance of rules of writing diaries — Statement of witness not coming in original form.

The accused and the Court are entitled to know whether between the witness's earliest statements before the police, and his evidence in Court there are material contradictions. This becomes impossible if the Police officers fail to observe the rules for writing diaries. It is of no avail to say that the officer tested subsequently the witness's statements with reference to the diary, because the Court is concerned with the earliest statement. Where the earliest statement under S. 162 of a witness does not come in its original form, his evidence in Court should be checked up with great caution. (*Para 3*)

Anno: Cr. P. C., S. 162 N. 2. S. 172 N. 2.

(b) Criminal P. C. (1898) S. 172 — Writing case diary on loose sheets.

The writing of case diaries on loose sheets is to be disapproved. Bound books with alternatively numbered pages and arrangements for carbon copies are expected to be provided by the Police Department and these alone should be used by the Police Officers; this automatically gives duplicate or triplicate copies, so that the loss of one copy is immaterial. If for any reason diaries have to be written on loose sheets of paper, they must be copied out verbatim in the proper case diary books, and the original also preserved in the case diary to avoid future controversy. (*Para 4*)

Anno: Cr. P. C., S. 172 N. 2.

(c) Evidence Act (1872) S. 9 — Test identification by Investigating Officer.

The results of a test identification by the Investigating Officer himself are bound to be most unsatisfactory. Firstly, it is not advisable on the ground of expediency; the investigating officer is naturally interested in the success of the prosecution and is likely to show improper zeal. The test identification must be held by a Magistrate or by a respectable and fair-minded private citizen. There is a legal difficulty also. When the Investigating Officer holds the test identification we have a statement of witness to him in course of investigation which is inadmissible for purposes of corroboration. (*Para 6*)

Anno: Evidence Act, S. 9 N. 4, 5

Lal Pradumn Singh and Lal Yadvendra Singh, for Applicant — Advocate General, for the State.

ORDER: This is an application in revision by Bhaiya Lal from the judgment by the Rewa Magistrate convicting him u/s 379 I.P.C. and sentencing him to R. I. for 2 months and a fine of Rs. 30/- with imprisonment in default. One Mahadeo Bari jointly tried, and similarly convicted and sentenced for the same offence, has been acquitted on appeal by the Sessions Judge.

(2) The facts of the case are simple. On the night of 13-1-1950 truck No. 1423 had been parked in the open, opposite to the court building at Rewa. On next morning it was found that one of the hind wheels had been lifted by a jack, and wheel along with the tyre had been stolen. The jack itself had not come from this truck, but was identified to have come from the place of one Kuber Singh, another lorry owner, under whom the appellant and Mahadeva Bari work as cleaners. Mahadeva puts up at the house of his grand-aunt at Rewa named Musammat Kailasia. The Police went to her house and recovered a wheel with tyre. Produced in court it was identified as that of lorry No. 1423; earlier there was also a test identification before the Investigating Officer. Mst. Kailasia stated that that night Bhaiya Lal and Mahadeva came to her, the former carrying the wheel. Mahadeva said he was going away for a few days and wanted to leave the wheel in the old woman's house. She allowed it to be kept in her house. The only other material witness is Ramesh Prasad, who says that very early on that morning he saw Bhaiya Lal taking away a wheel with tyre. According to Ramesh Prasad's statement in court Bhaiya Lal was alone at that time and Mahadeva was not with him.

(3) The applicant and the co-accused disclaimed all knowledge about the wheel and the tyre. and denied all the allegations. The learned Magistrate found that they were both in possession of the tyre very shortly after the theft; as they had not given any explanation they were themselves the thieves. Accordingly he convicted them u/s 379 I.P.C. The learned Sessions Judge allowed the appeal of Mahadeva because his physical possession in the tyre was not proved. The material evidence comes only from two witnesses, namely Mst. Kailasia and Ramesh Prasad. Ramesh Prasad's evidence would have been of very considerable value; but for the manner in which it has been recorded in the Police diaries. Sunder Lal, the first investigating officer, who examined Ramesh Prasad on the next day says that he made his notes on a loose sheet of paper, and later on dictated to P. Ragubir Singh, S. I. his recollection of the contents. This raises an important question. The accused and the court are entitled to know whether between the witness's earliest statements before the police, and his evidence in court there are material contradictions. This becomes impossible if the Police Officers fail to observe the rules for writing diaries. It is of no avail to say that the officer tested subsequently the witness's statements with reference to the diary, because we are concerned with the earliest statement. Where the earliest statement u/s 162 Cr. P. C. of a witness does not come in its original form, his evidence in court should be checked up with great caution.

(4) It is also my duty to very strongly disapprove of the writing of case diaries on loose sheets. Bound books with alternatively numbered pages and arrangements for carbon copies are expected to be provided by the Police Department and these alone should be used by the Police Officers; this automatically gives duplicate or triplicate copies, so that the loss of one copy is immaterial. If for any reason diaries have to be written on loose sheets of paper, they must be copied out verbatim in the proper case diary books, and the original also preserved in the case diary to avoid future controversy. For this reason and the fact that even as it is before us, the statement of Ramesh Prasad involves a serious contradiction in regard to Mahadeva Bari, I have to discard it.

(5) As for Mst. Kailasia she was in any event answerable for the possession of the stolen property. There are at least two persons having access to her house; one of them is Mahadeva and the other is Ram Dass, a nephew, who is a driver. She is naturally interested, in any case in throwing the blame on others, and, if possible, minimising the part played by her near relations. So her evidence against any outsider like the applicant, stands in need of corroboration.

(6) There were two test identifications, one for the stolen wheel and tyre and the other for jack on which lorry had been lifted. Considering that

most of the lorry tyres and wheel-rims are of standard size and shape, a proper sort of T.I. was indicated. In this case they were held by the Investigating Officer, Raghubir Singh. We are not told what formalities he observed. The results of a T.I. by the Investigating Officer himself are bound to be most unsatisfactory. Firstly, it is not advisable on the ground of expediency; the investigating officer is naturally interested in the success of the prosecution and is likely to show improper zeal. The T. I. must be held by a Magistrate or by a respectable and fair-minded private citizen. There is a legal difficulty also. When a witness comes in the court and says that this was the article stolen from his house or this was the dacoit that entered his house, it is evidence; but by its very nature, this is useless without corroboration to the effect that on a previous occasion, before an intelligent and impartial observer the witness picked out the particular article, or the man, from similar articles or men. In effect the witnesses should have them stated to the person holding the T. I., "This is the article that was stolen from my house"; or, "this is the man that entered in my house"; that person has to satisfy the court that he had taken full precautions against prompting, collusion, or being misled by distinctive marks on the suspect or the article, or private knowledge of the witness acquired after the happening in question. When the investigating Officer holds the T. I. we have a statement of witness to him in course of investigation which is inadmissible for purposes of corroboration. In the present case, we have a third difficulty in that the officer does not at all satisfy us that he took these precautions.

(7) In the result the T. I. cannot be taken into account, as the statements of the two material witnesses are not corroborated. I, therefore, allow the application and set aside the conviction and sentence; the fine, if paid, must be refunded.

(8) A copy of the judgment should be given to the Advocate General for communication to the Local Government.

D.H. *Revision allowed.*

A. I. R. (39) 1952 VINDHYA PRADESH 8 (C. N.5)

KRISHNAN, J. C.

State of Vindhya Pradesh v. Harol Lal Narmada Prasad Singh; Opposite Party.

Criminal Revn. No. 90 of 1951, D/- 24-3-1951.

Criminal P. C. (1898), Ss. 503, 506 — May issue a Commission.

In criminal cases a witness's personal appearance in the Court should be the rule, and commission should be the exception. When the case is one before a jury or assessors then commission is almost always refused. (Para 3)

The personal attendance of a witness and his availability to explain matters of detail is really a right of the accused. If he is prepared to waive it, a commission can always be issued, but when he is not prepared to waive it, the Court must insist upon the witness's attendance, subject of course to reasonable accommodation. (Para 14)

('Held' on facts and cirmumstances of the case that the requisition of the Magistrate under S. 506 for the issue of a commission for the examination of a prosecution witness could not be granted.)

Anno: Cr. P. C., S. 503, N. 1, 5.

Advocate-General, for the State; N. N. Mukerjee and Lal Pradumn Singh, for Opposite Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('82) 5 All 92: (1882 All W N 184) (Pr 3)

('82) 8 Cal 896 (Pr 3)

('22) A I R (9) 1922 Pat 40: (23 Cri L Jour 218) (Pr 4)

('32) A I R (19) 1932 Pat 242: (33 Cri L Jour 942) (Pr 4)

ORDER: This is an application in revision from the decision of the Addl. Dist. Mag. rejecting the requisition by the Munsiff Mag. under S. 506, Cr. P.C., for the issue of a commission for the examination at Kanpur of Lala Ram Ratan Gupta a P.W. in a case before.

(2) The only question is whether in view of alleged serious inconvenience & possible danger to his life the personal attendance of this witness should be spared. But the learned Addl. Dist. Mag. has both unnecessarily & improperly in my opinion written a long judgment, discussing the merits.

(3) It is the intention of the law & has been repeated in a number of rulings that in criminal cases a witness's personal appearance in the Ct. should be the rule, & commission should be the exception. When the case is one before a jury or assessors then commission is almost always refused. A typical case is the old one reported in 'Emperor v. R. P. Counsell', 8 Cal 896. The witness admittedly an old ailing woman was compelled to undergo the hardship of a journey in 1882 all the way from Darjelling to Calcutta. This was because

> "the issue of commission would be a most unsatisfactory course of proceeding & one dangerous to the interest of the prisoner."

In the old case from the Allahabad H. Ct. 'In re Farid un-Nisra', 5 All 92, commission was refused even to a purdahnashin lady.

> "The petnr. invokes the criminal law to punish, & she should be required to guarantee the 'bona fides' of her prosecution by attending at the Magistrate's Ct. I most unhesitatingly say that taking of evidence on commission in criminal cases should be most sparingly resorted to. Such a thing is unknown to English practice & ought not be adopted save in extreme cases of delay, expense, or inconvenience."

The Ct. however, suggested that as far as possible the Mag. should respect her purdahnashin prejudices while giving evidence in Ct.

(4) More recently the mater came up before the Patna H. Ct. 'Lachhmi Lal v. King-Emperor', AIR (9) 1922 Pat 40. There the circumstances were different, but the principle governing the issue of commission was laid down in these words:

> "The issue of a commission for the examination of an important witness such as an eye-witness in a serious criminal trial is a procedure which is much to be deprecated & which should never be adopted except for the most cogent reasons."

In a subsequent Patna ruling reported in 'Mohammad Shafi v. Emperor', A I R (19) 1932 Pat 242, it was laid down that

> "Ss. 503 & 506 should be used sparingly in a criminal prosecution. Above all the witness should be examined in open Ct. giving an opportunity for the accused to examine him. The mere fact that a person is temporarily ill is not a ground for allowing him to be examined on commission."

(5) The foregoing is a fair sampling of the H. Ct. rulings on this subject & I have not come across any, in which a substantially different view-point is taken. In fact, the wording of S. 503 also points to the same conclusion. Firstly, the examination of the witness should be necessary for the ends of justice & secondly the attendance of such a witness cannot be procured without an amount of delay, expenses & inconvenience, which under the circumstances of the case would be unreasonable.

(6) Dispensing with the personal attendance of an accused is on a slightly different footing. Courts should observe strictest impartiality between parties,

considering of course the general circumstances & their status in life, & also remember the difference between the personal attendance of an accused & a prosecution witness. When the personal attendance of an accused is to be dispensed with, the Ct. considers the question of safety, the genuineness of the request, & the possible loss or inconvenience to the accused himself, if his presence is insisted upon, & his respectfulness to the Ct. It is to the interest of the accused, other things being the same, to be actually present while prosecution witnesses are being examined, so that he can closely follow the case against him, and if necessary, apprise his lawyers or the Cts. of important matters. If at any such stage he is allowed to be absent, he is foregoing the right of personally following the prosecution evidence for his own convenience. But when the personal attendance of a P.W. is being dispensed with, the accused is losing the right of actually seeing him give evidence, & the Ct. also is deprived of dozens of occasions of clearing up small points of obscurity by its questions. However, elaborately interrogatories are drafted this advantage of personal explanation to the Ct. in presence of the accused cannot be got.

(7) Now we can apply these principles to the present case. Lala Ram Ratan Gupta is a well-known textile mill-owner at Kanpur & a person of very considerable wealth & position in the business community of our country. His manager Badri Singh started a case against Sardar Narmada Prasad Singh, an illaqedar & ex-minister of the Vindhya Pradesh. The letter containing the allegations was written in September 1949, but the case itself seems to have been started by the police under S. 409, I.P.C., in November 1949. Witnesses were summoned from time to time, & I understand that during these 15 or 16 months only six witnesses have been examined. They have been cross-examined before charge, but no charge has been framed as yet.

(8) Part of this delay appears to have been due to the accused himself wanting accommodation for this or that, in particular for bringing his lawyers from outside. Part of it has been due to the unwillingness or inability of Lala R. R. Gupta, 'de facto' complainant. On one occasion, he was asked by the Public Prosecutor not to come, because the accused wanted an adjournment; otherwise he was putting off his appearance. Like many big people he seems to have a very commendable disinclination to appear in the criminal Cts., even as a witness. But one has to put up with this, especially if he himself sets the criminal law into motion. I have carefully studied the various grounds that he put up from time to time not to appear. As early as June 1950, Mr. Gupta suggested that he might be examined on commission because he intended to go to England in the near future. He did not speak of his health in those days though I am prepared to believe that like most men of his class & position in life his health is by no means the best. A business magnate by the very nature of his pre-occupations will not be a Hercules. It would have been more reasonable had he suggested his examination, cross-examination & discharge before his departure to England, or even after his return, say within 5 or 6 months. Nothing came of this, however, Mr. Gupta did not go to England.

(9) Mr. Gupta was travelling on the 13th of August on the ill-fated Toofan Express train that met with derailment & a very serious accident near Mughalsarai. Luckily he escaped without physical injury but sustained a shock, which we are told absolutely prostrated him for some time. This is quite true; but the effects of the shock has had nearly seven months to disappear.

(10) We are told that at about the time the witness had a bad attack of dysentery. This also can be believed, but the reference to the dysentery is in the beginning of October. After that it is alleged that the witness was being put through a course of 100 days rest-cure (kaya kalp) from the 3rd October onwards by a body of vaidyas drawn from far & wide. This also I believe. We are in fact told in the middle of December that the treatment was to end within two months, in other words by the middle of February. During this period, it is very probable that the witness had been asked not to exert himself. Actually during this period the witness had been to Nasik, Bombay & Delhi, not to mention Lucknow, which is more or less next door to Kanpur. Thus even during the 100 days rest-cure, the witness has not been sitting as it were in an air-conditioned cell. The point to notice is that even 100 days treatment is over; now towards the end of March & in fact ever since the middle of February we do not hear of any of the old ailments. The allegations of intended visit to England, the shock received in the accident, the dysentery & the hundred days rest-cure are perfectly true; but something or other always turns up & the witness, already reluctant to attend, personally finds this or that new inconvenience.

(11) Actually Kanpur is not so distant & the journey from there to Rewa over about 120 miles of rly. & about 80 miles of road is by no means so inconvenient or expensive that the witness cannot put up with it. For a businessman of the status of the witness a few days absence is a serious matter, but the Ct. can give him the option of selecting his own date for attending within a particular week or fortnight specified by the Ct. about a month in advance.

(12) The opposite party opposing the appln. states that his examination & cross-examination may be finished in one day. Even making allowance it should not take more than 2 or 3 days & it should be possible for the witness to arrange beforehand. None of the grounds given from time to time, e.g. his intended visit to England, the shock received in the accident, the dysentery, & the hundred days rest-cure, is sufficient ground to dispense with personal appearance, though it may justify the grant of a few weeks time for getting over a temporary difficulty.

(13) This common disinclination on the part of high placed people seems to arise from a fear that spiteful litigants or lawyers might insult them. But the witness should trust the Ct's. firmness & fairness. If the witness is afraid for his personal safety, then also it is unnecessary to issue commission. If the police are satisfied they might make necessary arrangement. As for the comforts on the journey or during his stay here, the witness himself or the party calling him can see to them.

(14) Looked at any way, I find no ground upon which a commission could be granted. The personal attendance of a witness & his availability to explain matters of detail is really a right of the accused. If he is prepared to waive it, a commission can always be issued, but when as here he is not prepared to waive it, the Ct. must insist upon the witness's attendance, subject of course to reasonable accommodation.

(15) Thus while strongly disapproving of the manner in which the Addl. Dist. Mag. has dealt with the case, I also dismiss the appln. & hold that a commission is not indicated in the present case.

(16) The Dist. Mag's. handling the appln. has

raised a very important point of procedure in this State. Elsewhere in our country we have a magistracy as originally envisaged by the framers of the Cr. P. C. Here we have Magistrates who are also Munsiffs & are completely under the administrative control of the Dist. & Sess. Judges & the Judicial Comrs. In this system it is highly anomalous that Dist. Mags. like the present ones should deal with such matters. I am told that there was a confidential direction in the time of the Durbar that Dist. Mags. should not pass any order in judicial matters. In this context it would mean that every Mag. could become a Dist. Mag. for the purposes of S. 503. But after the Criminal P.C., has come into force here without any alteration in Ss. 503 & 506 such a direction can have no effect, nor is it possible for the higher judicial authorities to deal with a Dist. Mag. simply because he violates a confidential direction coming on from the time of the Durbar. The simplest way of curing this anomaly & of guaranteeing against repetition is for Govt. to order by notfn. that in the Vindhya Pradesh the Ses. Judges & no other authority shall be deemed to be Dist. Mags. for the purposes of S. 506, Criminal P.C.

K.S. *Revision dismissed.*

[C. N. 6.]

A. I. R. (39) 1952 Vindhya Pradesh 10

KRISHNAN, J. C.

Hanuman Prasad and another, Applicants v. Ram Autar Baldeo and others, Opposite-Party.

Application for Writ No. 44 of 1951, D/- 3-11-1951.

(a) *Constitution of India, Art. 226 (1) — Writ — Issue of, on Board of Revenue.*

A writ can be issued by the High Court on any department of Government or any tribunal; the Board of Revenue is no exception, though in view of its being the final Court in its own sphere, writs and directions on it should be issued only in exceptional circumstances. (*Para 4*)

Anno: C. P. C. Appendix III, Constitution of India, Art. 226, N. 1.

† (b) *Constitution of India — Art. 227 (1) (2) and (3) — Courts and Tribunals — Power of superintendence, if extends over Board of Revenue.*

Sub-article (1) of Art. 227 enunciates a general principle whereas the Sub-articles (2) and (3) describe some, but certainly not the only ways, in which the superintendence may be exercised. These are not exhaustive, but are specially mentioned because of their practical importance in the case of the Courts directly subordinate to the High Court. The specific mention of certain forms of superintendence in (2) and (3) does not however in any manner qualify the general powers of superintendence provided in the sub-article (1). The High Court has, therefore, powers of superintendence over the Board of Revenue. (*Paras 4 and 6*)

Anno: C. P. C. Appendix III, Constitution of India, Art. 277, N. 1.

Guruprasnya Singh, for Applicants; Bindeshwari Prasad, A. G. for Board of Revenue.

ORDER: The applicants have come to this Court from an order of the Hon'ble Board of Revenue, dismissing 3 appeals by them; the Board's reasoning was the same as that of the D.C. and the Commissioner, viz., that the order of the Tahsildar dispossessing the applicants and giving agricultural lands to the opposite parties 1 to 3 was an "executive order" outside the appellate jurisdiction of the superior revenue officers. The applicants pray for a direction either of the nature of 'mandamus' under Art. 226 or in exercise of the powers of superintendence under Art. 227 of the Constitution to the Board of Revenue to consider the appeal on its merits.

(2) The facts of the case are the following. The opposite parties 1 to 3 claimed to be the tenants of certain 'Sir' lands of the applicants. On 27-7-1950 when the D.C., of Rewa was camping in that locality they made some oral representations to him, whereupon the D.C. gave some oral orders to the Naib-Tahsildar, in ostensible execution of which the latter made some inquiries and ordered that the applicants should be dispossessed of some nine plots of land and the opposite party 1 to 3 put there. From this order, the applicants went up in appeal to the Deputy Commissioner. It was dismissed on the ground that it being executive order of the Naib-Tahsildar, he could not interfere. The applicants went up to the Commissioner, who repeated the same ground, and to the Board of Revenue, the senior member of which has ordered thus:

> "The action of the Naib-Tahsildar and the order passed by him putting the tenants into possession was not a judicial proceeding, nor was the order a judicial order. The Naib-Tahsildar acted as a Revenue Officer in his administrative and executive capacity. The Board of Revenue are a purely judicial body, and can hear appeals against judicial orders passed by the subordinate revenue Courts and cannot hear appeals or in any way interfere with executive or administrative orders passed by subordinate revenue officers."

After this decision, by the highest Revenue Court the applicants have come to this Court.

(3) POINT No. 1.: This ruling of the Hon'ble Board has created a serious situation both for the applicants in particular and for the citizens of this State in general. Valuable property in agricultural land has been taken by a subordinate Revenue Officer from one citizen and given to another; obviously, this has to be under the authority of law. The aggrieved party goes up to the highest Revenue Court, and is not told that the Subordinate Revenue Officer acted with jurisdiction, and that he was right with reference to the merits of the dispute. But this, like the D.C., and the Commissioner just refuses to go into the matter, because the deprivation of property is said to be done by an executive or administrative act. The persons dispossessed cannot go to the Civil Courts because the Revenue Law provides that a case of this nature, involving a landlord-tenant relationship, is cognizable only by the revenue Courts. He cannot protect his property by exercising force as a public servant has deprived him of it, and it is not open to him to go to the authorities. Thus he is literally without any remedy. Besides, this ruling is as it were, a 'blanche carte' to the Tahsildar and Naib-Tahsildars, to take land from some and present it to others, if the latter could satisfy them. Fraught with the gravest possible danger to the holders of agricultural land, this position calls for the exercise of such powers that this Court might have for remedying it.

(4) POINT NO. 2.: A writ can be issued by this Court on any department of Government or any tribunal; the Board of Revenue is no exception, though in view of its being the final Court in its own sphere, writs and directions on it should be issued only in exceptional circumstances. But I would look at this case from the view point of Art. 227 giving this Court powers of superintendence over "all Courts and tribunals" throughout its jurisdiction. The learned A.G., appearing on behalf of the Board of Revenue, opposite party No. 4, urges that this superintendence does not extend over that tribunal. The argument is that the Courts and tribunal in sub-article (1) should be one to which Sub-article (2) can apply,

and rules, forms, books and returns can be prescribed by the High Court. Since the High Court does not call for returns or prescribe the forms or regulate practice and proceeding of the Board of Revenue it has also no powers of superintendence over the latter. This is not a sound argument. The Sub-article (1) enunciates a general principle whereas the sub-articles (2) and (3) describe some, but certainly not the only ways, in which the superintendence may be exercised. These are not exhaustive, but are specially mentioned because of their practical importance in the case of the Courts directly subordinate to the High Court. In the case of the Courts not directly subordinate to the High Court, these are of no practical consequence, though there is nothing in the law to prevent a High Court from exercising over them the powers given in Sub-article (1) in the manner illustrated in sub-articles (2) and (3). In practice the High Court may not find it worth the trouble to exercise the superintendence in these ways, over Courts that are not directly subordinate. For example, these powers, which as far as subordinate Courts go are practically identical with those in the Government of India Act of 1935 and were exercised by most High Courts, till recently, only over the Civil Courts properly so called. However, lately, with the increasing measure of separation of powers most High Courts have begun to exercise the superintending powers in these ways also over criminal Courts. The specific mention of certain forms of superintendence in (2) and (3) does not in any manner qualify the general powers of superintendence provided in the Sub-article (1).

(5) A consideration of the legislative history of the Article also shows that the superintending powers under Art. 227 are meant to be general. The wording of S. 107 in the G. I. Act of 1915 is quite general. In the Govt. of India Act of 1935 a restriction was introduced. However, with the coming into force of the Constitution, the powers have again become general, as the words "subordinate" in S. 224 of the Government of India Act has been intentionally omitted. The only exception is contained in Sub-article No. (4) which does not mention the Board of Revenue.

(6) The Board of Revenue in this State has been created by Statute in Ordinance XIII (13) of 1948, S. 4 of which provides that it is the highest Revenue Court of appeal, so it becomes a Court within the territory over which this Court, which is a High Court for the purposes of Art. 227, exercises jurisdiction. This Court has powers of superintendence which in the case of Courts and tribunals not directly subordinate, will be exercised when exceptional circumstances, and possible grave consequences call for it.

(7) POINT NO. 3.: It is difficult to grasp what exactly these Revenue Tribunals mean by an executive or an administrative act. In the Rewa Land Revenue and Tenancy Code, as under different Tenancy Laws, various Revenue Officers or tribunals have their functions and spheres of activity clearly demarcated and laid down. These functions might on the one hand be of a ministerial nature such as the collection of Revenue, custody of revenue papers, or the preparation of non-controversial statements. On the other hand, they may be decisions upon the conflicting landlords-tenants and other claims to agricultural land. Often it is a dispute about the correctness of the record of rights or the right of this or that person to hold and cultivate some land, or to get rent from another. In all such disputes the Revenue Officer has to hear both parties, and to follow a prescribed procedure, and in most instances to take written accounts of contesting claims, and to give written reasons for his decision. Exercising the former class of functions, he is acting as an executive or to be more correct as an administrative officer. But when he orders the substitution of one name for another, or the alteration of the rent, or the nature of the tenancy in the record-of-rights, or the dispossession of one claimant and the possession of the other, his functions are judicial; here he has to exercise only the powers defined by the law, and to hear contending parties according to a certain procedure, and has to give his orders, in a prescribed form. Further, if he deprives anybody of his property, and gives it to another, whether a private citizen or Government, he has to do it not authority of law." In such matters, the law is conexecutive or administrative power, but under 'the authority of law." In such matters the law is contained in the tenancy statutes, or secondary legislation made under them. If he is not empowered for this under the law, or, being competent under it, does not exercise his jurisdiction in the prescribed manner it is the duty of the superior revenue tribunals to correct him.

(8) In this case it is alleged by the applicants that Naib-Tahsildar is not the legally competent authority to dispossess one claimant and put in another claimant. Again, it is alleged that the procedure was irregular. Section 136 of the R.L., R.T., Code requires that a tenant alleging forcible dispossession by the landlord should file a written application before the D.C., he has to notice the opposite party, and after hearing both give an order. This order would be appealable to the Commissioner, and again to the Board. The Naib-Tahsildar exercises the same powers as the Tahsildars, but it does not include the power of receiving applications alleging forcible dispossession by the landlord. Again, the law does not allow the D.C., to act on oral applications, and in no event to delegate, orally or even in writing to any subordinate, his powers under Section 136 of the R.L.R.T., Code. Every order of a Tahsildar is appealable to the D.C., with a right of second appeal to the Commissioner, and in certain circumstances, a third appeal to the Board.

(9) POINT NO. 4.: The circumstances of this case therefore call for the following direction to the Board of Revenue in the exercise of this Court's superintending powers under Art. 227, Clause (1). The Board should cancel its order of the 23rd August 1951 which is based on the theory of executive or administrative acts by the Tahsildar outside the appellate jurisdiction of the superior revenue Courts. It should itself decide or get its subordinate Courts to decide, whether or not the Naib-Tahsildar acted within his jurisdiction when he passed this order dispossessing the applicants and giving the land to the opposite parties 1 to 3. If it is found that the Naib-Tahsildar had no jurisdiction, then obviously, the order should be set aside, and the 'status quo ante' restored, by another delivery of possession to the applicants, if they have already been actually dispossessed. If, on the other hand, it is found that the Tahsildar acted within his jurisdiction, in that case either the Board, or on its direction its subordinate Court, should decide whether on the facts of the case the Tahsildar's order was a proper one. Obviously, if any of these questions is decided by a subordinate Court, the aggrieved party will have a right to go again to the Board in appeal from that decision.

(10) The application is allowed on the lines indicated above, with costs to the applicants payable by the opposite parties 1 to 3 each of them paying Rs. 25/-, 4 need not pay any costs.

(11) It is certified that this case involves a substantial question of law as to the interpretation of Art. 227 of the Constitution.

V.R.B. *Application allowed.*

[C. N. 7.]

A. I. R. (39) 1952 Vindhya Pradesh 12

KRISHNAN J. C.

Sukhnandan Prasad Hanuman Prasad, Applicant v. Baburam Maheswar Lal, Opposite Party.

Civil Revn. No. 27 of 1951, D/- 29-10-1951.

(a) Civil P. C. (1908), Ss. 10 and 115 — "Case decided" — Order under S. 10 — If case decided.

A "case" is a definite stage in the proceeding, a case decided is the order which for the time is final as far as that stage is concerned . An order under S. 10 is, therefore, a "case decided" and is subject to revision. *(Para 4)*

Anno: C. P. C., S. 115 N. 4, 5 Pts. 14 and 15.

(b) Civil P. C. (1908), Ss. 10 and 26 and O. 4 R. 1 — Date of institution of suit — Proper way of ascertaining.

The proper way of ascertaining the date of institution is to find out, whether, while tendering the plaint the plaintiff has done all that he has to do in compliance with Orders 4, 6 and 7. If he has done this, and has nothing more to do, then the tendering of the plaint to the proper officer should be terated as institution. Any delay in office, for no laches of the plaintiff, should naturally not be put at his door. If, on the other hand, there is some defect to be removed, or some deficiency in the Court-fee to be made up, then it becomes an important question whether the suit is instituted on the date of the tender, or on the date the defect is remedied by the plaintiff. When the Court grants time for the removal of the defect, and the defect is remedied, then the suit would normally be deemed to have been instituted not on the latter day but the day of the tendering itself, because the Court in its discretion has, as it were, condoned the delay. This condonation of the time taken to remove defects is at the discretion of the Court; but it cannot exercise it 'ex parte' so as to deprive the defendant of any right he might have acquired in this interval under the law of limitation. At all events the other party should have the right of urging that the Court's granting time for removal of defect has not affected the advantage he might havt gained in the interval. *(Para 5)*

Anno: C. P. C., S. 10 N. 4a; S. 26 N. 1; O. 4 R. 1 N. 3.

Raj Kishore Shukla, for Applicant; Lal Pradumn Singh, for Opposite-Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('50) A I R (37) 1950 Bom 130: (51 Bom L R 1004) (Pr 6)

('43) Gurdevi v. Chowdhri Mohd Bux: (A I R (30) 1943 Lah 65 F B) (Pr 4)

('51) Civil Revn No 26 of 1951: (A I R (39) 1952 Vind P 4) (Pr 4)

ORDER: This is an application in revision by the plaintiff in a suit before the District Judge, Satna, the trial of which has been stayed under S. 10 C. P. C., on the petition of the defendant, on the ground that a suit 'inter partes' involving the same issues was already pending before the Subordinate Judge Patna. In this Court the questions for decision are, firstly, whether an application in revision is maintainable from an order under S. 10 of the Civil P. C., and secondly, whether the suit at Patna had been duly instituted on 10-7-51; when the plaint was tendered to the proper officer by the defendant opposite party, or on 16-7-51 when it was registered.

(2) The facts of the case are the following: In 1949 the defendant of the present suit, who is a business man in the Patna District, had placed an order with the applicant for a quantity of wheat and of 'ata'. The plaintiff's account is that the defendant purchased them at Satna, but could not take them away because a ban on the export of these articles from Vindhya Pradesh had been imposed. The defendant was trying to get permission for exporting the goods, and was repeatedly requesting the plaintiff to keep the goods whatever the deterioration. The defendant failed to get the permits; ultimately he refused to pay for the goods which by that time had gone bad; the 'ata' completely rotten, and the wheat deteriorated, but saleable at a lower price. So, for the price of the 'ata' and for the difference in the price of the wheat and for some other items, the applicant instituted the present suit at Satna on 11-7-51.

(2) While the talks were on between the parties, the opposite party had, as he says, instituted a suit at Patna, on 10-7-51 against the plaintiffs, in regard to the same transaction; there he claimed damages on the averment that the plaintiff had contracted to supply at Patna but had failed. Consequently, the defendant was put to loss as he had contracted to deliver similar goods to a third party. On receipt of summons from the Satna Court the opposite party appeared and petitioned for a stay under S. 10 C. P. C., which was granted.

(3) Before the D. J. as well as here the plaintiff applicant's position was that though the defendant opposite party's plaint might have been tendered to the proper officer of the Patna Court on the 10th July, it should be deemed to have been instituted on the 16th July when it was put up before the Presiding Officer of that Court with an office note. The opposite party contends that he had done all that he had to do on 10-7-51 itself so that his suit at Patna had been instituted earlier and was already pending, when the Satna suit was instituted.

(4) 'Point no. 1.' To begin with the opposite party contends that stay order under S. 10 is an interlocutory order and not "a case decided", and so is not revisable under S. 115 of the Civil P. C. and S. 34 of the Bhopal V. P. Judicial Commissioners' Court Act. The most convenient and the fairest understanding is that a "case" is a definite stage in the proceeding, a case decided is the order which for the time is final, as far as that stage is concerned. The rulings that an order under S. 10 is an interlocutory order and, 'therefore', not subject to revision have to be reconsidered in the light of the Lahore High Court's Full Bench decision in 'Bibi Gurdevi v. Choudari Mohd. Bux',. This Court has already considered this aspect of the problem in the recent decision in 'Basant Lal v. Arjundas Khandelwal', Civil Revn. No. 26 of 1951, D/- 29-9-51 and need not repeat the reasoning. In a case of stay under S. 10 C.P.C. no appeal is possible from the stay order and the consequences to the party are the inconvenience, the monetary loss, and the risk of a delayed decision, which to a considerable extent are irremediable. It is also a jurisdictional point because a stay order really decides which of the two Courts should exercise its jurisdiction at first, after which there may not even be occasion for the other Court's exercising it. Therefore, I hold that the order is subject to revision.

(5) 'Point No. 2. Coming to the merits of the order sought to be revised, it is common ground that the two suits arise out of the same transaction, and the issues are directly and substantially identical. The only question, therefore, is whether the suit at Patna was instituted earlier. O. 4 R. 1 provides that a suit shall be instituted by presenting a plaint either to the Court itself, or the officer appointed by that Court in this behalf. It is not urged that the plaint at Patna was tendered to anybody other than the proper officer. It is also provided that the plaint should conform to the rules contained in Or. 6 and 7 as far as they are applicable; it is not shown that the plaint at Patna did not conform to any of these rules. All that is alleged is that in the Patna Court, the officer, who received the plaint put up his office note to the presiding officer, on the 16th on which date the suit was registered. The plaint in the present suit at Satna was tendered on the 11th; on that very day the office checking was over, and the suit was registered. This is what usually happens where only a few plaints are tendered every day. Where many plaints are presented every day, the officer appointed to receive them takes a few days to complete the check, and put up his report before the presiding officer. The proper way of ascertaining the date of institution is to find out, whether, while tendering the plaint the plaintiff has done all that he has to do in compliance with Orders 4, 6 and 7. If he has done this, and has nothing more to do, then the tendering of the plaint to the proper officer should be treated as institution. Any delay in office, for no laches of the plaintiff, should naturally not be put at his door. If on the other hand, there is some defect to be removed, or some deficiency in the Court-fee to be made up, then it becomes an important question whether the suit is instituted on the date of the tender, or on the date the defect is remedied by the plaintiff. When the Court grants time for the removal of the defect, and the defect is remedied, then the suit would normally be deemed to have been instituted not on the latter day but the day of the tendering itself, because the Court in its discretion has, as it were, condoned the delay. The delayed payment of the court-fee, S. 149 of the Civil P. C., is an instance to the point. This condonation of the time taken to remove defects is at the discretion of the Court; but it cannot exercise it 'ex parte' so as to deprive the defendant of any right he might have acquired in this interval under the law of limitation. At all events the other party should have the right of urging that the Court's granting time for removal of defect has not affected the advantage he might have gained in the interval.

(6) In the present case it is not urged that there was delay caused by the opposite party's failure either to pay the proper Court-fee or to comply with any of the other requirements of Orders 6 and 7. The delay in registering was caused not by any slackness on the part of the opposite party here, but was the result of office practice at Patna, and the plaintiff of that suit should not be penalised for it. The ruling reported in 'The Prince Line, Ltd v. Trustees of the Port of Bombay', AIR (37) 1950 Bom 130 has been placed by the applicant. This case rules that the Court exercising its discretion to condone the time taken in the removal of the defects in the plaint, would reserve to the other party the right to plead the bar of limitation. But that has no application to the present case where the only point for decision is whether the suit was instituted on the date the plaint was tendered or on the subsequent date on which it was registered after the office report. The view taken by the District Judge is the correct one.

(7) The result is that the application in revision is dismissed with costs to the contesting respondent and minimum pleader's fee under the rules.

V.R.B. *Application dismissed.*

[C N. 8.]

A. I. R. (39) 1952 Vindhya Pradesh 13

KRISHNAN J. C.

Raghavendra Singh and others, Applicants v. State of Vindhya Pradesh and another, Opposite-Party.

Civil Applns. Nos. 36, 35, 34, 32 and 33 of 1951, D/- 24-10-1951.

(a) *Constitution of India, Art. 226(1) — Writ of mandamus — Delay in applying.*

No doubt, an application for a writ in the nature of mandamus against an alleged invasion of a fundamental right can be made at any time; but a person who delays his application by two years cannot be heard to argue that the alternative remedy of his civil suit might take time. (Para 6)

Anno: C. P. C., Appendix III, Constitution of India, Art. 226 Notes 1 and 8.

(b) *Constitution of India, Art. 226(1) — Another remedy open — Writ, if can be issued.*

Where an applicant for an issue of a writ has another remedy open to him by way of suit for permanent injunction, the High Court cannot issue the writ simply because the applicant apprehends that he might lose the suit and get compensation only. (Para 7)

Anno: C. P. C. Appendix III, Constitution of India, Art. 226 N. 8.

(c) *Constitution of India Art. 226(1) — Invasion of right created by contract — Issue of writ.*

An invasion of a right created by contract of lease for which the lessee can seek relief in the Civil Court for compensation or cancellation of the lease or otherwise is not such an invasion of a fundamental right as to call for an extra-ordinary remedy. (Para 9)

Anno: C. P. C., Appendix III, Constitution of India, Art. 226 N. 8.

(d) *Constitution of India, Art. 366(1) — Order No. 126 of V. P. Government dated 27-6-1949 — Order is existing law.* (Para 10)

Anno: C. P. C. Appendix III, Constitution of India, Art. 366(10) N. 1.

(e) *Constitution of India, Art. 19(5) — Right to free management of property — Restriction reasonable and in public interest.*

The applicants were either grantees or lessees of immovable properties including patches of forests. On 27-6-1949, the Government passed an order whereby it was ordered that thereafter auction of Tendu leaf contracts would be unconditional and would cover not only Government forests but other areas. Proportionate compensation to private land-holders was also provided for by the order. Thereupon the applicants applied for issue of a writ of 'mandamus' restraining the Government and the Chief Conservator of Forests from interfering with their right to the free management of the property.

'Held' that the right of the applicants to the free management of the property was restricted only in a reasonable manner, and that in the interests of the public and the restrictions imposed by the order were within the exception contained in Art. 19(5). (Paras 11 and 12)

Kali Prasad Vakil, for Applicants; Advocate General, for Govt.

ORDER: These five applications have been filed by different members of the family of the Maharaja of Panna, holding what are popularly called Jagirs. Three of them namely Lt. Col. Raja Bahadur Bhartendra Singh Ju Deo (No. 36), Maharaj Kunwar Major Pushpendra Singh Ju Deo (No. 35) and Raja Raghavendra Singh Ju Deo (No. 34) are grantees of immovable properties including small patches of forests from the Maharaja for their maintenance ('Nankara'). The remaining two, namely Her Highness Maharani Sahiba of Tripura (No. 32) and Her Highness Maharani Srimati Padmini Kunwarba Saheba of Indergarh (No. 33) are holders of leases of certain properties including patches of forests; the leases are still current. All these 5 patches, and possibly similar other patches of forest granted or leased out to different members of the family, are scattered here and there within a large area of Government forests in the Bundelkhand area. Before the Constitution, on 27-6-1949 the Vindhya Pradesh Government passed the following order No. 126:

"In order to safeguard the interests of land-holders as also the Government Revenue, it is ordered that hereafter auction of Tendu leaf contracts will be unconditional and will cover not only Government Forests but also other areas. Where private land-holders have existed supported by Sanads and other documentary evidence such land-holders may put their claims before the Deputy Commissioner of the District. The Deputy Commissioner will enquire into their claims and report thereon. If the claim is established, a proportionate compensation will be payable to the claimant out of the auction sale proceeds."

and communicated it to the persons likely to be affected including the five applicants. The present applications, filed after more than two years, are for directions by this Court of the nature of 'mandamus' on the State of Vindhya Pradesh, and the Chief Conservator of Forests, restraining them from interfering with the applicants' rights in the forest areas included in the grants and the leases, as the case may be; secondly, directing them to cancel the order dated 27-6-1949 in so far as it affects the applicants' forests; and, thirdly, directing them not to include these forests areas belonging to the applicants and future auctions. A fourth relief was also mentioned to the effect that this Court should direct a cancellation of the leases for Tendu leaves granted by Government in the auctions held in 5-7-1949 and 21-11-50. But the lease period being over, no question of cancellation arises. The Government has already tendered to the applicants their share of the auction proceeds. If more is wanted by the applicants, the civil Court is at all events the proper forum for this.

(2) The following events have led to these applications. It is said that these grants and leases were already in existence from before May 1948, when the Maharaja of Panna retired from his office after making over charge to the Rajpramukh of the Vindhya Pradesh. As things settled down we find in November 1948, the Government of V. P. addressing a letter to the Jagirdars asking for particulars of the annual income from the forests in their Jagirs, and their willingness to surrender their forest rights in return for reasonable compensation. Nothing came out of this inquiry; and in June 1949 Government is making a provisional arrangement in regard to Tendu leaf contracts, without for the time planning to take over or buy out Jagirdars' rights. This would indeed have been hasty, as we find in November 1949, Government thinking of investigating the Jagirdars' titles themselves as in the following order:

"In order to determine whether (a) the Jagirdars of former Bundelkhand States have any rights of ownership of forests in terms of their Sanads; and (b) whether they are entitled to any compensation if their rights in forests are to be extinguished or any way restricted the matter needs further examination.

The Government, therefore, desire that the sanads of the Jagirdars of the Covenanting States of Bundelkhand be examined by the Deputy Commissioner concerned and the recommendations sent to the Government through the Commissioner with their views by 30th November, 1949."

Though we are proceeding on the assumption that the grants and leases are genuine, it is to be noted that Government is still investigating the question of recognising or cancelling these commitments by the Maharaja of Panna in favour of members of his family. Be that as it may, the O. 126 of 27-6-1949 was only a provisional arrangement for auctioning Tendu leaves. The title, whatever it was, of the Jagirdars was not questioned. Upon proof of the sanads the Jagirdars were to get shares of the auction proceeds proportionate to the area of their private forests. It was the substitution of one contractor for the whole block, instead of a number working each on a different patch, naturally the one contractor had to be selected by Govt. as the owner of the largest areas of the forest.

(3) Jagirdars apparently protested, some even alleging that they had already given leases for this forest produce, and some insisting that they would manage their patch of forest in their own way; these objections went unheeded and in 1949 and in 1950 auctions for this forest produce were held by Government both for its own forests, which are by far the most extensive, and the Jagirdars' patches. The Jagirdars' shares calculated on the basis of the areas, was tendered in June 1951 but the applicants declined to take them.

(4) The applicants allege that during these two years they have been diligently applying to Government through the forest department and through the D. C. Panna for the release of their private forests. Finding that this deprivation of and restriction on their right of property continues even after the Constitution has come into force, and Government is continuing the enforcement of the order, they have applied for a remedy under Art. 226 for the Government's violation of Arts. 19(1) (f) and 31(1) of the Constitution. It is argued that it is an excess of the Government's executive power, as any such interference with their right of selling the produce of their private forests can be only under the Indian Forest Act or other appropriate statute. Further, it is urged that money compensation is not at all sufficient relief and there is no other equally expedient and efficient alternative remedy.

(5) All this is questioned by the opposite party in the affidavits and arguments. Firstly, it is pointed out that applicants have come after 2 years. There is an alternative remedy in the form of a suit for compensation for past interference calculated on a more generous formula, and for permanent injunction. On the merits also, it is pointed out that in the sanads of grants the grantor, Maharaja, expressly reserved to himself the right of making rules for the management of the properties included in the grant; the present Government as the successor of the Maharaja could even under the sanads take over the management of these private forests. Though no such express reservation is found in the leases this is a

matter arising out of contract. The lessor has given a number of properties to the lessees; in regard to one of them he has withdrawn the freedom of management for collection of one of the produces. The lessees may bring a suit for the termination of the lease, or for the reduction of the consideration payable, or for compensation. But it is not a case for the issue of writs under S. 226 of the Constitution. Finally, even viewing it in the light of S. 19(1)(f) the opposite party contends that the order passed in June 1949 was made by a competent authority and was existing law. This may have the effect of restraining the owners' right of giving the contracts for the collection of the Tendu leaves to men of their own choice; but the restriction is reasonable, and in the interest of the general public. It reduces the dangers of poaching and the consequent loss of public revenues; it saves endless friction between the Jagirdar's contractors and Government. Moreover, the induction of small contractors ostensibly for collecting Tendu leaves into this or that patch of the forest, may lead to the depletion and destruction of the forest themselves, as to contractors would be tempted to cut and remove trees both from their private forests and in the adjoining or the approaching portions of the Government forests. Therefore, this existing law comes under the exception in Art. 19(5).

(6) 'Point No. 1'. Immediately after the orders these applications could not have been made, but there was nothing to prevent the applicants from coming here soon after the Constitution came into force instead of about 20 months later. The explanation given is that they have been approaching Government and Government has not passed any final orders, but has held two annual settlements and is preparing to hold the third. As early as November 1949, the Jagirdars knew that Government was not going to let them hold their own auctions. Even as early as November 1949, the Jagirdars knew of Government's determination; if they waited for final orders, even now they have not been passed. Either way, one does not understand why the applications have been filed at this stage. No doubt, an application against an alleged invasion of a fundamental right can be made at any time; but a person who delays his application by two years cannot be heard to argue that the alternative remedy of his civil suit might take time. The answer is that had he gone to the Civil Court the dispute might by now have been decided. Therefore, I am not satisfied with the real necessity for this Court's invoking Art. 226 in these cases.

(7) 'Point No. 2. The grievance in regard to past action by the Government in the holding of the auctions in 1949 and 1950 and in the preventing of two of the Jagirdars' contractors from collecting the Tendu leaves, — this grievance is solely remediable by a suit for compensation. In fact, the Jagirdar's share in the income has been tendered by Government. If it is considered insufficient or, if the Jagirdars want it to be calculated according to another formula, then the only proper course is a suit. The other grievance is the continuance of the deprivation of the Jagirdars' right to hold their own auctions. The civil Court remedy for this is a suit for permanent injunction on the Government; there is nothing roundabout or inexpedient in such a course. For the lessees, whose nexus with the lessor, who is the Govt., is based on contract, a suit is the only proper remedy. The Jagirdars urge that a civil Court may refuse a permanent injunction, on the ground that money compensation is adequate and ascertainable, or that a department of Government might not be interfered with. At this stage, this Court can say nothing on this. The point is that, there is a suitable, straightforward and, if I may say so, a routine manner of seeking redress of this grievance. Simply because the Jagirdars apprehend that they might lose such suits and get compensation only, this Court cannot issue writs.

(8) 'Point No. 3'. We may also examine the alleged invasion of a fundamental right. As far as the three grants go, the grantor had reserved to himself the right of making his arrangement for the management of the forests included in the grants. These sanads contain the following provisions:

"You may all the time collect income from the aforesaid properties, and meet your expenditure out of it and continue to obey my wishes. You should manage these properties in accordance with the settlement and the forest rules and further the other arrangements that may be brought into force by the riyasat."

Now the order dated 27th June 1949 is an arrangement made by the successor of the 'riyasat — which the grantees are bound to accept by the terms of the grants.

(9) In regard to the two lessees it has been pointed out that there is no similar reservation and that during the pendency of the lease the lessees should to allowed to manage the properties just as they desire. However, the forest area in each of the leases is one out of many properties, all of which have been leased with the sole idea that the lessees should be allowed to derive income. The lessor with a view to preventing invasion into and destruction of his property adjoining the lease forests, wants that only his nominees should collect Tendu leaves in the latter and pays up the income to the lessee. If this is an invasion, it is an invasion of a right created by contract for which the other party can seek relief in the civil Court for compensation or cancellation of the lease or otherwise. But this is not such an invasion of a fundamental right as to call for an extraordinary remedy.

(10) 'Point No. 4.' Now the question can be considered in the light of Art. 19 (1) (f) and 19 (5). The order of the V. P. Government dated 27-6-49 was passed before the Constitution came into force, and was meant to cover all the Jagirs or private interests in the forest area within the State; under Art. 366 Sub-cl. (10) this becomes "existing law". The applicants' argument is that the Government of the Vindhya Pradesh was not competent to make that order. This is not correct. The forest law of the Vindhya Pradesh in force at that time was the Rewa Forest Act; originally the law of the Rewa part of the Vindhya Pradesh was made applicable to the entire State by ordinance No. 4 dated 31st July 1948. The most important difference between the Rewa Forest Act and the Indian Forest Act was that under the former all the forests were Government property. If the Government was prepared to apply the Rewa Forest Act to the letter it could have taken the jagirdars' private forests in Bundelkhand also. But, in parts of these some sort of private right had been exercised and it would have been hard to do so. This means further legislation or the application of Indian Forest Act, which, in fact, replaced the Rewa Act in April 1950. But the consideration of suitable legislative measures means time; that was also the question of the investigation of the commitments by the retiring Maharaja, and the decision on whether those like the present grants and leases in favour of their family members should be recognised. During the pendency of these considerations some sort of working arrangement was necessary to prevent the ruination of the forest wealth. The order of 27-6-1949

is nothing more than such a working arrangement, pending further legislation, and the investigation, of the commitments. It is eminently reasonable, and does not either question the title, or reduce the income that the jagirdars can get by honest and efficient management with due regard to the preservation of the forest. Nor is it an excess of the executive power. If anything, it is a very moderate exercise of the powers, and a willing forbearance from applying the Rewa law to the letter. The order was, therefore, made within the limits of executive power, by a competent authority, in this case, the Government of the V. P., before the Constitution; so it is existing law.

(11) Assuming in these proceedings, that the applicants' titles are genuine, their right to the free management of the property has been restricted only in a reasonable manner, and that in the interests of the public. These forests are scattered within the blocks of Govt. forests; these jagirdars are members of the ruling family and the purpose of the grants or leases was that as much income as possible should be derived. So any unrestrained exercise of management by the owners will would be ruinous to public interest. It is not impossible that the Jagirdars will find contractors, who pay for these areas proportionately more than what they would pay for the Government forests, where there is more effective control against destruction of trees or collecting other produce than the one contracted for, and against poaching. The private contractors may also very easily collect produce, or cut trees from the neighbouring portions of Government forests. This danger is always there and is increased by the uncertainty about the future of these jagirs. These grants and leases are being examined, by Government (since November 1949) with a view to deciding, how many of the commitments should be recognised and confirmed and how many should be cancelled with or without compensation. Whatever the results, it is only human if the Jagirdars are anxious at once to get as much as they can out of the forests. Very real indeed are the dangers of giving ostensible settlements of this or that forest produce with full leave to the contractors to take away anything they like. Thus, from the view point of preserving every patch of forest and of preventing the far reaching damage to the country by the destruction of the private forests as well as of the adjoining Government forest, this restriction is in the public interest. Then there is the danger of poaching into Govt. forest, in the approaches on the borders of the private forest. The inconvenience suffered by the Jagirdars is next to nothing. The Govt. auctions the forest produce of big areas, and gives the Jagirdars a part of income based on proportionate areas. This formula is very correct, but if any Jagirdar for special reason wants a more generous formula for his private forest, he can claim it from the Government or approach the civil Court for more compensation. Naturally, this Court in the present proceeding cannot go into these details. If the Jagirdars get contractors who will pay more for these private forests than for the corresponding area of Government, it means only that the contractors will take other forest produce, or cut down trees, or poach on the Govt. forests. Thus, it is a case of a restriction which is both reasonable and in public interest.

(12) It is argued on behalf of the applicants that the Constitution aims at the sanctity of property, and the right of a citizen to do whatever he likes with his own. This is not correct. Such an exercise is a serious "abuse of right", and has been expressly provided against in the various exceptions in Art. 19 including Cl. 5. It is for the authority making such existing law to impose restrictions, and it is for the Court to decide if the restrictions are reasonable and in public interest. In the present case, I hold that the restrictions imposed by the order are within the exception contained in that sub-article.

(13) Thus, looked at in any way, no case has been made out for the issue of any direction by this Court. The five applications are dismissed with costs to the opposite party in each case of fifty rupees.

V.R.B. *Applications dismissed.*

[C. N. 9.]

A. I. R. (39) 1952 Vindhya Pradesh 16

KRISHNAN J. C.

Mata Din, Appellant v. Paltu and another, Respondents.

Second Appeal No. 197 of 1951, D/- 16-10-1951.

Limitation Act (1908), S. 12 — Delay caused by despatch of copies by post.

Where on the date fixed for delivery of the copies, the applicant does not appear personally to take delivery of the copies but requests the copying department to send them by post and the copies are accordingly sent by post on the date fixed for delivery, the applicant is not entitled to exclude the period of transit by post under S. 12 (Delay of three days held could not be condoned under S. 5). *(Para 3)*

Anno: Lim. Act S. 12 N. 18.

Lal Yadvandra Singh, for Appellant.

JUDGMENT: This second appeal would get time-barred unless we exclude the postal transit period in sending of the copy of decree and judgment to the appellant. Considering the number of people in this State, who like copies to be sent to them by post, this question becomes important.

(2) The first appellate Court passed its decree on 23-6-51. On 23-8-51 the party applied for copy, and after estimates filed the requisite stamps and paper on 31-8-51, and was to come for the copy on 7-9-51. He says that the copy was not ready on that date, and that he was told that it would be ready on 10-9-51. This is not clear from the certificate, but in the interest of the appellant I shall assume it. Instead of coming on 10-9-51, or sending somebody to take the copy the appellant requested the copying department to send it by post. The certificate shows that it was sent by post on 10-9-51, but reached the appellant on 13-9-51. The appeal has been filed here on 15-10-51, 14-10-51 being a holiday. If one excludes the entire period from 23rd August till the 13th September then the appeal is not time-barred. If on the other hand one excludes the period up to 7-9-51 or even upto the 10th, the appeal will be time barred.

(3) Certainly the party should not suffer for the time taken by the Court or its copying department. But when the copy is ready the party should come and collect it. If at his request it is sent by post, the period of transit cannot be excluded. This is not a thing which the Court or the copying department has to do under the law, but what the party wants to be done for his own convenience. Therefore, even assuming that the appellant had called for the copy on 7-9-51, but was told that it would be ready on the 10th, this appeal is time-barred by three days. This delay cannot be condoned under S. 5, Limitation Act. In the result the second appeal is dismissed summarily as time-barred.

K.S. *Appeal dismissed.*

[C. N. 10.]

A. I. R. (39) 1952 Vindhya Pradesh 17

KRISHNAN J. C.

Jangi Lal, Plaintiff-Appellant v. Baijnath Singh and others, Defendants-Respondents.

Second Appeal No. 96 of 1951, D/- 14-8-1951.

(a) Rewa Pre-emption Act, S. 6 — Suit for pre-emption by non-Rewa resident without obtaining necessary sanction — Decree conditional on obtaining such sanction can be passed — Rewa Land Revenue and Tenancy Code, S. 49.

Though S. 6, Rewa Pre-emption Act, read with S. 49, Rewa Land Revenue and Tenancy Code prohibits a non-Rewa resident from permanently acquiring by pre-emption a pattadari tenancy within the Rewa State except with permission of the Chief Revenue Authority, where the plaintiff who is a non-Rewa resident brings a suit for pre-emption without obtaining the necessary sanction of the Chief Revenue Authority, there is nothing in law or equity against making the preliminary decree for pre-emption conditional on the pre-emptor's obtaining the necessary sanction. Such a pre-emption suit should not be dismissed for want of sanction. (Para 4)

(b) Rewa Land Revenue and Tenancy Code, S. 49 — Section is repugnant to Art. 15, Constitution of India and has become void — Constitution of India, Arts. 13, 15.

S. 49, Rewa Land Revenue and Tenancy Code which prohibits a non-Rewa resident from acquiring a pattadari tenancy within the Rewa State makes a discrimination only on the ground of residence and as such it has become void under Art. 13 of the Constitution of India as being repugnant to Art. 15 of the Constitution. (Para 5)

Anand Chand Joshi, for Appellant; Lal Kamleshwar Singh, for Respondents.

JUDGMENT: This is an appeal by the plaintiff from the concurrent decisions of the two lower Courts dismissing his suit for pre-emption on the ground of being co-sharer because he was otherwise unqualified to purchase the land.

(2) The only questions here are, whether, firstly a conditional pre-emption decree could be passed to take effect upon the removal of the disability, and secondly, whether this disability to purchase is based on a law that is void as being repugnant to Art. 15 of the Constitution. The plaintiff Jangi Lal as well as the defendant Ganga are co-shareres with residence in a village in the Allahabad District. However, they have lands lying within the Vindhya Pradesh. This is what happens in many border villages. Defendant No. 1 is a man of the Vindhya Pradesh, who has purchased the half share of the defendant No. 2. The plaintiff, who is co-sharer on the same land brought a suit for pre-emption within one year. The lower Courts dismissed the suit on the following grounds. The suit itself seems to have been remanded by the appellate Court on an earlier occasion, on some other grounds. But we are not concerned with them here. The plaintiff being a resident of an adjoining State was incompetent to purchase the property except with the permission of the Chief Revenue Authority: vide S. 49 of the Rewa Land Revenue and Tenancy Code. Under S. 6, Rewa Pre-emption Act, no right of pre-emption would accrue when the purchase is barred by the Rewa Land Revenue Code or any other order.

(3) But this decision of the lower Courts is attacked on two grounds. The first ground is that the pre-emption decree itself could make it clear that it will not take effect until the pre-emptor obtains the permission.

(4) The pre-emption decree is in most cases a preliminary decree. Usually the condition is that the pre-emptor pays up the same amount as a purchaser has paid, but there is nothing in law or equity against making the decree conditional to the pre-emptor's obtaining the sanction of the Chief Revenue Authority. The purchaser defendant argues that the pre-emptor should have obtained the sanction before he brought the suit. One practical difficulty in this course is that by the time he obtains the sanction the suit might get time barred for no fault of his. Any way, the suit having been brought, I think it made no material difference if it is ordered that the pre-emption decree cannot take effect until the sanction is obtained.

(5) The second objection raised by the plaintiff-appellant seems to be unanswerable. S. 49 of the Rewa Land Revenue and Tenancy Code prohibits a non-Rewa resident from permanently acquiring a Pattadari tenancy within the Rewa State except with the permission of the Chief Revenue Authority. This Act was made at a time when the Rewa State was a separate political entity considering itself in certain respects foreign both to British India and to the adjoining Indian States. When such a disability was referred to in S. 6 of the Rewa Pre-emption Act the same political set-up continued. In other words, the Rewa Durbar considered itself legally competent to protect its subjects from the residents of neighbouring States or of British districts whom the Durbar considered to be foreigners. However, after the coming into force of the Constitution of India the position has changed completely. Article 15(1) expressly provides that there should be no discrimination against citizens among other things, on the ground of only of the place of birth. In other words, a rule or law saying that person born in or resident of the Allahabad district is debarred from purchasing lands in the Rewa District of the Vindhya Pradesh is to discriminate against him only on the ground of residence. One can understand a law providing that person, not living in the same revenue village or resident farther than a specific distance from the land, may not acquire a tenancy. Because this disqualification is not only on the grounds of facilities for cultivation. But a law which says that any resident of the Rewa State area can buy while any resident of another area cannot, except with permission, is certainly a discrimination only on the ground of residence. To that extent the rule militates against Art. 15 and under Art. 13 would become void. It is of interest to note that in this respect there are no exceptions to Art 15(1) while there are exceptions to Art. 19, Cl. (1) (f). The law of pre-emption is an exception to the right contained in Art. 19 (1) (f). But there can be no exception even on the ground of public interest to the right defined in Art. 15(1) that there should be no discrimination on the ground only of the place of residence. Therefore, the appeal is allowed and it is declared that the plaintiff appellant is entitled to buy the property in suit on depositing within one month of the amount for which defendant No. 1 has purchased the property. Upon depositing the amount defendant No. 1 should take the money and reconvey the property to the plaintiff. Costs to the plaintiff throughout payable by the contesting respondent and pleader's fee of 7 per cent. in each of the Courts.

K.S.

Appeal allowed.

[C. N. 11.]

A. I. R. (39) 1952 Vindhya Pradesh 18

KRISHNAN J. C.

Badri Batan Lal Rawat, Applicant v. Vindhya Pradesh Government and another.

Civil Misc. Appln. No. 19 of 1951, D/- 16-7-1951.

(a) *Constitution of India, Art. 14 — Equality before law.*

The grant of special facilities to Corporations for realisation of their claims from the debtors is no violation of the fundamental right of equality before law. (*Para 5*)

(b) *Words and phrases — "Government of the Vindhya Pradesh".*

The words "Government of the Vindhya Pradesh" used in an order made by a Secretary to the Chief Commissioner conveys exactly the same meaning, and has the same effect as the words "Chief Commissioner of Vindhya Pradesh". (*Para 7*)

(c) *Constitution of India, Art. 226 — Application in bad faith.*

Article 226 is meant to redress grievances for which either there is no other remedy or the alternative remedy is too slow, costly and uncertain. It is an exceptional equitable relief which can be granted on very good grounds. But if the applicants come in bad faith, the relief has to be refused. (*Para 8*)

(d) *Contract Act (1872), S. 128 — Liability of surety.*

The liability of the surety and of the principal debtor being co-extensive there is intrinsically no illegality in the creditor proceeding against the surety in the first instance. (*Para 4*)

Anno: Contract Act, S. 128 N. 2.

(e) *Datia State Bank Rules — Liability of debtor — Ordinance IV (4) of 1948.*

Where the debtor's liability to get his properties directly attached and sold up by the Bank of Datia arose by contract as well as by the operation of the Datia State Bank Rules and the contract is not one that can be avoided on any of the grounds given in the Contract Act the debtor's dues can be realised directly whatever the procedure be for the arrears of land revenue. (*Para 6*)

Lal Pradyumn Singh, for Applicant; Maheshwari Prasad Advocate General, on behalf of the Government.

ORDER: This is an application by Seth Batan Lal under Art. 226 of the Constitution for a direction of the nature of writ of certiorari and prohibition enjoining the Government of Vindhya Pradesh, and State Bank of Datia from proceeding with the realisation of a claim by sale of the applicant's house which has been attached.

(2) The facts are for the most part common ground. As early as 1931 the Durbar of Datia has founded the State Bank of Datia, and made rules for its management. Since 1944 the Managing Committee consisted of the Chief Revenue Officer of that State, the Chief Accounts Officer, the Treasury Officer and two nominees of the Durbar. The rules were changed from time to time, the last occasion being in 1944. After 1948 it was the bank owned and run by the Government of the Vindhya Pradesh with a managing committee appointed by the Raj Pramukh of the Vindhya Pradesh, and after the 1st January 1950 by the Chief Commissioner. At present, the Managing Committee is presided over by the Deputy Commissioner, who is the Chief Revenue Officer in the Datia District, and has been appointed by the Chief Commissioner. The Secretary of the Bank has taken the place of the Treasury Officer of the Datia Raj.

(3) Under the rules and regulations no civil Court proceedings would be necessary or legal for the realisation of its claims from its debtors. The bank can straightaway attach the properties and realise its dues as if they are arrears of land revenue. One of the debtors is Pt. Hit Kishore, son of Priya Dutta Pastore who owes Rs. 2,000/- besides interest for which the applicant is surety. The surety as well as the principal debtor have executed valid bonds agreeing to pay on demand, naming immovable properties as security and agreeing that on default the bank may straightaway attach and sell them. The debtor defaulted and the Bank tried to realise the money from him. As it was not possible to realise from him, it has proceeded against the surety and has attached a house belonging to him and given as security. The surety does not question his liability but he has urged the following points. Firstly, that the Bank has not taken all measures to realise the dues from the principal debtor's property, and till then the surety cannot be proceeded against. Secondly, it is suggested that this right of realising as arrears of land revenue is in contravention of the fundamental right of equality before law; this however, has not been pressed. Thirdly, it is pointed out that the law authorising the Bank to realise has been automatically repealed by the Raj Pramukh's Ordinance IV (4) of 1948 which extends all Rewa laws to the entire Vindhya Pradesh. The fourth point urged is that the Managing Committee itself, which is taking steps for realisation has not been properly appointed. For these reasons the prayer is that the Bank should be directed to release the property from attachment and proceed in the Civil Court.

(4) Taking the first point the liability of the surety and of the principal debtor being co-extensive there is intrinsically no illegality in the Bank proceeding against the surety. It would, of course, be more advisable as provided in R. 58 to proceed against the principal debtor and when the debt is irrecoverable to proceed against the surety. This is exactly what the Bank has been doing. The affidavit contains full particulars of the steps taken to realise the debt from the principal debtor. If there is any of the debtor's property still available for attachment, the surety could certainly point it out to the Bank after which alone the surety's property may be attached. But the surety has not done it. On the contrary, there is ample indication that this application is prosecuted by the principal debtor jointly with the surety with the sole purpose of evading payment. The affidavit on behalf of Batan Lal is sworn by no other person than Pt. Hit Kishore Pastore, the principal debtor; who has described himself as the pairokar of the applicant. Thus the allegation that the Bank is sparing the principal debtor and proceeding against the surety is obviously mala fide. There is not only no substance in this contention, but also it is one in bad faith. Either way it is to be rejected.

(5) Coming to the second ground about the constitutional validity of such special facilities for realisation given to corporations, there has been a recent case of exactly similar nature from the Bank of Baghelkhand in the Rewa part of the Vindhya Pradesh. It is not necessary to repeat the reasoning contained in that ruling to the effect that the grant of special facilities for realisation to corporations is no violation of the fundamental right of equality before law.

(6) The third point alleged is that this part of the Datia State Bank rules and regulations should

be read subject to Ordinance IV of 1948. According to this Ordinance, all laws of the Rewa State as have been published in the Rewa Raj Gazette came into force over the rest of the Vindhya Pradesh also superseding any local laws on the same subject. There are certain exceptions but we are not concerned with them here. The argument is that the State Bank should have followed the Rewa Rules for realisation of land revenue arrears instead of directly issuing the writ of attachment. There are two ways of looking at this argument. Firstly, the applicant's liability to get his properties directly attached and sold up by the Bank arises by contract as well as by the operation of the Datia State Bank Rules. That contract is not one that can be avoided on any of the grounds given in the Contract Act; and whatever the procedure be for the realisation of arrears of land revenue, the applicant's dues can be realised in this way. Secondly, even viewing it as a case for the application of the Rewa State Demand Rules, there has been no material departure from that procedure. The Rewa Rules provide that the requisitioning authority should file a certificate of the claim to the Deputy Commissioner, who will get it executed by a subordinate, namely a Tahsildar. There can, of course, be no bar to the Deputy Commissioner himself executing the certificate. Further, if the certificate-debtor files an objection to the Deputy Commissioner, he should pass it on to the requisitioning authority. The latter should consider the objection, and may cancel, or modify the certificate, or dismiss the objection. In this case admittedly the bank has followed substantially the same proceeding. The Chairman of the Managing Committee and the executive head of the Bank is the Deputy Commissioner himself, and he is executing the certificate. The Bank Rules have no express provisions for hearing of objections, but as the affidavit shows they are always heard. In this case the affidavit shows that the principal debtor was heard and given accommodation from time to time. The present applicant-surety himself admits that his objection was heard and was dismissed. Even now, there is nothing to prevent him from filing his objection to the Bank which will be disposed of by the Managing Committee. There is, therefore, no force in this argument.

(7) Finally, there is the ground that the present Managing Committee has not been properly appointed. Whether this or that member of the Managing Committee has been improperly appointed, the rights of the Bank as a corporation do not disappear. So, the liability of the surety to pay up, or in failure to suffer his property to be attached and sold up does not cease. Even on the facts there is no irregularity. It is difficult to understand how the appointment of the Deputy Commissioner as Chairman is wrong. According to Rule 5, the Ex-officio Chairman should be the Chief Revenue Officer of the Datia State. Since 1948 the same area as was the Datia State is the Datia District of the Vindhya Pradesh. The Chief Revenue Officer of that District being no other than the Deputy Commissioner, he is entitled to be the Chairman, even without an express order. As a matter of caution he has been expressly appointed to that post by an order of the Government of the Vindhya Pradesh. The Managing Committee could be appointed by the Ruler; these powers were surrendered to the Raj Pramukh in 1948 and when the latter retired and the Chief Commissioner took his place, the same power came to be exercised by the Chief Commissioner. The appointment by the Chief Commissioner has, therefore, the same effect as the appointment by the Durbar Alla. The objection of the applicant is to the effect that order was in the name of the Government and not of the Chief Commissioner. The words "Central Government" or "the Union Government" have been held to convey the same meaning and to have the same effect as the words "the Governor-General in Council" or the "President" as the case may be. Similarly the words "Government of the Vindhya Pradesh" used in an order made by a Secretary to the Chief Commissioner, conveys exactly the same meaning, and has the same effect as the words "Chief Commissioner of the Vindhya Pradesh."

(8) In the result, I find that there is no ground whatsoever to issue any direction in this case. As a matter of fact this is a joint attempt in bad faith by the principal debtor and the surety to defeat the claims of the Bank. Article 226 is meant to redress grievances for which either there is no other remedy or the alternative remedy is too slow, costly and uncertain. It is an exceptional equitable relief which can be granted on very good grounds. But if the applicants come as in this case in bad faith, the relief has to be refused.

(9) The application is dismissed with costs payable to the opposite party, and pleaders fee to the opposite party of Rs. 200/-.

D.H. *Application dismissed.*

[C N. 12.]

A I. R. (39) 1952 Vindhya Pradesh 19

KRISHNAN J. C.

Baijnath Singh and another, Applicants v. Jangi Lal and another, Opposite Party.

Review Appln. No. 38 of 1951, D/- 11-10-1951.

(a) Civil P. C. (1908) O. 47 R. 1 — Application for review with alternative prayer for leave to appeal to Supreme Court — Not maintainable — Civil P. C. (1908), S. 109 — Constitution of India, Art. 133.

An application for review of judgment with an alternative prayer for leave to appeal to the Supreme Court is not maintainable inasmuch as a review can be sought on certain grounds while leave to appeal to Supreme Court has to be sought on altogether different grounds. The applicant should file a separate application for leave. (Application treated as one for review only.) (Para 1)

(b) Civil P. C. (1908), O. 47, R. 1 — New plea in review.

Where the applicant for review has not urged the point of limitation during the hearing nor in the lower appellate Court, it cannot be urged by him as a sufficient ground for review. (Para 2)

Anno: C. P. C. O. 47 R. 1 N. 2.

(c) Civil P. C. (1908), O. 47 R. 1 — Mistake or error apparent on face of record — Constitution of India, Art. 15.

A suit for pre-emption was filed by a non resident of Rewa State before the coming into force of the Constitution. A pre-emption decree was passed in his favour inspite of the fact that under S. 49, Rewa Land Revenue and Tenancy Code the pre-emptor could not acquire the property except with the permission of the Chief Revenue Authority. At the time of passing the decree the disability under S. 49 of the Code had ceased in view of Art. 15 of the Constitution of India and it was no longer necessary to take the permission of Chief Revenue Authority:

Held the Court in taking notice of Art. 15 of the Constitution had not committed any mistake and

as such there was no mistake in passing the pre-emption decree. (*Para 4*)

Ammo: C. P. C. O. 47 R. 1 N. 15

Guruprasanna Singh, for Applicants.

JUDGMENT: This is an application from the decision dated 14-8-1951, allowing the Second Appeal No. 96 of 1951.* The applicant wants either that the judgment should be reviewed, or that leave should be given to enable the applicant to appeal to the Supreme Court. The applicant cannot ask for leave in this form. The application is treated as one for review. If the applicant thinks that he has got sufficient ground to ask for leave a separate petition should be filed for it. A review can be sought on certain grounds while leave for appeal to the Supreme Court has to be sought on altogether different grounds.

(2) Two points are alleged as mistakes patent on the face of the record justifying a review. The first is the allegation that this pre-emption suit was really time-barred namely that it was filed on 7-7-49 while the unregistered deed of sale has been executed on 25-6-48. Be that as it may, I note that this point was not argued before the lower Court. Again, when the plaintiff in second appeal raised various points the applicant-defendant could and should have raised the question of limitation during argument. This was also not done. When a point is not urged during the hearing, it cannot be urged by the losing party practically as a sufficient ground in review.

(3) The next point urged is that the suit was filed before the Constitution came into force, and the application of Art. 15 (1) by this Court is a patent mistake. This point has to be examined at some length. The suit was for the plaintiff's right of pre-emption on the ground of co-sharership in regard to a small piece of land in a village within V. P., but on the border adjoining Allahabad District. The plaintiff pre-emptor being a resident of the Allahabad District outside what used to be Rewa State, defendant contended that he was absolutely debarred from obtaining a decree for pre-emption as S. 49 of the Rewa Land Revenue and Tenancy Code prohibits a non-resident of the Rewa State from acquiring Pattadari tenancy within the State except with the permission of the Chief Revenue Authority. This Court's decision was 'firstly', that, at all events, a pre-emption decree should have been given leaving it to the pre-emptor to remove the disqualification by getting the permission of the Chief Revenue Authority before actually taking the reconveyance. Secondly this Court held that in view of Art. 15 of the Constitution that disability had automatically disappeared. The argument is that it is failure to note that the Constitution came into force after the sale and the filing of the pre-emption suit in question.

(4) This is to misunderstand the entire position. The finding is that the plaintiff was entitled to pre-emption decree in any event. As for the alleged disability, if it persisted, the plaintiff should take steps for its removal. It is a continuing disability and its removal may be either by the act of the parties or by the happening of some other event. Having obtained a preliminary decree for pre-emption it was open to the plaintiff to get the disability removed by applying to the Chief Revenue Authority. As it was the Constitution had come into force at this stage, and there was no need for the plaintiff to approach the C. R. Authority, because the disability had automatically ended as soon as the Constitution provided that there should be no discrimination on the ground of the place of birth within the Indian Union. The fact that the Constitution was not enforced on the day of sale is immaterial. On the date of the sale and for sometime afterwards the plaintiff was under a disability, but by the time the present decree was passed this disability had ceased, and it was no more necessary to take the permission of the Chief Revenue Authority. Thus I find that there is no mistake, and the fact of the sale having been before the coming into force of the Constitution has really no bearing on the present question. The result is that the application for review is dismissed.

K.S. *Application dismissed.*

*See AIR (39) 1952 V P 17.

[C. N. 13.]

A. I. R. (39) 1952 Vindhya Pradesh 20

KRISHNAN, J. C.

Lt.-Col. W. S. Nene, Plaintiff-Appellant v. Mahadeo Vishnu and others, Defendants-Respondents.

First Appeal No. 41 of 1951, D/- 4-8-1951.

(a) *Hindu Law — Adoption — Ceremonies.*

A point of law has to be decided independently of any party's pre-possessions. The adoption is complete as soon as the boy is given by his natural father to the adopter. The Hindu Law does not require that there should be a formal ceremony when the boy is given and accepted for a valid adoption. The fact that the parties believed that the religious ceremonies alone completed the adoption is immaterial. AIR (29) 1942 Mad 395, AIR (32) 1945 Nag 60, Rel. on.; AIR (27) 1940 All. 134, Dist. (*Paras 7, 10*)

(b) *Hindu Law — Adoption — Factum valet.*

If there is any question about the capacity to give, or the capacity to take, and the capacity to be the subject of adoption which are essential matters the doctrine of factum valet will not apply. But to the formalities and ceremonies which do not affect the essence of the adoption the doctrine would undoubtedly apply. 9 All 253, Rel. on. (*Para 11*)

(c) *Hindu Law — Alienation — Legal necessity and benefit to estate.*

There may be many cases in which legal necessity justifies a sale by the father without the son's consent. There may also be cases in which the conversion of the corpus is for the benefit of the joint family. But these two are naturally exclusive and should not be confused. In the one case the corpus is consumed and disappears, while in the other it is only converted into a form which the manager considers to be more profitable or more easily manageable. The purchaser should make such enquiries as a prudent man would make and then satisfy himself that the justification was the one or the other or in part one and in part the other. He cannot be heard to say in one breath that he understood that the property was going to be consumed, and there was legal necessity, and in the next breath to argue that he understood that the property was going to be preserved in a more manageable form. AIR (13) 1926 Lah 468 Referred. (*Para 14*)

(d) *Hindu Law — Adoption — Rights of adopted son.*

The adopted son is in no manner different from a natural born son and has the same rights. (*Para 13*)

(e) *Hindu Law — Alienation — Law applicable.*

If the joint family is governed by the Mitakshara law as applied in the Bombay Presidency then the alienation would be valid to the extent of the father-vendor's undemarcated share in the property and can be set aside only in respect of the son's

share. If, on the other hand, the family is governed by the Mitakshara Law as applied elsewhere than in Bombay and Madras the entire alienation is to be set aside. The results also differ; in the first instance the entire property goes to the son while in the latter case it becomes the joint family property as the status quo is restored. When the fact of the stay of the family in the supposed original homes cannot be ascertained, they have to be ruled by the law of their present, or ascertainable domicile. Yet another way of looking at it is to see if the party has adopted the ways of living of its present domicile. (*Paras 17, 18, 19*)

(f) Hindu Law — Alienation — Bona fide enquiry.

In the eyes of law failure to make such inquiries as a prudent purchaser should make it practically equivalent to a bad faith. (*Para 21*)

Guru Prasnya Singh, for Appellant; Hafizuddin Siddiqui, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('87) 9 All 253 (Pr 11)

('40) AIR (27) 1940 All 134: (ILR (1940) All 100) (Pr 10)

('26) AIR (13) 1926 Lah 468: (7 Lah 476) (Pr 14)

('42) AIR (29) 1942 Mad 395: (ILR (1942) Mad 682) (Pr 10)

('45) AIR (32) 1945 Nag 60: (ILR (1944) Nag 796) (Pr 10)

JUDGMENT: This is an appeal by the plaintiff from the judgment and decree of the learned District Judge, Rewa, dismissing on the ground that it was for the benefit of the estate, his suit for setting aside the sale of an orchard by his adoptive father (defendant No. 1), to defendants Nos. 2 and 3. Since the appeal has been filed, the parties have not only gone over the question of benefit of the estate, but also all the other questions decided in the lower Court in the plaintiff's favour; namely — whether the plaintiff is the son by adoption of the defendant No. 1, whether the property concerned is ancestral, or the self-acquired property of defendant No. 1. In addition, there is the question whether the plaintiff and defendant No. 1, who are Kokanastha brahmins are governed by the Mitakshara law as understood and applied by the Courts in Bombay which is their traditional home, or as understood and applied in the U. P., where they had settled for a long time, and from where they came to Rewa. Finally, in the event of only the sale of the plaintiff's half share being held invalid whether he is entitled to purchase the other half as pre-emptor; and if part or whole of the sale is set aside, the defendants 2 and 3 are entitled to a refund of the consideration, and to compensation for improvements.

(2) This is the case of the plaintiff. The defendant No. 1, Mahadeo Vishnu Kunte is an old man residing at Rewa, where he had worked as a Minister. Having no issue, and already in middle age by 1925, he decided to adopt a son. A widowed sister of his who had been married somewhere near Nagpur brought with her in Saban of the year 1925 Shankar Muneshwar Nene himself, also a Kokanastha brahmin, who was prepared to give his second son Vaman Rao Nene (the present plaintiff) in adoption to Mahadeo Kunte. Having given this son in adoption Shankar Muneshwar Nene also stayed for two or three months to get Vaman Rao, then only about 7 years old, accustomed to his new surroundings. Before leaving Shankar Nene gave a letter to Mahadeo Kunte stating these facts. The only purpose of giving this letter was to assure Mahadeo Kunte that the Nenes would not claim the boy any more, and that he could bring up the boy in his own way. In 1925 there was no datta hom or other religious function; Mahadeo Kunte had intended to perform it in due course of time, but had been putting it off. The upnayan of the boy was performed at the usual age, and he was educated at Rewa and other places till about 1940 when he joined the Rewa State Army. Shortly after, he also wanted to join the Indian Army, but there was some difficulty with the Maharaja who would not part with him. Whereupon, the plaintiff who has called himself Vaman 'Shankar' Nene in his school and official papers, applied directly to the Indian Army authorities and got a commission, and has risen to be a Lt.-Colonel. In the meantime, in 1944, Mahadeo Kunte, who by then was over 65 years, performed the dutt hom, and got the plaintiff newly christened, Vijai Kumar Mahadeo Kunte, which name, however, was not gazetted, and is probably being used only when the plaintiff performs religious ceremonies.

(3) Mahadeo Kunte owned an orchard in Rewa town in holding No. 30, Plot No. 550, Tarehti. Purchased in the time of Vishnu Pant Kunte, Mahadeo's father, it was ancestral property in the hands of the son. By 1949 Mahadeo was older than 70 years, and in poor health, subject to moments of depression, especially because his adoptive son being an military officer was away from him most of the time, and a young man Patwardhan by name, whom also he was bringing up, had run away to Bombay in quest of employment; occasionally he was indifferent to the fate of his properties. In May 1949 he sold this orchard for Rs. 3,000/- to the defendants 2 and 3 describing it as Maurasi, and noting the purpose of the sale as personal expenses (khangi kharcha). Shortly after, he regretted his haste and asked the common friend Sankatha Prasad, who was instrumental in getting this sale executed, now to persuade the purchasers to take back the money and reconvey the orchard. But the defendants would not listen. Kunte thereupon wrote to the plaintiff in June 1949; but the plaintiff being on active service could come only for a day some months after. He met the defendant No. 2, who has been described by himself and defendant No. 3 as the de facto purchaser. The plaintiff also failed in his attempt to persuade him to take the money and reconvey the orchard. Within one year the plaintiff filed the suit. The prayer proper was for the cancellation of the entire sale; alternatively if the sale of Mahadeo Kunte's share is valid, the plaintiff wanted the sale of his half share to be set aside, and further in regard to the other half prayed for a decree for pre-emption on the ground of co-sharership subject to his paying of Rs. 1,500/-. During the hearing of the suit the plaintiff seems to have offered the refund of the entire amount irrespective of whether the entire sale or half of it was to be set aside.

(4) The defence in brief is that the plaintiff is not the adoptive son, and that the property was not ancestral, but self-acquired; and defendant No. 1 was competent to sell it without the consent of the plaintiff. Again, the defendant alleged in the written statement that it was for legal necessity, but in the evidence made out that it was for the benefit of the estate. Finally, the purchaser's allegation is that both Mahadeo Kunte and the plaintiff had seen them making some improvements and had not only acquiesced, but actively encouraged them in this. The defendants alleged that the improvements they had made were worth Rs. 5,000/-; and as they were made with the active acquiescence of the plaintiff he was estopped.

(5) The learned District Judge found in favour of the plaintiff on all the issues except one, holding

that the sale of the orchard was for the benefit of the family, he dismissed the suit. On the value of the improvements he has given a finding to the effect that the defendants' own books not having been produced, their oral evidence itself showed that the total value of the improvements is Rs. 1,650/-.

(6) In appeal the plaintiff has argued that the sale was not for the benefit of the estate. While the defendant has supported not only this finding, but has also argued against the other findings in favour of the plaintiff.

(7) POINT No. 1: The first question is whether the plaintiff is the son by adoption of the defendant No. 1, Mahadeo Vishnu Kunte. In the plaint as originally drafted the date of adoption had been given as 1944; very soon after an amendment was made stating that the boy was given and accepted in 1925, and from this onward brought up as the son of Mahadeo Kunte. In 1944 a datta hom was performed, so as to give religious sanction. The purchaser's case seems to be that the 1925 incident is untrue, and an after-thought, and that if there was adoption in 1944 it is invalid. Thus we have to see whether it is a fact that the boy was brought here in 1925 and given in adoption by Shankar Muneshwar Nene, his father; and whether on a point of law the deferring of the datta hom till 1944 affected the validity of the adoption. Obviously, plaintiff and defendant No. 1 believed that the religious ceremonies alone completed the adoption; but a point of law has to be decided independently of any party's pre-possessions. That the plaintiff was brought as a young boy near about 1925 from somewhere in Nagpur to Rewa is altogether beyond dispute and has not been seriously challenged. From then till 1940, or 1942 when he joined the Indian Army he was with Mahadeo Kunte, and was brought up and educated by him. There are a number of witnesses of that Mohalla, most of whom are old and practically all of whom are either officers in service of the State, or respectable pensioners, all of whom state that they were present when Shankar Nene gave the boy in adoption to Mahadeo Kunte. It is unthinkable that those old men would speak falsehood, just to enable Kunte to get back the property on repayment of the consideration. As brahmins of the old school, they themselves seem to believe that for religious purposes the plaintiff became the son only in 1944 when the datta hom was performed. The facts are that the boy was brought and made over by Shankar Nene to Mahadeo Kunte. The circumstantial evidence would also support it. It is unthinkable, that the widowed sister would bring, and an old school orthodox brahmin like Mahadeo would accept, a boy brought from somewhere without the father's consent.

(8) The letter now produced and exhibited by those who claim to have seen Nene write it, seems also to be genuine. Again, in 1944 when the religious ceremonies were performed the respectable elders of that Mohalla were present, four of them signed a new endorsement on this paper. The writing of Nene is in Marathi and runs thus:

"Shri Mahadeo Vishnu Kunte alias Dada Sahib, resident of Rewa, after humble Namashkar — you are asking me to give my son Vaman alias Nana in adoption. I am quite pleased. I am ready to give him in adoption. I am confident that my cousin or other relations will make no objections. Be it known that I have made no commitments in regard to this boy's future. I am leaving tomorrow for Nagpur leaving Vaman with you. Yours, Shankar Muneshwar Nene, Rewa, dated 10-10-1925."

The endorsement in 1944 is in Hindi and runs thus:

"Today on 7-11-1944 the religious ceremony of dutt vidhan has been performed as indeed it was the desire of Shankar Raoji (Nene.) The proper functions were performed through the hands of Achut Raoji, and the boy has been baptised newly as Vijai Kumar Mahadeo Kunte: The signatories are Mahadeo Bal Krishna, A. D. Patwardhan, Kashi Nath Ganesh, Purshottam Achari."

Out of them Kashi Nath is P.W. No. 4, and he is a priest. The three other signatories have not given evidence. Patwardhan is the boy that has run away to Bombay; the two others, are not reported to be alive or available. On the papers being produced and signed in 1944 there are several highly respectable people. In 1944 there was no controversy whatsoever about the status of the plaintiff; nor was there an occasion for such a paper being forged then for no purpose.

(9) Apart from this paper, the happenings of 1925 are supported by circumstances and are deposed to by a number of highly respectable witnesses. The purchasers do not also question the fact of the plaintiff's being here from that time and being brought up. They seem to suggest that Mahadeo Kunte was bringing up the plainiff just as a matter of charity, just as he had been recently helping another poor boy named Patwardhan alias Bachhu. They have also pointed out that in the school books the plaintiff was described as the son of Shankar Muneshwar Nene under the guardianship of Mahadeo Kunte. They suggest with a certain amount of plausibility, that when the plaintiff wanted to get out of Rewa, he applied to the Indian Army authorities not as the son of Mahadeo Kunte of Rewa, but as the son of Shankar Nene of Nagpur, as it were, by-passing the Durbar. These do not affect the truth of the happenings of 1925. Mahadeo Kunte himself had felt that his right to the religious services at the hands of the plaintiff would be established only when the datta hom was performed, and the adoptee given a new name as a Kunte. This is quite in keeping with the notions of a Brahmin of the old school. He has always been thinking of performing a datta hom, but till he became quite old he had been putting it off. As for the plaintiff's applying to the Indian Army, it is quite likely he did so, because he was keen on avoiding the Maharaja of Rewa, who was against his leaving the Rewa State, but that has no bearing on the present issue.

(10) Whether the adoption was complete when the boy was given in 1925, or whether it became complete in 1944 is a question of law. There is very considerable authority for holding that the adoption is complete as soon as the boy is given by his natural father to the adopter. In the ruling reported in 'CHINA ANA MUTHUVAYYANGAR v. Thiruvangadammal', AIR (29) 1942 Mad 395, it has been held:

"that the Hindu Law does not require that there should be a formal ceremony, when the boy is given and accepted for a valid adoption. All that the law requires is that the natural father shall be asked by the adoptive parent to give his son in adoption and that the boy should be handed over and taken for this purpose, and that the adoption ceremony should be performed when the parties belong to the twice born class." "These ceremonies may be performed either at the time of the gift and acceptance or afterwards."

They can even be performed after the death of either the natural father or of the adoptive father. The same principle has been followed in the ruling reported in 'MAROTI BANSI v. Radhabai', AIR

(32) 1945 Nag 60. The purchaser has relied upon the ruling reported in 'RANBIR KARAM SINGH v. Jogendra Chandra', AIR (27) 1940 All 134. That case has no application for the very simple reason that the evidence only was that the so-called adopter, who was an Indian Christian, brought up the boy in the sense the word adoption is understood among Europeans, and not in the technical sense of Hindu Law.

(11) There is another way of looking at this. For a long time since 1925, Mahadeo Kunte had been giving out that the plaintiff was his adoptive son, and both of them had been behaving exactly as father and son. Here there is absolutely no doubt or question about the capacity to give, or the capacity to take, and the capacity to be the subject of adoption. If there was any question on these essential matters the doctrine of factum valet will not apply. But here, it would. To quote a passage from the ruling reported in 'GANGA SAHAI v. Lekh Raj Singh', 9 All 253 at p. 259, which has been quoted with approval in the latest addition of Mayne's Hindu Law:

> "In the case of adoption there are of course questions of formalities, ceremonies and other points which amount to moral and religious suggestion. They relate to what I may perhaps call the modus operandi of adoption. To such matters which do not affect the essence of the adoption the doctrine of factum valet would undoubtedly apply."

Thus I find that plaintiff is the adoptive son of Mahadeo Kunte. This was widely known, and in fact, Sankatha Prasad himself the purchaser's own witness and the common friend, who negotiated for the sale, was fully aware of it. If the defendant did not make even the most ordinary inquiry I do not see how the plaintiff can suffer for it.

(12) POINT NO. 2: The question whether the property was ancestral or self-acquired by the defendant No. 1 can be disposed of very briefly. The deed itself describes the property as "morusi." The scribe D.W. No. 4 pretends that he wrote this in ignorance of its real meaning. Defendant No. 2 who has come as D.W. 1, asserts that Kunte told him that it was his self-acquired property. I do not believe it. It is belied by the recital in the deed. Again, it is usual for a purchaser of ordinary prudence to ask for the title deed by which the vendor got the property. The evidence of Sankatha Prasad D.W. 2 would indicate that the title deed was shown; it is an exhibit here, and shows a purchase in 1912, by Vishnu Pant Kunte, father of Mahadeo Kunte. The defendant tries to get over this by examining D.W. No. 7, Gullan Bari. He says that in 1912 he was a personal servant of one Beni Bahadur Singh Dewan. Nearby there was the office of the sub-registrar. When Sita Ram sold the property to Vishnu Pant Kunte he saw the defendant No. (1) paying three or four hundred rupees. This is a belated and far-fetched story not specifically put to Mahadeo Kunte. As the original title deed shows and as the present sale-deed itself recites the property was ancestral.

(13) POINT NO. 3: The adopted son is in no manner different from a natural born son and has the same rights. The father as manager of a joint family property has certain rights more than other managers, but in the present case they do not come in. In the present sale by the father without the consent of his son we have to ascertain whether it was justified by legal necessity or benefit of the estate. This is the one ground on which the learned District Judge has dismissed the suit. With all respect to him I find it my duty to differ and to note that he has not grasped the real position. The sale-deed describes the necessity as one for personal expenses. The written statement of defendant No. 2 avers:

> "the defendant No. 1 has not sold the property for any improper purpose (beja kam ke lia) but he has sold to satisfy his proper needs for which the law gives him complete authority."

Neither in the sale-ded nor in defendant's pleading is it alleged that this was for the benefit of the estate, and that the vendor converted the orchard into Rs. 3,000/- cash because he apprehended that in view of his age, and the son's absence on active service, the property might deteriorate. Apart from the merits of the plea of benefit of the estate, to which I shall come presently, it is affected by the simple fact that it has not been taken at the proper stage of the case. There the purchaser asserts that the intention of the vendor was to sell the property, and consume the proceeds for expenses that were legally necessary. But the Court dismisses the suit because it believes that the conversion of the property and the retention of the corpus in a form more manageable in the circumstance was for the benefit of the estate.

(14) There may be many cases in which legal necessity justifies a sale by the father without the son's consent. There may also be cases, like the one reported in 'KARAM CHAND v. Ram Labhya Mal', AIR (13) 1926 Lah 468, in which the conversion of the corpus is for the benefit of the joint family. But these two are mutually exclusive and should not be confused. In the one case the corpus is consumed and disappears, while in the other it is only converted into a form which the manager considers to be more profitable or more easily manageable. The defendant-purchaser should make such enquiries as a prudent man would make and then satisfy himself that the justification was the one or the other or in part one and in part the other. He cannot be heard to say in one breath that he understood that the property was going to be consumed, and there was legal necessity, and in the next breath to argue that he understood that the property was going to be preserved in a more manageable form. This is exactly what the purchaser does here. In the sale-deed it is recited that the purpose was personal expenses. Presumably, the defendant understood this to be the purpose as he repeats it in his written statement. It is amply evident from the materials before the Court that there was no legal necessity of this nature. Mahadeo Kunte has led on the whole a thrifty and happy life occupying high positions in Rewa, there were no pre-existent loans; there was no pressure on the estate. His family is small and he had to support only himself and his wife and a widowed sister. He has his pension as an ex-Minister, his income from the Tata share dividends, from house rent, and from the lease of his garden. In addition, the plaintiff who was even then Lt.Colonel used to send him money from time to time. Thus there was really no necessity whatsoever for selling the property for personal expenses (khangi kharcha) as given in the deed, or for his legal necessities (jayas zaruriat) as given in the purchaser's pleading. But now he turns round and suggests at a late stage a new justification. On the view I have already given the purchaser cannot be heard to say this.

(15) On the merits also a new story is hardly acceptable. Like several old men Mahadao was thinking of a remote future and was sometimes depressed. It appears that the old man used to speak to his friends about the possible future difficulties in the management as his son was away, and may settle elsewhere. The garden was itself

in the charge of lease; though it might not have been managed in a very business like manner, there is nothing to indicate that it was going to pieces. In fact, it was in a good condition, fetching Rs. 100/- a year. It was very near Mahadeo Kunte's house, not in any out of way place, but in the heart of the town. There were also no difficulties in the management. Therefore, the sale was not justified on either of the two grounds, namely on the ground of the legal necessity which the purchaser took and gave up, or on the ground of benefit which he took up at the stage of argument and has not proved.

(16) POINT NO. 4: There is no estoppel. The evidence is overwhelming that even from June 1949, both father and son had decided to get the sale set aside. So, it is impossible that they would have been appreciating the defendants' making improvements and asking them to go ahead. The plaintiff's evidence that he asked for a reconveyance is supported by the circumstances. I believe it. There is, therefore, no estoppel.

(17) POINT NO. 5: This takes us to the question whether the whole of the sale or only that part relating to the plaintiff's half share should be set aside. In view of the offer of the plaintiff to refund the entire consideration, this is of no practical consequence here. Still it has been raised and is worth examining. If the plaintiff's family is governed by the Mitakshara law as now applied in the Bombay Presidency then the alienation would be valid to the extent of the vendor's undemarcated half share in the property, and can be set aside only in respect of the plaintiff's share: this position the plaintiff has pleaded in paragraph 15 (b).

> "In case it is held that the sale is valid in regard to the vendor's half share then I pray that my right to pre-emption to that share is declared and I may be given title and possession on payment of Rs. 1,500/- or any other sum which the Court considers proper."

It may be noted also that the Rewa Pre-emption Act is in force here. If, on the other hand, the family is governed by the Mitakshara law as applied elsewhere than in Bombay and Madras the entire alienation is to be set aside. The results also differ; in the first instance the entire property goes to the plaintiff, while in the latter case it becomes the joint family property as the status quo is restored. Again, the pre-emptor has to give half the total consideration as the price, plus, such equities, in regard to his over half share as the Court imposes. If in equity the purchaser is given compensation equal to the price of the property the sale of which is set aside then the result is the same as far as he is concerned.

(18) The family being called Kokanastha brahmins it is to be presumed that it came originally from Kokan in the Bombay Presidency. We are able to trace its history only upto when it lived in Bithur in the U.P. If there was migration to Bithur from Konkon it was so long ago, that we do not know when. It would automatically follow that we are not in a position to know how the Mitakshara law was applied in Konkon itself at the time the family might have migrated from there. This by itself is sufficient ground for applying the lex loci, either of the U.P. or of the Rewa State which in this matter is the same. All over the country there are sections of Hindus with family traditions of their having come originally from a distant region. There are people in the hill districts of Himalaya with the traditions of their origin in the Deccan, and there are also people in the extreme south who claim to have their origin in the Madhya Desh. But if these are unverifiable traditions, and the fact of their stay, in the supposed original homes cannot be ascertained, they have to be ruled by the law of their present, or ascertainable domicile.

(19) Yet another way of looking at it is, to see if the party has adopted the ways of living of its present domicile. The plaintiff himself has pleaded that he is a hereditary resident of Rewa and evidence does not take us to any point beyond Bithur. Nothing has been shown in the defendant's evidence to esablish that the family has still adhered to the ways of living prevalent in the Konkan. That way also the Mitakshara law as understood in U. P., and Rewa would apply. On this view the entire alienation has to be set aside.

(20) POINT NO. 6: The material difference from the purchaser's point of view between whether the entire alienation or only the alienation of the plaintiff's half share is set aside, will disappear, if he gets compensation equal to the sale price. In the one case it will be an equitable refund of the entire price, and in the other an equitable refund of the half, and a payment of other half, as the purchase money paid by the pre-emptor. The equitable right to this refund depends upon the good faith of the purchase. In this case there was not what may be termed bad faith technically, but there was a complete want of inquiry. The purchaser says that he thought that the property was self-acquired, though the title deed by which the property came to this family shows, and this sale-deed itself describes it, to be ancestral. Again, he could very easily have ascertained, if there was a son and whether his assent has been obtained. In fact, the purchaser does not seem to have thought of the possibility of the son putting questions.

(21) In the eyes of law failure to make such inquiries as a prudent purchaser should make is practically equivalent to a bad faith. I note, however, that from the very beginning the plaintiff and his father had been offering to make a refund. Within a month after the sale defendant No. 1 offered the money and asked for reconveyance. Again, when the plaintiff came he wanted a reconveyance of the property and offerred the money. In the plaint itself there is only the offer of half the price as an alternative in case only the alienation of his share is set aside. However, in the lower Court also the plaintiff seems to have offered the entire consideration. Thus I hold that, though in the sctrict letter of the law the defendant is not entitled to a refund of the price of the whole or part of the property the sale of which has been held to be invalid, in view of the plaintiff's own offer, I order that he should be given refund of the consideration.

(22) POINT NO. 7: It also logically follows that the purchaser should get the value of the improvements he has proved to have made. He pleaded that he has spent about five or six thousand rupees, but he could not prove it. The purchaser's own evidence led to the following finding by the District Judge, namely that the total value of the improvements is Rs. 1,650/- about Rs. 1,000/- for masonry about Rs. 150/- for miscellaneous items, and about Rs. 500/- for a persian wheel. I, therefore, order that in addition to the Rs. 3,000/- the purchaser should get Rs. 1,650/- if he delivers the property without any damage or removal of the improvement. If the persian wheel is removed with care, it will cause no damage to the property. So, it would be open to the plaintiff either to pay Rs. 1,150/- for the improvements, and allow the purchaser to take away the persian wheel without causing damage to the well, or to buy the persian wheel also and pay the sum of Rs. 1,650/- assessed by the lower Court.

(23) In the result the appeal is allowed with costs and pleaders' fee according to rules in both the Courts to the plaintiff. The sale is set aside subject to the plaintiffs depositing within two months Rs. 3,000/- as refund of the purchase money plus a further sum of Rs. 1,650/- or Rs. 1,150/- as the case may be according as he choses or does not choose to take over the persian wheel. Before withdrawing the amount the purchaser defendants should give back the sale-deed & other papers to the plaintiff and further at their own expense execute a registered deed of relinquishment. In their own interest the defendants should cause no damage to the property, or to the improvements. Otherwise, the damage will be assessed by a Commissioner appointed by the lower Court and deducted out of the amount payable to them.

D.H. *Appeal allowed.*

[C. N. 14.]

A. I. R. (39) 1952 Vindhya Pradesh 25

KRISHNAN, J.C.

Laxman Prasad, Appellant v. Ram Dularey Gupta, Respondent.

Civil Appeal No. 48 of 1950, D/- 20-1-51.

(a) Arbitration Act (1940), Ss. 39 and 48 — Arbitration proceedings pending before Act came into force — Order refusing to file award — If appealable — Civil P. C. (1908), S. 104, (before amendment) Schedule II Para. 21.

Where the proceedings in an arbitration without the intervention of the Court were pending at the time the Act of 1940 came into force, an order refusing to file an award is appealable under S. 104, Cl. (b) of Civil P. C., as it stood when Sch II was in force. (Para 7)

(b) Hindu Law — Joint family — Trade — Partnership with stranger.

The fact that a 'karta' in a joint Hindu family carrying on trade, is a partner in certain business, cannot make his joint family also a partner, especially where that business is no part of the family business. (Para 8)

(c) Registration Act (1908), S. 17 — Award — Private award — Registration.

An arbitration award covering immovable property worth more than one hundred rupees, has to be registered. Non-registration of the paper makes it inadmissible, thereby making the suit for filing the award itself bad. (Para 9)

In the case of an award on arbitration ordered by the Court the award does not become binding till it is incorporated in the decree of the Court. In other words, the award does not create any title until and unless a decree is passed. On the other hand, an award without intervention of Court is meant to take effect as soon as it is made without any interference by the Court. So it requires registration. Otherwise, it cannot be admitted into evidence. AIR (21) 1934 Cal 815, Rel. on. (Para 10)

Anno: Reg. Act, S. 17, N. 67.

(d) Stamp Act (1899), S. 36 — Objection to admissibility on ground of want of stamp raised — Instrument admitted in evidence — Question cannot be re-agitated.

Where an objection that an instrument was not stamped was raised but the Court stated that it would be considered at a later stage and at later stage the Court admitted the instrument into evidence, the question cannot be re-agitated. (Para 9)

Anno: Stamp Act S. 36, N. 2.

(e) Hindu law — Joint family — Trade — Family business — Acts of manager — Power to bind other members to arbitration.

Even if a joint Hindu family trading firm is a partner in a business, the Karta or the manager by his signature alone cannot bind down other members to arbitration. (Para 13)

(f) Arbitration Act (1940), S. 2 — Arbitration agreement out of Court — Form of.

No doubt the agreement for arbitration out of Court unlike for one through Court need not be in any particular form and should be interpreted liberally. All the same, the agreement, if it is to be of any value, should make out that there is a dispute, and indicate what that dispute is and unless the Arbitration Act applied should also contain a "binding" clause. (Para 14)

Anno: Arb. Act, S. 2. N. 4.

(g) Deed — Construction — Ambiguous document — Subsequent conduct if can be considered.

The circumstances attending the creation of the document may be looked into in case there is ambiguity, and it is capable to two interpretations. But if there is no ambiguity, extraneous matters cannot be looked into. In no case can 'subsequent' happenings and 'subsequent' conduct of the parties be utilized for the interpretation. (Para 14)

(h) Words and Phrases — 'Tasfia.'

In certain parts of the country 'Tasfia' is used in the sense of private settlement, in certain part it is used in this sense that a Court decides a dispute. The nearest English word would be "settlement' or 'clear up.' (Para 15)

(i) Arbitration Act (1940), S. 30 — Award — Setting aside —Omission of part of subject-matter

In the case of an arbitration relating to a money claim between partners of a firm an omission of a part of the subject-matter without the parties' consent, express or implied, invalidates the entire award. AIR (30) 1943 Pat 285, Ref. (Para 22)

Anno: Arb. Act, S. 30, N. 6.

(j) Arbitration Act (1940), Ss. 12, 33 — Arbitration revoked half way — Effect.

If an agreement to arbitrate is revoked half way, the arbitration cannot proceed, but an interested party may bring a suit or an application for the filing of the agreement itself. (Para 23)

Anno: Arb. Act, S. 33, N. 1.

(k) Arbitration Act (1940), S. 13 — Power of arbitrator — Arbitration relating to money claim between partners.

Where the arbitration agreement relates to a money claim between partners, the arbitrator cannot be heard to say that he would examine only such books and papers, any party chose to show him. He should insist upon parties producing the books in regard to all the business; otherwise, either party refused to produce the books and help in the investigation of all the works, the arbitrator should either draw an inference or refuse to proceed. (Para 25)

Anno: Arb. Act, S. 13, N. 1.

(l) Arbitration Act (1940), S. 30 — Arbitration award on uncertain reference would be void. (Para 31)

Anno: Arb. Act, S. 30 N. 6.

Lal Yadvendra Singh and Lal Guruprasnna Singh, for Appellant; Ram Manohar Lal, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('38) AIR (25) 1938 Bom 422: (177 Ind Cas 911) (Pr 10)

('34) AIR (21) 1934 Cal 815: (62 Cal 201) (Pr 10)

('45) AIR (32) 1945 Cal 19: (48 Cal W W 721) (Pr 10)

('43) AIR (30) 1943 Pat 285: (22 Pat 108) (Pr 22)

JUDGMENT.: The plaintiff has filed this first appeal from the judgment and decree of the learned Additional District Judge of Rewa dismissing his suit for filing of an award alleged by the plaintiff to have been made by Shiva Shankar Lal as arbitrator selected by himself and the defendant-respondent. The plaintiff and the respondent, at any rate, Seth Ram Dularey, in his personal capacity, had been doing business in partnership from 1934 onward as building contractors. The partnership has not yet been dissolved, but the plaintiff alleged that some differences had recently cropped up, and the parties agreed to get their accounts settled, and the mutual claims decided by Shiva Shankar Lal, who has been described as a common friend, and, who has got experience in accounting. Shiva Shankar Lal had already been checking up the firm accounts, and, incidentally, making statements of the advances made by the defendant's firm to the business, and the receipts from that business. On 27-3-1949 the plaintiff and Ram Dularey gave a joint agreement, by which the plaintiff contends Shiva Shankar was appointed arbitrator to settle all matters pending between the two. The remuneration was also fixed and was paid in advance. Shiva Shankar tabulated certain statements in regard to 12 out of the 20 building works done by the partnership. He arrived at certain conclusions in regard to these twelve. The defendant Ram Dularey was insisting upon the other items should be taken into account at all events, six of them in which money had already been paid, but the accounts in regard to them being with the plaintiff and the plaintiff failing to make them over, they could not be examined. In the meantime, the plaintiff pressed for Shiva Shankar Lal's completing his inquiry. Towards the last week of August 1949 Shiva Shankar Lal completed the accounts in regard to 12 items, and made out that he would not proceed further as it would require a good deal of time and work, the accounts for other works were not forthcoming from the plaintiff, and in six of the items some more partners had been taken in. On the 29th August, the defendant noticed Shiva Shankar Lal revoking his authority, as he was leaving out many of the works. However, Shiva Shankar Lal replied that he had finished his work. He wrote to the plaintiff about the defendant's revocation and got the reply that the plaintiff would agree with him. For about one and a half months nothing more seemed to have happened, but in the middle of October registered letters were sent to the parties by Shiva Shankar Lal that the award was ready, and inviting them to take copies. The report or the award itself is dated 29th August, though the parties were invited to take copies sometime later.

(2) The plaintiff filed the suit on 28-11-1949, under Section 14, Clause 2 of the Arbitration Act on the original side of the High Court of Vindhya Pradesh, which on its abolition was made over to the District Judge of Rewa. The defendants were not Ram Dularey only but the entire joint family of which he happened to be the Karta. The other members questioned their liability, as according to them, it was, in any event, a matter between Ram Dularey personally and the plaintiff. Ram Dularey himself contested the suit. He pointed out that the agreement of 27-3-1949 is not an agreement for arbitration but only for the appointment by both parties of Shiva Shankar Lal as an accountant, or commissioner not to decide any dispute, whose very existence was not noted on the agreement, but to examine the accounts and split the liabilities (Hisab tor dena). He also pointed out that there is no recital that the signatories would accept the decision or the award of Shiva Shankar Lal. In fact, Shiva Shankar Lal was not to decide the matter. If in his subsequent notes or correspondence Ram Dularey had even used the word Punch, it was in a very loose sense, and is not binding.

(3) Secondly, Ram Dularey pointed out that while Shiva Shankar Lal had been asked to add up and do the accounting about 'all' the transactions he purposely stopped with twelve earlier works, and inspite of repeated requests by him (Ram Dularey) refused to account for eight other works that were also done by the partnership. Even if it was an agreement for arbitration, the arbitrator refusing to do the accounting for all the works as agreed, would make his award bad. Ram Dularey also pointed out various acts of misconduct. He was a debtor of Ram Dularey and as remuneration for doing some accounting work of Ram Dularey's firm from before, he wanted the loan to be set off. As this was refused he made common cause with the plaintiff. Again, he allowed the plaintiff to avoid bringing accounts, and still made a report or award substantially in his favour. He made out that the defendant owed the plaintiff on account of those twelve works, a net amount of about Rs. 17,000/- and added an equal amount as interest. While for the defendant's money in the hands of the firm he allowed no interest. For a large number of items also Shiva Shankar Lal has decided in favour of the plaintiff in violation of the principles of equity and good conscience. These acts of misconduct on the part of Shiva Shankar Lal make his decision unacceptable in the eyes of law, even if it is held that he had been appointed arbitrator and not accountant.

(4) Two other points were also raised to the effect that the agreement had not been stamped and the Court while postponing the consideration did not decide it. Similarly, there was an uncertainty at the stage at which the so-called award was stamped. Besides the award covered some valuable immoveable property also, and on that account required registration, but was not registered.

(5) In appeal these points are repeated. In addition it is pointed out that under the Arbitration Act no appeal lies.

(6) The points can be considered seriatim as below:

(7) POINT (1): An appeal from a decision refusing to file an award not being noted in Section 39, Arbitration Act no appeal would lie under the Act. On the other hand, S. 104 of the Civil P.C., as it stood when the second schedule was in force includes:

(b) "An order filing or refusing to file award in an arbitration without the intervention of the Court."

Filing a suit in November 1949 the plaintiff believed that the Arbitration Act applied. However, the Arbitration Act came into force in the Vindhya Pradesh only on 15-5-1949. As provided in S. 48 of that Act, it would not apply to any reference pending at its commencement. The alleged arbitration agreement having been made on 27-3-1949, the proceedings were pending at the time the Act came into force. Thus the plaintiff-appellant was wrong in noting S. 14 (2) at the top of the application for filing the award, which should more properly have been para. 21 of Schedule II. The plaintiff did not amend his plaint in this particular, but the Court itself framed an issue on this point and came to the conclusion that it was properly an application under Schedule No. II of the Civil P. C. On this view an appeal lies.

(8) POINT No. (2): The plaintiff described the firm as the defendant because according to him the defendant's firm, which is a Hindu joint family was his partner. The common ancestor of the

members of the defendant's firm was one Bhura Ram. Bhura Ram had two sons — Ram Saran and Ram Dass. Ram Dass's son and grandson are now alive and are junior members. In 1934, Ram Saran's son Ram Din is said to have entered the partnership. Bhura Ram's family business was money-lending and bullion sales and not building contract. When Ram Saran's eldest son Ram Din became a partner with the building contractor the joint Hindu family firm did not join, because it could not take it up without a separate contract and the consent of all the members. Shortly after it, Ram Din died and Ram Saran continued to take interest in the building work. There was no written agreement at either stage, but if the plaintiff is to be believed there was now a novation. In Ram Din's time, according to the plaintiff, it was an agreement that Bhura Ram's family should advance the money and should get interest for it. In the eyes of law Bhura Ram's family was just like any banker advancing money to the partnership, constituted by Ram Din and the plaintiff — Laxman Prasad. It was purely an accident that Ram Din happened to be a member of this banking firm. However, the plaintiff alleges that after Ram Din's death the agreement was that the firm should give money free of interest while Laxman Prasad, the plaintiff, should work. This is an allegation, which it is unnecessary to decide in this suit; it is interesting to note that such an agreement was unusual and to the extreme disadvantage of the bankers. It may be noted, even here that Shiva Shankar Lal's interpretation of this condition is even more to the disadvantage of the defendant. He assumed that whenever the banker's money was with the partnership no interest would be paid, but whenever the building partnership money was with the bankers they should pay interest. This is a matter of detail that can be only decided when there is a suit directly for winding up and taking accounts of the partnership. We are further told that after Ram Saran's death Seth Ram Dularey, the second son of Ram Saran and the seniormost member then living was the Karta of the family. But Ram Dularey being a partner in this building business cannot make his joint family also a partner, especially where the building business is not part of the family business. The position is too clear to call for the discussion of the case law on this point. If a decree is to be passed in this case in favour of the plaintiff, it should be a decree against Ram Dularey personally and not against the joint family.

(9) POINT NO. (3): One more objection of a formal nature can be disposed of at this place. The agreement which was marked as Ex. No. (1) appointing Shiva Shankar Lal as the accountant or the arbitrator was not stamped. The report of the award Ex. (2) has been stamped but the time and the manner of stamping has been a subject-matter of discussion. Further, this paper, which the plaintiff describes as an award covers not only money claims, but also two houses. Whether Shiva Shankar Lal should have taken the houses also into account is another question, but he proceeded on the assumption that the houses were part of the partnership property and so, while allotting the partnership property between the parties he thought fit to include the houses. Be that as it may, this award — as the plaintiff would call it — covers immoveable property also worth more than one hundred rupees, and has, therefore, to be registered. Non-registration of the paper makes it inadmissible, thereby making the suit itself bad. On the matter of stamps, S. 36 of the Stamp Act is bar to the re-agitation of this point, as it provides that, once the Court admits a paper, the question of stamping may not be raised again. There is a body of case law on the subject. Some of the rulings have gone to the extent of making out that once any document is admitted, in the sense that it is looked into, and discussed as an exhibit S. 36 would begin to apply, whether or not, the Court has consciously decided on the objections. In the present case, the objection was made but the Court stated that it would be considered at a later stage. At later stage the Court admitted the papers into evidence. The document having been admitted the question cannot be reagitated.

(10) The objection on the ground of non-registration of the report or the award, stands on a different footing. This award as the plaintiff and Shiva Shankar Lal would have us believe, is otherwise registerable, being a non-testamentary document creating title to immoveable property of more than Rs. 100/-. The question only is whether the proper stage for registering the award is before or after the decree is passed. In this respect one has to distinguish between awards on arbitration ordered by Court and awards without the intervention of the Courts. In the former case the award does not become binding till it is incorporated in the decree of the Court. In other words, the award does not create any title until and unless a decree is passed. On the other hand, an award without intervention of Court is, if it is an award at all, meant to take effect as soon as it is made without any interference by the Court. So it requires registration. Otherwise, it cannot be admitted into evidence. This is a reasonable view and is supported by many rulings including the following: JITENDRA NATH v. Nagendra Nath', AIR (21) 1934 Cal 815. The argument in this case centred round the legal significance of the deletion or the exception as regards "any award" under S. 17 of the Registration Act by the amendment of 1929 (S. 10 Transfer of Property (Amendment) Supplementary Act, 1929). The appellant's contention was that this did not make the registration of private awards compulsory, but places private awards on the same footing as awards of arbitrators through the intervention of the Court.

> "The answer to this argument is that whereas an award made by arbitrators under orders of the Court has no force until a decree is passed on it, a private award, if it is valid, is operative even though neither party has sought to enforce it by a regular suit. A private award, therefore, falls within the class of documents specified in S. 17(1)(b), Registration Act, whereas an award of the other class does not. S. 49 of the Act would rule it out, if it is sought to use it as evidence of a transaction affecting the property."

The same principle was repeated in the Calcutta ruling reported in 'NANIBALA v. Ramgopal', AIR (32) 1945 Cal 19 in the ruling reported in CHIMANLAL GIRDHAR v. Dayabhai Nathubhai', AIR (25) 1938 Bom 422 it was held:

> "An award comes under S. 17(1)(b) of the Registration Act, and when it purports or operates to create, declare, assign, limit or extinguish any right, title, or interest of the value of Rs. 100/-, and upward to or in immoveable property it is compulsorily registrable. If the Court files an award which is compulsorily registerable and has not been registered and makes it a decree of the Court, it acts contrary to the provisions of S. 49, Registration Act."

(11) The basis of the plaintiff's suit is that this is an award and a valid award. If so, non-registration exposes it to a disability of S. 49 of the Registration Act. On this ground alone the suit deserves to be dismissed. The proper person to register the award is the arbitrator himself as he is the executant. Besides, any person interested

in the transaction, as in this case the plaintiff, can ask for compulsory registration.

(12) 'POINT NO. (4)': Coming to the merits of the suit the first question for consideration is whether the Ikrarnama or agreement is a valid instrument appointing Shiva Shankar Lal arbitrator, or it is only a commission for taking accounts. It runs thus:

"We two — firm Ram Saran Ram Din and Pandit Laxman Prasad — have been doing engineering contract work ever since 1934-35. We began this arrangement that both partners shall look after the work while such moneys as may be invested by the shop (or the firm Ram Saran Ram Din) shall bear interest at Re. 1/- per cent per month, which shall be paid after the checking of bills. Later on Bhai Ram Saran made the oral agreement that whichever money is invested shall be advanced by his firm while the work shall be looked after by the contractor (Pt. Laxman Prasad). Accordingly, we the partners have been doing the contract work and have been responsible for the same. The books of accounts and credits and debits have also been in accordance with this, that is to say, the responsibility for the work is Pandit Laxman Pd's while the responsibility for advancing money ('without interest') has been with the firm of Bhai Ram Saran. Therefore, let accounts be taken of the partnership work in accordance with this mutual arrangement. The liability for loss and the claim to profit shall be half and half. We both partners are handing over our respective books. Let Babu Shiva Shankar Lal examine all our accounts in accordance with this condition and settle them."

(Isi shart ke bamujib kul hisab kitab ki dekhbal karke Babu Shiva Shankar Lalji tor kar deven).

Signed by both parties
27-3-1949."

The exhibit is drafted by Shiva Shankar Lal himself and remained with him. The word (nir biaj) "without interest" has been inserted in Shiva Shankar Lal's handwriting, and while Laxman Prasad asserts that this was part of the oral agreement the defendant denies it. In the cross-examination he assents to the suggestion that though the insertion was wrongly made he acquiesced in it as he was anxious to get the accounts totalled-up anyhow.

(13) This instrument does not use any word like arbitrator or its Hindi equivalent and does not invite Shiva Shankar Lal to give an award or decision. It is not also signed by the other members of the defendant's firm. Even if this was part of the joint family business the karta or the manager by his signature alone cannot bind down the other members to arbitration. However, having on other grounds already held that a decree, if any, in favour of the plaintiff can be only against Seth Ram Dularey, I do not think it necessary to discuss this aspect of the case. Another feature is that the parties do not expressly state that they would abide by any decision that Shiva Shankar Lal might give. In the application which is equivalent to the plaint the plaintiff asserts that Shiva Shankar Lal was appointed arbitrator, for a dispute between the parties in regard to the division of the money.

(14) None of these points appear in the agreement. No doubt the agreement for arbitration out of Court unlike for one through Court need not be in any particular form and should be interpreted liberally. All the same, the agreement, if it is to be of any value, should make out that there is a dispute, and indicate what that dispute is, and unless the Arbitration Act applied should also contain a "binding" clause. No doubt para 7 of the schedule to the Arbitration Act makes this binding clause an implication but in the present case that Act is not applicable. Was it applicable, an appeal would not lie, and the so-called decision or award given more than four months afterwards would be of no value. Besides the Arbitration Act contains several other safe-guards. The paper does not speak a syllable about any dispute. Once it does not, no occasion arose either for a decision or an award by Shiva Shankar Lal, or for a binding clause, which are also not found. A well-known principle of interpretation given in text-books like Maxwell's and in the number of rulings by High Courts is that the circumstances attending the creation of the document may be looked into in case there is ambiguity, and it is capable to two interpretations. But if there is no ambiguity, extraneous matters cannot be looked into. In no case can 'subsequent' happenings and 'subsequent' conduct of the parties may be utilized for the interpretation.

(15) In this case, for example, we have in evidence that Shiva Shankar Lal was looking up and virtually re-writing the accounts of the defendant's firm for more than a year before this agreement. It appears that the defendant's method of accounting was not scientific. Every income and every payment was noted in the daily books. There were no ledgers for different clients or different headings, so that to find the total result of a set of dealings with one party extracts had to be made from the daily books over a very large period; Shiva Shankar Lal had made abstract statements for different heads from the books of the defendant's firm, including, of course, some heads of the dealings with this firm. It was necessary for the sake of completeness if the books of the plaintiff were also examined and the entries in the defendant's books collated, agreed or corrected with reference to the corresponding entries in the plaintiff's. Having made statements of certain complicated transactions Shiva Shankar Lal was in position to do a similar process with regard to the plaintiff's books and make out final totals of mutual liability. A reading of the agreement would show that at that time only this was thought of by the parties. No word implying arbitration was used, no dispute was divulged, no binding clause was noted, and no authority given to make a decision or award. Totalling or separating the liabilities is a mechanical process of the same nature which Shiva Shankar Lal was already doing. On the other hand, deciding a dispute and giving an award is a quasi-judicial process involving discretion. The paper does not show it. On behalf of the plaintiff it is sought to be shown that there were attendant circumstances. I have the oral evidence of the witnesses before me and while the plaintiff asserts that there was a talk of arbitration the defendant does not. There is a statement of other witnesses which is not of much assistance. The most that can be inferred from their statement is that in the confused state of affairs both parties agreed to call Shiva Shankar Lal to do the accounting. Subsequently, the defendant and, of course, the plaintiff much later have used the word 'punch'. Certain statements of accounts from each other's books were made and passed to the parties for noting their comments. As usual, corrections were suggested, and objections noted. In a few cases the defendant has written that the difference in question may be decided by the Punch Mahodaya. Actually, the word 'Tasfia' is used. In certain parts of the country 'Tasfia' is used in the sense of private settlement, in certain part it is used in this sense that a Court decides a dispute. The nearest English word would be 'settlement' or 'clear up'. When the

agreement so-called or the letter of authority to Shiva Shankar Lal is clear in itself, I am not in favour of importing extraneous matters. Even if that is allowable, subsequent conduct cannot be used. It thus appears that in this case as the accounting went on; towards the beginning of August, real disputes came in. Here again the parties are at variance, and that was an unseemly exchange of notes and letters in August. But once S. S. Lall claimed the status of an arbitrator it was inevitable. I shall examine this matter later on, but in the end of March the agreement was a joint authority for the inspection of the books and taking of the accounts and not an agreement for arbitration. One has only to read it to come to this conclusion.

(16) Shiva Shankar Lal, as the evidence goes, is a pensioner-accountant getting about Rs. 25/- pension. If it was thought to make him arbitrator the document would have been far more formal. If it was sought to make this accounting, only an informal paper would be sufficient purely a guarantee against misuse of the books.

(17) In any case, the absence of particulars of the dispute is fatal to the contention of the plaintiff. If he is an arbitrator, he should be told what dispute he should decide. Finally, if it is an agreement between the parties to abide by whatever report or award Shiva Shankar Lal gave that should be mentioned in so many words. I have already noted that the provisions of the Arbitration Act, which has other safe-guards, cannot be imported into this case to imply a binding clause. Thus, in my opinion, this is not a clear or an operative agreement to get a dispute arbitrated upon and to be decided by an award binding on both the parties.

(18) POINT NO. (5) Even if, this was an agreement for arbitration, the admitted fact of the incompleteness of the decision and the altogether unsatisfactory explanation given by Shiva Shankar Lal, militate against its being filed. Building contracts were taken by the partners from time to time from 1934 onward, and one or two of them are still pending. It is to be noted that it was not a partnership created for each individual work and dissolved after its completion, and the cashing of the bills, and again another partnership entered into and formed for the next work, and so on. On that view the accounting, and mutual claims in regard to most of the works would be hopelessly time-barred. The plaintiff's case is that the partnership, which started in 1934 and was novated by oral agreement on the death of Ram Din, continues even now, and has not been dissolved. So this taking of accounts and settlement of claims is not upon the dissolution of the partnership, or with reference to each individual work as a separate partnership business, but in course of the work of the partnership, which has not been dissolved. This aspect of the matter is the foundation of the case. It is alleged vaguely by the plaintiff that there was a written agreement at the inception of the partnership, but that agreement has not been produced. It is further alleged that after Ram Din's death there was a novation by oral agreement, about which there is difference between the parties on the point of interest.

(19) From 1934 to 1938 or 1939 twelve works were done. It appears there was a gap for a few years, and more works were taken up after 1944. Till 1947 six works are alleged to have been done, and after it, two more for which the bills have not yet been paid. For the twelve works of the earlier period statements were prepared by Shiva Shankar Lal. Possibly some statements had already been prepared during his inspection of the books of the defendant's firm. Any way, soon after the agreement these statements were made over to the two parties and their suggestions and counter-suggestions taken. But Shiva Shankar Lal was not prepared to go any further. After some argument the defendant was pressing that the accounts should be taken in regard to other matters as well; that is to say, the eight subsequent works, and, at all events, six more of them in which all bills had been paid. It is at about this stage that the parties began to dispute both about certain items in the statements already made in regard to the twelve works, and also in regard to the manner in which the interest should be charged. The dispute now having come into existence, Shiva Shankar Lal thought that he was the Punch. It is again at this stage that the word Punch has been used by both parties, but this is well after the agreement.

(20) In the beginning of August the defendant found that Shiva Shankar Lal was not going to take accounts of all the works as mentioned in the agreement, but was going to stop only with the twelve works done before 1938. On 10-8-1948 he accordingly writes a letter, which is Ex. 16. In this he makes a reference to previous correspondence and gives his counterstatement in regard to the twelve works. In addition, he invites Shiva Shankar Lal to call upon the plaintiff, who happened to be already in Rewa, to make over other books, so that the accounting may be completed in regard to 'all' the works. But the plaintiff never seems to have any intention of producing his books in regard to the six or eight works of the subsequent period. It is to be remembered that he is practically working partner, while the defendant is the banker and the sleeping partner. This unwillingness of the plaintiff either to produce the books or otherwise to assist in the taking of accounts of the subsequent period can lead only to one inference that, he thought, that the taking of accounts for the first twelve works would result in defendant's having to pay him money, while the taking of accounts for the subsequent period would result in his having to pay the defendant. Without in the least manner assisting in the accounting for the entire period including the eight subsequent works, the plaintiff began to press Shiv Shankar Lal to complete his investigation. His letter dated 19-9-48 and numbered as Ex. 16 deserves to be quoted in full:

> "I am herewith forwarding my separate accounts for the period from 1934 to 1938. They are already under your examination. I have only to request the Punch that he would be pleased to settle the disputes that have cropped up between me and Seth Ram Dularey in course of the partnership. I hope that the Punch will settle the matter as early as possible."

(21) In this letter we find several interesting features not indicated in the agreement. The agreement of March does not refer to any dispute, but this clearly states that there is a dispute now in regard to the partnership accounts. The agreement does not speak of any settlement or award; this speaks of it. Again, while the agreement does not use any word like Punch, this does. Finally, while the agreement speaks of taking accounts for "all works" this speaks of taking accounts of 1934-1938. This is a letter addressed by one of the parties to Shiva Shankar Lal. According to the defendant it is at about this stage that Shiva Shankar Lal identified himself with the plaintiff and began to scheme to the defendant's detriment. While the defendant could not know what passed between Shiva Shankar Lal and the plaintiff, he says that Shiva Shankar Lal got annoyed with him, as he would not write off an outstanding loan. One need not, however, go so far as to find Shiva Shankar Lal becoming a partisan of the plaintiff, though

the appearances are bad. He has been authorised to take accounts or to arbitrate over all the works. If he found it impossible, the arbitration ends. If he found that he should take more trouble, he could claim more remuneration and upon refusal give up the work. If one party was refusing to assist in the investigation of all the works, he should compel that party to do so, or draw up the proper inference, or refuse to arbitrate. If he wanted to stop with some, and not all the works, he should have taken the consent of both the parties.

(22) Before me some rulings are placed by plaintiff to show that an award is not bad simply because part of the subject-matter of the reference has been omitted. No doubt there are cases in which the omission of a part of the subject-matter would not be material, but there are also cases in which such an omission without the parties' consent, expressed or implied, invalidates the entire award. There may be cases of partition, such as reported in 'RAMBAHADUR JHA v. Sreekant Jha', AIR (30) 1943 Pat 285, where in a partition arbitration certain items were left unpartitioned owing to inherent difficulties in partitioning them. But in a case like the present one there is no such difficulty. It is a money claim as between partners, and it is a travesty of all equitable principles to select only those works in which one party has to get money, and leave out the others in which very likely that party has to pay money. The unjustness will become more glaring when it is remembered that a suit for dissolution and accounts for this partnership would be costly, even if it lay in the absence of registration. In fact, S. S. Lal calling himself arbitrator appointed for 'all' the works, now takes those cases, in which the plaintiff is entitled to money from the defendant and calls upon the latter to pay. As for the others he leaves it to defendant, if he cares, to realise by other means.

(23) The defendant having shown extreme patience, now finds that the turn of affairs is most unexpected. On 29-8-1949 he addresses Shiva Shankar Lal.

> "He reminds him that the agreement was for the settlement of accounts in regard to 'all' works, but points out that the plaintiff had refused to file account for several big works, and Shiva Shankar Lal had expressed his intention to give an award or report only in regard to the remaining works. Therefore, the defendant pointed out that he had no confidence in his impartiality; and requested him not to proceed with the work and cautioned him further that he will not accept any report or settlement that he might make."

This letter apparently reached Shiva Shankar Lal on the 30th. The defendant's grievance was not new, but he had been literally crying hoarse over it for at least three weeks. It was a genuine grievance because the agreement whatever it was, was in respect of all the works. It is also clear from what follows that the report or award was really not ready at that time, though Shiva Shankar Lal has dated Ex. P-2 29-8-1949, that is to say, the very date on which Ram Dularey sent the notice and a day before Shiva Shankar Lal's receipt. Be that as it may, he should have consulted both the parties, and, if for any reason, it was impossible to do the accounting, the arbitration or accounts-taking should have been stopped unless both parties agreed to proceed further on a new basis. If an agreement to arbitrate is revoked half way, the arbitration cannot proceed, but any interested party may bring a suit or an application for the filing of the agreement itself.

(24) Shiva Shankar Lal had by now so completely identified himself with the plaintiff that he forthwith replied by a letter dated 1-9-1949, which runs thus:

> "I have received on 30-8-1949 your postal notice dated 29-8-1949. It is completely wrong on your part to state that the agreement was to settle all the accounts (kul hisabat). Whatever books of yours and of the contractor Pt. Laxman Prasad's were placed before me I have examined in your presence and have prepared a complete settlement of them. I have not received any letter from Pt. Laxman Prasad calling on me not to proceed with the accounting. Therefore, I am not bound by your notice."

(25) This letter shows that Shiva Shankar Lal tries to forget the clearest provision of the agreement that 'all' the works should be examined. Again, having set up as an arbitrator, Shiva Shankar Lal cannot be heard to say that he would examine only such books and papers, any party chose to show him. He should insist upon parties producing the books in regard to all the business; otherwise either party can steal an advantage by keeping back such books and accounts as might show that it has retained some of the partnership money. If either party refused to produce the books and help in the investigation of all the works, the arbitrator should either draw an inference or refuse to proceed.

(26) On the question of revocation also the arbitrator is wrong. Having found that he is identifying himself with one party, the other revokes it; in this case with perfect justification. Justification or no justification, the arbitrator cannot say that the revocation must be by both. It never happens. Yet another point is that while he says in this letter that he has prepared accounts he wants to make out in the evidence that the so-called award, which is very lengthy, was already complete at that time. This is obviously false. If it had been complete at that time, there was nothing to prevent him from sending notices to both the parties immediately saying that the award was ready and they might take copies. This is done 1½ months later in the middle of October. In his evidence Shiva Shankar Lal asserts that he forthwith purchased the stamp and affixed it. But confronted with the stamping, he has to make further explanations. The stamp was purchased by Laxman Prasad in about the middle of October and affixed at that time. Moreover, while on the one hand, he asserts that he has completed his work and had the award ready, we find him on the other hand entering into further correspondence with the plaintiff informing him of the revocation and his reply. He wrote to Pt. Laxman Prasad and enclosed copies of the revocation notice and his reply. But that letter itself has not been produced leading to the only inference it contained such matters as would even more clearly indicate Shiva Shankar Lal's partisanship.

(27) He gave a final explanation in the end of his award (para 22). His final explanation of why he did not do the accounting for all the works does not repeat what he stated to the defendant that it was a mistake to say that the agreement covered all the works. Such an allegation would be absurd. He says that investigation of the remaining six works, I shall say eight works, would involve him into as much of work as he had already put in for which alone remuneration had been paid.

(28) Obviously, this is a lame explanation. He had agreed to do the work in regard to all the contract items and had already taken the money for remuneration. Common fair play required that Shiva Shankar Lal should either complete the work he had undertaken, or return the money and de-

cline the work. He cannot do part of the work and keep the entire money.

(29) The next explanation given is that in the other works there are other partners so that it would be difficult. This involves us into whether other partners were taken into these works, and secondly what is the nature of their interest. The defendant states in his evidence that in regard to one of them another partner was taken, but not in regard to others. A partnership cannot take any fresh partners unless all the existing partners agree. Any way, the existence of other partners was not mentioned in the agreement. If it was taking accounts, it would have made no difference. If it was making an award, it would not bind the other partners, but it may be binding on the agreeing partners inter se. The arbitrator has no business to proceed when he found that there were other partners without either calling the other partners or making it clear that he would decide only those items in which these two alone are involved. Even a better course would have been to make allotment for all the partners leaving it to them to accept or to reject. But in the absence of evidence this is obviously a lame excuse.

(30) The result of this discussion is that on the ground of incomplete decision on the reference the report of S. S. Lal cannot be filed even if otherwise valid.

(31) POINT NO. (6): There is yet another difficulty also. At least after the 10th August 1949 and in any case after the 19th when the plaintiff gave his account the position is that the parties are not 'ad idem'. In other words, when they wrote in the agreement that Shiva Shankar Lal should take accounts or should give an award on all the works the parties did not mean the same thing Laxman Prasad, at any rate, claims to have meant only the twelve works from 1934-38. On the other hand, Seth Ram Dularey understood by all the works what any reasonable man would understand i.e. all the works done by the partnership, which had not yet been dissolved from its beginning in 1934 till that day. If Laxman Prasad's interpretation which for various reasons Shiva Shankar Lal also claims to have accepted, is one in good faith, then there was an honest difference of a fundamental nature about the subject-matter of the reference itself. If, on the other hand, as it appears from the circumstances, Shiva Shankar Lal and the plaintiff agreed to stop at 1938 with the 12 works, then it was a fraud on the defendant. Either way at the time the so-called award or report was made, the parties were not ad idem. The agreement itself would be void for uncertainty and the arbitration award, if any, on an uncertain reference would be equally void.

(32) POINT NO. 7: Several points of misconduct on the part of Shiva Shankar Lal have been given by the defendant. They have also been discussed by the lower Courts. The misconduct need only be legal misconduct though in view of Shiva Shankar Lal's conduct at least after 1948-1949, the defendant has been able to suggest something worse than that. If it is a case of discretion only, the mere possibility of disagreement by the Court cannot make it misconduct. If, on the other hand, there are decisions so outrageous as to shock conscience it is certainly misconduct. It is unnecessary to go into various items, but the grant of interest is most fantastic. One can understand if interest is calculated both ways, Shiva Shankar al went on the assumption that Ram Dularey's m should advance monies for the partnership siness without interest. Let us assume it for ne moment. It would follow that when the banker's money is with the partnership, there should be no interest. It would also follow, in the absence of any provision to the contrary, that if the partnership money is with the banker it should also bear no interest. One can even understand if the joint family of Ram Dularey as bankers is called upon to pay interest to the partnership for the partnership funds it retains, and then this interest is allotted between the partners inter se on the proper basis. Shiva Shankar Lal has given as much interest as principal, and called upon the defendant to pay the plaintiff, as if the partnership is identical with Laxman Prasad and the defendant as an individual is identical with the firm of bankers. Other items of misconduct have been alleged, but one need not go into them.

(33) In the result, looked at in any way, the suit of the plaintiff was bound to fail. The wonder is why it was brought at all and fought with so much keenness. The appeal is dismissed, costs to the defendant-respondent and pleader's fee of Rs. 500/- as the hearing has been very long and keenly contested, or the certified amount whichever is less. Pleaders' fees at 5 per cent not allowed as it will be far too excessive.

V.B.B. ***Appeal dismissed.***

[C. N. 15.]

A. I. R. (39) 1952 Vindhya Pradesh 31

KRISHNAN, J.C.

The Central India Development and Constructions Ltd., Satna and Sons, Applicant v. State of Vindhya Pradesh.

Miscellaneous No. 43 of 1951, D/- 25-9-1951.

(a) Civil P. C. (1908), Ss. 110, 115 — Order granting permission to sue in forma pauperis — Constitution of India, Art. 133.

An order granting permission to sue in forma pauperis is amenable to revision. In so far as the revisional jurisdiction of a High Court in such matters is concerned it is not a substantive question of law. (Para 2)

Anno: C. P. C. S. 110, N. 17, S. 115, N. 4, 5.

(b) Civil P. C. (1908), S. 109 — Final order — Grant or refusal of permission to sue in forma pauperis — Constitution of India, Art. 133.

In general, the question of grant or refusal of permission to sue in forma pauperis is one of convenience to the plaintiff or the appellant. It is at best only a point of procedure, having no bearing on the rights of the parties. There is really no finality in relation to the suit. It is always open to the plaintiff to pay the Court-fee and continue the suit. No question involving the rights of the parties has been disposed of or even touched. AIR (20) 1933 P C 58, AIR (14) 1927 Pat 175; AIR (19) 1932 Rang 192 (1), Rel. on. (Para 3)

Anno: C. P. C., S. 109, N. 4.

(c) Civil P. C. (1908), S. 110 — Substantial question of law — Constitution of India, Art. 133.

The right of the High Court to act in revision and to cancel the permission given by the lower Court to sue in forma pauperis has been well recognised, and that question is not of importance to the public at large, and that way, a substantial one. AIR (29) 1942 Oudh 422, Rel. on. (Para 5)

Anno: C. P. C., S. 100, N. 17.

Raj Kishore Shukla, for Applicant; Advocate-General on behalf of Government.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('33) AIR (20) 1933 PC 58: (11 Rang 58) (Pr 3)
('42) AIR (29) 1942 Oudh 422: (200 Ind Cas 426) (Pr 5)
('27) AIR (14) 1927 Pat 175: (6 Pat 67) (Pr 4)
('32) AIR (19) 1932 Rang 192 (1): (10 Rang 504) (Pr 4)

ORDER: This is an application for leave to appeal to the Supreme Court from a revisional order passed by this Court setting aside the permission granted by the District Judge to the applicant plaintiffs to bring a suit in forma pauperis. The ground for this order is that shortly before getting this permission, but after filing their application, the plaintiffs, who are a private limited company, had reduced their membership, and refunded a considerable part of the share-capital, and further intentionally concealed it from the District Judge. The applicant contends that this is a "final order" and, therefore, the suit value being more than Rs. 20,000/- he is entitled as of right to bring the appeal. Secondly that this involves a substantial question of law, namely whether an order accepting a pauper petition is a "a case decided" and is as such amenable to the revisional jurisdiction of the High Court.

(2) In so far as the revisional jurisdiction of a High Court in such matters is concerned I am of opinion that it is not a substantive question of law. There is considerable authority as noted in p. 3 of the order for the view that an order granting permission to sue in forma pauperis is amenable to revision.

(3) Now, I shall take up the question whether it is a "final order". The most instructive definition of a "final order" is contained in the Privy Council decision in 'Abdul Rehman v. D. K. Kasim and Sons', AIR (20) 1933 P C 58:

> "The finality must be a finality in relation to a suit. If after the order the suit is still a live suit in which the rights of the parties have still to be determined no appeal lies under 109-A. The effect of the order, if it is to be a final order under Section 109 (a), C. P. C. should be to dispose of finally the rights of the parties."

In an order of the present nature, there is really no finality in relation to the suit. It is always open to the plaintiff to pay the Court-fee and continue the suit. No question involving the rights of the parties has been disposed of or even touched. In general, the question of grant or refusal of permission to sue in forma pauperis is one of convenience to the plaintiff or the appellant. It is at best only a point of procedure, having no bearing on the rights of the parties. One case may appear exceptional, namely — where the ground of refusal of permission is "that the allegations did not show a cause of action." When the High Court also gives a finding to this effect, it may be argued there is finality with reference to the subject-matter of the suit, and the order is "final" in the sense of S. 109 (a), C. P. C. Even this is not altogether beyond doubt, but we need not discuss it here, as in the present case the cancelling of the District Judge's permission is not on that ground, but one of fraudulent disposal of property. This at all events is not a final order.

(4) In the case 'Ram Prasad v. Mt. Phool Pati', AIR (14) 1927 Pat 175, the same question arose and it was held that:

> "An order refusing leave to appeal in forma pauperis is not a final order within the meaning of S. 109 (a)."

Similar was the ruling in 'Aisha Bee Bee v. Noor Mohammad', AIR (19) 1932 Rang 192 (1):

> "Such an order does not purport to affect the merits of the suit in any sense, or to determine the rights of parties."

(5) Another aspect of the matter came up for consideration in the ruling reported in 'Jiwan Nath v. Ram Chandra', AIR (29) 1942 Oudh 422. There the appellate Court had ordered an inquiry by the Subordinate Judge into the pauperism of the applicant, but when the report was received, the appellate Judge rejected it. The point taken was that this was a "fit question" for appeal to His Majesty in Council. The Chief Court pointed out that the discretion of the appellate Court to differ from the report of the Subordinate Court on pauperism had been recognised in many reported decisions and that in any case the question was not

> "one of such importance that a decision by their Lordships of the Privy Council would be of benefit not only to the people directly involved in the litigation, but to the public at large."

Here also the right of the High Court to act in revision and to cancel the permission given by the lower Court has been well recognised, and that question is not of importance to the public at large, and that way, a substantial one.

(6) The result is that in my opinion the order referred to is not a final order, and, therefore, it is unnecessary to grant leave. Nor is a substantial question of law involved.

D.H. *Application rejected.*

[C. N. 16.]

A. I. R. (39) 1952 Vindhya Pradesh 32

KRISHNAN J. C.

State of Vindya Pradesh v. Raghunath Mannulal Plaintiff-Respondent.

First Appeals Nos. 91 and 92 of 1951, D/- 30-1-1952.

(a) Contract Act (1872), S. 72 — Payment under coercion — Money paid as tax — Tax declared illegal — Liability of Government to refund.

Where certain sales tax realized by Government on export sales has subsequently been declared to be illegal, the liability of the Government to make a refund is beyond doubt. The suggestion that the payments were made voluntarily and therefore no refund can be claimed, is without any force. The taxing authority gives publicity to its orders which being statutory are presumed to be known to the citizens concerned. The consequences of non-payment are implicit whether or not he is threatened with them directly. It cannot be seriously alleged that when the assessees paid up according to the returns of their export sales, they were paying a subscription or gift to the Government without any idea that they were paying a tax, the non-payment of which would lead to inconvenience to them. So these are non-gratuitous payments under coercion as defined under S. 72 of the Contract Act. (Para 5)

Anno: Contract Act, S. 72 N. 4.

(b) Limitation Act (1908), Art. 16 — Suit to recover tax paid under protest under special Act — Tax declared illegal — Limitation — Applicability of general law of limitation — Starting point — Sales Tax — Vindhya Pradesh Sales Tax Ordinance (2 of 1949).

In a suit for refund of tax paid under protest, if the collection has been made legally under a

special law providing for a taxation, then a claim to a refund should be within the special period of limitation prescribed there. But if the collection or levy is one, which is altogether outside that law, it cannot be held to be one made under it; and a claim to refund of that collection is governed not by that special law, but the general one. The position in regard to limitation is exactly the same as in regard to the jurisdiction.

(Para 6)

The special rule of limitation can only apply to the acts done in the special law. If act has been done outside the special law then the general law of limitation comes in. *(Para 10)*

Further, in such a case the claim of refund comes into existence only when a competent authority declares it to be illegal. The period between payment and the declaration of illegality should not in all equity be included for the very simple reason that during this period the assessee can make no claim to the refund. That way it would be equitable to calculate limitation under the special Act assuming that it applies, not from the date of payment, but from the date when it was declared by the Court that it cannot be legally levied. *(Para 7)*

Anno: Lim. Act, Art. 16. N. 5.

(c) *Sales Tax — V. P. Sales Tax Ordinance (2 of 1949) S. 21 — Tax recovered declared illegal — Suit for refund — Jurisdiction of Civil Court not barred — Civil P. C., (1908), S. 9.*

There is general jurisdiction of the Civil Court but for certain acts done under certain special statutes the jurisdiction of the civil Court is restricted and vested in special authorities under those statutes. But if the assessment or act concerned is one which cannot be done under the special statute then the general jurisdiction of the Civil Court remains and special jurisdiction cannot be invoked. In other words if the Sales Tax authority has jurisdiction under the V. P. Ordinance and has exercised it, may be wrongly then the aggrieved party cannot go under S. 21, to the Civil Court, but should go to the tribunal mentioned in the Sales Tax statute itself. If on the other hand, this authority had acted without jurisdiction, then the aggrieved party must go to the Civil Court, because its grievance is a general grievance and not one under the special law. AIR (35) 1948 All 382 F B; AIR (36) 1949 Nag 215, AIR (36) 1949 Nag 190; AIR (38) 1951 Bom 440, Rel. on. *(Para 9)*

The fact that the taxing authority was not aware of the illegality at the time of the collection, but became aware of it subsequently makes no difference. *(Para 11)*

Anno: Civil P. C., S. 9, N. 50.

Advocate-General, on behalf of Government in both the Appeals; Janki Prasad, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('48) AIR (35) 1948 All 382: (ILR (1948) All 26 F B) (Pr 9)

('49) AIR (36) 1949 Nag 190: (ILR (1949) Nag 87) (Pr 9)

('49) AIR (36) 1949 Nag 215: (ILR (1948) Nag 971) (Pr 9)

('51) AIR (38) 1951 Bom 440: (53 Bom L R 621) (Pr 9)

('52) AIR (39) 1952 Saurashtra 1 (Pr 9)

JUDGMENT: These two appeals by the defendant, State of V. P., from the judgment and decrees of the learned D. J. Nowgong against it, involve exactly the same points of law, and can be conveniently considered together. The suits were for the repayment by Government, of certain sums deposited by the plaintiffs in July 1950 on account of sales tax which was subsequently declared to be illegal. The defendant resisted them not on the ground that the taxes were payable, but on a number of what may be described as procedural grounds, which were not accepted by the learned D. J. The first and practically the only material issue is whether these sums, namely Rs. 3,142/4/- in Krishnadass's suit and Rs. 6,536/- in Raghunath Dass's suit, which were admittedly paid by them and received by Government, were really due to Government on account of sales-tax imposed by law, and they were payments under duress, and in any case non-gratuitous payments by the assessees of taxes declared by this Court to be illegal. Secondly, if the sums were not legally leviable by Government, the plaintiffs-respondents have committed such defects in procedure that they cannot get back their money. A number of such procedural defects have been pointed out in the memorandum of appeal filed by the learned Advocate-General. They being: (a) the payments were voluntary, (b) the suits are time barred, (c) the plaintiffs have not discharged the burden of proof placed on them by the explanation of Art. 286 (1). (d) that the civil Court has no jurisdiction to entertain a suit.

(2) The two plaintiffs come from Harpalpur, a trade centre in the V. P. The Vindhya Pradesh Sales Tax Ordinance No. 2 of 1949 was made by the Raj Pramukh in January 1949 and continued to be in force when in April 1950 sales-tax was imposed here. It was provided that no sales-tax would be payable, on the sales within the V. P. of food grains and oil seeds; but if they were sold for export the sales would be taxed. The first quarter having ended in June 1950, the assessees including the two plaintiffs were to pay up these amounts as sales-tax on food-grain and old seeds sold and sent by them out of this State. The merits of the plaintiff's claim would be the same even if these articles were subject to sales-tax if sold within the V. P.; except that it would have been for them to show these were export sales. The plaintiffs assert that they paid under protest; the payment being non-gratuitous and as a tax, the form of the protest is immaterial.

Soon after they issued notices on Government u/s 80 C. P. C. In the meantime, assessees from different parts of the V. P. had filed applications to this Court for a direction to Government that no sales-tax should be levied on export sales. This Court held that the sales-tax was leviable on sales within the State but not on export sales even for the one year in the President's Order (C. O. No. VII), because in this State no sales-tax was actually being levied when the Constitution came into force. This order was passed on 11-12-50 and a certificate was given to enable the State of V. P., if it thought fit, to appeal to the Supreme Court. However, the State of V. P. accepted the decision. The result was that any collection of sales-tax levied on export sales was illegal and the assessees were entitled to a refund. In case the goods were subject to sales-tax on internal sale it would naturally be for the assessees to show that they were export sales, and the taxing authority would be entitled to take all precautions against misdescription of sales within the State as export sales. Even this does not arise here; for food grains and oil seeds

were free from the sales-tax if sold for consumption within the V. P.

(3) The most proper course for the taxing authority now was to order refund of sales-tax realization on export sales. This tax is one on the vendor; often he passes it on to the purchaser, and adds an equal amount to the price, but when the levy has been illegal, the assessee namely the vendor should get the refund. It is between him and the purchaser to settle how much should go to the latter; the taxing authority is not concerned with it. Nor has this been questioned by the defendant appellant. Any feeling on the part of the tax-payer that inadvertent over-payments, or taxes paid and collected under a misapprehension of law, will not be easily refunded on the discovery of the mistake or illegality, is obviously a serious difficulty in prompt collection, and should on the ground of public policy be guarded against by the taxing authority. Still Government did not take steps to refund these amounts.

(4) Accordingly the suits were filed in February 1951, two months after this Court's decision on the tax on export sales. Statements were filed by the Government Pleader making out various grounds but the defendant did not offer to refund, nor did he allege, which would have been wrong, that the purchaser alone should get the money back. The learned A. G. has argued that the written statements should not have been accepted because there is an order in the V. P. that D. Cs. 'may' sign the pleadings and written statements. I do not agree. That order only enables the D. Cs to sign the pleadings, but it does not anywhere provide that the Courts should reject pleadings not signed by that authority. The Government Pleader was legally competent to file written statements. I was also prepared to hear the learned A. G. on such grounds as he thought that the Government Pleader had omitted; subject to costs to the other side. Actually there is no such ground.

POINT No. 1:

(5) The liability of the Government to make a refund is altogether beyond doubt. The suggestion that the payments were made voluntarily and therefore, no refund can be claimed, is without any force. The taxing authority gives publicity to its orders which being statutory are presumed to be known to the citizens concerned. The consequence of non-payment are implicit whether or not he is threatened with them directly. It cannot be seriously alleged that when these assessees paid up according to the returns of their export sales, they were paying a subscription or gift to the Government without any idea that they were paying a tax, the non-payment of which would lead to inconvenience to them. So these are non-gratuitous payments under coercion as defined under S. 72 of the Contract Act. Actually they led evidence to show that it was payment under protest; but even without it, their claim to refund is sound.

POINT No. 2, LIMITATION:

(6) Under the Vindhya Pradesh Sales-tax Ordinance and also the corresponding section of the C. P. and Berar Sales-tax Act, which has subsequently taken its place, the limitation for a claim of refund is 3 months. The general law of limitation for suits for such claims against Government is one year. This suit has been brought within one year from the actual payment, and also within 3 months from the date the levy was declared by this Court to be illegal. In my opinion, if the collection has been made legally under a special law providing for a taxation, then a claim to a refund should be within the special period of limitation prescribed there. But if the collection or levy is one, which is altogether outside that law, it cannot be held to be one made under it; and a claim to refund of that collection is governed not by that special law, but the general one. The position in regard to limitation is exactly the same as in regard to the jurisdiction, and will be more fully discussed under it. The suit is not time-barred.

(7) Another way of looking as it is also this. The limitation is no doubt 3 months from the payment, but if the taxing authority holds it to be legal, the claim to refund comes into existence only when a competent authority declares it to be illegal. The period between payment and the declaration of illegality should not in all equity be included for the very simple reason that during this period the assessee can make no claim to the refund. That way it would be equitable to calculate limitation not from the date of payment, but from 11-12-1950 when it was declared by this Court that sales-tax on export sales cannot be legally levied. The suit was brought within three months from that date. Looked at in any way the suits were not time-barred; but in view of the applicability of the general law of limitation, this aspect of the case need not be further discussed.

POINT No. 3:

(8) Another point suggested is that the explanation to Art. 286 (1) has not been applied. I do not see how this explanation comes in here. This is only to guard against certain implications of the Sale of Goods Act that the property may in certain circumstances pass to the purchaser even before it has reached him. This explanation provides that the test for sale for the purposes of this article is actual delivery as a result of such sale for the purposes of consumption. That does not arise in the present case. No doubt, it would be for the assessee to show that these were really export sales, but even that does not come in here, because if they were sold within the State, no tax would have been payable.

POINT No. 4:

(9) Finally, there is a question of jurisdiction. The V. P. Sales-tax Ordinance (in S. 21) as well as the C. P. and Berar law, which has since taken its place, provide that "no assessment or order made under this Act or Rule made "thereunder" shall be questioned in any civil Court".

There is a provision for appeal, revision and review before the Commissioner of Sales-tax, and also for the statement of case to the High Court. Here again, the test is whether the order or the assessment is such as could be really made under the special law. There is general jurisdiction of the civil Court but for certain acts done under certain special statutes the jurisdiction of the civil Court is restricted and vested in special authorities under those statutes. But if the assessment or act concerned is one which cannot be done under the special statute then the general jurisdiction of the civil Court remains and special jurisdiction cannot be invoked. To put it in other words, if the Sales Tax authority has jurisdiction, and has exercised it, may be wrongly, then the aggrieved party cannot go to the civil Court, but should go to the tribunal mentioned in the Sales Tax Statute itself. If on the other hand, this authority had acted without jurisdiction, then the aggrieved party must go to the civil Court, because its grievance is a general grievance and not one under the special law. This is widely accepted and one need only give a fair sampling of the case law. In the case of a professional tax levied by a District Board, reported in 'DISTRICT BOARD OF FARRUKHABAD v. PRAG DUTT', AIR (35) 1948 All 382 (FB), it was held

"If an assessment is made within the frame-work of the Act, but is wrong, it may not be possible for the civil Court to give to assessee any relief as remedy may be confined to an appeal under that Act. If on the other hand, the assessment complained of is beyond the competence of the Board, and is therefore an illegal imposition, the civil Court will have jurisdiction to interfere."

Two cases reported in 'AIR (36) 1949 Nag', are of interest in this connection. The one 'SECRETARY MUNICIPAL COMMITTEE KARANJA v. NEW EAST INDIA CO., LTD., BOMBAY', reported on p. 215, is of taxation by a Municipality, and the other 'DISTRICT COUNCIL, BHANDARA v. KISHORILAL', reported on p. 190, is of taxation by the District Council. In both the cases the same principles were laid down.

"When a Municipality is seeking to recover sums, which the Government of India Act has prohibited it from taking in the shape of taxes it is acting wholly without jurisdiction, and the suits claiming refund lie in the civil Court and are not barred by special provisions in the C. P. Municipalities Act."

Similarly, in the 'DISTRICT COUNCIL'S CASE' it was held that

"the protection given in the special law cannot be claimed if the taxing authority travels beyond its limited provisions in imposing a tax."

A similar view has been expressed in 'ABDUL MAJID v. P. R. NAYAK', AIR (38) 1951 Bom 440, in connection with a High Court's powers. Here it was a case of administration of Evacuee Property. It has been held that

"It is only in regard to the orders passed under the ordinance itself and action taken under the ordinance with the provisions given in it can be deemed to take away the jurisdiction of the Court."

The case reported in 'BAI MARIUM v. ASST. CUSTODIAN OF EVACUEE PROPERTY, JETPUR', AIR (39) 1952 Sau 1, is also similar to the Bombay ruling reported above. The principle is that

"a special law takes away the general jurisdiction of the civil Court only in regard to acts done under that Act."

(10) The same principles also apply to limitation. The special rule of limitation can only apply to the acts done in the special law. If act has been done outside the special law then the general law of limitation comes in.

(11) In regard to limitation and jurisdiction the fact that the taxing authority was not aware of the illegality at the time of the collection, but became aware of it subsequently makes no difference.

(12) The result is that the appeals are without substance, and are dismissed. Costs to the plaintiffs respondents and pleaders fee at 3½ p.c. in each case.

V.B.B. *Appeals dismissed.*

A. I. R. 1952 Vindhya Pradesh 35

KRISHNAN J. C.

R. R. Ranade, Applicant v. State of Vindhya Pradesh and another.

Appln. for Writ No. 5 of 1952, D/- 4-2-1952.

(a) Constitution of India, Art. 226 (1) — Contractual matter — Issue of Writ.

There is no occasion for the issue of a writ on what appears to be a simple issue arising out of contract, such as payment of entertainment tax. **(Para 4)**

Anno: Civil P. C., Appendix III, Constitution of India, Art. 226 N. 1.

(b) Constitution of India, Art. 226 (1)—Writ of prohibition — Issue on taxing authority.

A writ of prohibition cannot be issued on a taxing authority pure and simple. **(Para 5)**

Anno: C. P. C., Appendix III, Constitution of India, Art. 226 N. 12.

Janki Prasad, for Applicant.

ORDER.: This is an application under Article 226 of the Constitution for a writ of prohibition or for any other appropriate direction on the Deputy Commissioner of Datia enjoining him from assessing entertainment tax on the cinema goers that might attend a cinema house under the managership of the applicant.

(2) The facts of the case are the following: Sometime in 1946 the Private Secretary to the Nawab of Bhopal obtained a 15 years monopoly lease and permission from the Datia Durbar for the running of a cinema house at Datia. A building at Datia was also rented out to him by the Durbar. The lease also contained a provision that it would be a monopoly and further that no entertainment tax would be levied. After the formation of the Vindhya Pradesh in 1949 the original licensee assigned the license to the present applicant. In course of the investigation of the commitments of the Durbar the Government of India examined the matter and decided that this monopoly is repugnant to the constitution, and the applicant should take a proper license under the Vindhya Pradesh Cinema Rules; and further that from the date of this notice the applicant should collect and pay the entertainment tax. The applicant says that he has temporarily closed the cinema house and wants a direction from this Court to the taxing authority, namely the Deputy Commissioner of Datia, that on the strength of the condition in the original lease the applicant should be allowed to exhibit the shows, and the public allowed to attend free of the entertainment tax.

(3) I do not think that a writ of prohibition, or any other direction is called for.

(4) The applicant claims that exemption is based on a contract between the Datia Durbar and the original licensee. The Government of the Vindhya Pradesh State, the successor to the Ditia Durbar, after investigation by the Central Government has noticed the applicant that the provision about the exemption from the entertainment tax is not binding on it. It is purely a contractual matter, and whether or not it is binding is a matter for the judicial or quasi-judicial authority competent to hear objections or appeals from the assessment of entertainment tax to decide. It is of interest also to note that the entertainment tax is not a tax on the shower of the entertainment but one on the spectator, though as a matter of convenience the entertainer is made to collect it along with the charges of the show. The position is just the reverse of that of sales tax, where the assessee proper is the vendor, though he may also try to pass part of the tax on to the purchaser.

The applicant's objection is not that of the assessee, which he is not, but based on the apprehension that taxation might reduce the attendance, or oblige him to bring down his charges, so as to attract spectators. Anyway, it is an objection by the entertainer to a tax, which has not yet been collected, but may be collected as soon as he begins to show. There is nothing inexpedient or roundabout in his collecting and paying up the entertainment tax and claiming future exemption from the proper authority. Else, he may even now move the proper authorty to clarify the position. There is no occasion for the issue of a writ on what appears to be a simple issue arising out of contract.

(5) Nor do I think that the writ of prohibition can be issued on a taxing authority pure and simple. Certain tribunals like the income-tax tribunal, or Local Rates Revision Committees are quasi-judicial authorities giving judicial decisions on issues before them. In the present case that stage has not come. The taxing authority has cautioned the applicant that if he shows cinema films, he will have to collect and pay entertainment tax. As far as the record appears no quasi-judicial authority has been invited to give a decision on this point. If it does, it would be acting within its jurisdiction under the statute and no occasion would also arise for the issue of a writ of prohibition upon it.

(6) The applicant wants to get a short cut decision that he can continue to show the films without collecting the entertainment tax, and that the demand by the State is illegal. Obviously this Court cannot help him in thus short circuiting the proper procedure.

(7) The result is, this application is without substance and is summarily dismissed.

V.R.B. *Application dismissed.*

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KRISHNAN J. C.

Motilal and another, Plaintiffs-Appellants v. Baba Baldeo Dass, Defendant-Respondent.

Civil Appeal No. 88 of 1951, D/- 29-1-1952.

(a) Religious Endowments — Dedication — Founder a new-comer to place and living on charity — Deity housed in one of rooms — Founder welcoming casual voluntary contributions and presents — No invitation to public — Founder a soldier by profession and keeping his weapons in room where deity was housed — Voluntary contributions from public for a comparatively short period but not obligatory — Public not claiming voice in management — Held that there was no dedication and that the temple was not public — The fact that the members of a particular community volunteered their services in carrying the idol in procession on certain occasions, (which service, however, was discontinued after some difference of opinion had arisen amongst them) in the absence of evidence to show that they did this as a matter of any scheme held did not show that they had any voice in the management. Case Law Ref. (Paras 11, 12)

(b) Evidence Act (1872), S. 32 (4) — Document must show what exactly were rights and privileges.

Section 32, Cl. (4) applies only when it is a public right or custom or a matter of general interest. Where the document does not state what exactly were the rights or the customary privileges of community in connection with a certain temple, the document is not admissible under S. 32 (4). (Para 15)

Anno: Evi. Act, S. 32 N. 23.

(c) Evidence Act (1872), S. 13 (a) — Transaction casually referred to — Document is not admissible.

A transaction in which the right was directly asserted might be admissible, while one in which it was casually referred to, would not be. (Para 12)

Anno: Evi. Act, S. 13 N. 6.

(d) Evidence Act (1872), Ss. 32 (4) and 13 (a) — Statement made when there was dispute — Statement is inadmissible. (Para 15)

Anno: Evi. Act, S. 32 N. 28; S. 13 N. 1.

Vishnu Mitra and Moti Lal Verma, for Appellants; Janki Prasad, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('40) AIR 1940 PC 7: (15 Luck 1) (Pr 8)
('32) AIR 1932 All 708: (143 Ind Cas 95) (Pr 7)
('38) AIR 1938 Bom 471: (178 Ind Cas 926) (Pr 7)
('28) AIR 1928 Mad 879: (113 Ind Cas 635) (Pr 7)
('33) AIR 1933 Sind 213: (150 Ind Cas 266) (Pr 7)

JUDGMENT: This is an appeal by the plaintiffs from the judgment and decree of D. J. Tikamgarh dismissing their suit under S. 92 in regard to a small temple of Baldau at Tikamgarh, in the charge and possession of the defendant Baba Baldev Dass s/o Prahlad Dass. The most important question for decision is whether this temple is a public religious endowment or institution, or whether it is the private property of the defendant inherited from his father and grand-father. A secondary question is, whether besides being a public temple this institution or endowment has been created and has been controlled in the past by the Tamera community of Tikamgarh. Then there are a number of minor issues which are not of much significance. The plaintiffs claim that this is a public religious endowment and that they represent the Hindus of that locality, and want the Pujari to be removed on the grounds of unfitness and negligence, accounts to be demanded of the income of the temple, and a new scheme for management and worship framed. At the same time as Tameras they claim to represent the caste, whose members had created the foundation and had from time to time endowed it and controlled its management. For the future they want that a committee of Tameras should be constituted to look after the temple and to see that the religious functions are properly carried out and the Hindu community of that place is afforded all facilities of worship in a suitable religious atmosphere.

(2) The learned D. J. found that this was not a public temple, but the private property of the defendant. He also held that neither the public in general nor the Tamera community of Tikamgarh in particular had any right to manage or control the temple.

(3) 'Point No. 1': By far the most important question is whether this is a public or a private temple. When we have no evidence, documentary or oral, on the creation of the institution, we have to be guided by circumstances and incidents of special significance during its existence. This Baldau temple so-called is really a room or cell in a small house in the Bazar of Tikamgarh. The house is the dwelling place of the defendant's family. At present the room or cell in which Baldau and subordinate dieties are installed has a small opening into the bazar so that people can enter into it without walking through the living rooms of the house. It is also in evidence that there has been no exclusion by the defendant of any Hindu going there at reasonable hours and in a proper manner for worship. From time to time small properties and a stipend have been granted to the deity by the Durbar of Tikamgarh, in accordance with the admitted custom of helping temples, whether public or private. There was a small grant in 1926 by one Har Prasad Pamera by a will

which we shall discuss later on. Recently, the defendant has got some shops near the temple settled with him in the name of the deity by the Municipality after some dispute with local tradesmen. This bazar has always been small, but lately it has been showing increased importance.

(4) The taking care and the worship of the deity as well as payment of the expenses for the services and the management of the properties, has always been done by the defendant or his ancestors. In this connection it is worth recounting briefly the history of this family. One Gosain, popularly called "Karnal" Dass came to these parts, not later than the beginning of the 19th century. As this nickname indicates he seems to have been a soldier adventurer. He brought some weapons, and his favourite deity Baldauji with other subsidiary idols, and installed them in his house at Tikamgarh. As he is said to have fought in some battle on the side of Maharaja Vikramajit of Orchha, who died in 1817, his time can be ascertained. Soon this Baldau attracted local attention. It is said that the service charges were met by collection in a begging bowl. The plaintiffs allege that the Tameras acquired a house and fixed this idol and appointed this 'Karnal' Babaji as the Pujari. There is not a particle of documentary evidence or inscription to support it. The oral evidence on such happening does not at all come from anybody having special means of knowledge. We do not even know the names of the Tameras, who started it, nor is there an explanation consistent with the Tamera theory of how this idol was installed in a house not belonging to any of them, or in a separate structure, or platform.

(5) It is common ground that after the 'Karnal' Babaji his son, Pahlad Dass, lived in that house and looked after the idol, conducted the services by the begging bowl collections, durbar stipends, and probably occasional contributions by worshippers. Though there is no direct evidence, it is not impossible that the Tameras of Tikamgarh had also made casual contributions like any other class of residents, but there is nothing to indicate that the Tameras had shown any predilection to this 'deota'. Nor does the evidence contain any indication of tradition that Baldau is the special favourite god of the Tameras of Tikamgarh or elsewhere. Any way, Pahlad Dass also had continued in the exercise of soldierly qualities and had earned the Durbar's pleasure by fighting with distinction with the Orchha troops on the side of John and Co. against the Rani of Jhansi. After Pahlad Dass's death his elder son Baba Nanhe Dass stayed in the house and looked after the idols. Baba Nanhe Dass seems to have died near about 1920 and his brother Baba Baldeo Dass i.e. the present defendant took over. Though no material has been produced by the plaintiffs about the state of affairs during these 120 years or so, the defendant's documents and the common ground show the following data. The occupants of this house were the settlers into Tikamgarh and brought the idols. They did not have any local patrons in particular except the durbar, which seems to have helped the family at least in those days, not for religious qualities but for distinction as soldiers. During this period the Hindu public in general seem to have given alms to these Babajis, but there is really no evidence of the Tameras in particular providing for day to day worship, or other services. On all the three possible occasions during this period, a son or brother took over without the least friction or argument, without the Tameras or other outsiders having any say in the matter. This shows that the temple does not at all have had the incidents of a public temple. On the contrary it was not even a temple properly so called, but a cell or room in a residential house in which the 'karnal' Dass had stored his weapons and his favourite dieties.

(6) One important circumstance is emphasised by plaintiffs to show that this is a public temple, whether or not the Tameras have special rights and responsibilities in its management. In fact, the learned lawyer appearing for the plaintiff-appellants was more insistent upon a declaration that it is public temple than upon the other declaration in regard to the Tameras. For a long time, and possibly from soon after its foundation there has been a small side-door opened. The Hindu public had been allowed to go there and there has been no exclusion; though there is no proved instance of advertisement or express invitation. The opening of the door shows that the custodians were facilitating the Hindu public's coming there for worship. This by itself is not necessarily an indication of the temple being a public one. But it is to be considered in the light of the status and the means of the custodian, the value he might attach to the small presents in money and in material, which Hindu worshippers usually bring, the force of public opinion or pressure on the custodian, and finally the well known disinclination of the average Hindu to obstruct or exclude others from worshipping even his private idols as long as it is done decorously. The case law on this subject can be conveniently summarised thus.

(7) In the ruling reported in 'MOOL CHAND v. DEVI GIR MOTI GIR', AIR 1933 Sind 213 this aspect of the case has been discussed and the process by which the private temple can become a public temple has been discussed. The permission or non-exclusion of worshippers in general is by itself insufficient to prove these. Other matters like the support given to the institution by the Hindu communities of the area, the payment of fixed lagas by them year in and year out, and similar indicia are also to be taken into account. In the ruling reported in 'SAHDEV DASS v. RAJA RAM', AIR 1932 All 708 it was held that there is no presumption either way on the temple being public or private. The mere receipt of offerings from every body may not be sufficient to alter the private nature. In 'KELUACHAN v. C. S. SHIVARAMAPATTAR', AIR 1928 Mad 879 and 'DHORI BHAI v. PRAGDASSJI BHAGWAN DASSJI', AIR 1938 Bom 471, permission and non-exclusion of Hindus in general was held to be, though not conclusive, at all events, strong indicia of its public nature. In the Madras ruling it was held:

> "when all castes of Hindu public for centuries have been freely using a temple and have never been debarred from using it and there is no evidence that they did so with permission, it would require strong evidence to persuade a Court that the temple is nevertheless intended for the use of one isolate caste, or tarwad or family."

Similarly, in the Bombay case it was held that:

> "public user for a long period without objection is strong evidence of a public trust."

It is worth noting that in Madras case it is a case of worship for centuries, while in the Bombay case the property was acquired by a Sadhu and descended from Chela to Chela. In the present case it is only for about 150 years, and the idol was installed by a house-holder and descended to son or brother.

(8) This tendency to over-emphasise non-exclusion without regard to other circumstances, has been corrected by the decision of the Privy Council reported in 'BHAGWAN DIN v. GIHAR SWAROOP', AIR 1940 P C 7.

"It is not enough to show that Hindus willing to worship have never been turned away, or even that the deity has acquired considerable popularity among the Hindus of the locality. Facts and circumstances in order to be accepted as sufficient proof of dedication of a temple as a public temple must be considered in their historical setting in such a case. A dedication to the public is not to be readily inferred when the property was acquired by grant to an individual or family. Such an inference if made from the fact of user by the public is hazardous, since it would not in general be consonant with Hindu sentiments or practice that worshippers should be turned away, and as worship generally implies offerings of some kind, it is not to be expected that managers of a private temple should in all circumstances desire to discourage popularity."

(9) In the present case, for example, for a long time the temple had really no properties worth speaking of. Again, the first custodian or the founder was a new comer to the place living on public charity. Very naturally he would encourage members of the public to go and have a look (darshan) at his favourite deity, and welcome alms or casual voluntary contributions and possibly presents placed at the feet of the idol. Again, there was a certain measure of harmless vanity in this display, because the weapons with which the founder was reputed to have done acts of valour were also on display. If in these circumstances the Karnal Dass and his son and his grand sons had not only not excluded, but also encouraged other Hindus to come and worship his deity it is not sufficient to convert it into a public type.

(10) It appears that in the beginning the Pujari or custodian used to move about with a begging bowl and collect money or grain for the expenses of the temple service. Subsequently, it appears that people began to contribute. After 1930 or 1935 when there was a dispute with some Tameras, they had given up making any contributions, but some servants of the Durbar advised them to continue contributing. We do not know the results, but this sort of casual voluntary contribution over a comparatively short period is not the same as the Dharmlagga referred to in the Sind ruling. There is no evidence that the Hindus in general or the Tameras considered these contributions obligatory, and had given them in return for a right to worship and a voice in the management.

(11) Finally, there is also no instance of any outsider Hindu, Tamera or otherwise, individually or in a body, claiming a voice in the management, or ordering or advising the custodians to go this or that in connection with the temple worship. Thus, there is no material on which we can hold this to be public temple.

(12) 'Point No. 2.' Poor as is the evidence of the temple being a public one, that on the special rights and responsibilities of the Tameras in regard to it is poorer still. There is altogether no acceptable evidence that the Tameras founded it. There is also no evidence that at any time the Tameras had a voice in its control or management. Near about the temple there are a number of Tamera houses; and it is possible that the Tameras used to worship there. This is probable, but of no value. Occasional subscriptions by them were also likely, but all Hindus had been contributing, and there is nothing special in that.

(13) It is alleged that once in a year in Bhadon the idol of Baldau Thakur is carried to a tank nearby for a special service and reached back to the temple. Oral evidence had been adduced to show that still about 30 or 35 years ago, the Tameras used to carry the 'viman' of the idol to the tank. As a result of some difference, which is not clearly described, they gave up doing it and for about 38 years this has been done by some Dhimars. The whole thing is obscure, but even if we assume that some of the Tameras used to volunteer their services for carrying the idol on that occasion, it cannot make either the temple a public one, or give the Tameras the right of controlling and managing its affairs. There is no evidence that the Tameras in a body arranged these functions, followed a scheme and collected and spent money. The most that this can mean is that on the occasion of this festival some Tameras volunteered their services, but gave up doing it as a result of some differences 30 or 35 years ago. It is worth noting that it would be at about this time or a few years after that this defendant took over. Though the Tameras had withdrawn this volunteer service, they did not claim voice in the selection or the appointment of the Pujari.

(14) The next piece of evidence is the allegation by 3 witnesses that about 45 years ago the Tameras had contributed to the making and the installation of a new idol of Jotiji, the consort of Baldeo. The evidence comes from those who are not likely to have first-hand knowledge, and no special reason to remember this after about half a century. If indeed the Tameras had arranged for the installation of a new idol then they might be able to produce accounts, or proceedings of the caste committee and similar papers. The defendant's statement is that at about that time another similar idol was available in a temple under the control of the Durbar; it was removed and installed here. This looks more likely. In any case, the plaintiff's evidence that the Tamera got the idol and installed it does not carry any conviction.

(15) There is one more piece of evidence on which the plaintiffs lay considerable emphasis. There was one Har Prasad Tamera, who died about 1926 without issue. His properties were not many and he in fact seems to have been a very small man. He had made a sort of will providing that after some expenses his properties should be given to this Baldau temple. They turned out to be a small shop of very little value in those days, and one or two other insignificant items. Even they were treated as escheated by Durbar, but were claimed and taken by defendant as Har Prasad had willed that they should go to this Baldauji. In his will or testament Har Pd. had stated that this is the temple of Tamers, this being in fact the first and the only occasion any Tamera had stated that he had an interest in the control and the worship at this temple. This statement has been sought to be made admissible under S. 32 Cl. (4) and Cl. (7) along with S. 13(a) Ev. Act. I am doubtful about the admissibility; it lies at the extreme outer limit of a very large number of cases covered by S. 13(a). Section 32 Cl. (4) may apply only when it is a public right or custom or a matter of general interest. This paper does not state what exactly were the rights or the customary privileges of the Tameras in connection with this temple. As for S. 13(a) the most reasonable view would be that a transaction in which the right was directly asserted might be admissible, while one in which it was casually referred to, would not be. If this recital is omitted, it would make no difference on the effect of the transaction or of the document. If Har Prasad Tamera had said nothing about this matter or had even said that the temple was the private property of the defendant the paper would have still the same effect. On this view this is not a transaction in which this particular right was 'asserted' and, therefore, it would be inadmissible. There is another difficulty

also. According to the plaintiffs own evidence, some 30 or 35 years ago say 5 or 10 years before this will there was some difference, and the Tameras had given up the volunteer service of carrying the 'viman'. If so, this statement was made when there was 'some' dispute, though its details are obscure in this connection. That way the statement becomes quite useless either under S. 32(4) or under S. 13 (a) Evidence Act.

(16) On the merits also this statement is of little value. Har Prasad Tamera was giving next to nothing to the temple. Even then he says casually it is a 'Tameras temple'. What exactly he means by it is not clear. Then as now there was no material to support any claim of the Tamera for special privileges.

(17) On the other hand, there are as many as 3 documents by which the Durbar has made grants to this temple. There are grants directly to the custodian of that time without any mention or the control or need for consultation with the Tameras. If it was a fact that the Tameras had a right to control the management and the service it is unthinkable that princely patronage would pass directly without their having a voice in its disposal.

(18) Thus, I find that there is altogether no evidence of the Tameras having any right of control over this temple.

(19) 'Point No. 3': From about the time of Har Prasad's death and the defendants claiming those small properties there had been some arguments between him and the Tameras. The dispute seems to have become chronic when about 1935 or 1936 the defendant got settlement of some shops near that temple in the name of the deity. Shortly after it, the Tameras seem to have moved the D. M. in this matter, but nothing came out of it. The suit has since been filed not to vindicate a right in public temple, but as a result of recent quarrels with the owner of a private temple.

(20) In view of the findings given above it is unnecessary for this Court to decide on the question of fitness of the defendant to be the Pujari of the temple. The suit was rightly dismissed and the appeal is also dismissed with costs to the defendant-respondent and pleader's fee of 7 per cent.

R.G.D. Appeal dismissed.

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KRISHNAN J. C.

Abadijan and another, Plaintiffs-Appellants v. Otermal, Defendant-Respondent.

Second Appeal No. 208 of 1951, D/- 25-2-1952.

Houses and Rents — C. P. and Berar Regulation of Letting of Accommodation Act (XI (11) of 1946), S. 1 — Extension under S. 2, Part C States Laws Act (XXX (30) of 1950), to V. P. — Validity — Pendnig actions — Effect — Applicability of Rewa State Rent Control Ordinance (1946)—Houses and Rents—Rewa State Control Ordinance, 1946 — General Clauses Act (1897), S. 6 (e) — Interpretation of Statutes — Retrospective effect.

The extension of the C. P. and Berar Regulation of Letting of Accommodation Act of 1946 to the V. P. under S. 2, Part C, States Laws Act (XXX (30) of 1950), is ultra vires, on account of there being already an existing law on the same subject in force in that Part C State. So the Rewa State Rent Control Ordinance, 1946 is still the law in force there. AIR 1951 S C 332, Applied. (Para 10)

Obiter: But assuming that the C. P. and Berar Regulation of Letting of Accommodation Act of 1946 is the law in force after 21-1-1951, pending litigation should be governed not by the repealed law, but by the new law; AIR 1936 All 3 and AIR 1951 Rajas 45, Rel. on. (Para 12)

If the C. P. and Berar Regulation of Letting of Accommodation Act of 1946 has come into force, then in the pending actions, the civil Courts can no more fix the standard rent; they should give reasonable time to either party to move the controller and come with his decision if any, after which they should decide the litigation giving effect to the decision of the controller on such matter as are within his jurisdiction. (Para 13)

Lal Yadvendra Singh, for Appellants; Lal Gurprasanna Singh, for Respondent.

Cases referred to:

('51) AIR 1951 SC 332: (1951 S C R 747) (Pr 5)
('36) AIR 1936 All 3: (58 All 495) (Pr 12)
('51) AIR 1951 Rajas 45 (Pr 12)
('51) S. A. No. 141 of 1951, D/- 14-7-51 (VP) (Pr 6)

JUDGMENT.: This is a second appeal by the plaintiffs. On 29-5-1951, the learned Munsiff fixed under Section 7, Rewa States Rent Control Ordinance 1946, the standard rent for a house belonging to them and occupied by the defendant. The plaintiffs state that by that time, the Rewa Ordinance had been repealed and C. P. & Berar Regulation of Letting of Accommodation Act of 1946, had come into force. When they went up in appeal to the learned District Judge, he declined to interfere on the ground that he also had no jurisdiction. The points for decision here are pure questions of law of a somewhat technical and obscure nature. Firstly whether the law on this subject now in force in the Vindhya Pradesh is Rewa State Rent Control Ordinance, 1946, or whether it is the C. P. & Berar Regulation of Letting of Accommodation Act. Secondly, if the new law has come into force, whether pending actions should be decided according to it or according to the old repealed law. Thirdly, whether or not the parties rights and liabilities under the old law being still alive, the abolition of the forum which was empowered to apply the old law, would make any difference.

(2-3) The facts of the case are the following. The plaintiffs own a house at Satna which on 14-5-1949, defendant rented from them at a rental of Rs. 50/- per mensem, the agreement being for six months at the first instance. He occupied it on that date after paying an advance of Rs. 100/- and he continued even after 14-11-1949, till the time of the filing the suit, on 27-4-1950, after the issue of a notice he had paid only Rs. 200/- in all. The suit was for the rent calculated at the contract rate of Rs. 50/- per month. The defendant held that contract rate of rent was excessive and wanted the Court to fix the standard rent under Rewa State Rent Control Ordinance which was then in force. The learned Munsiff fixed the standard rent at Rs. 15/- and decreed the suit accordingly. The plaintiffs appealing to the District Judge, he decided on 16-12-1950, that the standard rent had been fixed on insufficient material, and remanded the case for a fuller consideration after ascertaining, if possible, the rent that was actually paid for the house on 1-1-1939. The suit went back to the Munsiff. On 29-5-1951, he again decided that Rs. 15/- per month must be the standard rent. Again, there was an appeal, but the learned District Judge dismissed it on 27-7-1951, on the ground that he has no jurisdiction now to consider if the Munsiff was compe-

tent to fix the standard rent.

(4) From December 1950, onward there were some important legislative changes. In exercise of the powers conferred by the S. 2 of the Part C States Laws Act (30 of 1950) the Central Government extended to the V. P., the C. P. & Berar Regulation of Letting of Accommodation Act of 1946 (C. P. & Berar Act 11 of 1946), as in force for the time being in the M. P., subject to certain modifications; it also repealed the Rewa State Rent Control Ordinance of 1946. There are some basic distinctions between the Rewa Ordinance on the one hand and on the other the C. P. Act and the Control Order made under it on 7-12-1950. Under the Rewa Law the Civil Court hearing any suit for rent or eviction from premises could fix the standard rent, according to certain principles laid down in the Ordinance; but under the new law the powers could be exercised by a specified officer called "Controller" who may be appointed by a D. C. The order itself was brought into force in the V. P. on 20-1-1951, when the suit was pending before the Munsiff after the remand order. The new law has no express provision in regard to pending actions. Section 3 of the Central Government's order under Section 2 of the Part C States Laws Act has really no application to pending litigation; but applies to orders already passed and action already taken which would continue to be in force, and be deemed to have been made or taken under this Act.

(5) The plaintiff's position is that the Munsiff should have granted decree according to the contract rate; otherwise he should have given reasonable time to the defendant to move the Controller to reduce the contract rate of rent and after it awarded a decree on the rent if any fixed by the Controller or on the contract rate. The defendant respondent on the contrary takes the position that according to the Hon'ble Supreme Court's answer to the President's reference reported in Article 143, Constitution of India and Delhi Laws Act (1912) Etc.—In re: 'AIR 1951 S C 332, the extension of the C. P. & Berar Law to the V. P. was ultra vires. Further, it is urged on behalf of the defendant respondent that while we have a gazette notification as to the coming into force of the Order, there is (no?) notification of the coming into force of the Act itself. Therefore the old Rewa Law continues to be in force and the learned Munsiff had jurisdiction to fix the standard rent. Even assuming that the C. P. & Berar Act had come into force, the defendant relies upon the principle contained in Section 6 (e) of the General Clauses Act and urges that pending questions should be governed by the repealed law.

(6) The learned District Judge has not touched on these questions but has dismissed the appeal because he says that there has been a ruling by this Court that the old Rewa law has been repealed. The reference is not given but presumably it is to the judgment in the 'Second Appeal No. 141, dated 14-7-1951, at a time when the full report of the answer to the Special reference No. 1, was not available and we had only the incomplete newspaper summaries.

(7) Point No. 1: The judgment of the highest Court has to be read and studied as a whole without omission even of a single paragraph. There was some divergence of view between the Hon'ble Judges who answered the reference. Section 2 of the Part C States (Laws) Act 1950 can be divided into two distinctive portions in regard to each of which a separate answer has been given by two of the Hon'ble Judges. The first part of the section runs thus:

> "The Central Government may by notification in the official Gazette extend to any part C State (other than Coorg and Andaman and Nicobar Islands) or to any Part of such State with restrictions and modifications as it thinks fit, any enactment which is in force in a Part A State at the date of the notification."

This is of the same purport as Section 7 of the Delhi Laws Act 1912 and Section 2 of the Ajmer Merwara Extension of Laws Act 1947. Five out of the seven Hon'ble Judges gave the answer that these are intra vires.

(8) But in regard to the second part of the Section 2 of the Part C States Act, the answer given by two of the Hon'ble Judges is materially different from what they gave in regard to the first part. The second part of the section runs thus:

> "And, provision might be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that part C State."

Four of the seven Hon'ble Judges were of the opinion that this part is ultra vires and answered accordingly. It is unnecessary to quote the answers of the two Hon'ble Judges namely, Hon'ble C. J. (Vide paragraph 51 on page 349 of the judgment); and Hon'ble Justice Mahajan (Vide paragraph 207-208 on pages 392-393) to the effect that all the sections in their entirety are ultra vires. We need not also reproduce the reasonings of the Hon'ble Fazl Ali, J., Hon'ble Shastri, J. and Hon'ble Das, J., (Vide paragraphs 91 P. 361, paragraph 130 P. 371; Paragraph 348 P. 434 respectively) who answered that all the three sections in their entirety are intra vires. But it is necessary to quote the relevant portions of the judgment of the two Hon'ble Judges, who have taken a different view in regard to the two parts of the section:

> "Section 2 of the Part C States (Laws) Act 50 is ultra vires to the extent that it empowers the Central Government to extend to the Part C States Laws which are in force in part A State even though such laws might conflict with or affect laws already in existence in the area to which they are extended. The power given by the last portions of the section to make provisions in any extended enactment for the repeal or amendment of any corresponding provincial law which is for the time being applicable to that part C State, is, therefore illegal and ultra vires." (Paragraph 276 of H. J. Mukherji's answer in p. 408.)

Again:

> "My answer is that Section 2 of the Part C States (Laws) Act is intra vires except for the concluding sentence which runs as follows:
> "And provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that part C State."
> "In my judgment, this portion is ultra vires but as it can be separated from the rest of the Act, the remainder is good."
> (P. 390 of Hon'ble J., Bose's answer in p. 391.)

(9) Thus, while in regard to the first part of this section the majority answer that it is intra vires, in regard to the second part, the majority answer is that it is ultra vires. The result of the answers to the reference under Article 143 of the Constitution is this. If the Central Government extends to a Part C State, the law of a Part A State on a matter on which there is no law existing in that Part C State then its action though an exercise of a delegated legislative powers would be intra vires. If, however, as in the present case, there is already a law in force in

the Part C State on a particular subject, and the Central Government extends a part A State law on the same subject, and thereby expressly as in the present case (Vide Section 2 of the Central Government's order), or even by implication, repeals the existing corresponding law on that subject already in force in the Part C State, such extension is ultra vires.

(10) Thus, a careful and complete study of the Hon'ble Supreme Court's answer to the reference leads us to the finding that the extension of the C. P. and Berar Regulation of Letting of Accommodation Act of 1946 to the V. P., is ultra vires, on account of there being already an existing law on the same subject in force in this Part C State. So the Rewa State Rent Control Ordinance 1946 is still the law in force here. Since the learned District Judge has referred to some older decision of this Court, it is made clear that until this is varied by the Hon'ble Supreme Court, subordinate Courts here should follow this ruling, and ignore earlier decisions, if any, on this subject.

(11) 'Point No. 2.': The next question is whether on the assumption that the C. P. & Berar Regulation of Letting of Accommodation Act of 1946 is the law in force after 20-1-1951, pending litigation should be governed by the repeal law. Though this is of no immediate consequence, it is worth while having this Court's answer to this question also on record, because this is an obscure and controversial question, and the higher Court may take a different view.

(12) In the absence of special provisions for pending actions in the new law, the parties would continue to be subject to the liabilities and rights created by the repealed law. Maxwell states:

> "When the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun unless the new statute shows a clear intention to vary them." (p. 229, 9th Edition.)

Section 6 (e) of the General Clauses Act provides that:

> "unless a different intention appears the repeal of any enactment cannot affect any legal proceeding in respect of any right, privilege, obligation etc., and any such legal proceedings may be continued or enforced as if the repealing enactment had not been passed."

If the present case came under Section 6 (e) of the General Clauses Act then the pending litigation should be decided under the Rewa State Ordinance whether or not the C. P. & Berar Regulation of Letting of Accommodation Act of 1946 has really replaced it. But there are some difficulties. It has been held that Section 6 (e) would not apply if repeal is followed by fresh legislation: 'DANMAL PURSHOTTAM DAS v. BABU RAM CHHOTELAL', AIR 1936 All 3. Recently a case came up before the Rajasthan High Court 'KESHRI PRASAD v. BODHRAJ', AIR 1951 Raj 45. It was a proceeding started on an election petition. Under the repealed law a first class Magistrate could deal with it, but under the new law that power was exercisable by the District Judge. The Rajasthan High Court held that S. 6(b) of the G. C. Act did not apply in such a case, and upheld the order transferring the proceedings to the Court competent under the new law. Therefore, in a case like this the new law, if it has come into force, will govern pending actions.

(13) 'Point No. 3.': The difficulty of this question will be lessened if we distinguished between the rights and liabilities of the parties on the one hand and the procedure on the other according to which the parties can exercise or enforce those rights and liabilities. The rights and liabilities are governed by substantive law properly so-called which cannot have retrospective effect unless expressly so provided. Therefore, in pending actions they continue to be those acquired under the law in force, at the beginning of the action. On the other hand, the forum before which and the manner in which these rights and liabilities can be exercised and enforced are governed not by substantive law but by procedural law properly so called which can have retrospective effect. When it happens that the repealing law leaves the forum and the procedure unaltered, there is no difficulty whatsoever for the parties to exercise and enforce their rights and liabilities accruing under repealed law; this, in fact happens in the vast majority of cases. Sometimes as here, the new law creates a new forum and provides for a new procedure; the righs and liabilities may continue to be the very ones that had come into existence at the time the action began under the old law; but the forum and procedure for their exercises having ceased to exist, the parties have to approach the new forum, and follow the new procedure under the fresh legislation, for exercising and enforcing the rights and the liabilities accruing under the old law itself. In the present case the forum and the procedure have changed and the controller has taken the place of the Civil Court. But the right of the tenant to get the contract rate of rent reduced and his liability to eviction in certain circumstances and the similar rights and the liabilities of the landlord have not ceased. Therefore, in the present case, if the C. P. & Berar Regulation of Letting of Accommodation Act of 1946 has really come into force, then in the pending actions, the Civil Courts can no more fix the standard rent; they should give reasonable time to either party to move the controller and come with his decision if any, after which they should decide the litigation giving effect to the decision of the controller on such matters as are within his jurisdiction. But I have held that the C. P. & Berar Act has not really come into force; unless and until another view is taken the decisions under points (2) and (3) are of academic interest only.

(14) 'Point No. 4': Under the Rewa Rent Control Ordinance itself, it was the duty of the learned District Judge to consider whether the learned Munsiff has rightly arrived at the standard rent. If he has not, the learned District Judge as the appellate Court should have modified the standard rent in accordance with the Rewa State Rent Control Ordinance. The result is that the learned District and Sessions Judge's judgment and decree are set aside and he is directed to hear the entire appeal on its merits on the basis that the law on the subject there is still the one contained in the Rewa State Rent Control Ordinance.

(15) In the special circumstances of the case, the parties shall bear their own costs.

(16) Under Art. 133(1) of the Constitution it is certified that this case involves an important point of law.

(17) The position in this respect is anomalous and confusing; but it can be very easily cleared by fresh legislation with an express direction in regard to pending actions.

V.B.B. *Order accordingly.*

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KRISHNAN, J. C.

Kartar Singh and others, Accused-Appellants v. State of Vindhya Pradesh.

Criminal Appeal No. 80 of 1951, D/- 13-2-1952.

(a) Evidence Act (1872), S. 9 — Two-witness identification — This is held sufficient to satisfy requirements of prudence. (Para 9)

Anno: Evidence Act, S. 9 N. 5.

(b) Evidence Act (1872), Ss. 114 and 133 — Approver's evidence — Value.

The approver's evidence usually is of some value, if there is independent corroboration, firstly of his physical presence during the dacoity, and secondly, also of a particular nature of the parts he assigns to each of the accused persons. This presupposes strict observance of the principles of law and the rules of prudence in the recording of the confession and of granting pardon. (Para 10)

Anno: Evidence Act, S. 114 N. 3; S. 133 N. 4, 5.

(c) Criminal P. C. (1898), S. 337 — Early recording of confession — Necessity.

In the case of the approver even more than in the case of other witnesses it is essential that the Court should know what exactly he had stated at the earliest stage, which is possible only when the confession is recorded early. When the confession is recorded late it is quite useless to look into the approver's evidence. The statement of an approver, whose confession is recorded after the practical completion of the investigation, and who has been in Police custody for a very long time, is utterly useless. (Paras 10, 11)

Anno: Criminal P. C., S. 337 N. 13.

(d) Evidence Act (1872), S. 24 — Confession after accused is placed in police custody.

There is a very considerable difference between a confession recorded 'before' an accused is placed in police custody, and one recorded immediately 'after' it. In fact, in the former event, the contents of the confession may themselves be the reason for placing him in police custody for pointing out the places or recovering of the articles which he divulges in the confession. If on the other hand, he is put in police custody, and returns with a readiness to confess, it is obvious that it has been the stimulant. In such circumstances one would expect the Magistrate to give much longer time, and some special caution before recording the confession at all. Such a confession even if unretracted is by itself of little value unless corroborated. Where the confession has been recorded and has been withdrawn there is a greater need for it. (Para 13)

Anno: Evidence Act, S. 24 N. 7.

(e) Evidence Act (1872), S. 27 — Facts discovered — Meaning of.

Section 27 provides an exception to the general law about confessions enunciated in the 3 preceding sections, and like all exceptions, should be narrowly interpreted. "Facts discovered" mean the physical perception of a material fact, and not merely learning of a mental fact or the contacting of a witness. AIR 1935 Mad 528; AIR 1941 Mad 290, Not foll. (Para 16)

Anno: Evidence Act, S. 27 N. 3.

(f) Evidence Act (1872), S. 27 — 'Distinctly' — Meaning of.

The word 'distinctly' excludes the admission of the statement into evidence, if there is any other conscious agency or will intervening between the information and the discovery. When there has had to be further inquiry of an independent nature before the discovery is made, one cannot hold that it is "distinctly" related to the information or confession. (Para 18)

Anno: Evidence Act, S. 27 N. 9.

(g) Evidence Act (1872), S. 27 — 'Distinctly' — Meaning of — Discovery accompanied by statement.

Where the accused is alleged to have accompanied his act of making over the articles by certain statements evidence of the act itself is admissible, but whether the statement is admissible or not would depend on whether it distinctly relates to the discovery. Even when it is directly explanatory of the act it is not admissible because the explanation, however closely connected with the fact, does not relate to the discovery itself. (Para 23)

Anno: Evidence Act, S. 27 N. 9.

(h) Evidence Act (1872), S. 9 — One article identification.

At best of times the identification of articles involves uncertainty, but if it is one article identification, and that is not very distinctive in appearance, it would be very unsafe to convict. (Para 25)

Anno: Evidence Act, S. 9 N. 4.

(i) Evidence Act (1872), S. 9 — Persuasions to accused — Production of articles by accused.

It cannot be said that persuasions or bait held out to the accused are always illegal, or should not be given. There may be cases in which this method of catching offenders is the most expedient one, but when the accused himself brought the properties to the thana we should have good evidence for holding that they were stolen properties, and not his own property, which the accused was bringing to the police so as to earn their goodwill. (Para 26)

Anno: Evidence Act, S. 9 N. 4.

(j) Evidence Act (1872), S. 9 — Identification parades by investigating officers.

At all events, on the ground of inexpediency (at least, if not of illegality) the holding of test identifications for suspected man and articles by investigating Police Officers is to be strongly disapproved. The test identifications should be held by Magistrates, and where they are not available, by intelligent and fair minded members of the public, but never by Police Officers; the formalities and precautions should also be observed. In many dacoity cases identification of recovered articles is the only and at all events the most important material. A mistake in the procedure, or an intentional or unconscious prompting of the witnesses will surely lead to the conviction of a wrong person, and the escape of the real offender. (Para 27)

Anno: Evidence Act, S. 9 N. 5.

(k) Criminal P. C. (1898), S. 162 — 'Statement' — Identification parade by Police Officer.

The results of test identifications by a Police Officer would be inadmissible under S. 162. Identification by the witnesses of the object or person during a test identification is a statement which is ruled out by S. 162. AIR 1943 Cal 644, Rel. on; AIR 1929 Nag 36; AIR 1941 Mad 675, Not foll. (Paras 28, 29)

Anno: Criminal P. C., S. 162 N. 3.

(l) Criminal P. C. (1898), S. 162 — 'Statement' — Dacoity case — Supplementary list of stolen articles.

In a dacoity the non-mention of a particular stolen article in the F. I. R. is by itself no strong ground for disbelieving the owner when subsequently he states that it was gone. It all depends upon circumstances, his status, the number of the articles that have disappeared and the confusion and the hurry. But, while the statement contained in the F. I. R. including the list of stolen articles, if any, is part of the earliest statement to the police, and therefore is admissible for corroboration "a supplementary list" whether oral or written, given to the officer during investigation, is really a statement under S. 162 and therefore admissible. Admitting into evidence the supplementary lists of stolen properties is wrong, and against the provisions under S. 162. The practical consequences of non-mention of certain properties in the F. I. R. is a question of fact depending on the circumstances. (Para 32)

Anno: Criminal P. C., S. 162 N. 3.

(m) Evidence Act (1872), S. 9 — Identification of articles — Conviction.

To convict anybody on the basis of identity of articles recovered from his house, is a very risky matter. There is always the danger of mistake. But it is lessened when the article is very distinctive in appearance, or when it is ordinary, there are a number of them. As a measure of prudence the Court would insist on the proved identification of two articles of distinctive appearance about which there cannot be any reasonable chance of mistake. (Para 35)

Anno : Evidence Act, S. 9 N. 4, 5.

(n) Penal Code (1860), S. 395 — Great prevalence of dacoity — Punishment.

In view of the great prevalence of dacoity in certain parts, a sentence even under S. 395 has to be severe; except where that section applies for purely technical or formal reasons, an adequate sentence is purely more than 7 years R. I. Thus whether or not S. 397 also applies in such a case is of little practical consequence as it only prescribes that when there are particular aggravating circumstances, the sentence shall not be less than 7 years. The actual sentence has to depend on the sections applicable and the circumstances of each case. (Para 35)

Anno: Penal Code, S. 395 N. 5.

(o) Penal Code (1860), Ss. 397 and 398 — Distinction.

The mere fact of carrying a fire-arm or other deadly weapon will not attract S. 397. That section does not say "carries or is armed with" but says "uses any deadly weapon, or causes grievous hurt or attempts to cause death or grievous hurt to any person". The distinction between "using" and "to be armed" is a material distinction and has been observed in the wording of Ss. 397 and 398. The latter section covers attempts only to commit dacoity or robbery when "being armed" is by itself sufficient. But if it is a case of committing robbery or dacoity the weapon has to be used or it should be an overt act, which amounts to attempting to cause death, or grievous hurt, or of actually causing grievous hurt. (Para 35)

Anno: Penal Code, S. 397 N. 3, S. 398 N. 1.

(p) Criminal P. C. (1898), Ss. 236 and 423— Charge under S. 395, Penal Code — Conviction under S. 412, Penal Code.

Under S. 236, charges under Ss. 395 and 412, Penal Code against an accused can be framed in the alternative, and a conviction under S. 395 can be altered to one under S. 412 in appeal when there is no surprise or prejudice. (Para 35)

Anno : Cr. P. C., S. 236 N. 9; S. 423 N. 31.

Avadh Bihari Lal, for Appellants; A. A. G., for The State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('43) AIR 1943 Cal 644: (45 Cri L J 258) (Pr 29)
('35) 58 Mad 642: (AIR 1935 Mad 528: 36 Cri L J 1442 (FB)) (Pr 15)
('41) AIR 1941 Mad 290: (42 Cri L J 407) (Pr 15)
('41) AIR 1941 Mad 675: (42 Cri L J 848) (Pr 29)
('29) AIR 1929 Nag 36: (29 Cri L J 963) (Pr 28)

JUDGMENT.: This is a criminal appeal by 7 persons from their conviction under Sections 395 and 397 I.P.C., by the learned Sessions Judge, Panna. Kartar Singh, Karhora Lodhi, Devi Singh and Tirlock Singh have been convicted under Sections 395 and 397, I.P.C., and sentenced to R. I., for 10 years each, and to pay a fine of Rs. 100/- each and with further R.I., in default. The three others have been convicted under Section 395, I.P.C. and sentenced to suffer R I., for 6 years each and to pay a fine of Rs. 100/- with further R.I. in default.

(2) Typical of the cases arising out of the recent epidemic of dacoity in the Bundelkhand, this involves several important points of law in regard to confessions, the application of S. 27, Evidence Act, the holding of test identification by police officers, the admissibility of supplementary lists of stolen articles given during investigation, and the requirements of S. 397, I.P.C.

(3) The facts of the case are the following: At about 2 p.m., in the afternoon of the 9th January 1951, some 12 men armed with various weapons including 3 country made guns, two country made pistols, and an axe, entered the house of Piarey Lal Lodhi at village Sarsi, Thana Raipur, in the Panna District. The menfolk of the house were away, but there were a number of women namely Piarey Lal's mother, his two wives, and his sister. The intruders frightened the women, threatening to shoot them, and also beat them with lathis, and thereby compelled them to deliver properties, which they took away. As Piarey Lal Lodhi is a man of substance, the takings were more than three thousand rupees worth, including Rs. 500/- in cash, ten gold mohars, and about Rs. 1,500/- worth of silver and gold ornaments. By the time the news reached him in a neighbouring village and he

returned with other villagers to help him, the dacoits had retreated with the booty.

(4) The F. I. R., was given against "unknown" with a list of 16 articles, obviously the more important of the stolen properties, whose loss was detected at once. Later on, a fuller list containing 37 more items was given to the investigating officer, which has been exhibited as Ex. P-2, for the prosecution. Presumably the police were hunting up clues for about one month, when from the 11th or the 12th February a number of arrests were made. Hanumat Singh was arrested on 11-2-1951, probably in connection with another dacoity. Tirlock Singh was arrested on the 13th, Karhora on the 14th, Dillipat Singh on the 13th, Raghubaria on the 14th and Kartar Singh on the 2nd March. Devi Singh is said to have come himself to the thana on the 12th March. Bhaggi Singh approver was arrested on the 16th February more or less at the same time as most of the other suspects; but his confession was recorded about 2 months later, on 18-4-1951. Three others, who have been acquitted by the learned Sessions Judge, were also arrested either on the 12th or the 13th. A number of articles were recovered from the possession of the arrested men; every one of them except Hanumat Singh also taking out certain properties and giving them to the police officer in the presence of search witnesses. The particulars of these recoveries have to be dealt with in extenso separately in regard to each of the appellants.

(5) Hanumat Singh was remanded to police custody on the 12th. He returned on the 14th, and immediately the police prayed for recording his confession, which was done on 15th. Baggi was arrested on the 12th, and seems to have remained in the police custody for nearly a month, in what circumstances, and under whose orders, it is not possible to ascertain from this record. His confession was recorded on 18-4-1951, after all arrests were made, and all properties had been recovered. He was pardoned subsequently and has been examined as an approver.

(6) The suspected persons, ten in all, were put up on a T. I., parade before a Magistrate with all the usual formalities. The inmates of the house picked out Kartar Singh and Raghubaria out of these appellants, Mt. Lotan and Piare Bahu identifying them as two of the dacoits. The identification of properties recovered from these two, is only supplementary to these identifications; while in regard to the others the evidence is solely of the recovery and identification of properties. T. Is. for the properties were done in all but one case by the Magistrate; the exception being that of Devi Singh the properties recovered from whom, were put on T. I., before a police officer.

(7) The accused denied that they had taken parts in the dacoity. Hanumat Singh withdrew the confession; Kartar Singh and Raghubaria questioned the fairness and regularity of the T. I. All the appellants denied that the properties had been recovered from or produced by them. In any case they argued that the ornaments are the most ordinary ones, and therefore unidentifiable and questioned the identification by the inmates of the house.

(8) The learned Sessions Judge considered the evidence. He accepted the identification of these two appellants; he tried to connect the recovered and identified properties with one or other noted in the F.I.R., list or "the supplementary" one. He held that these 7 men had taken part in the dacoity, four of them having armed themselves with the firearms. He convicted all under Section 395 and the four also under Section 397, I.P.C.

(9) There is altogether no doubt that there was a dacoity, in the manner given by the prosecution witnesses, in particular the women inmates. The takings were considerable, as Piarey Lal Lodhi is a big cultivator, and a moneylender as well. The question, therefore, is one of identifying whether this or that appellant was really in the dacoity. As far as Kartar Singh and Raghubaria go, the identifiction by the inmates leaves no reasonable doubt that they took part in the dacoity. The witnesses had altogetner no occasion to see these two before. It is not suggested, nor is it possible that there was any previous enmity or any previous incident, which could have prompted them to make false identification. There is also no chance of mistake in good faith as the dacoity was committed by broad day light, and the T.I., was held shortly after in Jail, by a Magistrate with all formalities and precautions. There is a two witness identification in each case, and this is sufficient to satisfy the requirements of prudence.

In addition, there was the evidence of some articles also; in the case of Kartar Singh of a Bahuta, or the silver ornament worn over the upper arm, and in the case of Raghubaria of a Mundri or challa, a silver ornament. These are single article identifications, and by themselves not of much significance; but the identification of the accused is by itself sufficient to prove their presence among the dacoits without any more evidence. It is unnecessary therefore to discuss the identification of recovered properties in their cases.

(10) As in most Bundelkhand dacoity cases, so in this also, there is an approver. The approver's evidence usually is of some value, if there is independent corroboration, firstly of his physical presence during the dacoity, and secondly, also of a particular nature of the parts he assigns to each of the accused persons. This presupposes strict observance of the principles of law and the rules of prudence in the recording of the confession and of granting pardon. Bhaggi Singh was arrested on the 16th February, and was taken on the next day or the 18th to his house where he dug out certain properties, which were subsequently put up for T. I. and are said to have been identified as theirs by Piare Lal Lodhi's people. He is supposed again to have taken the officers more than a month later on 21-3-51 and this time pointed out two weapons buried somewhere. His confession was recorded on 18-4-51 by when the investigation was complete. Whatever is contained in the confession either by way of names of suspects, or by way of particulars of properties, had already come out before this. No material contained in this confession made more than 3 months after the crime, and 2 months after the arrest of the approver, provided a clue either for the arrest of the suspects or the recovery of the properties.

Granting pardon and examining the approver is at best a necessary evil, in view both of approver's escape from punishment, and of the natural suspicion with which any Court would look upon the evidence in the best circumstances. However, sometimes the secrecy of the crime, and the scarcity of clues necessitate this course, solely for the apprehension of other offenders, the recovery of the incriminating objects, and production of evidence otherwise unobtainable. These can be safely considered to be only grounds on which pardon may be granted. In most cases the police officers are liable to get the necessary clues soon after the man's arrest, and obviously before the formal confession is recorded, but this will not be evidence. In the case of the approver even more than in the case of other witnesses it is essential that the Court should know what exactly he had stated at the

earliest stage, which is possible only when the confession is recorded early. It would also be of real advantage to the investigating authorities to have the formal record of the approver's statement at the earliest stage, because it will enable them to make use of the clues, if they are genuine, and save them from being misled, if the approver plays tricks. The Magistrate can better apply his mind to the question whether pardon should at all be granted.

On the other hand, when the confession is recorded late it is quite useless to look into the approver's evidence. An early confession would enable us to see if it contains verifiable indications of the approver's having personally taken part in the dacoity; but, if it is made at the close of the investigation this is impossible. In fact, any jail bird can be made to state that he was in this or that particular dacoity, describe what by that time is practically common knowledge, and name those already arrested by the police. Again, if the confession is recorded early, and contains particulars of the co-accused, the parts played or the properties taken by them, it is possible to arrest those, and check the correctness of the confession in the light of the results of the arrest and search. Thus the corroboration on particulars, can be obtained or at least looked for, and it would be of real assistance to the investigating officers. If it is recorded after the completion of the investigation, it cannot serve the purpose of giving fresh clues, but can only be used for the dubious purpose of emphasising or completing a pre-conceived prosecution theory by attempting to fill in the gaps in the evidence.

(11) Arrested on the 16th he has pointed out the properties on the 18th, but we find him again in Police custody on the 21st March 1951 trying to help in the recovery of two weapons that are said to have been concealed. The learned S. J. remarks and rightly that the so-called recovery on the 21st March is an absolute farce. Certainly it is, but that is not the point just now. I have been at pains to find out how this Bhaggi Singh happened to be in police custody on two occasions and to ascertain the dates on which, and the reasons for which police custody, was ordered, and he was brought back to the lock-up. In this record I am not able to find any such orders, the indication being that Bhaggi Singh was in Police custody for more than one month, which is certainly illegal. Possibly there were several dacoity cases being investigated at about the same time, with Bhaggi Singh being an accused in two or more of them. Possibly he was put in Police custody in each case for less than 15 days, but for a total of more than one month. The whole thing is obscure, and I am not able to ascertain the exact course of events as the records of other dacoity cases, if any, are not before me. One thing, however, is certain that the statement of an approver, whose confession is recorded after the practical completion of the investigation, and who has been in Police custody for a very long time, is utterly useless.

(12) The mere perusal of the approver's evidence shows that there is nothing in it which would require that the maker must have been a first hand witness of what he describes. He gives certain names; those being of persons arrested long before, and describes a story which anybody can give without having even seen the dacoity. Nor is there any verifiable particular in regard to any of the other dacoits named in the F.I.R. I have discussed this approver at this length, as nearly in every dacoity case from Bundelkhand there is one, and often his evidence is of no use in the ascertainment of truth.

(13) **Hanumat Singh:** Hanumat Singh confessed, but subsequently retracted. This appellant was arrested on the 11th February probably in connection with another case. He was taken in police custody ostensibly for pointing out properties, but with results that I shall presently describe. He returned on the 14th, and on the same date the Police gave a petition that his confession might be recorded which was done on the 15th. There is a very considerable difference between a confession recorded 'before' an accused is placed in police custody, and one recorded immediately 'after' it. In fact, in the former event, the contents of the confession may themselves be the reason for placing him in police custody for pointing out the places or recovering of the articles which he divulges in the confession. If on the other hand, he is put in police custody, and returns with a readiness to confess, it is obvious that it has been the stimulant. In such circumstances, I would expect the Magistrate to give much longer time, and some special caution before recording the confession at all. Such a confession even if unretracted is by itself of little value unless corroborated. Here the confession has been recorded and has been withdrawn and there is a greater need for it.

(14) This takes us to the question of the alleged recovery of properties. On Hanumat Singh's statement while in police custody the officer went to the house of one Bhupat Singh. The properties did not come from Bhupat Singh's house. Bhupat Singh, who is a witness (P. W. 18) has stated in evidence that Hanumat Singh had brought a bundle to his house and buried it in a room there. Sometime later Dillipat Singh, brother of Hanumat Singh, asked Bhupat to make over the properties to Ram Piarey Brahmin; Bhupat Singh accordingly did so. Ram Piarey, who has also come as a witness (P. W. 19), says that Bhupat Singh gave him certain properties, and that he gave them to the Police Officer. Now it is obvious that Bhupat Singh and Rampiarey are both in the position of accomplices, and any statement by them alleging that the properties had come from Hanumat Singh has to be looked upon with greatest suspicion and rejected unless there is independent corroboration.

These two in fact admit to be the agents for disposal of dacoity-stolen properties, and 'yet are not' prosecuted, but are brought as witnesses. Hanumat Singh's confession has also to be rejected unless there is independent corroboration, especially as it was made 'after' all these movements in search of the properties. The alleged statement of Hanumat Singh while in police custody has been sought to be introduced as evidence under S. 27, Evidence Act, and then utilised as corroboration of his subsequent confession before a Magistrate.

(15) On the facts, in view of the circumstances in which this statement is said to have been made, and the properties not being found or discovered in Bhupat Singh's house, this statement of Hanumat Singh while in police custody is of very little value indeed, even if it was admissible. But in my opinion the alleged statement is inadmissible. The law applicable is contained in S. 27 of the Evidence Act, which has been variously interpreted by the High Courts, the difference mainly centring round: firstly, whether the "fact discovered" in consequence of the information is a material fact, in other words, the discovery of a material incriminating object; or whether it includes any abstract fact the police officer learns because of the information, secondly, when part of the information or confession alone is to be admitted where to draw the line upto which it relates "distinctly to the fact discovered".

The more general view is that the "fact discovered" should be a material or physical object and not merely a piece of knowledge newly acquired. If the information is that at such and such a place a particular object has been thrown away or blood has been shed, it should be the discovery of that object or of the blood marks. It is not sufficient, if the information is to the effect that, if so and so is asked, he will tell about the property, and that person does tell something about the propetry which leads to its being found. The word used is "discovered" and not "learned"; the former implying that a physical object is actually present all the time, and the information leads to its being uncovered and exposed. While this is the more general view the lower Court seems to have followed one of those cases in which "the fact discovered" has been given a wider sense such as the Madras case reported in 'EMPEROR v. RAMANUJAM', 58 Mad 642

> "There the majority view was the facts referred to in S. 27 are not confined to actual physical material objects. They need not be of such a nature that by themselves without any accompanying statement of a witness, they demonstrate the truth of the information; in other words, the facts need not be 'self-probatory'."

The minority view was that the word 'fact' is used

> "in S. 27 in the sense of a physical fact which can be perceived by the senses. The fact discovered should, therefore, be a material and not a mental fact; and the word 'discovery' is used in that section in the sense of finding upon a search or inquiry of article connected with the crime or other material fact. The discovery of a witness to the crime or act of the accused, on his information, would not be a discovery of fact within the meaning of S. 27; and the confirmation or otherwise of the statement of the accused by the witness discovered cannot make any difference."

It is of interest to note that in this case 'independently of the questioned statements' it was held by the same judges that there was sufficient evidence to justify the conviction (ibid p. 668). In a later case reported in 'In re R. RAMAMURTHY', AIR 1941 Mad 290 the majority view of wider interpretation of the phrase 'facts discovered' was followed.

(16) I am inclined to take the view, that "facts discovered" mean the physical perception of a material fact, and not merely learning of a mental fact or the contacting of a witness. This enlarged meaning of "fact discovered" given in this Madras ruling ignores distinction, between the processes of "learning" and of "discovery", and is further fraught with the danger that anything learnt as a result of the information given by the accused might enable it to be introduced in evidence. Moreover, S. 27 provides an exception to the general law about confessions enunciated in the 3 preceding sections, and like all exceptions should be narrowly interpreted.

(17) Coming to the present case, Hanumat Singh's statement while in police custody was something like this: "I have buried in a room in Bhupat Singh's house certain properties stolen in the Sarsi dacoity." Going to Bhupat Singh's house the officers do not find it, and do not discover anything. They contact a new witness who as a fact is an accomplice deserving to be prosecuted; after examining him, they go to Ram Piarey, and receive certain properties from him. Now these properties from Ram Piarey are received possibly as the result of some information given by Bhupat Singh and certainly by Ram Piare himself, which information may become admissible under S. 27, Evidence Act. But they are not discovered or received as a result of the confession given by Hanumat Singh while in police custody.

(18) Nor is any part of Hanumat Singh's statement 'distinctly' connected with the discovery of properties with Ram Piare. The words "distinctly", "strictly" and "immediately", all of which will mean the same thing in this context, exclude the admission of the statement into evidence, if there is any other conscious agency or will intervening between the information and the discovery. When there has had to be further inquiry of an independent nature before the discovery is made, one cannot hold that it is "distinctly" related to the information or confession. That way also Hanumat Singh's statement would be inadmissible.

(19) I have examined the legal aspect of this question because nearly in every case of dacoity we are told that the properties were discovered upon the clue or information given by the accused, the language invariably being "ba..nishan dehi mulzim ke paya gaya". Section 27, in fact seems to be the constant refuge of prosecution authorities in many of these dacoity cases, who overlook the limitations that are implicit in that section.

(20) As far as Hanumat Singh is concerned even if the statement was admissible its probatory value is practically nothing. The confession, it should be noted, was made after this quest for properties with Hanumat Singh in police custody, and immediately upon his return from police custody. That Ram Piare gave these properties to the police officer is almost certain; that some of them, at any rate, were picked out by Piarey Lal Lodhi's people as their properties is also very likely; but surprisingly enough the person who was keeping them, and Bhupat Singh upon whose information these were discovered, have been let off, and examined as witnesses. Whatever that might be, the connection between the alleged statement of Hanumat Singh while in Police custody and Ram Piarey's producing the articles depends solely on the evidence of Bhupat Singh and Ram Piarey, persons, who are practically accomplices, and who had their own reasons to save themselves and throw the blame on somebody already arrested by the Police in the Sarsi dacoity.

(21) The result is that Hanumat Singh's confession was made in circumstances indicating pressure, if not actual physical violence. It has been retracted and has not been corroborated. He is, therefore, entitled to be acquitted.

(22) It appears that an argument was seriously put forth in the lower Court that the retracted confession of Hanumat Singh could be used as corroborative material to the statement of approver. I do not at all accept this view.

(23) Trilok Singh: Trilok Singh was arrested on 13-2-51. After arrest he took the officers and the search witnesses into his house and produced a bundle of silver articles pushed into the roof below the eaves. A formal list signed by the witnesses was made. Elsewhere in the house a country made gun was concealed and was also recovered. At a third place Trilock Singh removed a mat and from under it took a bundle containing more ornaments. All these ornaments were put up for T. I. before a Magistrate. Trilock Singh has no doubt denied the discovery, but there is evidence not only of the officers, but also of the search witnesses supported by the documents made at that time. Trilock Singh is also alleged to have accompanied his act of making over these ornaments by certain statements. Here again, there is some difference of opinion between the High Courts. Evidence of the

act itself is admissible, but whether the statement is admissible or not would depend on whether it distinctly relates to the discovery. Even when it is directly explanatory of the act, I do not think it is admissible because the explanation, however closely connected with the fact, does not relate to the discovery itself. So those statements have to be ignored.

(24) The ornaments recovered from Trilok Singh were put up for T. I. with due formalities and mixed with a number of similar ornaments in each instance. Three out of the inmates of the house namely Piare Babu, Lotan Bai, and Munaia identified three articles. The first is a single Bahuta weighing about 25 tolas, the weight of the pair being given as 46 tolas in the F. I. R. Then there is the general similarity and marks on the article like the letter ह . The other article is a silver karanphul or ear-pendant of silver. It is used in pairs, but only one of the two was recovered from Trilok Singh. This again is distinctive in appearance and has been satisfactorily identified. The third item are a number of old and obsolete coins which have been stored for their value as silver. They are essentially non-identifiable articles and I do not attach any significance to their identification. However, the two other articles are very distinctive in appearance and are proved to a degree of practical certainty, to be ones stolen during the dacoity. Not only has Trilok Singh given no explanation, but also are the places he has kept them such as to indicate that he was concealing them from possible search and recovery. These stolen articles were recovered from Trilok Singh not immediately after the crime, but after a month later. I would, therefore, alter his conviction from one under S. 395 to one under. 412, I. P. C.

(25) Devi Singh: This appellant was not arrested for some time and was reported absconding. The evidence of the investigating officer is that he had asked certain people to pursuade him to surrender. This may be perfectly true, but is of no direct bearing here. Devi Singh appeared at the thana on 12-3-51 and surrendered. He had brought a number of articles to the thana which were noted in a seizure list, and signed by witnesses. Four out of them are said to have been identified, they being a chura or bangle, a coin, an axe and a blanket. From his house a country made gun was also recovered, which the approver pointed out as the very gun which Devi Singh was carrying during the dacoity. For reasons already noted one can safely ignore approver's evidence. The articles alleged to have been identified by the inmates of the house are four, three of which at all events are most common and altogether unidentifiable, being a coin, an ordinary axe, and a blanket without marks; the fourth is an ordinary chura or plain silver bangle also without any distinctive marks. An interesting point with this chura is that it weighed 13¾ tolas. It is sought to be identified with 5th article in the F. I. R. list, weighed only 25 tolas to the pair i.e., 12½ tolas to the piece. Possibly this is approximate. At best of times the identification of articles involves uncertainty, but if it is one article identification, and that is not very distinctive in appearance, it would be very unsafe to convict.

(26) But there are other circumstances also. The accused himself is supposed to have come to the thana not only to surrender but also to produce the stolen articles now in his possession. This was the result of certain persuasions or bait held out to him, the details of which we are naturally unable to ascertain. I am not for the moment suggesting that such persuasions or bait are illegal, or should not be given. There may be cases in which this method of catching offenders is the most expedient one, but when the accused himself brought the properties to the thana we should have good evidence for holding that they were stolen properties, and not his own property, which the accused was bringing to the police so as to earn their goodwill.

(27) There is one very strong reason why the identification of these articles should not be taken into account. Where the T. I. for the articles recovered from or made over to the Police by the other suspects in this case was held by a Magistrate, that for Debi Singh's articles was held by a Police Officer connected with investigation. At all events, on the ground of inexpediency (at least, if not of illegality) the holding of T. Is. for suspected men and articles by investigating Police Officers is to be strongly disapproved. In other rulings this Court has pointed out this inadmissibility on both the grounds. The formalities and the precautions necessary have also been described in other decisions. The T. Is. should be held by Magistrates, and where they are not available by intelligent and fair-minded members of the public, but never by Police Officers; the formalities and precautions should also be observed. The objection to this course on the grounds of expediency and fair play is so obvious as to need only bare mention.

In many dacoity cases identification of recovered articles is the only and at all events the most important material. A mistake in the procedure, or an intentional or unconscious prompting of the witnesses will surely lead to the conviction of a wrong person, and the escape of the real offender. It is not suggested that the Police Officers will intentionally forge identification charts or openly prompt the witnesses to make identifications, but the fact remains that the officer has a very commendable interest in the success of the prosecution, and has already framed his own theories about the guilt of the person concerned. It is only human that he might by excessive zeal, unconscious mistake, and unintentional prompting, bring about results in support of his theory.

(28) I also hold that the results of T. I. by a Police Officer would be inadmissible under S. 162 of the Criminal P. C. The case law on the subject is somewhat conflicting. In the Nagpur case reported in 'RAMADHIN BRAHMIN v. EMPEROR', AIR 1929 Nag 36, it was held:

> "a statement of Police Officers, who give evidence with regard to the identification parades which were held and who depose to certain of the accused persons having been identified by P. Ws. in an identification parade, is not inadmissible in evidence under S. 162 as their evidence does not relate to any statement made to the Police, but is a simple exposition of the fact or circumstance witnessed by themselves."

Actually in this case the J. C. Nagpur was distinguishing and disagreeing from a Rangoon High Court Full Bench ruling which being probably unreported, I am unable to trace out. The question is whether the witnesses identifying the object or person during a T. I. is a statement which is ruled out by S. 162, Criminal P. C., or another fact or circumstances, which is not.

If one visualises what exactly happens during a T. I. he has to hold that it is a statement and nothing else. The men or the articles are mixed up with similar non-suspected men or non-suspected articles, and certain precautions are taken to eliminate prompting, accidental identification and the like. Then the person holding the T. I. calls in the witnesses one by one. He asks them to point out if any of the articles before them be-

longs to the house owner, or whether any of the men standing before him have taken part in the crime. The witness goes and either states something, or touches or holds the articles or the men. He need not say anything but the very process of touching or pointing out is equivalent to stating that

"this article belongs to so and so, or comes from his house, or this man was among the dacoits that entered the house."

Sometimes the witness states in so many words; sometimes he does this by gestures implying words. In fact, this pointing out or identifying is a statement used for corroboration of the witness's statement in Court, the corroborative value depending upon the nature of the precautions taken.

(29) This is exactly the view held in the Calcutta ruling reported in 'KHABIRUDDIN v. EMPEROR', AIR 1943 Cal 644.

"Section 162 embraces all kinds of statements made to a Police Officer in the course of the investigation. The evidence of the fact of identification is nothing but the evidence of statements which constitutes an identification in a compendious and concise form. Any identification of stolen property in the presence of a Police Officer during investigation is a statement made to the Police Officer during investigation and is, therefore within the scope of S. 162. The pointing out by finger or nod of assent in answer to a question is as much a verbal statement as statement by word of mouth. The witnesses should not be allowed to depose to a fact that they had identified the stolen property in the presence of the Police Officer."

In the ruling reported In Re: 'KSHATRI RAM SINGH', AIR 1941 Mad 675, it was held,

"any evidence about the statements made by witnesses at the identification parade held by the Police in the course of investigation is excluded by S. 162, Criminal P.C., but the fact that the witnesses have identified persons at parades held by the police may be proved."

In so far as the statements are concerned this is to the same effect as the Calcutta ruling, but it proceeds on the assumption that the witnesses identifying at parades is something other than statements. It is this view-point that has been more or less clearly distinguished in the Calcutta ruling.

The only significant part of the identification is a statement by word or gesture to the following effect.

"This man was among those that entered so & so's house, or picked so and so, or was seen running away and the like."

It would be most illogical to hold that when the witness states this, then the identification is inadmissible, but when without stating any answer to the question, he points out or touches or nods it becomes admissible. The result of the discussion is that I hold that where the T. I. is held by a Police Officer the fact that a witness identified the suspected articles or men cannot be adduced into evidence.

(30) For all these reasons the case against Devi Singh is not proved. He is, therefore, entitled to be acquitted.

(31) 'Karhora Lodhi'. This man was arrested on 14-2-51. In the presence of the witnesses his house was searched. From a box in his house certain articles were recovered including a silver challa and a sutia. He also took them to a part of his house and dug out of the ground certain other articles namely a todar, a bahuta, a coin (sikka), a gujaria, all of silver, and a golden bali. All these were put up along with similar articles for T. I. before a Magistrate with the usual precautions. The sikka by its very nature was unidentifiable, but the other articles namely challa, sutia, todar, bahuta, gold bali and gajaria were identified by Piaryee Bahu, Rania, Lotan and Piarey Lal Lodhi as properties that had been stolen from their house during the dacoity. While the bahuta, sutia, and the golden bali are identifiable in every respect with those described in the F. I. R. itself, the three other articles, todar, gajaria and challa, are not named in the F. I. R. list. However, in this case, as in many others, there is what has been called a supplementary list, the admissibility and the corroborative value of which have to be discussed in extenso.

(32) The confusion created in a dacoity by the removal, destruction, or scattering of properties, is such that it does take some time for the house owner to make a full list of the properties removed. All the same, he has to inform the police as soon as possible, both to enable them to find out the offenders, and to bring on record the earliest picture of the happening. Therefore, sometimes no list of properties is given in the F. I. R., or only the more important properties are noted. If no list is given he says that he is making the list and he will give it as soon as possible. If the list is given in a hurry he states that he is looking up and will inform the police, if he discovers that some more things have also gone. Thus the non-mention of a particular stolen article in the F. I. R. is by itself no strong ground for disbelieving the owner when subsequently he states that it was gone. It all depends upon circumstances, his status, the number of the articles that have disappeared and the confusion and the hurry. It is quite usual, that by the time the Police arrive, a full inventory is made and the officer is informed, or that in addition to those already given in the F I R. the loss of some more articles is reported. But, while the statement contained in the F. I. R. including the list of stolen articles, if any, is part of the earliest statement to the police, and therefore is admissible for corroboration, "a supplementary list" whether oral or written, given to the officer during investigation is really a statement under S. 162, Criminal P. C., and therefore inadmissible.

The practical consequences of non-mention of certain properties in the F. I. R. is a question of fact depending on the circumstances. In such a case the first informant states in his evidence that he gave a list in the F. I. R. of such and such articles, and that subsequently he discovered that these other articles had also been removed. He could not give a complete list in the F. I. R. because he was in a hurry. The P. P. should also bring on record the exact time the witness found out that these other articles had also been stolen. It is open to the accused to ask with reference to the statement to the Police Officer, whether at all and on what date or what stage of investigation he had apprised the police that they had gone. The Court should decide, how far the delayed discovery of the loss of a particular article affects the truth of the witness's story on this particular, and at all events, whether the loss of any article is reported after any clue to its recovery has been obtained. These are questions of fact varying in each case. Admitting into evidence the supplementary lists of stolen properties is wrong, and against the provisions under S. 162, Criminal P. C.

(33) The witnesses have stated that in addition to the F. I. R. properties certain other properties including these three had been stolen from the house. In view of the large number of properties

and the confusion created in the dacoity, I find that the non-mention of these comparatively smaller and less valuable properties in the F.I.R. list is no indication that the witnesses are exaggerating or dishonestly adding to the list of stolen properties. Nor has the accused concerned sought to bring out any contradiction. The manner in which he had concealed several of them is an indication that he was anxious to keep them away from the reach of the police; in this context it is a case of guilty knowledge. He denies that he was in possession of these articles. This denial is not acceptable because the evidence of the search comes not only from the police officers but also from the search witnesses. However, in view of the lapse of time between the dacoity and the recovery of stolen articles from this appellant I think it is safer to convict him under S. 412, I.P.C. instead of under S. 395, I.P.C.

(34) 'Dillipat Singh': This appellant was arrested on 13-2-51. Taking the police officer and the search witnesses, into his house he picked out of a jar of pickles, two silver articles namely one khangoria and one chura. The appellant denies this and makes allegations against the search witnesses. But the denial is of no significance and allegations of enmity have not been brought home. These two articles were put up for T. I. before a Magistrate with due formalities. As the khangoria has been identified only by one witness, the chances of mistake are very considerable in regard to it; so it is not safe to take it into account. This leaves us the silver chura as the only article that has been identified by three inmates. To convict anybody on the basis of identity of articles recovered from his house, is a very risky matter; there is always the danger of mistake. But it is lessened when the article is very distinctive in appearance, or when it is ordinary, there are a number of them. As a measure of prudence I would insist on the proved identification of two articles of distinctive appearance about which there cannot be any reasonable chance of a mistake.

One pair of silver chura of a weight of 25 tolas was taken in the dacoity. It is supposed that one of the two is identical with that recovered from Devi Singh actually weighing 13¾ tolas; the other is sought to be identified with the one given by Dillipat Singh. The churas described in the F.I.R. as well as one found here are plain solid silver rods bent round to form a circle. The other ornaments like the bahuta and karanphool are on some elaborate moulds with distinctive marks. But with a chura of a common type and no distinctive marks, the risk of mistake is very great. I note further that this article was exceptionally clean and bright when put up on the T. I. If, as is not unlikely, the witnesses had heard of the contents in the seizure list, and that this article had been taken out from a pot of lemon pickles, they could have easily picked out this acid cleaned one. Any way, I am not prepared to support the conviction based upon the identification of a single article of no distinctive pattern with no other corroboration whatsoever. The concealment is a circumstance no doubt; but it is not strong corroboration in these circumstances. I, therefore, give the benefit of doubt to Dillipat Singh and allow his appeal.

(35) Out of the four whose convictions have been upheld here, Kartar Singh, Karhore and Trilok Singh have been convicted by the lower Court under Ss. 395 and 397 I. P. C. In view of the great prevalence of dacoity in these parts, a sentence even under S. 395, I.P.C. has to be severe; except where that section applies for purely technical or formal reasons, an adequate sentence is surely more than 7 years R. I. Thus whether or not S. 397 also applies is of little practical consequence, as it only prescribes that when there are particular aggravating circumstances, the sentence shall not be less than 7 years. The actual sentence has to depend on the sections applicable and the circumstances of each case. But the aggravating circumstances which attract S. 397 have not been properly understood by learned Sub-J. In this case he finds primarily on account of the approver's evidence that these persons had fire-arms while committing a dacoity. For reasons already noted, I attach no weight to the evidence of the approver, and I would not find as a fact that these, or Kartar Singh only, had fire-arms; but that is not the point here.

The mere fact of carrying a fire-arm or other deadly weapon will not attract S. 397, I.P.C. That section does not say "carries or is armed with" but says "uses any deadly weapon, of causes grievous hurt or attempts to cause death or grievous hurt to any person". The distinction between "using" and "to be armed" is a material distinction and has been observed in the wording of Ss. 397 and 398, I.P.C. The latter section covers attempts only to commit dacoity or robbery when "being armed" is by itself sufficient. But if it is a case of committing robbery or dacoity the weapon has to be used or it should be an overt act, which amounts to attempting to cause death, or a grievous hurt, or of actually causing grievous hurt.

In the result, the appeals of Kartar Singh and Raghubaria are dismissed, their convictions under S. 395, I.P.C., are upheld and the sentences maintained. The convictions of Trilok Singh and Karhore are altered to ones under S. 412, I. P. C. Charges under that section could have been framed in the alternative under S. 236, Criminal P. C., and from the way in which the evidence against them has been placed, there is no surprise or prejudice. The sentence already imposed on these two would be deemed to have been imposed under S. 412, I. P. C. The appeals of Hanumat Singh, Devi Singh and Dillipat Singh are allowed and their convictions and sentences are set aside. They should be released forthwith unless wanted in some other case.

(36) As important points of procedure during investigation have been discussed a copy of this judgment should be given to the learned Advocate General for communication to Government.

D.H. Order accordingly.

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KRISHNAN J. C.

Kedar Ram and others, Accused-Applicants v. Ram Bharosa, Complainant, Opposite Party.

Criminal Revn. No. 255 of 1951, D/- 21-2-1952.

(a) Criminal P. C. (1898), S. 436, Proviso — Notice — Complaint dismissed — Further enquiry — Practice of noticing and hearing accused disapproved.

Sometimes Sessions Judges do notice the opposite party in proceeding under S. 436 against the dismissal of complaints; but it is not the requirement of law as the proviso to that section governs only those cases in which the accused having been summoned and evidence having been recorded, he is discharged. On the other hand, there is no provision for notice when it is the dismissal of a complaint. This distinction is sound, because in the former

case, there has been a judicial weighing of the pros and cons of the case. But when a complaint has been dismissed summarily, or after inquiry under S. 202 or for default of process fee, there has been a consideration only whether there is a prima facie case. Having no locus standi till he is summoned, the accused has no right of being heard, and an order for further inquiry without noticing and hearing him is perfectly legal. (Para 4)

Even as a measure of prudence, it is inadvisable normally to notice him in such a proceeding though in exceptional cases the Sessions Judge may include in his order for further inquiry, a direction to the effect that the accused may be given an opportunity of producing this or that public document of showing any patent and non-controversial matter in regard to the dispute. Again, if before passing the order under S. 203, the Magistrate himself has heard the accused, and has taken into account any non-controversial matter brought in by him, it is prudent though not legally necessary, that before ordering further inquiry under S. 436, Criminal P. C., the Sessions Judge should hear the accused on that point. In general, whether it is a Magistrate or anybody ordered by him holding an inquiry under S. 202, or whether it is a Sessions Judge entertaining an application under S. 436, Criminal P. C., the practice of noticing and hearing the accused should be disapproved. (Para 5)

Anno: Criminal P. C., S. 436 N. 15.

(b) Criminal P. C. (1898), S. 202 — Cognizable case — Complaint to Magistrate — Complainant should not be sent to police except for special reasons.

Even in a cognizable case, the complainant going to the Magistrate direct should not be sent to the police except for special reasons. The Criminal P. C. gives the complainant the option of moving the police or filing a complaint. Often the former is more expeditious; and by filing complaint the complainant incurs expenses, suffers delay, risks the disappearance of clues and traces, and allows the witnesses to remain unexamined for sometime. These are important in assessing the evidence. When complainant comes to the Court directly, even in a cognizable case, it is obvious that he does not choose to go to the police and should not be driven back to them unless it is in public interest that the police should inquire or investigate. (Para 6)

Whenever an informant is dissatisfied with the final report of the police, he files what is usually called a protest petition. It is really a complaint in the eyes of law and should be treated as such. The complainant should be examined on oath and the Magistrate should either issue summons or order inquiry or dismiss it summarily. If the complainant has already been examined on oath before the matter has gone to the police, he need not be examined a second time; but the case will be one on complaint, and not on report by police. (Para 7)

Anno: Criminal P. C., S. 202 N. 9, 20.

(c) Criminal P. C. (1898), S. 203 — Dismissal of complaint — Dismissal order should contain reasons.

Whether the complaint is dismissed summarily or on a report on inquiry under S. 202, Criminal P. C. or on the results of the police investigation either on the complaint itself or on another F. I. R. relating to same case, the order of the dismissal under S. 203, Criminal P. C. should contain the Magistrate's reasons. Simply writing that the report is adverse or that the police have considered the matter is not sufficient. The Magistrate should apply 'his' mind to the complaint and the report on inquiry, and give his own reasons. No doubt, he may derive material from the report but he should satisfy himself that the report is logical and fair. Failure to give Magistrate's own reasons will lead to orders for further inquiry and duplication of the work, with consequent loss of the public time and harassment to parties. (Para 8)

Anno: Criminal P. C. S. 203 N. 10.

Anand Chand Joshi, for Applicants; Ramesh Pratap Singh, for Opposite Party.

ORDER: This is an application by the accused in a complaint case, from the decision of the learned Sessions Judge under S. 436, Criminal P. C. ordering further inquiry, without noticing and hearing him.

(2) Though this is a trivial case, it provides occasion for this Court's giving the badly needed guidance to the Magistrates of this State about disposal of complaints.

(3) This was a complaint of false personation for executing a sale-deed under Ss. 419, 423, 205 and 109, I.P.C. Prima facie it is cognizable case, but the complainant chose to file complaint before the Magistrate. Having examined the complainant on oath, he sent the matter to the Police ordering that this should be treated as F. I. R. and investigated. Accordingly the Police investigated and gave a final report that no prima facie criminal case was made out. Sometime before the report was received, and possibly guessing its contents, the complainant filed a petition that the Police were taking sides, and wanted the matter to be taken up as a case of complaint. By the time this petition was considered, the Police report had come. The learned Magistrate accepted the report and in effect dismissed the complaint under S. 203 on the ground that the Police had given an adverse report after investigation. From this order, the complainant went up in revision under S. 436 to the Sessions Judge. The Sessions Judge considered the application, and without noticing or hearing the present applicant, (the accused in that case) ordered further inquiry.

(4) The applicant's grievance is that he was not heard. Sometimes Sessions Judges do notice the opposite party in proceeding under S. 436 against the dismissal of complaints; but it is not the requirement of law as the proviso to that section governs only those cases in which the accused having been summoned and evidence having been recorded, he is discharged. On the other hand, there is no provision for notice when it is the dismissal of a complaint. This distinction is sound, because in the former case, there has been a judicial weighing of the pros and cons of the case. But when a complaint had been dismissed summarily, or after inquiry under S. 202 or for default of process fee, there has been a consideration only whether there is a prima facie case. Having no locus standi till he is summoned,

the accused has no right of being heard, and an order for further inquiry without noticing and hearing him is perfectly legal.

(5) Even as a measure of prudence, it is inadvisable normally to notice him in such a proceeding, though in exceptional cases the Sessions Judge may include in his order for further inquiry, a direction to the effect that the accused may be given an opportunity of producing this or that public document of showing any patent and non-controversial matter in regard to the dispute. Again, if, before passing the order under Section 203, the Magistrate himself has heard the accused, and has taken into account any non-controversial matter brought in by him, it is prudent, though not legally necessary that before ordering further inquiry under Section 436, Criminal P.C., the Sessions Judge should hear the accused on that point. No such occasion arose in the present case. In general, whether it is a Magistrate or anybody ordered by him holding an inquiry under Section 202, or whether it is a Sessions Judge entertaining an application under Section 436, Criminal P.C., the practice of noticing and hearing the accused should be disapproved. The scope of these enquiries is not the weighment of the pros and cons, but only the ascertainment of the prima facie case, if any Proper weighing of the evidence and decision can be done only in a proper trial, and any attempt to do this in proceedings under Sections 202 and 436, Criminal P.C., is unnecessary and virtually impossible. If the accused himself comes, he may be allowed to produce documents of a public nature, or to show patent and non-controversial matters; sometimes it may happen that such non-controversial matters clear up the entire case. But it should be a matter that this is absolutely non-controversial which if known to the inquiring officer will be automatically taken into account and the accused does nothing more than to apprise him of its existence.

(6) I may also point out here that even in cognizable case the complainant going to the Magistrate direct should not be sent to the police except for special reasons. Our criminal procedure, gives the complainant the option of moving the police or filing a complaint. Often the former is more expeditious; and by filing complaint the complainant incurs expenses, suffers delay, risks the disappearance of clues and traces, and allows the witnesses to remain unexamined for sometime. These are important in assessing the evidence. When complainant comes to the Court directly, even in a cognizable case, it is obvious that he does not choose to go to the police and should not be driven back to them unless it is in public interest that the police should inquire or investigate. For example there may be cases of kidnapping, abduction, or violent theft or dacoity calling for immediate arrests and searches, or pursuit of the accused or the property into another jurisdiction or the stopping of a continuing offence involving danger to the public. In such cases, a private party is not capable of adequate and effective action; and they have to be made over to the police. Otherwise, the case should proceed on the complaint.

(7) There is one principle worth noting here that Magistrates often lose sight of. Whenever an informant is dissatisfied with the final report of the police, he files what is usually called a protest petition. It is really a complaint in the eyes of law and should be treated as such. The complainant should be examined on oath and the Magistrate should either issue summons or order inquiry or dismiss it summarily. If, as in this case, the complainant has already been examined on oath before the matter has gone to the police, he need not be examined a second time; but the case will now be one on complaint, and not on report by police.

(8) Finally, I note in this case that in his order which amounts to a dismissal under Section 203, Criminal P.C., the learned Magistrate has not given his reasons. Whether the complaint is dismissed summarily or on a report on inquiry under Section 202, Criminal P.C., or on the results of the police investigation either on the complaint itself or on another F.I.R., relating to same case; the order of the dismissal under Section 203, Criminal P.C., should contain the Magistrate's reasons. Simply writing that the report is adverse or that the police have considered the matter is not sufficient. The Magistrate should apply 'his' mind to the complaint and the report on inquiry, and give his own reasons. No doubt, he may derive material from the report but he should satisfy himself that the report is logical and fair. Failure to give Magistrate's own reasons will certainly lead to orders for further inquiry and duplication of the work, with consequent loss of the public time and harassment to parties.

(9) Hundreds and thousands of complaints are disposed of every year but each complaint calls for consideration in the light of the principles outlined above.

(10) The application in revision is dismissed.

V.B.B. *Revision dismissed.*

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KRISHNAN J. C.

Babulal and others, Defendants-Appellants **v.** Jagat Narain and others, Plaintiffs-Respondents.

Civil Appeal Nos. 74 and 90 of 1952, D/- 23-2-1952.

(a) Civil P. C. (1908), O. 6 R. 2 — Variance between pleading and proof.

A question about alleged or apparent variation of pleadings by evidence is most often one of prudence rather than of law pure and simple. So no general abstract guiding principle can be laid down.

There may be an amplification of a pleading worded somewhat too generally and vaguely. This has to be allowed as long as the obscurity in the plaint is cleared early enough during the hearing to give the other party an opportunity of grasping the details and reply to them.

The variation may be supplementary to a pleading already set out, but in no manner inconsistent with it. In such a case, the Court should consider, whether the new material is something that arises out of the pleading, and is not inconsistent with it. Such variation can be proved provided there is no surprise and the other party has had a reasonable opportunity to answer. If that variation is admitted by the other party itself, there is no surprise and there can be altogether no objection to its being proved and the suit decided according to it. Case law reviewed. (Para 19)

Anno: C. P. C., O. 6 R. 2 N. 9.

(b) Contract Act (1872), S. 230 — Liability of agent on contract — Agent undertaking personal responsibility.

Under S. 230, every agent, who undertakes personal responsibility for payment is personally liable, and can be sued in his own name on the contract, unless the other contracting party elects to give exclusive credit to the principal. (Para 22)
Anno: Contract Act, S. 230 N. 3.

(c) Contract Act (1872), Ss. 182 and 211 — Adat System — Kachha and pucca — Distinction.

The distinction between kachha arhtia and pucca arhtia properly so-called, is that the former is a general type of agent, while the latter is of a special type pledging his credit, and for certain purposes himself acting as the principal, his English counterpart being a del credere agent. Case law referred. (Para 22)
Anno: Contract Act, S. 182 N. 5; S. 211 N. 1.

(d) Contract Act (1872), Ss. 226 and 234 — Agent's Contract — Liability of principal — Election by contracting party.

The principal's liability is always there, whether or not there is a contract which fastens the liability on the agent also and does not cease except when there is an election or some form of estoppel by the contracting party. The Indian law of election is embodied in S. 234, Contract Act. To enable the principal or the agent to claim exemption from liability two conditions are essential: the contracting party should have induced a belief in one of them that he is going to hold the other alone liable. Second, this belief should have resulted in a course of action which would not have happened otherwise. AIR 1950 Orissa 42, Ref. (Para 24)

The liability of the principal upon a contract made on his behalf, is not affected by the bare fact of the agent's personal liability, and the credit given to him by the other contracting party. (Para 25)
Anno: Contract Act, S. 226 N. 1.

(e) Contract Act (1872), S. 233 — "Hold them both liable" — Meaning — Joint decree against principal and agent.

The words "hold them both liable" mean that the party dealing with agent can join both the agent and the principal in one suit. There is no suggestion that if he does so, he is only entitled to a decree against one or the other and not against both. Whatever the legislature may have intended the words "may hold both of them liable" mean that both may be sued to judgment in one suit. AIR 1917 Bom 268, Foll.; AIR 1939 Mad 520, Rel. on; AIR 1926 Mad 1213, Dissented from; AIR 1926 PC 136, Disting. (Para 26)

'Quaere': A suit is brought against the principal or the agent, and judgment is obtained. It is not satisfied, and the contracting party brings a fresh suit against the other. Whether S. 233, Contract Act would allow such a suit. (Para 26)
Anno: Contract Act, S. 233 N. 1.

(f) Contract Act (1872), Preamble — Interpretation of Act — English law — Use of.

Generally speaking the Indian Law of Contract is the same as the English law, but where the statute itself clearly lays down principles that may not be identical with the latter, the Court has to be cautious in accepting citations of English Law or of rulings applying that law.

The duty of the Court in India is to apply the Indian Statute in its literal and unambiguous sense, without any prepossession in regard to the English law. The latter can be applied only when the words of the Indian legislation do not qualify or vary it. (Para 26)
Anno: Contract Act, Pre N. 3.

N. N. Mukherjee and Hanuman Prasad, for Appellants in C. A. No. 74 and Defendants in C. A. 90; Lal Guruprasanyya Singh and Lal Pradumn Singh, for Respondents in C. A. No. 74 and Appellants in C. A. No. 90.

REFERENCES: Courtwar / Chronological / Paras

('26) AIR 1926 PC 136: (99 Ind Cas 742 PC)	26
('30) AIR 1930 PC 57 (1): (24 Sind LR 138)	19
('36) AIR 1936 PC 27: (159 Ind Cas 704)	19
('17) AIR 1917 Bom 268: (40 Ind Cas 194)	26
('21) AIR 1921 Bom 307: (45 Bom 535)	19
('30) AIR 1930 Bom 569: (128 Ind Cas 550)	21
('15) AIR 1915 Cal 339: (43 Cal 103)	18
('23) AIR 1923 Cal 142: (50 Cal 292)	19
('25) AIR 1925 Cal 521: (78 Ind Cas 162)	19
('50) AIR 1950 EP 92: (52 Pun LR 31 FB)	22
('37) AIR 1937 Lah 389: (173 Ind Cas 444)	22
('40) AIR 1940 Lah 195: (189 Ind Cas 690)	22
('47) AIR 1947 Lah 54: (225 Ind Cas 8)	19
('26) AIR 1926 Mad 1213: (49 Mad 900)	26
('39) AIR 1939 Mad 520: (ILR (1939) Mad 282)	26
('47) AIR 1947 Nag 87: (ILR (1946) Nag 96)	19
('48) AIR 1948 Nag 173: (ILR (1948) Nag 409)	22
('50) AIR 1950 Orissa 42: (ILR (1949) 1 Cut 453)	24
('25) AIR 1925 Oudh 641: (89 Ind Cas 380)	21
('30) AIR 1930 Oudh 312: (6 Luck 19)	21
('23) AIR 1923 Pat 481: (71 Ind Cas 897)	19
('40) AIR 1940 Pat 187: (190 Ind Cas 665)	19
('44) AIR 1944 Pat 276: (218 Ind Cas 68)	19

JUDGMENT: All these 3 appeals which have necessarily to be considered together, arise out of the learned District Judge of Umaria's judgment and joint decree against both the defendants I party and II party, for the price of 320 bags of mustard weighed and delivered to Mohanlal, the Manager of the Hindu Joint Family firm constituted by defendants second party, as the agent of the defendant first party. From this decree the agents (defendant second party) have appealed, generally questioning the fact of the delivery of the goods to Mohan Lal but particularly emphasising that there was no special agreement or contract by which they would be liable. Civil appeal No. 90 is by Badri Prasad (Defendant I party), the disclosed principal for whom the goods were purchased; besides, questioning the facts he argues that the plaintiff having elected to proceed against the agents, defendant second party, there should have been no decree against him. In addition to this there is a cross-appeal by the plaintiffs for interest at the rate of 6 per cent. for the period between filing of the suit and the passing of the decree.

(2) The questions of fact are these: First, whether any agreement was made on 23-8-49 between Jagat Narain as the manager of the plaintiff's firm, and Mohan Lal, in the presence of Badri Prasad, for the sale of 1382 mds. of mustard at Rs. 29/1/6 a maund. Secondly whether at the

same time the plaintiff Jagat Narain expressing diffidence about the credit of Badri Prasad, who lives in another district, Mohan Lal, manager of the agents (defendant second party) himself undertook to pay. Thirdly, whether in pursuance of this agreement 320 bags, each containing 2 mds. 5 srs. were actually delivered to Mohan Lal, the latter declining to take any more of the agreed quantity; and finally whether the price or part of the price for these goods and the bags, and the incidental charges have remained unpaid.

(3) The questions of law are whether in these circumstances the principal alone i.e. the defendant first party, as provided in S. 230, Contract Act, or the agents alone by virtue of any election under S. 234, Contract Act and a separate contract or both, under S. 233, Contract Act would be generally liable. The defendant II party further urge that the case against them given in the evidence is a variation of the case in the plaint. The learned District Judge accepted the plaintiff's case on facts, held that the liability was joint, and decreed the suit accordingly.

(4) The plaintiffs are a Hindu Joint Family firm dealing in food grains and oil seeds with their head office at Umaria. Jagat Narain, their manager alleges that on 23-9-49 Mohan Lal, who is the manager of another Hindu Joint family firm, came to him along with Badri Prasad introducing him as the proprietor of an oil mill at Gaya on a visit at Umaria for purchase of oil seeds. The plaintiff No. 1 no doubt had a quantity of oil seeds to sell, but expressed diffidence about the credit of the principal, a resident of another district; whereupon Mohan Lal undertook himself to pay. They were shown samples of about 1,382 mds. of mustard kept in 691 bags in different parts of the godown. The agreement was to buy the whole lot at Rs. 29/1/6 a maund the price to be paid immediately on the weighment and delivery. From the next day it was weighed and delivered to Mohan Lal in bags containing 2 mds. and 5 srs. each, a slightly larger quantity than the usual two maunds, so as to save bags. By the evening of 26-8-49, 320 bags had been filled and removed by Mohan Lal to his godown, some on bullock-carts and some by porters. He declined to take the rest, a matter of no consequence here, as no damages have been claimed on this account by either party. Jagat Narain began to insist upon the payment but Mohan Lal defaulted for several days; by the 1st August he was alarmed and issued registered notices both on Mohan Lal's firm and on Badri Prasad, who was still at Umaria. There was no reply to Mohan Lal's notice, but Bhawani Prasad, the uncle and Munim of Badri Prasad, who had also come to Umaria sent a reply which has been subsequently repudiated. Then the plaintiffs filed the suit and also obtained an injunction against the despatch of mustard bags to Badri Prasad's Gaya address, and also sought measures to ensure that he would pay up in the event of a decree passed against him. Nothing came up of these interlocutory orders; for one thing Badri Prasad went away to Gaya and for another inspite of the injunction order wagon loads of oil-seeds were being sent by Mohan Lal to Gaya, consigned not in the name of Badri Prasad, but in the names of his brother and cousin, who are also members of the same firm.

(5) The plaintiffs' suit was for a joint decree for the price of the seeds and the bags and some incidental charges and interest and costs, the total of which came to more than Rs. 20,000/-.

(6) In his plaint he mentioned the agreement in general terms and in his evidence gave particulars of the express undertaking given by the defendant Mohan Lal.

(7) The defence case is somewhat confused; but it is better to summarise it as given in the evidence. The earliest defence story in Badri Prasad's reply to the notice, has been given up and need not be discussed. Mohanlal gave no reply at all. His defence in brief here is that the agreement was made not at the plaintiff's shop, but at his place. No doubt, he agreed to make the payment, if the goods were placed with him, but as he was not given any of them he is not liable. In this appeal the emphasis is placed on a point of law. He was not a pakka arhatia pledging his own credit, but a kachcha arhatia in the proper sense of the term. So, there should at all events be no decree against him. No special contract and no usage have been proved, nor any presumption established to make the agents liable.

(8) Badri Prasad on the contrary argues, firstly, that his business is separate from that of the firm Govardhan Dass Jagannath; a point of no consequence now, as the decree is against him personally. Secondly, that whatever happened was between Mohan Lal and the plaintiffs and he was not a party to the agreement, or to the removal of the goods, if any, to Mohanlal's place. Thirdly, the plaintiffs should be deemed to have elected to have given exclusive credit to Mohanlal and elected to proceed against his firm, so that under S. 234. Contract Act he should not be made liable.

(9) Both the defendants have urged that S. 233 should not be applied in this case; each wants the decree to stand solely against the other.

'Point No. 1'.

(10) On 2°-8-49 Badri Prasad principal and Mohanlal Manager of the Joint Hindu Family Firm who are the agents, met the plaintiff Jagat Narain and entered into an agreement for the purchase of mustard at the price and quantities mentioned by the plaintiffs. There is no serious denial of it. The evidence, in fact, is overwhelming. Mohanlal says that it was at Mohan Lal's shop and the plaintiff that it was at his. This difference is of no consequence, but I believe that it was at the plaintiff's place, where the samples were examined and approved. Badri Prasad says he paid Rs. 45,000/- to Mohan Lal at his shop and asked him to buy 691 bags, incidentally the quantity mened by the plaintiff also, we are not concerned with this story here. Badri Prasad's presence at the time of agreement is certain because he had gone all the way to Umaria for this purpose, the quantity was very considerable, and the sample had to be seen. Both the others speak of his presence. I hold that he was also present at the time of the agreement. There is no disagreement about the quantity agreed and about the price.

'Point No. 2.'

(11) In the plaint it is avered in general terms,

> "Defendant Mohan Lal agreed to purchase etc. etc. on behalf of his principal Badri Prasad defendant No. 1. At the time of this agreement Badri Prasad was also present."

The plaintiff, who is the first witness, states in the beginning of his evidence:

> "Mohanlal said, I shall get the goods weighed and make the payment. This was because I told Mohanlal that Badri Prasad was an outsider (pardesi admi) and I did not know him."

The other witnesses of the plaintiff support this. For example Ram Kumar s/o Kulal Sonar says,

> "Jagat Narain said to Mohan Lal that he did not know this Gayawala whereupon Mohan Lal replied I shall get the weighments done and the payment made. As the weighment progresses I shall go on giving money."

The same is stated by Ram Kumar s/o Murli Dhar Marwari and by Bhagwat Prasad, who is the

munim of Jagat Narain. What is more to the point is that Mohan Lal himself states in his evidence,

"Badri Prasad came to me and said that he had agreed to purchase 691 bags etc. etc. from Jagat Narain, but his usual arhatia was declining to take it up as he could not produce such a large sum. Badri Prasad wanted me to be arhatia for this. and pay Jagat Narain from my funds. I agreed to make the payment if the goods were weighed and placed in my godown. Shortly after he brought Jagat Narain and before him also I said the same thing namely that I would pay up if the goods are weighed and placed in my godowns."

(12) Mohanlal however continues to say that Badri Prasad did not bring the goods to his godown but told him after 4 or 5 days that he was not purchasing from Jagat Narain as the goods did not tally with the sample. I shall consider this separately. As far as the agreement goes there is no doubt about the presence of both Badri Prasad and Mohan Lal at that time, and that Mohan Lal undertook to pay up because the principal came from another district.

'Point No. 3.'

(13) This takes us to the consideration of whether the goods were actually weighed and delivered to Mohanlal. The plaintiff's case is that he weighed and gave the goods to Mohan Lal, who was present during the weighment, and who got the bags carried to his godown during 3 days. the 24th, the 25th and 26th. The total number of bags was 320, each filled with 2 mds. 5 srs. Besides the plaintiff, we have as witnesses the weighmen and the porters. This is also supported by the contents of the letters exchanged between Badri Prasad and Mohan Lal during the next few months when they were planning a common defence in the suit. The plaintiff has also produced his account books, but they are not of any value independently of his oral evidence. because within a few days of these transactions a suit was thought of. The plaintiff's statement to this effect is supported by a number of witnesses such as Mangal Kotwar, who says that he and two others carted on one day 125 bags of mustard from Jagat Narain's godown to Mohanlal's godown, "namely the one he had rented". Ram Prasad Dhimar and Jorhi Teli give evidence about their actually weighing the mustard and filling 320 bags of 2 mds. 5 srs. each. Jagat Narain's Munim also speaks of it substantially on the same lines as Jagat Narain himself. The evidence of these witnesses is to the effect that during 3 days 320 bags full of mustard were weighed in presence of Mohanlal and his son at Jagat Narain's godown and removed to Mohan Lal's godown.

(14) Mohanlal says in the evidence that he did not take delivery of any mustard bags; his witnesses set up a story that has not been even put in the cross-examination of the plaintiff. This sort of story naturally carries no conviction. If one looks to the reply to the registered notice given on behalf of Badri Prasad it will be yet another story which Badri Prasad himself had given up. Each of the defendants has been anxious during the trial to throw the blame on the other; so they have exhibited the correspondence that passed between them during the few months after these happenings when they were preparing their defence.

(15) In October, 1949, Mohanlal writes to Badri Prasad in Ex. D 1 on behalf of defendant first party.

"I have ordered a small wagon for 110 bags also from Bhure Naik. I can send 85 bags of Bhure Naik and the other bags left with me. This will leave with me the 281 bags in dispute (jagerewale)".

Badri Prasad states thus:

"Mohanlal took money in advance for the purchase of 691 bags from Jagat Narain of which he only sent the 39 bags. Kailas Prasad is my brother and Ram Autar is my cousin. Mohan Lal sent 39 bags in their name, and wrote in his letter that out of those 691 bags he weighed only 320 bags of mustard & discarded the rest because there was a dispute about the quality. The 39 bags were sent in Ram Autar and Kailash's name because upon the suit of the plaintiff's (Firm Fatechand Sarogi) the Rewa High Court had banned the export of any goods to my name."

The correspondence shows not the least repudiation of the fact of the taking delivery of 320 bags by Mohanlal. On the contrary. it shows a shameless plan to defraud and harass Jagat Narain till he comes down. Badri Prasad and Mohan Lal give the impression of confidence trickster planning to evade payment and drag on the litigation. This contains, the account of despatch of about 39 bags of mustard in evasion of the injunction order, and a balance of 281 (disputed bags still left with Mohanlal). The only dispute at that time i.e. October 1949 in which Badri Prasad and Mohan Lal were interested was the present suit. Thus there is no doubt whatsoever that Mohan Lal took delivery of the 320 bags of mustard as described by the plaintiff. By the end of October he has sent to Gaya 39 bags and still had with him the balance of 281 "disputed bags".

'Point No. 4'.

(16) It is nobody's case that any money was paid to Jagat Narain for the mustard. The examination of the facts shows that the plaintiff's account is true in regard to the agreement, Mohanlal's undertaking to pay up, and delivery of 320 bags with 2 mds. 5 srs. of mustard each to Mohanlal and the non-payment of the price.

'Point No. 5.'

(17) Out of the grounds of law I shall first take up the variation of pleadings alleged by Mohanlal Defendant II party. In the plaint a very general statement is made. without mentioning either that the agent was a pucca arhatia or that he made an offer to pay. There is no specific issue in so many terms in this matter, though there is a general issue in regard to the liability of this or that defendant. On the other hand, the express undertaking is the very first thing that the plaintiff mentions. and which is clearly repeated by his witnesses on this point. Not only had Mohan Lal had opportunity to cross examine these witnesses, but also has he himself admitted having given the undertaking to pay; but justifies his non-fulfilment of the undertaking. because no bags were removed by or left with him, an allegation which I have held to be false. If this is a variation we have to see if it is inconsistent with the pleadings or arises directly or indirectly out of them. A further point for consideration would be whether this variation, if any, has surprised the defendant concerned, and therefore calls for the remand of the suit to afford both parties a chance to amend their pleadings.

(18) Apparent variations between pleadings and evidence are quite common, especially when, as in this State, the pleadings are not worded with the neatness and technical accuracy of English practice and where the language employed is often vague and obscure. The following is a gist of case law placed by the parties. In 'NOGENDRA MOHAN v. PYARI MOHAN', AIR 1915 Cal 339, it was ruled that 'the plaintiff cannot abandon his own case and claim relief on the basis of the case set up by the defendant".

(19) There the plaintiff had given up his initial position. In 'ANAND CHANDRA v. BROJALAL SINGHA', AIR 1923 Cal 142 this question was more fully discussed.

"The rule that pleading and proof must correspond is intended to serve a double purpose; first to apprise the defendant distinctly and specifically of the case he is called upon to answer. and secondly, to preserve an accurate record of the cause of action as a protection against a second proceeding upon the same allegations. The test thus is whether the defendant will be taken by surprise if relief is granted on the facts established by the evidence; or, a variation between a pleading and what is proved is immaterial unless it hampers a defence or unless it relates to an integral part of the cause of action. The principle of variance between pleading and proof should not be applied in an abstract way; the whole of the circumstances must be taken into account and carefully scrutinized, as the question is, in ultimate analysis, one of circumstances and not of law."

In this case the 'variation' really supplemented the pleadings, which were not abandoned. The case in 'KASTURBHAI MANIBHAI v. HIRALAL DAHAYABHAI', AIR 1921 Bom 307, was also similar.

"Facts which have not been pleaded specifically in the plaint, but are admitted by the defendant can be relied on by the plaintiff to establish his claim."

Here again the important qualification is that the plaintiff only supplements but does not give up his pleadings. In 'DALPHEROO MIAN v. BANGALI MALI', AIR 1923 Pat 481, the variation was not allowed because it changed the case altogether.

"His original case was that the whole house has been his transferor's property under a gift from the transferor's father & the case has been found false. Now he tries to vary it and seeks to recover possession on the allegation that part of it was his own share."

The case reported in 'GOLAK CHANDRA v. NISHI CHANDRA', AIR 1925 Cal 521 is similar to this Patna case. The case propounded in the plaint being disbelieved the plaintiff sought to vary it substantially. It was held,

"that either the suit should be dismissed or the plaintiff given permission to make an amendment if it was in the interest of the fair administration of justice."

In 'SIDDIK MOHAMED SHAH v. MT. SARAN', AIR 1930 PC 57 (1), it was a case of defendants leading evidence on a claim which was never put forth in the pleadings. It was not allowed. In 'NORTH WESTERN UTILITIES LTD. v. LONDON GUARANTEE & ACCIDENT CO. LTD.', AIR 1936 PC 27, it was pointed out that it was most inadvisable to admit a new head of claim without proper amendment of pleadings. There it was no variation or new evidence in support of the claim already pleaded but a new claim altogether. 'DAMMU VIGHNESAM v. LAKSHMI NARASINGHA MURTY', AIR 1940 Pat 187, rules

"the Courts should be careful to see that cases are decided in accordance with the pleadings or upon the facts proved at the trial but consistent with the allegations made in the pleadings; in other words, a variation between pleadings and proof ought to be carefully watched to see that the opposite party is not taken by surprise."

In the Patna ruling 'PRAHLAD MOHANTI v. PRAHLAD CHANDRA DASS', AIR 1944 Pat 276 the general principles of alternative pleadings were laid down.

"All the material facts should be set out in the plaint and if the plaintiff is in doubt as to which of several reliefs he may be entitled to he should ask for relief in the alternative. Similarly, if he has more than one cause of action against the defendant, he should set out the facts on which he relies, as constituting each cause of action and sue for all of them in one and the same action. If the plaintiff does not take either of these courses the suit would fail."

Here it was not amplifying of the cause of action pleaded, but of bringing in fresh cause of action. In 'RAMKISHORE LAL v. KAMAL NARAYAN', AIR 1947 Nag 87, "A finding was held to be illegal as it was arrived at in the absence of any pleading to that effect". In this case not only was the proper pleading absent, but also was the allegation opposed to that party's pleading. In 'PANNALAL v. CHIMAN PARKASH', AIR 1947 Lah 54 there was no pleading in regard to a particular issue of law but the defendant was allowed to prove it

"because it was put to the plaintiff's first witness in cross-examination, without any objection, and the plaintiff knew fully well what the defendant intended to establish."

The total effect of the case law can be summarised thus: A question about alleged or apparent variation of pleadings by evidence is most often one of prudence rather than of law pure and simple. So no general abstract guiding principle can be laid down.

(a) Firstly, there may be an amplification of a pleading worded somewhat too generally and vaguely. This has to be allowed as long as the obscurity in the plaint is cleared early enough during the hearing to give the other party an opportunity of grasping the details and replying to them.

(b) Secondly, the variation may be supplementary to a pleading already set out, but in no manner inconsistent with it. A variation no doubt it is, but the Court should consider, whether the new material is something that arises out of the pleading, and is not inconsistent with it. Such variation can be proved provided there is no surprise and the other party has had a reasonable opportunity to answer. If that variation is admitted by the other party itself there is no surprise and there can be altogether no objection to its being proved and the suit decided according to it.

(c) Thirdly, the variation, though not necessarily inconsistent, may amount to the setting out of an additional cause of action. Normally such a variation should not be accepted, but if the variation is sought to be made at an early stage, the Court should consider whether it is in the interest of justice that permission to amend the pleadings should be given.

(d) Finally, we may have a variation altogether inconsistent with the pleading and divulging an entirely new case; this can never be allowed, nor is it likely in such a case that leave to amend will be in the interests of justice. Where to draw the line between matters arising out of the pleading and those quite extraneous, is a question, not of law, but of prudence for the Court to answer, having regard to the circumstances of each suit.

(20) In the present case the liability of the agents has been pleaded and the terms of the bargain have been generally set out in the plaint. The details of the express undertaking to pay have not been put in the pleadings, but have been given out in the very beginning by the plaintiff and are in fact admitted by the defendant himself. If it is a variation at all, it arises out of the pleading and

far from being a surprise, is as it were the common ground. So, it was rightly allowed to be proved.

'Point No. 6.'

(21) This takes us to the main question raised by the agents in their appeal No. 74 to the effect that the disclosed principal alone, and not they, is liable for the price of the goods and, further that, not being a pacca arhatia or any similar special type of agent their position does not attract the presumption contained in the second part of S. 230, Contract Act. A good deal of case law has been cited in support of this. It is an obvious proposition of law contained in S. 230, Indian Contract Act and Art. 116 of Bowstead's Agency that in the absence of any agreement to that effect, an agent is not personally bound by a contract entered into on behalf of a disclosed principal. 'HARI SADHAN MITRA v. BECHA LAL', AIR 1925 Oudh 641; 'GANPAT MAHADU v. FORBES, FORBES, CAMPBELL & CO.', AIR 1930 Bom 569; 'GAURI SHANKAR v. JAWALA PRASAD', AIR 1930 Oudh 312 have also been cited but they need not be discussed. For, in the present case, the liability of the defendants-second party is based not upon the agency as such, nor upon any presumption of the type contained in the second part of S. 230, but upon the express contract by the agents themselves. As a matter of fact the plaintiff avers and Mohanlal himself admits he agreed to pay if the goods are made over to him; the goods were actually weighed and made over to him and his liability is clear.

(22) Both in the lower Court and here the question was raised and discussed whether the defendants were pucca arhtias; it is altogether unnecessary for us to answer this question. In fact, this is practically impossible, because, in the Umaria bazar these terms are not used in any technical sense. The distinction between kachha arhtia and pucca arhtia properly so-called, is that the former is a general type of agent, while the latter is of a special type pledging his credit, and for certain purposes himself acting as the principal, his English counterpart being a del credere agent. On this also a good deal of case law has been cited on behalf of the agent-appellants viz. 'FIRM GOPAL DAS PARMANAND v. MUL RAJ', AIR 1937 Lah 389; 'BAL KRISHAN & CO. v. RAMNATH', AIR 1940 Lah 195; 'BAKSIRAM RODMAL SHOP, AKOLA v. FIRM JASROOP SRINATH, HARDA', AIR 1948 Nag 173; 'RAM DEV JAI DEV, FIRM v. SETH KAKU', AIR 1950 EP 92, in the last of which the question has been discussed at length, and the case law reviewed. The pucca arhtia agency properly so-called originated in Bombay, and spread to different parts of the country, where the mercantile world and the law Courts understand it in the Bombay sense. The few witnesses of this case who have referred to this seem to understand by arhtia any broker or commission agent, who is personally liable whether or not the agency is called pucca or kachha. The plaintiff himself has neither pleaded that the defendants second party are pucca arhtias, nor has he in his evidence sought a decree against them also on the ground of such an agency, in which case a contract of personal liability would be presumed or implied. On the contrary the plaintiff's case is that there was an express contract of personal liability, which I have already found to be true. The liability of the agent here is not based on a presumption referred to in the second part of S. 230, Contract Act, nor on any contract implied in a pucca arhatia agency but on an express contract to that effect. Both under the English law as summarised under Art. 116 of Bowstead's Agency, and under S. 230 of the Indian Contract Act, every agent, who undertakes personal responsibility for payment is personally liable, and can be sued in his own name on the contract, unless the other contracting party elects to give exclusive credit to the principal.

> "The question whether an agent who has made a contract on behalf of his principal is to be deemed to have contracted personally and if so. the extent of his liability on the contract depend on the intention of the parties to be deduced from the nature and the terms of the particular contract and the surrounding circumstances including any binding custom." (Bowstead's Agency Art. 116)

Similarly, Halsbury's formulation of the law is also to the same effect.

> "When a person in making a contract discloses both the existence and the name of a principal on whose behalf he purports to make, he is not as a general rule liable on the contract to the other contracting party, but a personal liability may be imposed on him by expressed terms of the contract, and by ordinary course of business or by usage."

In the present case it is not by virtue of usage such as is implied in a pucca arhtia agency but by express contract that the agents-appellants in civil appeal No. 74 are liable.

'Point No. 7'.

(23) Just as the agents have contended in C. A. 74 that the principal is solely liable, so also the principal has contended in this appeal C. A. 90 that by virtue of the express contract the agents alone are liable.

(24) The principal's liability is always there, whether or not there is a contract which fastens the liability on the agent also and does not cease except when there is an election or some form of estoppel by the contracting party. The Indian law of election is embodied in S. 234, Contract Act. To enable the principal or the agent to claim exemption from liability two conditions are essential: The contracting party should have induced a belief in one of them that he is going to hold the other alone liable. Second, this belief should have resulted in a course of action which would not have happened otherwise. For example, in the recent ruling reported in 'MAHADEO GANGAPRASAD v. GAURI SHANKAR', A I R 1950 Orissa 42 the buyer charged the agent for exceeding the authority given by the principal and held him alone responsible for the loss; later on the buyer sought to sue the principal also when it was held that he had elected to proceed against the agent.

(25) There has been no election in the present case. When the agreement was arrived at the disclosed principal was actually present; and the vendor did not say that he would hold the agent exclusively responsible. Again, within the few days after the delivery of the goods the vendor noticed both the agent and the principal in exactly the same terms. Nor do we have any act done by the principal upon the inducement that the agent alone would be held responsible. Therefore, there is nothing in the present case to show that the plaintiff-vendor had elected to proceed against the agent only, or has by his conduct induced the principal to do any act, which would estop him from suing the latter also. The liability of the principal upon a contract made on his behalf, is not affected by the bare fact of the agent's personal liability, and the credit given to him by the other contracting party. I, therefore, hold that the principal is also liable.

'Point No. 8.'

(26) Both the principal and the agents have relied on S. 233, Contract Act and questioned the correctness of the joint decree, arguing that the liability of the principal and the agents is not joint, but alternative and mutually exclusive. They have also quoted case law. The doctrine of mutually exclusive liability has certainly been applied in most English cases; but we have to apply the statute contained in S. 233, Contract Act. Generally speaking the Indian law of contract is the same as he English law, but where the statute itself clearly lays down principles that may not be identical with the latter, we have to be cautious in accepting citations of English law or of rulings like 'SOMASUNDARAM v. SUBRAMANIAM', AIR 1926 PC 136, applying that law. That case came from the Straits Settlements, where presumably the law applicable is that of England and not the Indian Contract Act. The rulings reported in 'SHIVLAL MOTILAL v. BIRDHICHAND', AIR 1917 Bom 268, contains a discussion of this question.

"The words 'hold them both liable' mean that the party dealing with agent can join both the agent and the principal in one suit. There is no suggestion that if he does so, he is only entitled to a decree against one or the other and not against both. Whatever the legislature may have intended it appears to me that the words 'may hold both of them liable' mean that both may be sued to judgment in one suit."

In the ruling reported in 'KUTTIKRISHNAN NAIR v. APPA NAIR', AIR 1926 Mad 1213 the view taken was that even under S. 233, Contract Act the liability was alternative and not joint.

"What S. 233 means is that the person dealing with the principal through the agent may at his election sue either or both of them 'alternatively' in case where he is not sure against whom his exact remedy is. But he cannot get judgment against both of them jointly for the amounts sued for."

This ruling was obviously an attempt to read into that section the alternative liability of English law; but this has been distinguished by the subsequent decision of the same Court reported in 'MAHOMED SHAMSUDDIN v. SHAW WALLACE & CO.', AIR 1939 Mad 520.

"There is in India a statutory provision allowing the plaintiff to sue both the principal and the agent in a case where the agent is personally liable. There is no ambiguity used in this section and I am unable to see anything unreasonable in it."

To my mind it appears that the duty of the Court is to apply the Indian Statute in its literal and unambiguous sense, without any prepossession in regard to the English law. The latter can be applied only when the words of the Indian legislation do not qualify or vary it.

(27) An interesting question arises out of this position:

A suit is brought against the principal 'or' the agent, and judgment is obtained; it is not satisfied and the contracting party brings a fresh suit against the other: whether S. 233, Contract Act would allow such a suit has been left undecided in these rulings. The answer would depend, for one thing, upon how far the joint liability under section 233, is the liability of joint promisors under S. 43 of the Contract Act, and for another how far the first suit would amount to an election under S. 234 of the Contract Act. That question does not arise in the present case where from the very beginning the vendor has been holding both the agent and the principal liable, and has been demanding money from them, and has sued both. There being S. 233 in our law, there was no reason why the plaintiff in this case should not get a joint decree.

(28) In the result appeals Nos. 74 and 90 are dismissed with costs to the plaintiff respondents. Pleader's fee in each of the appeals should be calculated at 3½ per cent. making a total of 7 per cent. for the joint hearing.

(29) The cross appeal by the plaintiffs is only for the interest for the duration of the suit. It is established by the evidence that by usage in Umaria Bazar interest is payable at the rate fixed by the District Judge. It is unreasonable that the plaintiff should get interest upto the date of the suit, and again after the date of the decree, but should go without it for the duration of the suit, which had to be brought solely because of the defendant's default. The cross appeal is allowed with costs to the plaintiff but no pleader's fee. The interest awarded in the cross-appeal and costs should be added in to the joint decree.

V.B.B. Order accordingly

A. I. R. 1952 VINDHYA PRADESH 57
KRISHNAN J. C.

Ram Charan Surdas, Applicant v. Gaya Prasad, Opposite Party.

Criminal Revn. No. 22 of 1952, D/- 29-1-52.

(a) Criminal P. C. (1898), Ss. 253 and 288 — Non-compliance with formal requirements — Course to be followed by Magistrate.

Generally speaking, if a criminal Court is faced with the position that a formal requirement such as want of sanction has not been complied with, it can either discharge the accused without applying its mind to these facts or it can consider the formal requirement, and independently of it, form its opinions on the facts also and give its findings on both. When the absence of the formality is undoubtedly fatal to the prosecution, the first course is indicated. But when there is scope for a difference of opinion whether this formal defect is fatal, then the second alternative is better. If there is the likelihood of the superior Court taking a different view on this issue, it is better that the findings on the facts are already before it. In the event of its holding that the formality is really unnecessary or its absence has been cured, it will be able to proceed without sending back the case for decision on the merits. (Para 4)

Anno: Cr. P. C., S. 253 N. 4; S. 258 N. 3, 4.

(b) Penal Code (1860), S. 166 — Case under — Delay in placing allegations before Magistrate.

In cases such as under Ss. 342 and 166, Penal Code the most important though by no means the only test is whether allegations against the police officer or any other public servant concerned are placed before proper authority at the very earliest opportunity. A delay in making this allegation before the Magistrate or other competent authority is almost fatal to a prosecution of this nature. (Para 5)

Anno: Penal Code, S. 166 N. 1.

Guru Prassan Singh, for Applicant.

ORDER: This is an application in revision from a judgment of acquittal by the magistrate Nowgong. The applicant wants either that judgment to be set aside or that it should be described as a discharge.

(2) In a case under S. 3/7 of the Essential Supplies Act, a bailable warrant was issued on the applicant. The applicant's case is that he produced suitable bailors, but the Police Officer (Opposite party) refused to accept them till an illegal gratification had been paid. However the applicant's brother went to the Magistrate on the next day and got him released on bail.

(3) Later on, the applicant started this case against the officer under Ss. 342 and 166, I. P. C. which had ended in acquittal. On the facts the learned Magistrate held that the case was not proved. On law also he held that sanction had not been obtained. The applicant's contention is that the findings on the facts are perverse, and further, that having held that there was really no jurisdiction because of the want of sanction, the Magistrate should have recorded an order of discharge and not of acquittal. The intention apparently is to have the order converted into one of discharge and start the case on fresh complaint with or without sanction.

(4) Generally speaking, if a criminal Court is faced with the position that a formal requirement has not been complied with, it can either discharge the accused without applying its mind to these facts or he can consider the formal requirement, and independently of it, form its opinions on the facts also and give its findings on both. When the absence of the formality is undoubtedly fatal to the prosecution, the first course is indicated. But when there is scope for a difference of opinion on whether this formal defect is fatal, then the second alternative is better. If there is the likelihood of the superior Court taking a different view on this issue, it is better that the findings on the facts are already before it. In the event of its holding that the formality is really unnecessary or its absence has been cured, it will be able to proceed without sending back the case for decision on the merits. In a criminal case particularly this is a great advantage. This is exactly what the learned Magistrate has done in the present instance. He considered the case on merits and came to the conclusion that the facts cannot support a conviction. Separately from it, he also considered whether sanction under an old Rewa State law was necessary. He has held that it was. This is a point upon which there is likelihood of difference of opinion, till in a proper case this Court gives a ruling. In view of the findings of fact a ruling on this question is really unnecessary in this case.

(5) Such cases are sometimes difficult on the facts. On the one hand, the police having to discharge delicate, often unpleasant functions, are naturally exposed to such allegations by persons who are arrested or whose sureties have to be refused for good reasons. On the other hand the officers are exposed to temptations especially when dealing with well-to-do tradesmen of the type of the applicant. Therefore, the most important though by no means the only test is whether allegations against the police officer or any other public servant concerned are placed before proper authority at the very earliest opportunity. In this case — for example — we are told that for a whole day the officer was bargaining with the applicant at Harpalpur which is less than one hour's 'bus-route' distance from the Magistrate's Court at Nowgong Chhatarpur; where the S. P. stays is less than 2 hours 'bus-route' from Harpalpur. It is nobody's case that during that day any friend of the applicant or of his surety ran up to apprise either of these authorities. Not that the applicant has no friends or helpers; in fact on the very next day his brother himself goes to the Magistrate and gets bail for him. A delay in making this allegation before the Magistrate or other competent authority is almost fatal to a prosecution of this nature. In this case acquittal on the facts was almost a foregone conclusion.

(6) The point of law is left open for a decision in a proper case. It is altogether unnecessary to consider if the order should be modified to one of discharge, solely to enable the complainant to bring a new complaint on these very facts which have been rightly found in any case to be insufficient for a conviction.

(7) The application is dismissed.

D. H. Revision dismissed.

A. I. R. 1952 VINDHYA PRADESH 58

KRISHNAN J. C.

Badku Lal and others, Plaintiffs-Appellants v. Bhaiya Lal and others, Defendants-Respondents.

First Appeal No. 26 of 1951, D/- 23-7-1951.

(a) Contract Act (1872), S. 62 — Unconditional acknowledgment — Accounts stated — Limitation Act (1908), Art. 64.

In the current register of the plaintiff, the following entry was made:

"On Bhadon Sudi 2006, the balance of Rs. 34000/- is found payable by Hiralalji made by check and understanding of Hiralalji's books...worked out the accounts, Rs. 34000/- found correctly payable."

Held that viewing the document both as an unqualified acknowledgment and as account stated it amounted to a new contract and could itself be a cause of action: 33 Cal 1047 (PC); AIR 1934 PC 147, Rel. on. (Para 8)

Anno: Contract Act, S. 62 N. 2; Limitation Act, Art. 64, N. 2.

(b) Civil P. C. (1908), O. 1, R. 10 — Suit by manager of joint Hindu family against manager of joint Hindu family.

Where a suit is brought by the manager of a joint Hindu family against the manager of joint Hindu family, the fact that some other adult members are named as parties, would not make it a suit in their personal capacity. The suit is not bad in such a case for the absence on either side of certain other members of the joint families. Nor does the circumstance affect the liability of the joint families to be bound by the result of the suit. Case law discussed. (Para 21)

Anno: C. P. C., O. 1 R. 10, N. 18.

Lal Pradumna Singh and Lal Guruprasnya Singh, for Appellants; B. L. Dikshit and Deep Narain Pathak, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('06) 33 Cal 1047: (33 Ind App 165 PC) 15
('32) AIR 1932 PC 182: (54 All 564) 20
('34) 56 All 376: (AIR 1934 PC 147) 15, 16, 17
('01) 23 All 502: (1901 All WN 150) 15
('23) AIR 1923 All 284: (71 Ind Cas 623) 19
('24) AIR 1924 All 908 (1): (46 All 709) 19
('38) AIR 1938 All 504: (ILR (1938) All 741) 17
('44) AIR 1944 Bom 19: (211 Ind Cas 155) 15
('29) AIR 1929 Lah 263: (10 Lah 745) 15

('33) AIR 1933 Lah 47: (141 Ind Cas 425) 15
('49) AIR 1949 Mad 625: (1949-1 Mad LJ 52) 20
('35) AIR 1935 Nag 221: (159 Ind Cas 447) 17
('41) AIR 1941 Nag 294: (ILR (1942) Nag 177) 17
('48) AIR 1948 Nag 131: (ILR (1947) Nag 604) 19
('42) AIR 1942 Oudh 335: (200 Ind Cas 172) 20

JUDGMENT: This is an appeal by the plaintiffs from the judgment and decree of the learned District Judge of Umaria dismissing their suit claiming a sum of Rs. 36,627/- from the defendant-respondents, on the basis of a statement of accounts which was acknowledged without qualification.

(2) The most important points for decision are; firstly, whether, on the facts, the plaintiffs' account of the happenings on the 3rd September 1949 are correct. Secondly, whether under the law the document upon which the suit is based is account stated, and an unqualified acknowledgment which can itself be a cause of action. Thirdly, whether the suit is bad for the absence on either side or the other, presumably minor, members of the family. In addition to these, two other questions have also to be considered, namely, whether the defendants were entitled to a re-opening of the accounts and to point out omissions on the credit side. Finally, even if the plaintiffs' contentions are accepted, whether they would be entitled to the sum of Rs. 2,627/- included in the claim as interest.

(3) The parties do business in food grains, and in gold and silver in the Umaria Bazar. In both cases it is joint family business, the plaintiffs working under the name of Badku Lall-Dipchand, and the defendants under the name of Bhure Naik-Raghunandan Prasad. The plaintiff-brothers, Barkoo Lal, and Dip Chand are the kartas and the persons in day to day charge of their joint family business. Two of the other members are joined as plaintiffs, while some of the sons or grand-sons of the plaintiffs 1 to 3, who are members of the joint family, have not joined. Similarly, the joint family business of the defendants' family is conducted by the defendants No. 1 & 2 Bhaiya Lal and Hira Lal, who are the kartas or managers. Just as on the plaintiffs' side, so also here, two more members are on the record, but there are some sons and grandsons, not made parties here. The two families have been having mutual dealings for several years. By September 1949, the plaintiffs were the creditors to the tune of many thousands.

(4) The plaintiffs' case is that on 3-9-49, the defendants Bhaiya Lal and Hira Lal sent for plaintiff Deep Chand with his books. From time to time the accounts had been examined and settled; on this occasion also Puran Lal, Munim of the plaintiffs, and Ram Prasad Munim of the defendants, totalled the accounts, and after adjustments, found that a sum of Rs. 34,000/- was due from the defendants to the plaintiffs. The principals accepted it. In the current register of the plaintiffs the following entry was made.

> "On Bhadon Sudi 2000 the balance of Rs. 34000/- is found payable by Hiralalji made by check and understanding of Hiralalji's books, (ruju mukable Hiralalji ko hisab samjh kar)" Signed Puran Lall Munim of Badku Lal Dip Chand".

Then there is a stamp written over by Hira Lal for Bhure Naik Raghunandan Prasad followed by this statement:

> "worked out the accounts; Rs. 34000/- found correctly payable" Sd. Hira Lal and Bhaiya Lal.

For some months after it, the plaintiffs were asking for payment but the defendants were putting off. Ultimately the plaintiffs had to issue a notice on 10-2-50 demanding payment within 7 days and threatening a suit on non-payment. No money having been paid the suit was filed on 4-7-50.

(5) Plaintiff's case is based on the averment that the document prepared on 3-9-49, and signed by the karta of the defendants' family is an unconditional and unqualified acknowledgment, and is also accounts stated. They have also claimed interest at the rate of -/12 - percent per month.

(6) The defendants' case is that the suit is bad for non-joinder, of other members on either side, and the absence of formal pleading in plaint that on either side the joint family was represented by the actual persons noted as parties. It was also alleged that the signatures of Hira Lal and Bhaiya Lal were insufficient because for 3 or 4 years before the suit Gulab Chand defendant No. 3 was doing everything. As for the happenings on 3-9-49 the defendants deny that there was any account and allege that the defendants signed the documents under coercion and misrepresentation by Deep Chand. In the evidence of the defendants though not in the written statement, it is alleged that Hira Lal alone was there. Deep Chand told Hira Lal that Barku Lal was going to turn him out unless he got an acknowledgment from the defendants for the amount outstanding. Deep Chand also assured Hira Lal, and took a solemn oath that he would not sue, and that the defendants may settle the accounts properly later on. On this coercion and false representation Hira Lal signed the acknowledgment for Rs. 34000/- without examining the books. It is stated in the evidence though not in the written statement that some days later, Deep Chand sent the register through a Munim named Kolai Prasad saying that Barkoo Lal was still unsatisfied without the signature of Bhaiya Lal. Whereupon on Hira Lal's persuasion the reluctant brother also signed.

(7) On law the defendants argue that this is a bare acknowledgment which cannot give rise to a cause of action. The defendants admit that a sum of fifteen to sixteen thousands is really payable, but the plaintiffs had been purposely putting off the settlement of accounts inspite of repeated requests by the defendants. The defendants aver that at least two amounts were paid by them before the acknowledgment had not been made, and pointed out that, similar omissions may be detected, if the plaintiffs' books are examined. They also deny the liability to pay interest.

(8) Substantially accepting the case of the defendants on the facts and the law the learned District Judge dismissed the suit with costs.

(9) 'Point No. 1.' I shall take up the facts at first. On the happening on the 3rd September 1949 (11 Bhado Sudi 2006) the witnesses are Dip Chand plaintiff, and Bhagwan Prasad, who went to call him from the house of the defendants. In addition, he has examined two other witnesses to show that the defendants' version is an after-thought. Similarly, on the defendants' side we have Hira Lal, the defendant Ram Prasad, his munim, who denies even his presence on that day; and then the two others namely Puran Lal and Kolai Prasad, both munims of the plaintiffs at that time, but since gone out of their service, either being dismissed for misconduct as Deep Chand says, or quitting it quietly for more suitable or better paid work, elsewhere.

(10) The circumstances are, the fact of signed statement of the defendants to the effect that they had checked the accounts; the intrinsic unlikelihood of men of the world like the defendants being trapped by such devices as they attribute to Deep Chand, their failure to point out this coercion and misrepresentation, when they were served with a written notice, and the refusal of Hira

Lal to produce his books and disprove the suggestion that a similar entry as Ex. P(1) will be found in his books as well.

(11) (After discussing evidence His Lordship proceeded.) Thus, the result is that on 3-9-49 there was a check-up of the accounts with reference to the books or memoranda prepared by the munims of the respective parties. It is also extremely probable that an entry to the same effect was simultaneously made in the current book of the defendants. Hira Lal's reply to this suggestion is this:-

> "I cannot say if in my books there is an entry on 11 Bhadon Sudi 2006 to the effect that Rs. 34000/- are payable. This is because those books are not for production here. I have not produced my books because the plaintiff has not produced his original books (Asal Bahi)."

It is difficult to make sense out of this. On such a crucial point involving 34,000 rupees, he should be able to accept or deny specifically; if he is not it is almost certain that there is such an entry. If he wants to disprove the suggestion that in his books also there is a similar entry, he must produce them. I do not see any point in this talk about the plaintiffs' original books, as the suit is based on Ex. P1, a document signed by the defendants. But the position of the defendants is even worse. They summoned the plaintiffs' books, probably to enable the defendants to show the alleged omissions; but the defendants did not get them exhibited or examined for the omissions.

(12) I find that the learned District Judge's findings on the facts, are against the documents, and a body of circumstances, and supported only by the unreliable witnesses, and very belated stories on the defendants' side. I have, therefore, to set them aside, and find that on the 3-9-1949 there was a check up, and adjustment of accounts actually done by the munims, and accepted by the principals. The story of coercion and misrepresentation is false.

(13) Point No. 2: Both the parties have argued at very considerable length on whether the document upon which the suit has been brought is a bare acknowledgment or is an account stated as described in Art. 64 of the Limitation Act. Limitation as such has not been pleaded by either party, and does not arise in this suit which is based upon this document and is filed within 3 years from its execution. The plaintiffs have argued that this document amounts to an unqualified and unequivocal acknowledgment of the defendants' liability, and, therefore, could by itself form the basis of a suit. According to the plaintiff it also amounts to an account stated, which can be the basis of the suit, the defendants being barred from reopening the accounts except on proof of fraud, misrepresentation, or any other ground on which a contract could be avoided. As against this, the defendants argue that this is an acknowledgment which cannot be the basis of a suit and deny it to be accounts stated. They also seem to have thought at one stage that they had a case for reopening of the accounts, and accordingly pleaded that they were liable only to fifteen or sixteen thousands and that certain items on their credit side had been omitted, and also summoned the plaintiffs to produce their old books.

(14) The word 'acknowledgment' has been used by the lower court and by the parties in more than one sense. For example, there is a sense in which the word 'acknowledgment' is used under section 25 (3) of the Contract Act. There the person making the acknowledgment has expressly to forego the benefit he has obtained by the operation of the statute of limitation. Such an acknowledgment can become a cause of action under section 25 clause (3), Contract Act, only on an express promise to pay, and not merely by a statement to the effect that so much is due from the maker. The learned District Judge has, in my opinion, unnecessarily, introduced this section to support his finding that this cannot be cause of action; really section 25 (3) of the Contract Act does not at all come into this case. Neither party has asked for its consideration either. The second sense in which the word 'acknowledgment' has been used by the parties as well as by the court in some of the rulings cited is the one covered by S. 19 of the Limitation Act. In that sense, S. 19 does not give rise to a new cause of action, and only keeps alive the pre-existent cause of action over a further period of limitation. We are not directly concerned with acknowledgment in that sense also. The third sense in which the word 'acknowledgment' is used is where defendant gives in writing to the plaintiff that he owes him so much of money which can be an unequivocal and unqualified statement of liability. It can also be the result of investigation of accounts and an adjustment of cross-claims, or payments by one party towards a loan owing to the other, with the final balance struck in favour of one party against the other; it is called an accounts stated, but if accepted unequivocally it is an acknowledgment by the party ultimately found to be the debtor that so much is due from him. There may be several instances where an acknowledgment can come under both the headings, the second as well as the third; but, in the present case, we are not concerned with an acknowledgment as giving a sufficient period of limitation, but one which is a fresh cause of action, a novated contract, so to say, as defined under section 62 of the Contract Act.

(15) The plaintiff has taken his stand on the Privy Council rulings in 'MANI RAM v. ROOP CHAND', 33 Cal. 1047 PC and 'BISHUN CHAND v. GIRDHARI LAL', 56 All 376 and others in which these were followed. The defendant No. 1 on the contrary has taken his stand on the old Allahabad ruling 'GANGA PRASAD v. RAM DAYAL', 23 All 502. Viewing the document in question as an acknowledgment Ganga Prasad's case rules that it by itself cannot be a sufficient cause of action. To quote from that ruling;

> "A mere acknowledgment signed by a debtor in the account book of his creditor showing a balance standing against the debtor on an account which is not a mutual account, is neither an account stated, to which Art. 64 of the Limitation Act applies, nor is it evidence of a new contract which can be the basis of a suit".

The High Court went on to point out that,

> "In England an acknowledgment if unconditional, is held to be sufficient evidence of a new contract which can be sued upon, because an unconditional acknowledgment takes a case out of the statute of limitation. In India it is otherwise".

This has been clearly disapproved in 'MANI RAM SETH'S CASE'.

> "An unconditional acknowledgment implies a promise to pay, and the same meaning attaches where there is an acknowledgment of a right to have accounts settled, and no qualification of the natural inference that whoever is the creditor the amount shall be paid when the condition is performed by the ascertainment of a balance in favour of the claimant".

I do not accept the defendants' argument that this ruling should not be accepted because it is coloured by the dicta of English law courts. In fact, there are a very large number of cases from different High Courts in which this principle has

been followed in regard to unqualified acknowledgments. To quote only a few of them; in 'KAHAN CHAND v. DAYA RAM', AIR 1929 Lah 263 and in 'PUNJAB RAM v. JOWAYA', AIR 1933 Lah 47 'MANI RAM SETH'S CASE' was followed and a number of earlier rulings of the Punjab Courts were disapproved. In the latter case the Lahore High Court held that 'an unconditional acknowledgment implies a promise to pay'. It follows therefore that a suit can be based on an acknowledgment. In 'SHANTA BAI v. TRIKAM LAL VRIJVALLABHDASS', AIR 1944 Bom 19 the Bombay High Court followed the Privy Council decision in 'MANI RAM SETH'S CASE':

"An unequivocal acknowledgment of a debt does involve an implied promise to pay it. It is only just to hold that if a man unequivocally acknowledges that a debt is due from him he should be taken impliedly to promise to pay it. Of course he may couple his acknowledgment with some expression which shows that he was not promising to pay. But if there is no qualification the acknowledgment of the debt should be held to involve an implied promise to pay."

(16) Now turning to the same document, considered as "account stated" we have to apply the principles contained in the Privy Council ruling 'BISHUN CHAND v. GIRDHARI LAL' (56 All 376 PC). The phrase 'account-stated' is a technical one. Though it has not been defined in any statute; it has been used in Art. 64 of the Limitation Act, and has been repeatedly discussed in the rulings of the different High Courts. The earlier rulings upon which the defendant has relied, this description was restricted to cases,

"where some cross-claims are brought into account on either side and are set off against each other and balance is struck. The consideration for the payment of the balance is the discharge on each side. Such an 'account stated' clearly evidences a new contract on which a suit can be based, but where there are no demands to be set off against each other, but only debts on one side of the account and payments made by the debtor on the other there is no new contract".

However, the dictum in 'BISHUN CHAND'S CASE' has over-ruled these earlier dicta.

"The essence of an 'account stated' is not the character of the items on one side or the other, but the fact that there are cross-items of account.

Such a transaction is in truth bilateral and creates a new debt and a new cause of action. Nor can it be material as it seems in determining whether there can be an account stated, where the balance of indebtedness is throughout, as it must be at the end, in favour of one side, nor can it matter in this connection where the only payments made on the other side were simply payments in reduction of such indebtedness or were payments made in respect of other dealings."

These principles have been followed in a number of rulings from different High Courts.

(17) I have carefully considered the rulings on this subject cited by the defendants. But several of them have no bearing on this question; some are also prior to the Privy Council decision in 'BISHUN CHAND'S CASE' (56 All 376 PC). So they need not be discussed. In 'GOPI NATH v. SMT. CHAMELI', AIR 1938 All 504, it was pointed out that a mere statement of balance is not 'account stated'. This is correct, because 'account-stated' involves a conscious bilateral process, while a mere statement of balance can be a unilateral admission without one of the parties applying his mind to the accounts. Similarly in 'SHAM LAL v. GULABCHAND', AIR 1935 Nag 221, it was held that

"the mere signature of the debtor under an entry in the creditor's book that a certain amount was found due was not account stated."

The ruling in 'C. KHISTY v. K. B. SUBBARAO', AIR 1941 Nag 294, is also to the same effect. The basic distinction between a mere statement of balance and 'account stated' is that in the latter case both the parties apply their minds to the accounts and after striking off the balancing items, arrive at the result that so much is payable by one to the other. This is exactly the position here. The document itself says that the parties worked out the accounts and found it correct and that Rs. 34,000/- was payable by the defendants. Even an unqualified statement, that they accepted that Rs. 34,000/- as being payable by them would be sufficient cause of action against the defendants. Here the plaintiffs' position is stronger. The defendants themselves say that they had worked out the accounts. Again the bilaterality is also clear in that. Both the parties took part in the process; and the document itself is signed by the plaintiffs' Munim as well as the defendants themselves. It is also very probable, that precisely similar entries were made in the books of the defendants, which is yet another indication of its being a consciously bilateral.

(18) The result is that viewing it both as an unqualified acknowledgment and as 'account stated' it amounts to a new contract and can itself be a cause of action.

(19) 'Point No. 3': The defendants' argument is that the suit is bad, because for one thing all the members of the plaintiffs' family have not joined as parties; for another, though in the body of the plaint the defendants Hira Lal and Bhaiya Lal have been described as Peshwas and Kartas of the joint family, they have not been expressly sued in that capacity and some other members of their family have also been left out. The plaintiffs' reply to it is that the businesses of both parties are admittedly joint family businesses. It is also common ground that the plaintiff No. 1 and the defendant No. 1 are the eldest brothers on the respective sides, and the managers of the joint families; in addition that the plaintiff No. 2 and the defendant No. 2 respectively — second brothers were helping their elder brothers in the day to day management of the joint family business. The plaintiffs also point out that the averment in paragraph 10 of the written statement that Gulab Chand has been looking after the business has not been proved in the evidence or suggested in the cross-examination, and that in any event Gulab Chand also is a defendant. Plaintiffs say that besides putting down the kartas as the parties they brought into these records as parties some other adult members also two on each side, a matter of prudence and caution as they knew of the business. The members of the joint families who have been left out on either side have not been expressly described as minors; but are certainly, as the evidence shows, the sons of those already on the record. It is admitted by both sides that the persons omitted do not take any part in the conduct of the day to day affairs of the respective family businesses. The learned District Judge has laid the following dictum namely:

"If the intention of the plaintiffs is to sue both parties representing the entire family on either side, he should bring on the record only the kartas or the managers suing or being sued as such. If some, but not all of the other members whether minors or otherwise are also brought on the record this will be neutralising their representa-

tive capacity, and the suit will be brought by the parties in their personal capacities."

For one thing, I find that the difficulty pointed out by the learned District Judge was altogether unreal; it was perfectly easy to have called upon the parties to bring other members on the record. For another, this dictum is disapproved in a number of decisions of the different High Courts. For example in 'TULSHI v. BISHNATH RAI', AIR 1923 All 284 it was held that

"Where a suit was brought against the manager and the adult members were also joined party defendants, the minor members must be taken to have been duly represented. It was not necessary that he should have been described as a manager or that in the plaint it should have been stated specifically that the defendants to the suit represented not only themselves, but also minor members. It was sufficient if in reality the whole of the family was represented by the persons who were named as defendants to the suit. It is true that it was unnecessary to make every adult member a defendant if they were represented by the managing member, but if for the sake of precaution the adult members were made parties to the suit that did not affect the real nature of the suit."

In 'CHETAN SINGH v. SARTAJ SINGH', AIR 1924 All 908 it was held that

"where all the adult members of a joint family appear on the record as plaintiffs or defendants, it is the legitimate presumption that they are acting as managers on behalf of themselves and of the minor members."

In the ruling reported in 'GENDULAL v. JANGLI', AIR 1948 Nag 131, the question was whether the other members were bound by the decree passed on the basis of a promissory note executed by the manager of a joint Hindu family for the purpose of financing an ancestral joint family business; it was held they were.

"The fact that the other adult members had joined in the execution of the promissory note and were made defendants in the suit would not lead to the conclusion that the signature of the managers is referable only to his personal capacity. Signatures of the other adult members are obtained by the creditor merely to safeguard himself."

(20) The ruling in 'PAPANASAM CHETTIAR v. MUTHAYYA CHETTIAR', AIR 1949 Mad 625, contains a complete discussion of the earlier case law. There it was held,

"A family is bound by a decree properly passed against the Manager. He need not be described as such in the plaint though it may be advisable to do so. If it appears that in fact he was the Manager and the suit related to joint family liability it must be presumed that he was suing or being sued in his representative capacity. The fact that some adult members were joined as parties to suit would not divest the manager of his representative capacity."

Against this, the defendants have not placed a single ruling to the effect that the simple fact of some other adult members being named as parties would make it a suit in their personal capacity. Some of the rulings placed by the defendants like the one reported in 'BEHARI LAL v. RAM CHANDRA', AIR 1942 Oudh 335 are really suits brought by some partners; principles applicable to partnership cannot be carried over to Hindu joint families. In the case in 'BENARES BANK LTD. v. HARI NARAIN', AIR 1932 PC 182 cited by the defendants the question was not in regard to the liability of the members not noted as parties, but whether the debt had been incurred by the father in a business that was newly started by him or ancestral. In the present case there is no such question, because it is admitted by both parties that their respective businesses were joint family businesses.

(21) The result is that the suit is not bad for the absence on either side of certain members of the joint families. Nor does this circumstance affect the liability of the joint families to be bound by the results of this suit.

(22) 'Point No. 4'. During the hearing, the defendants did not seek to reopen the accounts. Fraud and misrepresentation not having been proved, there is no case for reopening. Even in regard to the two omissions alleged in the written statement the defendant has not led evidence or joined issue. In fact, the defendants did not produce their books; they called for the books of the plaintiffs, but would not make use of them. So the question of deciding the alleged omissions did not at all arise.

(23) 'Point No. 5': The plaintiff has claimed interest at the rate of 12 as. per cent per month, a not unreasonable rate, if interest were found to be payable at all. Interest can be claimed only by virtue of statute, contract, or usage, or on equitable grounds, as damages or compensation for the loss of the use of the principal. Statute has no application here and the plaintiff has not alleged or given evidence of any contract. The pleadings create a general impression that the plaintiffs want interest according to usage in the business; this by itself is not unreasonable, but it has not been specifically alleged in the plaint or stated in the evidence. Similarly, there is a case for the claim of interest in equity as damages or compensation but for some reasons the plaintiffs have not claimed that also. Thus not having made out the claim to interest on any of the four grounds which alone can justify it, they are not entitled to get any money on this account.

(24) The result is that the plaintiffs' appeal is allowed, and the judgment and decree of the District Judge are set aside; with the reservation that they shall not get anything by way of interest. The appellate decree shall be for the principal of 34,000/- with future interest at 6 per cent, p. a. The plaintiff shall also get from the defendant the costs in both courts, and pleaders' fee in both the courts as per minimum according to the rules.

D.H. Appeal allowed.

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KRISHNAN J. C.

Nathmal, Plaintiff-Appellant v. Ganga Vishnu and another, Defendants-Respondents.

First Appeal No. 72 of 1950, D/- 8-8-1951.

Sale of Goods Act (1930), S. 21 — Contract Act (1872), S. 73 — Contract for sale of goods at 'bilty' rates — Implications of — Property when passes to buyer — Suit for damages — Place of suing — Civil P. C. (1908), S. 20.

On information sent by B at Sahdol, A from Calcutta wired to B to purchase certain quantity of mahua seeds and despatch it to Calcutta at the 'bilty cut' rate quoted by B which was higher than the normal market rate and meant 'with the way bill made out'. B made the purchase at Sahdol and sent 2 wagons charging the 'bilty cut' rate. B, however, could not secure third wagon for 14 months during which the seeds were lying with B in his godown and deteriorated. After notice to

A, B auctioned the stock and sued A at Sahdol for the difference as damages and for certain other charges:

Held (1) that under S. 21, Sale of Goods Act, property did not pass to A until B had put the goods in a wagon and obtained a way bill for it as the contract was at the 'bilty cut' rate. A was therefore not liable for any damages.

(2) That the information sent by B did not amount to a proposal. The proposal in this case started from A and was accepted by B at Sahdol. The cause of action therefore arose at Sahdol, the Court at which had jurisdiction to try the suit. AIR (9) 1922 Lah 100 and AIR (15) 1928 Lah 297, Rel. on. (Para 11)

Anno: S. of G. Act, S. 21 N. 2; Contract Act, S. 73 N. 2, Civil P. C., S. 20 N. 16.

Babu Lal Udania, for Appellant; Lal Yadevendra Singh, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('22) AIR (9) 1922 Lah 100: (65 Ind Cas 282) 10
('28) AIR (15) 1928 Lah 297: (9 Lah 455) 10
('14) AIR (1) 1914 Mad 311: (24 Ind Cas 423) 10
('51) F. A. No. 26 of 1951: (AIR 1952 Vindh Pr 58) 11

JUDGMENT: This is an appeal by the plaintiff from the judgment and decree of the learned District Judge of Shadol dismissing the suit for damages and compensation for the loss suffered by the defendants' breach of contract for the purchase of about 500 maunds of mahua seeds. The central issue is whether the plaintiff-seller was bound to arrange for the wagon and loading in it; or whether the plaintiff vendor's responsibility ended when he had collected or allotted out of his godown stock the required quantity of the goods. Other questions have also been raised such as the jurisdiction of the court at Sahdol to entertain the suit, the non-joinder of minor members of the defendants' family, and about details such as the real price at which the stuff was sold off, interest, storage charges and the like.

(2) The plaintiff's case is this. He does business at Sahdol among other things in Mahua seeds. Defendants, who are two brothers managing a joint family business at Calcutta, ordered, from the plaintiff three wagon loads of Mahua seeds, in round figures a quantity of 1500 maunds. The plaintiff despatched two wagon loads immediately after receipt of the orders on the 25th and the 28th November 1947. He had also collected the proper quantity for the 3rd wagon load, but could not despatch it because a third wagon was not available in view of the great dearth of wagons, and inspite of repeated attempts. From time to time the plaintiff was writing to the defendants to send their men and make their own arrangements, but for more than a year the defendants failed to do so. All the time, the quantity of mahua seeds was stored up in the plaintiff's godown, and was drying up & deteriorating. Ultimately after more than one year, the plaintiff noticed the defendants, that unless they paid up and took delivery of the goods, he would have to auction them at Sahdol, and claim from them the losses incurred in the transaction. The defendants still failing to take delivery, the goods were auctioned on 2-5-49. There was a loss in weight by the drying up of the seeds. Again, as the market price had fallen, and the seeds had deteriorated the plaintiff could get only Rs. 12-2-0 per maund as against Rs. 18/- per maund which was the price of the Mahua seeds in November 1947, when he had sold to the defendants. Besides, there were the godown charges for the storing, and looking after of the bags, which had become defendant's property; then there was interest at 1 per cent. per month customary in the trade, and one or two small items such as correspondence charges, discount on hundis that had been dishonoured, and the like. The total claim came to Rs. 7,000/- in round figures.

(3) The case of the defendants was that if there was a cause of action it arose at Calcutta, where the plaintiff's offer to sell was accepted by them. At a late stage, the defendants alleged that the pltff's brother Kedar Nath had come to Calcutta, & had entered into an oral contract supplementing the written contract of the letters and the telegrams. However, not being pleaded in the written statement or put to the plaintiff in his examination this story of Kedar Nath's contract will be ignored. The defendants aver that the non-joinder of other members of their family makes the suit bad. Further, out of their order two wagon loads had been delivered to them according to contract, and they had paid for them on the plaintiff's invoice, though he had inserted wrong items and had made false representations about the price. As for the third wagon load, the defendants were not liable to pay anything until the goods had been loaded in the wagons and the way-bill forwarded to them; for they ordered not at the market rate, but at what is called "bilti-cut". If, therefore, the plaintiff had purchased or had allotted from his stock a wagon load, the defendants were not liable until the plaintiff had loaded them in a wagon, and made the way bill available to them; property passes on to them only after this was done by the plaintiff. They point out the parties' conduct in support of this; in regard to the two wagons sold on the same arrangement, they paid up, over and above the bilti cut rate, the charges of cartage to station, coolies' wages for the loading, and even tips to the railway servants. Again, they had refused to pay even Rs. 1,000/- as advance against the goods ordered, and alleged to have been purchased, but not loaded and covered by a way-bill. For nearly one year, they were willing to take delivery, if the plaintiff sent the way-bill. At one stage they even offered to try to obtain a wagon, so as to help the plaintiff, and not because they were obliged to do so. If inspite of all this, the plaintiff could not send the third wagon load, loaded and way bill forwarded, in other words, as bilty cut, he has to suffer the losses. The defendant also pointed out that the plaintiff had been negligent and that the story of auction at Rs. 12/2/- is a fiction. The defendants also attack the plaintiff's account on several details, and his claim to interest.

(4) Substantially accepting the defendants' case the learned District Judge dismissed the suit.

(5) 'Point No. 1': The main question is whether the contract was that the plaintiff should give the articles loaded in a wagon, that is, with the way bill made out, or whether he was to buy only in the market at Sahdol, and let defendants make their own arrangement on their own responsibility. The plaintiff's case is that he arranged for the wagons for the first 1,000 mds. not as a part of the contract, but as a help to the defendants. According to him, the Mahua seeds became the defendants' property as soon as they were purchased and kept in his godown.

(6) The correspondence by which the contract was entered into has to be examined. The earliest letter we are concerned with is the one written by the plaintiff to the defendants on 16-11-1947 (Ex. D 1) which runs thus:

"With compliments from Dhanraj Natmal of Sahdol. This is to inform you that Mahua seeds are

still cheap here, but with increasing demand. If you are interested please wire urgently; price of Mahua seeds is from 2 sr. 14 chh. to 2 sr. 12 chh. per rupee; customs six annas per md.;.....". "This is the rate to-day, and the booking is also open. If you like you may purchase and send your men. Bilty cut rate for Mahua seeds Rs. 16/- to Rs. 16/8/- per maund."

At 2 sr. 14 chh. to 2 sr. 12 chh. per rupee it works out to Rs. 14/- to Rs. 14/8/- to the maund and the bilty cut rate is about Rs. 2/- higher. On receipt of this letter, the defendants wired for:

"two wagon loads 'bilty cut' with bags including your commission at Rs. 16/8/- good quality."

(Ex. D. 2)

The plaintiff did not accept this offer, but sent a letter (Ex. D. 3) on the 21st November.

"With compliments from Dhanraj Nathmal of Sahdol. Please note that the rates are increasing and now Mahua seeds sell in the market at 2 sr. 6 chh. and 2 sr. 5 chh. a rupee. If you are interested please buy. Please note that Godhra and Calcutta mill people are purchasing here. Mahua seed bilty cut rate Rs. 18/- to Rs. 18/8/-."

While 2 sr. 6 chh. and 2 sr. 4 chh. a rupee works out to Rs. 16/13/6 to Rs. 17/4/- to a maund the bilti cut rate is about Rs. 1/4/- higher per maund. Upon this the defendants wired on the 26th:

"Your letter 21st purchase 500 mds. Mahua seeds profitably. Wire." (Ex. D. 5)

A letter was also sent to confirm this. On the 27th or 28th the plaintiff replied that he had purchased 500 mds. at Rs. 18/- per maund, and upon getting the indent for wagon he would despatch it, and forward the way bill and invoice. The plaintiff adds:

"you can get 2 to 4 thousand maunds of the stuff as every day 1,000 to 2,000 bags are coming in. If you are in need of the tisi, please write to me. The bilty cut rate for tisi is Rs. 18/8/- to Rs. 19/-. In the bazar, you can get it at Rs. 16/- per maund."

Thus for tisi also, there are two rates:- the ordinary market rate and the bilty cut rate, which is substantially higher. Then we come to the defendants' letter of the 28th exhibited as Ex. P 1.

"I am in receipt of your telegram. You state you have purchased 500 mds. of mahua seed at Rs. 18. This looks rather high, and you have charged more items. Please send two more wagon loads that is 1,000 mds. of Mahua seeds at 'this' rate and keep on despatching as soon as purchased. (Mal hat ke hat chalan karte jana). If you regularly send telegrams on the rise and fall in the market, it will facilitate our business."

(6a) We are not directly concerned with the first wagon load, nor with the second wagon load of 500, which itself was at Rs. 18/- per md. as per quotation contained in the letter of 21-11-47. As already noted the open market rate then was Rs. 16/13/6 to Rs. 17/4/- and the bilty cut rate was Rs. 18/- to Rs. 18/8/-. In other words about Rs. 1/4/- or 7½ per cent. higher than the general market rate. The plaintiff himself supplied the first wagon load at Rs. 18/-, which was the bilty cut rate, and at which the next 2 wagon loads were ordered. The earliest telegram of the defendants also shows that it was bilty cut rate at which he was proposing to buy. The defendants' own invoice and letter also show that rate. Thus, it is altogether beyond doubt that the order for all the three wagon loads had been placed "bilty cut".

(7) This takes us to a consideration of what is meant by a bilty cut rate. Literally, it means "with way bill made out", bilty being the name for the way bill, or the railway receipt, and the making out of it being called "bilty katna". The plaintiff was throughout stating that there were two rates, one the general market rate, and the other the bilty cut rate, the latter being always higher, in this instance by 7 or 8 per cent. Obviously this extra was to compensate the vendor for his obligation to get wagons, and see to the loading. It is here that S. 21 of the Sale of Goods Act comes into operation.

"Where the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof."

In the present case until the seller puts them into the wagon, and obtains a way bill, and informs the buyer, property does not pass to the latter. This is exactly what the seller himself has been doing in regard to the two other wagon loads. He has loaded them, got the way bills and made his invoice. An examination of the invoice shows that he has charged the bilty cut rate plus certain customary charges of the bazar, plus the cartage to the station, and the loading charges, and even the tips given to the railway servants. The way bill and the invoice go to the plaintiff's banker, the defendants get information, pay the banker, obtain the way bill, and take delivery at a siding near Calcutta. Had the contract been for purchase in the open market, it could be contended that S. 20 applies and the possession passed to the purchaser as soon as the contract was made, or when the property was obtained; but that is not the case here. There is yet one more circumstance supporting it. If the property had passed to the purchaser as soon as the goods were collected or allotted in the plaintiff's godown then the plaintiff would be entitled to payment even at that stage. While sending the invoice for the second wagon load the plaintiff wanted Rs. 10,000/- as against the price of their consignment, including a further Rs. 1,000/- by way of advance. The defendant refused to accept it. The invoice was corrected to the price of the goods already despatched and then the defendant paid. Even apart from it, the correspondence leaves no doubt that the contract was at the bilty cut rate, with the seller's obligation to load the goods in the wagon and obtain the way bill.

(8) While two wagons were available the third could not be obtained for nearly 14 months. It is unnecessary to discuss the correspondence of the time, which naturally shows increase in impatience on both sides. At one stage, the defendants also promised to try, but failed, to obtain the wagon from their end. I do not see how it could be argued from this, that the defendants were liable to arrange for the wagon and should have sent their own men to take charge of the property. Some cases have also been cited, but they are ones, in which the property had already passed to the purchaser. Here the property has not passed to the purchaser, and could not pass till the loading and obtaining of the way bill. The plaintiff's present contention would have been perfectly correct had there been no obligation on his part to do anything more than just to purchase and store the goods. In that case the property would already have passed to the defendant, and any losses would be on his head; but here the position, as already noted, is altogether different. The plaintiff took a higher rate, in return for which he took upon himself another obligation. He discharged the obligation in regard to two wagon loads, and made profit. He could not discharge the obligation in regard to the third wagon load and should therefore suffer the consequences; the goods continuing to be his property till loaded in the wagons. On this view the suit was bound to fail.

(9) 'Point No. 2': Then comes the question of jurisdiction. In the present case we are concerned with the contract contained in Ex. P 1 dated 28-11-47. In this it is the defendants that propose that a further quantity of two wagon loads may be purchased and despatched immediately. This proposal is received by the plaintiff at Sahdol, and is accepted by him. The defendant's argument seems to be that it was the plaintiff who proposed in his letters dated 16-11-47 and 21-11-47, and it is the defendants, who accepted the proposal at Calcutta, and communicated the acceptance by his first telegram ordering 500 mds. But the defendant has to meet two difficulties. The first difficulty is that in regard to the first order of 500 mds. itself: the second is that whatever might be the position in regard to the first order of 500 mds.. the second order of 1,000 mds. more is proposed by the defendant after he gets notice of the service of the first order. Again, even in regard to the first order of 500 mds. my view is that the letters of the plaintiff dated the 16th and the 21st November are not proposals at all. They are merely pieces of general information. One thinks of a catalogue, but these letters are even less specific than a catalouge. The proposal really comes, when upon hearing that the booking is open, and Mahua seeds are still cheap, the plaintiff orders. The telegram of the 21st, ordering at Rs. 16/8/- was a proposal which the plaintiff did not accept for reasons he has stated in his letter. The second telegram of the 26th is a proposal. It does not fix the price, but wants the plaintiff to purchase "profitably", he purchases on his own responsibility at the bilti cut rate of Rs. 18/- quoted by him. The plaintiff argues that this makes him what is called a pakka arathia, but that has no bearing on the present case. The point is that even the first order was proposed by the defendants in this telegram and was accepted by the plaintiff at Sahdol. Hearing of this the defendants makes another proposal now at the same rate as the first order and for 1,000 mds. This is Ex. P. 1 and was accepted by the plaintiff at Sahdol. So the cause of action arose at Sahdol and not at Calcutta.

(10) The question of jurisdiction in such cases is somewhat ticklish and no two cases are alike. The line is most often to be drawn between a piece of information, or as for that matter a catalogue, and a specific proposal. A number of rulings have been cited by both sides; plaintiff naturally relying upon those in which information like the one sent by him has been described as something less than a proposal, and the defendant those in which letters sent in somewhat similar circumstances have been considered to be not merely information or quotation but regular proposal. In the case reported in 'GOGI PADMARAJAPPA v. MADDURU VENKATASUBBIAH', A. I. R. 1914 Mad 311 it has been held that the cause of action arose in a similar case, where the goods were consigned to the carrier. In this case the goods were to be consigned to the carrier at Sahdol. The case reported in 'THE FIRM DURGA PRASAD MUTSADDI LAL v. FIRM RULIA MAL DOOGAR MAL', A. I. R. (9) 1922 Lah 100 is similar to the present one. It was held that the postcard sent by the vendors containing their terms and asking the purchaser to wire, if he wanted goods, was

> "only an invitation for an offer in the same way as catalogue of goods sent out by any shop, and not a proposal within the meaning of Contract Act. The contract was completed where proposals were received by wire and acceptance signified."

In the case reported in 'BHAMBOO MAL v. RAM NARAIN', A. I. R. (15) 1928 Lah 297 the principal in the position of the present defendants was suing a commission agent in the position of the present plaintiff. It was held that:

> "The suit must be instituted at the place where the commission agent carries on his business and the principal cannot sue him at the place from where he sent the order.

Thus I hold that the court of Sahdol has jurisdiction to try the suit.

(11) Point No. 3: The defendant also avers that the nonjoinder of the minor members is a defect in the framing of the suit. That this is not a defect, has been held in a number of rulings which have been discussed and followed in a recent decision by this Court (First Appeal No. 26 of 1951 'BADKULAL v. BHAIYA LAL'.)

(12) The other points that were raised for discussion were on matters of detail, and about interest. They would have arisen for consideration only if it had been held that the defendants are liable for damages, on the view taken here in regard to the defendants' liability, they do not arise.

(13) The result is that the suit of the plaintiff was rightly dismissed on the main ground. His appeal is also dismissed. Costs to the defendant-respondent and pleaders' fee according to rules.

D.R.R. Appeal dismissed.

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Jangjeet Singh, Applicant v. Dy. Commissioner, Panna, Opposite Party.

Writ Appln. No. 13 of 1952, D/- 4-3-1952.

(a) Constitution of India, Art. 226 — Other remedy open.

An application under Art. 226 for an order of the nature of prohibition on the D. C. Panna enjoining him from executing the decision of award given by the Maharaja of Panna in regard to the 'guzara' payable to certain junior branches of his family by the applicant who is the proprietor of an estate said to be governed by the rule of primogeniture is not maintainable if the remedy in the Revenue Courts has not been exhausted. Cases of this class are within the jurisdiction of the revenue Courts. The Revenue Board is the highest revenue Court and a party who still has the right of moving it, cannot apply for a writ simply because he fears an adverse decision. If he has lost the right by limitation then also he cannot seek relief by asking for a writ. Article 226 is not meant to be a refuge for litigants who are either diffident of success in the regular Courts or have got time-barred cases. Further, where the Panna Maharaja's decision was given 4 years ago and the applicant has tried to avoid it by just sitting tight, it does not lie on him to say now that continuing his litigation in revenue courts would involve delay. (Paras 2, 3)

(b) Constitution of India, Art. 226 — Discretion how to be exercised.

The jurisdiction of High Courts under Art. 226 is essentially one of equity, and by its very nature, discretionary. When the jurisdiction is discretionary and equitable, courts are bound to consider whether the applicant has himself been acting in a fair

and straightforward manner. When he acts in a patently dishonourable and unjust manner, Courts should refuse to give him any assistance.

Where the applicant was under an obligation to provide maintenance grants to the junior branches, as long ago as 1948 he invited the decision of Maharaja of Panna, and, at all events, tacitly acquiesced in it, and did not question it for nearly 4 years but later, wanted to go back on the decision in the hope that because of the political and administrative changes he would be able to show that the revenue Courts under the present set up could not execute an order by Maharaja of Panna in his capacity of highest revenue authority, the Judicial Commissioner's Court will refuse to exercise its equitable jurisdiction to assist the applicant in practising inequity. (Para 4)

Lal Praduman Singh and Janki Prasad, for Applicant.

ORDER: This is an application under Art. 226 of the Constitution for an order of the nature of prohibition on the D. C. Panna enjoining him from executing the decision or award given by the Maharaja of Panna on 30-4-1948 in regard to the 'guzara' payable to certain junior branches of his family by the applicant who is the proprietor of an estate said to be governed by the rule of primogeniture.

(2) Cases of this class are within the jurisdiction of the revenue courts. The order of the Deputy Commissioner is appealable to the Commissioner with a further right of appeal to the Board of Revenue in certain cases. The Commissioner of Bundelkhand had decided that the award or the judgment of the Maharaja of Panna given before he retired from that office, was executable by the Dy. Commissioner. Probably in ignorance of it, an appeal was filed which by certain rules of practice was heard by the Commissioner of Baghelkhand in his capacity of Additional Commissioner Bundelkhand. He decided that there being already an order by the Commissioner Bundelkhand, he, as Additional Commissioner had no more jurisdiction to decide the matter. The applicant has now either to acquiesce in that decision, or, subject to limitation and other condition, to move the Board of Revenue.

(3) There are three strong reasons why this application cannot be entertained at this stage. The remedy in the Revenue Courts has not been exhausted. It is of no avail for the applicant to say that he does not want to go to the Board of Revenue because the Commissioner Baghelkhand is also a member. The Revenue Board is the highest revenue court and a party who still has the right of moving it, cannot apply for a writ simply because he fears an adverse decision. If he has lost the right by limitation, then also he cannot seek relief by asking for a writ. Article 226 is not meant to be a refuge for litigants who are either diffident of success in the regular courts or have got time-barred cases. Secondly, the Panna Maharaja's decision was given 4 years ago; the applicant has tried to avoid it by just sitting tight. It does not lie on him to say now that continuing his litigation in revenue courts would involve delay. The delay has been the choice of the applicant himself, and he cannot, after 4 years try to hustle matters by moving applications under Art. 226 of the Constitution.

(4) Thirdly, the jurisdiction of High Courts under Art. 226 is essentially one of equity, and by its very nature discretionary. It does happen by the very imperfection of the law, and the uncertainty of people's notions about morality, that Courts sometimes have to give decisions which in effect run counter to the dictates of honour and justice. But when the jurisdiction is discretionary, and equitable, courts are bound to consider whether the applicant has himself been acting in a fair and straightforward manner. When he acts in a patently dishonourable and unjust manner, courts should refuse to give him any assistance. This is implied in the maxims, "He who seeks equity must do equity". "He who comes into equity must come in clean hands".

In the present case, it is beyond doubt that the applicant is under an obligation to provide maintenance grants to the junior branches. As long ago as 1948, he invited the decision of Maharaja of Panna, and at all events, tacitly acquiesced in it, and did not question it for nearly 4 years. He now wants to go back on the decision, not because he was not a consenting party, nor because there was any coercion, but in the hope that, because of the political and administrative changes, he will be able to show that the revenue courts under the present set up, cannot execute an order by Maharaja of Panna in his capacity of highest revenue authority. Whether or not he is going to succeed in proving this and thereby preventing the award from taking effect is his look out, but this attempt is patently unfair and unequitable. Therefore, this court refuses to exercise its equitable jurisdiction to assist the applicant in practising inequity.

(5) The result is that the application is summarily dismissed.

B/D.H. Application dismissed.

A. I. R. 1952 VINDHYA PRADESH 66

KRISHNAN J. C.

Hukumchand Jain, Accused-Applicant v. Ram Saroop, Opposite Party.

Criminal Revn. No. 17 of 1952, D/- 13-3-1952.

Criminal P. C. (1898), S. 517 — Restoration of status quo ante.

S. 517 enables the Court to restore the property to the party claiming possession, but it is neither possible nor proper for it to investigate questions of title. If no offence is proved to have been committed, the Court should restore the status quo ante. If an offence has been committed then also the status quo is to be restored, but not the one before the seizure of the goods by the police, but the one before the commission of the offence in respect of the goods. The subject matter of an alleged burglary was 28 bags of rice, which according to the complainant had been placed in a godown locked by the Agent of a Bank. In the course of the investigation, the Police seized the bags, prepared a search list, noting that they were recovered from the possession of the bank, and were left with the agent of the bank on his executing an undertaking to produce them when called upon to do so. There was an inquiry into the case, but it ended in a discharge.

Held that the Court was bound to restore the status quo ante before the seizure of the goods by the Police. At that stage the

bags were in a godown along with the other bags of rice locked by the agent of the Bank, and therefore in his possession and control. The bank was not claiming possession by virtue of entrustment after seizure. It demanded the restoration of status quo ante, which was quite unanswerable.

(Paras 4, 6)

Anno: Cr. P. C., S. 517, N. 10.

Hanuman Pd., for Applicant: Anand Chand Joshi, for Opposite Party. A. A. G. Moti Lal Verma, for the Government.

ORDER: This is an application in revision by the aggrieved party from an order of the learned Sessions Judge under S. 520, Cr. P. C., restoring to the opposite party, Bank of Baghelkhand, the exhibits seized in a case under S. 457 I. P. C. which ended in the discharge of the present applicant.

(2) The facts of the case are the following. One Kashi Prasad lodged a F. I. R. under section 457, I. P. C. with the police against the applicant. The subject matter of the alleged burglary was 28 bags of rice, which according to the complainant of that case had since been placed in a godown at Sahdol and locked by the Agent, Bank of Baghelkhand. In course of the investigation, the Police seized them, prepared a search list, noting that it was recovered from the possession of the bank, and left them with the agent on his executing an undertaking to produce the articles when called upon to do so. There was an inquiry into the case, but it ended in discharge

(3) Sometime after the discharge, on the applicant's petition, the Magistrate ordered that the opposite party should be called upon to deliver him the bags of rice. The latter went up in appeal under section 520 Cr. P. C. and the S. J., who set aside the Magistrate's order and directed that the properties should be left with the Bank of Baghelkhand. From this order the applicant has come to this court.

(4) S. 517 Cr. P. C., enables the court to restore the property to the party claiming possession, but it is neither possible nor proper for it to investigate questions of title. If no offence is proved to have been committed, the court should restore the status quo ante. If an offence has been committed then also the status quo is to be restored, but not the one before the seizure of the goods by the police but the one before the commission of the offence in respect of the goods. In the present case, the court was bound to restore the status quo ante before the seizure of the goods by the Police. At that stage the bags were in a godown along with other bags of rice locked by the agent of the Bank, and therefore in his possession and control.

(5) The Bank's account is that in that godown there was a quantity of rice pledged by the applicant for a loan, which rice has been sold up since and the proceeds paid to the applicant, after retaining a portion for adjustment. Here we are not directly concerned with that quantity. In addition, these 28 bags which were the subject-matter of the present case were also left in possession of the Bank, as marginal security in view of the fluctuation of the price and the possibility of a sharp fall. The bank had closed the godown and put its lock. The applicant's own story is that these bags are his, and he had not put them in the Bank's possession as marginal security; he had left them in the godown and the servants of the bank were allowed to lock it, because the pledged goods were also there.

It is obvious that there were many transactions between the applicant and the bank, giving rise to claims and liabilities cognisable by the civil courts. The criminal court cannot go into this, its sole test being possession before seizure by the police. The godown was locked up by the bank, which is the clearest evidence of its possession over the goods. In fact, it was with the assistance of the bank agent and from his possession that the Police seized the bags. They have made notes to this effect in the search list; throughout the case, the applicant did not suggest that the search list was wrong and the recovery was from him and not from the bank.

(6) After the seizure the bags were entrusted to the agent of the bank. Had this been the only ground on which the bank claimed to be in possession, the learned Magistrate's order would have been quite correct. The bank was bound to deliver the goods to whosoever the court directed. In the present case, however, the bank was not claiming possession by virtue of this entrustment; it demanded the restoration of status quo ante which is quite unanswerable.

(7) The result is that the application is without substance and is dismissed.

B./D.H. Application dismissed.

A. I. R. 1952 VINDHYA PRADESH 67

KRISHNAN J. C.

Indra Bahadur Singh, Applicant v. State of Vindhya Pradesh.

Criminal Ref. No. 161 of 1951, D/- 6-10-1951.

(a) Criminal P. C. (1898), S. 145 — Civil Court's decision declaring person's title and confirming possession — Magistrate cannot hold otherwise, only two days after decree.

Where the highest Civil Court declares the title of a person to a land and confirms his possession, the magistrate cannot only two days after the decree, hold otherwise in a proceeding under S. 145 Cr. P. C. specially when no change in the situation and the circumstances have taken place since the filing of the civil suit. Proceedings under S. 145 are not of the nature of criminal proceedings properly so called, where the Criminal Court has to arrive at a finding independently of any decision of a Civil Court. (Nature of proceedings under S. 145 indicated). Case law Ref.

(Paras 6, 9)

Anno: Cri. P. C., S. 145, N. 5, 10, 11.

(b) Criminal P. C. (1898), Ss. 107 and 145 — Proceedings under, when should be taken — Duty of magistrate — Question of possession already decided by Civil Court — Proper proceedings are under S. 107 and not S. 145.

Whenever a dispute likely to result in a breach of the peace is brought to the notice of the magistrate, he may proceed u/s. 107 or S. 145; but it is the Magistrate who has to make the choice, and not the Police Officer or the private party petitioner. In fact, the Magistrate can proceed under a section other than the one noted in the report or the petition which is only to apprise him of the facts and is not meant to dictate the law. At the same time, the Magistrate cannot choose one or other section arbitrarily, but should follow judicial principles. If prima facie, it appears that there is a ge-

nuine dispute in regard to possession, and prima facie claims of both the parties need investigation, then at all events S. 145 should be applied. If on the other hand, the question of possession has either been decided by competent courts, or the contentions of the parties are such, that no reasonable man would be in doubt as to which party is in possession, then it is a case for action u/s. 107, against the party that prima facie seems to be indulging in a pretence. It is obvious that, unless it appears in course of the proceeding that the claim of this party is something more than a bare pretence, S. 145, Cr. P. C. should not be brought in. For, really, there is no dispute about possession that requires the Magistrate's decision. (Para 10)

Anno: Cr. P. C. S. 107 N. 2 and 4, S. 145 N. 59.

Vindheshri Prasad, for Applicant; Gurprasanna Singh, for the State of V. P.

ORDER: This is a reference by the learned Sessions Judge, Satna, recommending that the finding of the learned Magistrate in a proceeding under section 145, Cr. P. C. may be set aside, and Indra Bahadur Singh who was the defeated party in that proceeding may be declared to be in possession of lands in the proceedings. The only question is whether, the highest civil court having already declared the title, and confirmed the possession of Indra Bahadur Singh, it was at all open for the learned Magistrate to hold otherwise, in a proceeding started within two days after that decision.

(2) These lands lie in what used to be the Kothi State. Indra Bahadur Singh, and one Sarju Prasad Singh, Pawaidar disputed about this land; on 19-4-48, the Maharaja of Kothi decided that the former was entitled to be put into possession in execution of which order, the Tehsildar gave delivery of possession on 18-6-48. Early in 1949 the Police gave a report that in regard to these lands there was a dispute between Indra Bahadur Singh and Bhagota and Ram Sajiwan Kachis, who claimed that they were tenants on the land from before, and were not affected by the Maharaja's decision as they were not parties to that dispute. Indra Bahadur Singh seems to have contended that he was in possession and that these men had been set up against him by the defeated pawaidar. Be that as it may, the Magistrate dropped the proceedings because there was nothing on the land and no finding on possession was called for. As for the crop on the Khalihan which the police had taken in their charge, he ordered that it might be given to the party "from whose possession it had been taken", without precisely directing to whom it should be given. In effect, this order amounted to the learned Magistrate's delegating his discretion to the Police Officer, who had to decide to whom the crop should be given; he seems to have given it to the Kachis.

(3) Indra Bahadur Singh thought that this was a cloud cast on his title and filed a suit for declaring title, in which he stated that he was not asking for possession because he was already in possession and that he had not been ousted. He further asked for a money decree against these defendants for the value of the crop. The suit was decided in favour of Indra Bahadur Singh, but he was not given a decree for the money. The Kachhi defendants went up in appeal alleging 'inter alia', that no restoration of possession was asked for. Both the District Judge and the High Court of that time gave a finding that no restoration of possession was necessary, as the plaintiff was already in possession, and explicitly ordered that they were confirming his possession.

(4) The High Court's judgment was delivered on 17-7-50. On the 19th July, the Kachi defendants went up on the land, armed with lathis and prevented the plaintiff Indra Bahadur Singh from cultivating it. The Police Officer, who had every reason to be apprised of the civil court's decision, gave a report for action under sec. 145 Cr. P. C. The learned Magistrate held that the actual cultivating possession was with the Kachis and he accordingly maintained it. Indra Bahadur Singh applied in revision before the Sessions Judge who has made a reference recommending that the decision of the Magistrate should be reversed and Indra Bahadur's possession maintained.

(5) The highest civil court having decided on the title and confirmed the possession of Indra Bahadur Singh, the question is, whether immediately after it, the Magistrate should at all consider whether the defeated party was in possession from before. This case is to be distinguished from others in which the dispute about possession starts sometime after the civil court's decision and there is the possibility of some change in the meantime. Another feature of this case is that, it is common ground that during the civil litigation there was no change, and the position was exactly the same at the end as in the beginning. On behalf of Indra Bahadur Singh, who has appeared and supported the reference, the point taken is that the civil courts including the very highest have decided not only that he had title, but also that he was in possession; it is not merely a case of the presumption of possession following title, but an actual judicial finding to that effect. On the ground of public policy, as well as according to the ruling reported in 'MAKHAN LAL v. MANGAL', 1942 All LJ 629, in a proceeding u/s. 145, Cr. P. C. the criminal court should respect to the findings of the Civil Court. As against this, the opposite party, who have appeared to contest the reference, argue that the judgment of a civil court is not admissible in a criminal case. Further, that a decree confirming possession is no better than a bare declaration, and cannot bar the criminal court from holding that the person whose possession is confirmed was not in actual possession on the date of the decision. As authority for it, is cited the case reported in 'RAGHUNATH SINGH v. EMPEROR', AIR 1936 Pat 537, distinguishing the earlier ruling of the same court in 'KISHORE JHA v. ANAND KISHORE JHA', AIR 1930 Pat 162(2). The opposite party has also cited 'RAMANAMMA v. APPALANARASAYYA', AIR 1932 Mad 254; 'TRAILOKYANATH DAS v. EMPEROR', AIR 1932 Cal 293 and 'EMPEROR v. NASIR AHMAD', AIR 1945 PC 18.

(6) These were criminal cases properly so called in which the question was whether the person on trial should be found guilty or not. A proceeding u/s. 145, Cr. P. C. is a criminal case only in the sense that its primary purpose is to keep the peace, and that a Magistrate deals with it. Otherwise, it is not a criminal case properly so-called, where the issue is whether a particular person is guilty and therefore liable to punishment under the law. Again, a decision in a criminal case properly so-called in regard to the guilt or the innocence of a person can be varied by the superior criminal courts only, and never by any decision whatsoever of a civil court. On the the other hand, a decision in regard to the possession or an attachment made in a proceeding u/s. 145 Cr. P. C. can be, and is meant to be varied, or finally decided by a civil court. No doubt the dispute that forms this subject-matter of a criminal case may come up before

a civil court not at all with a view to reagitating the question of guilt or innocence, but with a view to deciding the claims to property, or to damages. That is why in the rulings cited by the opposite party, it was held that the criminal court should consider the question before it independently of the decision of the civil court. In the Patna case 'RAGHUNATH SINGH v. EMPEROR', AIR 1936 Pat 537, the Sessions Judge had considered the Munsiff's decision confirming possession, but declined to accept it as binding. The High Court itself thought that the decree was "apparently based on wrong conclusions", and that "the winning party there, Suchit Singh was not actually in the possession of the lands." Be that as it may, the High Court held that the Sessions Judge's decision cannot be challenged,

> "on the ground that the weight he attached to this opinion of the Munsiff was less than that required by law."

In the Madras case 'RAMANAMMA v. APPALANARASAYYA', AIR 1932 Mad 254 it was an allegation of defamation being agitated in the Civil Court and also in the criminal court. Naturally each court had to consider the case before it independently of the opinion of the other court. In the Calcutta case reported in 'TRILOKYANATH DAS v. EMPEROR', AIR 1932 Cal 293, it was a trial by a jury in which the question of possession of some land was a material fact in issue. Obviously, the jury had to form their own opinion on this fact and the prior decision of the Civil Court did not conclude it so far as the question of guilt was concerned. In the P. C. ruling 'EMPEROR v. NASIR AHMAD', AIR 1945 PC 18, there were many questions, but in regard to this point it was held that in considering the guilt of innocence of a party the criminal court should take into account the material before it and not be bound by any civil court's decision.

(7) These cases have no bearing on a proceeding u/s. 145, Cr. P. C. In the earlier Patna ruling 'KISHORI JHA v. ANAND KISHORE JHA', AIR 1930 Pat 162(2) which has been distinguished it was held that a decree for confirming possession was conclusive in regard to a subsequent proceeding u/s. 145, Cr. P. C. It was an ex parte decision made four years before the proceeding u/s. 145, Cr. P. C. The later decision of 1936 was a reference to a criminal case proper and not to a proceeding u/s. 145, Cr. P. C.

(8) In my opinion, it would be wrong to apply these principles when we have a civil court's decision confirming possession, and a subsequent proceeding u/s. 145, Cr. P. C.

Under the law it is for the civil court to vary a finding on possession given by the criminal court under section 145 and not vice versa, the obvious reason being that the latter is a provisional finding arrived at, not as the final decision of the rights of the parties, but as a measure of keeping the peace. Certainly, if there has been some lapse of time between the civil court's decision and the proceedings, or if there is any allegation, or possibility, that since the institution of the suit there have been changes, the Magistrate is competent to consider whether the result of the suit has not been varied by subsequent happenings. But when it is not pleaded or found that there was any change after the institution of the suit and the proceeding itself is started immediately after its final decision, the Magistrate cannot go behind it in his finding on possession. A confirmatory decree is a finding on possession on the date of the suit, and unlike a decree for restoration of possession it does not call for a delivery of possession. Obviously, if defeated litigants are allowed to ignore the decisions of the highest civil court in suits, in which they themselves are parties, there would be no end of trouble.

(9) The result is I hold that in the present proceedings the civil court's decree concluded the matter in so far as the possession on the date of the suit was concerned. It being nobody's case nor the Magistrate's finding that there was a change after the suit was instituted, Indra Bahadur Singh should have been held to have been in possession and not the opposite party.

(10) There is another aspect of the matter. In the present case, S. 145, Cr. P. C. was not indicated, the proper section for proceeding under, being S. 107, Cr. P. C. Whenever a dispute likely to result in a breach of the peace is brought to the notice of the Magistrate, he may proceed u/s. 107 or S. 145, Cr. P. C.; but it is the Magistrate who has to make the choice, and not the Police Officer or the private party petitioner. In fact, the Magistrate can proceed under a section other than the one noted in the report or the petition which is only to apprise him of the facts and is not meant to dictate the law. At the same time, the Magistrate cannot choose one or other section arbitrarily, but should follow judicial principles. If prima facie, it appears that there is a genuine dispute in regard to possession, and prima facie claims of both the parties need investigation, then at all events S. 145 should be applied. If, on the other hand, the question of possession has either been decided by competent courts, or the contentions of the parties are such, that no reasonable man would be in doubt as to which party is in possession then it is a case for action u/s. 107, Cr. P. C. against the party that prima facie seems to be indulging in a pretence. It is obvious that, unless it appears in course of the proceeding that the claim of this party is something more than a bare pretence, S. 145 Cr. P. C. should not be brought in. For, really there is no dispute about possession that requires the Magistrate's decision. It would be sheer waste of public time and harassment to the rightful possessor, and a premium on violence, if u/s. 145, Cr. P. C. Magistrates begin to investigate claims to possession, which are mere pretences. In the present case, the opposite party should have been proceeded against u/s. 107, Cr. P. C.

(11) The result is that the reference is accepted and the learned Magistrate's finding on possession is reversed.

B/R.G.D. Reference accepted.

A. I. R. 1952 VINDHYA PRADESH 69

KRISHNAN J. C.

Mst. Laxmi Bai and another, Defendants-Appellants v. Lal Chand Chela Ram and another, Plaintiffs-Respondents.

First Appeal No. 7 of 1952, D/- 29-4-1952.

(a) Court-fees Act (1870), S. 7 (iv) (c) — Suit for cancellation of deed of sale after parting with possession — Court-fee.

Where, after possession has been delivered to the transferee, the transferor brings a suit for cancellation of a deed of sale executed by him, without a prayer for recovery of possession, the relief of cancellation itself sought by a party ostensibly bound by the deed is a substantive relief and should be taxed 'ad valorem'. AIR 1932 All 485 (FB), Ref. (Paras 9, 14)

Anno: C. F. Act, S. 7 (iv) (c) N. 5.

(b) Specific Relief Act (1877), S. 39 — Suit for cancellation of sale deed by party to instrument after parting with possession — Possession not asked for — Instrument should not be cancelled.

Ordinarily, where the plaintiff is out of possession, and is in a position to claim a decree for possession, he should not be permitted to obtain merely a decree for the cancellation of an instrument according to which if genuine, he has no title to the land. Ordinarily, a court would exercise its discretion wisely if it declined to adjudge such an instrument void, and would do well to leave the plaintiff to sue for possession: 34 All 140, Foll. (Para 13)

The equitable relief for cancellation of deed should not be granted to a party who has got an insuperable barrier, and who can and should bring a straightforward suit for the recovery of the property. S. 39 applies only where the serious injury is reasonably apprehended; but where the inquiry has already happened and the property has gone out of the hands of the party, he should bring a suit for its recovery. AIR 1939 Mad 894, Ref. (Para 13)

Anno: Spec. Relief Act S. 39 N. 2.

(c) T. P. Act (1882), S. 53 — Sale of property to defraud creditors — Binding nature of transaction.

The motive of putting the property beyond the reach of the creditors, does not by itself make the transaction a sham one. As far as the parties to the sale are concerned, it is a perfectly valid and a binding transaction; it is open only to the creditors to bring a suit for avoiding the sale on the principles contained in S. 53 of the T. P. Act. If from the very beginning, there was no real intention that the property should pass, then the deed can be cancelled in a suit by the parties themselves, if no fraud has been committed and no equities created in favour of bona fide purchasers from the ostensible transfer. If, after a real sale, the purchaser fails to pay up part or whole of the consideration, the vendor can demand the consideration with damages or compensation, and hold the property till the consideration is paid up. (Para 15)

Anno: T. P. Act, S. 53, N. 8, 9.

(d) T. P. Act (1882), S. 53 — Fraudulent transfer — Who can avoid.

A person cannot, on the one hand, make a fraudulent transfer to defeat somebody else's interests, and then sue to recover the property from the transferee after the fraud has materialised. But if the fraud is only intended, and has not yet materialised to any extent, then the Court should not refuse assistance. Case law ref. (Para 21)

In many cases, the fraud contemplated at the time of the transaction is not fully effected. As long as it is effected to a substantial extent then the person in pari delicto cannot recover. (Para 21)

Anno: T. P. Act, S. 53 N. 9.

(e) T. P. Act (1882), S. 53 — Benami transaction.

A benami or ism-farzi transaction, properly so called, is really a tri-lateral one; in other words, A sells property ostensibly to B, but really to C, who gives the consideration, and who almost always takes the title deed. The transfer as such is not a sham or imaginary one; it is only the name of the ostensible transferee that is illusory or farzi. (Para 21)

Anno: T. P. Act, S. 53, N. 5, 7.

Lal Guruprasnyya Singh, for Appellants; Lal Pradumn Singh and Raj Kishore Shukla, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('12) 34 All 140: (13 Ind Cas 19)	13
('33) 54 All 812: (AIR 1932 All 485 FB)	14
('87) 11 Bom 708	21
('08) 35 Cal 551	21
('32) AIR 1932 Lah 503: (13 Lah 713 FB)	21
('95) 18 Mad 378	21
('97) 20 Mad 326	21
('06) 29 Mad 72: (15 Mad LJ 478)	21
('39) AIR 1939 Mad 894: (ILR (1940) Mad 73)	12

JUDGMENT: This first appeal has been filed by the defendants from the judgment and decree of the learned D. J. Satna in favour of the plaintiffs-respondents cancelling the deed of sale executed by them in favour of Lalji Ram Kachi, the husband and father of the respective defendant-appellants. The questions for decisions are, firstly whether the plaintiffs having been dispossessed the suit could at all have been brought on the plaintiffs' own account of the case, for cancellation of the deed u/s. 39 of the Specific Relief Act, without a prayer for the recovery of the properties and restoration of possession on payment of ad valorem court fee. Secondly, whether at the time of the execution of the said deed by Lal Chand in favour of Lalji Ram it was not intended that the title should pass. Thirdly, whether on the point of consideration, the plaintiffs are bound by the accounts stated by Lal Chand to Lalji in November 1952. Finally, even assuming the truth of Lalchand's story, whether in view of a fraud having already been committed on his creditors he was entitled to get any relief whatsoever.

(2) Plaintiff Lal Chand Sindhi and his son Megh Raj are two displaced persons settled at Satna. The late Lalji Ram Dariayana Kachi was also another, whose widow Khushali Bai alias Laxmi Bai and whose adoptive son Dharsi are the defendant-appellants. The plaintiffs had originally impleaded Liladhar Kachi, also brother of Lalji Ram as defendant, but on proof of his being separate from his brother and on information of the adoption, the proper changes were made.

In the beginning of 1950, the business concern at Satna, called Saranarthi Udyoga Bhandar, consisting of a house, machinery fixed to the ground, and raw materials and manufactured goods, became the plaintiffs' property after they bought out eight other partners, paying each of them something in cash, and a cheque for Rs. 2,000/- each post-dated, on 13th April 1950. Lalji Ram had no share in the capital, but was working as a sort of manager. On the 13-4-50, the plaintiffs executed a deed of sale (Ex. P 1) in favour of Lalji Ram Dariyana Kachi, of the S. U. Bhandar for a total consideration of Rs. 20,000/- stating that

"Rs. 12,000/- in cash have already been paid on 4-4-50, and the remaining Rs. 8,000/- have been given to him in the form of hundis."

(3) By the end of that month, three out of eight creditors were paid Rs. 6,000/- in all by Lalji, whose

widow has produced the receipts. Four, out of the remaining five unpaid creditors, namely — Hotchand Sindhi, Achumal, Rochi Ram and Bishan Dass filed suits against the plaintiffs and immediately attached before judgment the S. U. Bhandar describing it as the only available property. However, soon after the attachment, on 10-7-50 Lalji Ram filed an application under O. 38, R. 8, setting out the sale in his favour by Lal Chand, who also filed a petition supporting that claim; the property was released in favour of Lalji Ram, who took possession. Those plaintiffs lost interest after this release of the S. U. Bhandar and withdrew their suits, allowed them to be dropped, and have not pursued the matter any more. In November 1950, accounts were stated between Lalji Ram, on the one hand, & the plaintiffs Lal Chand & his son on the other (Ex. D(1) and P(3)). D 1 which is admittedly signed by Lal Chand reads thus:

"Compliments to Seth Lal Ji Bhai. There has been sale and purchase by us and you respectively, of the S. U. Bhandar. For this transaction you now owe me Rs. 1,800/- only: there is nothing to be given or taken between us except this amount."

15-11-50.

The counter-part signed by Lalji runs thus:

"Seth Lal Chand saheb, to you and to Seth Megh Raj your son, I still owe the balance of Rs. 1,800/-. There is no other sum outstanding between us."

15-11-50.

The next transaction we hear of is the payment by Lalji Ram to Lal Chand of Rs. 1,000/- (800/- ?) on 6-12-50, the receipt for which has been produced by the defendant-appellant. "Received Rs. 800/- from Seth Lalji Ram. Now out of the Rs. 1,800/- Lalji owes me Rs. 1,000/- only."

(4) In the beginning of January 1951, Lalji Ram was seriously ill, and despairing for his life he left for Bombay on 7-1-51 for treatment, never in fact to return. On the very next day the plaintiffs sent a pleader's notice by post to Lalji at his Satna address. The substance of the notice is this:

"My clients Lal Chand and Megh Raj have sold you on 13-4-1950 the S. U. Bhandar along with the business, machinery and the like for Rs. 20,000/-. You gave them many false hopes and they have now authorised me to notice you in connection with your fraud and forgeries (Jalsazi) and take steps for the cancellation of the deed. The consideration mentioned in the deed has not been paid, and my clients have said that they have received neither the cash consideration of Rs. 12,000/- nor any hundis for Rs. 8,000/-. My clients have been continually demanding the consideration but by pressure and evasion you have put off payment till now. My clients have no choice, but to take steps for cancellation of the deed. Please, therefore, cancel the deed within 24 hours, else my clients will seek relief both in the criminal courts and the civil courts."

(5) As soon as information was received at Satna of Lalji's death at Bombay the plaintiffs filed the present suit on 17-1-51. Whereas in the lawyer's notice the ground is the prolonged evasion of paying the consideration, the ground here is that the transfer was from the very beginning a sham one and there was, as it were, an agreement to reconvey the property.

"Lalji gave us to understand that by transferring the Bhandar to him the impending attachments in suits by the creditors could be stopped and the impending arrest at their instance could also be avoided. Believing him and trusting his false representations we executed a deed setting out falsely that we had sold the property to him for Rs. 12,000/- cash and hundis worth Rs. 8,000/- and made statements to that effect before the sub-registrar. Lalji Ram further stated that thereby the plaintiffs would be saved from the danger aforesaid, and again there would be another registration of deed in favour of the plaintiffs whereupon they would get possession as before. Accordingly, the deed was registered."

The plaintiffs made no other averments in the plaint about the possession, but wanted that

"it be declared that the deed aforesaid be inoperative and further the deed be cancelled and the sub-registrar be given notice of this cancellation."

(6) Along with the plaint the plaintiffs gave a petition and affidavit for attachment before judgment of this very Bhandar alleging that:

"Lalji Ram has died recently, and his wife defendant is wasting the property and is preparing to go away with the property to some place outside and she has no other immovable properties in the V. P."

(7) The widow and the son of Lalji Ram contested the suit, firstly, on the formal ground that in view of the decision of the court in the first claim case, the pleadings in the plaint, and the prayer for attachment before judgment, the plaintiff himself was accepting the possession of the defendants. Accordingly, a suit for recovery of possession on full payment of ad valorem court-fee was proper and not one for a bare declaration or cancellation of the deed under S. 39, Specific Relief Act. Further, the defence pointed out that the early stand was not of a sham transfer, but according to the notice, a real transfer, with only the claim of consideration. The defendants adduced evidence by the production of receipts for Rs. 6,000/- the statement of accounts that only Rs. 1,800/- was outstanding, and the further evidence of payment of Rs. 800/- more and pointed out the plaintiffs had stated that no more than Rs. 1,000/- was outstanding. The defendants were prepared to meet a claim for the unpaid part of the consideration, if properly made, but averred that a suit for cancellation was out of the question.

Finally, the argument was that even according to the plaintiffs the intention of the parties to the sale was to commit a fraud, which had been accomplished; so on the plaintiffs' own story, they and Lalji were in pari delicto, and could no more recover the property, which should lie where it was.

(8) The learned D. J. held that there was no need for the plaintiff to ask for recovery of possession, and that a suit for cancellation could be entertained and the court-fee of Rs. 10/- was sufficient. He further held that Lalji Ram could not have paid any money, and, therefore, the transaction was a sham, and accordingly he decreed the suit.

(9) Point No. 1. The wording of the relief portion of the plaint has an indication that both S. 42 and S. 39 of the Sp. Relief Act were thought of. Actually, in view of the defendants' possession, neither could a bare declaration be sought, nor the mere cancellation. In fact, the whole procedure of the plaintiffs is an attempt to get back the property by filing a suit on payment of a court fee of Rs. 10/-. Properly a suit of this nature, by a party to the deed itself may come u/s. 39 and not u/s. 42; but the relief of cancellation itself sought by a party ostensibly bound by the deed, is a substantive relief, and should in a case like the present one be taxed ad valorem. Again, when the plaintiff is out of possession, he has got a straightforward remedy, namely, a suit for the recovery of the property, on the ground that the sale was void or voidable at his instance on the ground of fraud,

misunderstanding, or the like. It is surprising that the plaintiffs should have got a decree, even without being called upon to pay ad valorem court fee. Whatever the result of the suit, it was one taxable ad valorem.

(10) It is altogether certain that Lalji Ram got possession of the S. U. Bhandar along with machinery and the goods named in the sale deed. It is to be noted that after it was executed, it was given by the executants to Lalji Ram. Again, the petition of 10-7-1950 setting out Lalji's claim and supported by Lal Chand himself, was followed by an order releasing the property in favour of the claimant Lalji Ram. Even Lal Chand, who has tried to make the most foolish and absurd prevarications had plainly to admit it. In one or two suits against Lalji Ram himself by third parties this Bhandar was attached. This again is evidence of Lalji's possession. But one need not depend much on it as there are the statements and the conduct of the plaintiffs themselves admitting that Lalji was in possession. I have already quoted the part of the plaint in which it is clearly averred that there was an agreement that, after the creditors were defeated "there would be again another registration after which the plaintiffs should get possession as before the sale."

There was of course, no subsequent reconveyance of the properties to Lal Chand and his son by Lalji Ram, which means that the first transfer with possession to Lalji Ram effected by the sale deed continued all the time.

Again, along with the plaint, a petition supported by affidavit was filed for the attachment of these very properties before judgment on the ground that Lalji's widow i.e., the main defendant was wasting them and was preparing to take them away. If the properties in the suit were in the possession or charge of the plaintiffs, then they would not be attached before judgment on these grounds. On the other hand, when the defendant is in possession of the suit properties, there is certainly a very real danger of wastage, which especially in the absence of any other property or security, calls for action under O. 38, C. P. C. This was the position here. The plaintiffs' asking for attachment before judgment with the clear affidavit that the defendant was going to waste or remove the properties is an admission of the defendants' possession.

The oral evidence of the plaintiffs is a record of absurd contradictions and prevarications; there is also oral evidence for the other side, but the fact of the defendants' possession of these properties is proved by the plaintiffs' own pleadings & affidavit.

(11) It is argued on behalf of the plaintiffs that before leaving for Bombay on the 6th or the 7th January 1951 Lalji Ram said to his wife (defendant No. 1) that Lal Chand was trying to take possession by sending some lathias. For one thing, this does not amount to plaintiffs' possession, nor is it Lal Chand's case that he got possession by turning out Lal Chand forcibly on the eve of his departure to Bombay. Lal Chand does not say in his plaint and affidavit that he is in possession. In his evidence it is that he was in possession all the time, the sale not having given anything to the vendee. It is clear on all grounds that the defendants were in possession.

(12) Nor can it be contended that the plaintiffs could take their chances by asking for a declaration. The suit for the cancellation of a deed on the ground of its being void or voidable would come u/s. 39, if it is one to which the plaintiff himself is a party. In the case 'VELLAYYA KONAR v. RAMASWAMI KONAR', AIR 1939 Mad 894 it was held:

"There is a difference between a suit for the cancellation of an instrument and one for a declaration that the instrument is not binding upon the plaintiff. When he seeks to establish a title in himself and cannot do so without removing an insuperable obstruction such as a decree to which he has been a party, then clearly he must get that deed or decree which forms the obstruction cancelled or declared void in toto. His suit in such a case is substantially one for the cancellation of the deed or the decree, even though it be framed as a suit for declaration. But when he is seeking to establish a title and finds himself threatened by a decree or a transaction between third parties, he is not in a position to get that decree or deed cancelled in toto. His proper remedy, therefore, is to get a declaration."

(13) The equitable relief for cancellation of deed should not be granted to a party who has got an insuperable barrier, and 'who can and should bring a straightforward suit for the recovery of the property. S. 39 applies only where the serious injury is reasonably 'apprehended': but where the injury has already happened and the property has gone out of the hands of the party, he should bring a suit for its recovery. In 'SHANKAR LAL v. SARUP LAL', 34 All 140 it was held:

"Ordinarily where the plaintiff is out of possession and is in a position to claim a decree for possession he should not be permitted to obtain merely a decree for the cancellation of an instrument according to which, if genuine, he has no title to the land. Ordinarily a court would, we think, exercise its discretion wisely if it declined to adjudge such an instrument void, and would do well to leave the plaintiff to sue for possession.

In the present suit, there is a much stronger case for refusing this discretionary relief even if the deed was voidable, because the plaintiffs, as it were, tried to take possession by the back door by pretending in the plaint and in the affidavit that the defendant was in possession, and was going to waste or remove the property and asserting subsequently in evidence that they themselves were in possession and mere cancellation of deed was sufficient.

(14) On the question of court-fee also the plaintiff should be taxed ad valorem fee, whatever the results of the suit and the present appeal. In 'KALURAM v. BABU LAL', 54 All 512 (F. B.) it was ruled,

"A relief to have a registered instrument adjudged void or voidable, with the possible result of its being delivered up and cancelled is much more than a mere declaratory relief. It is undoubtedly a substantial relief of a nature different from a declaratory one."

* * * *

"The court has to see what is the nature of the suit and the relief claimed, having regard to the provisions of S. 7 of the Court-Fees Act."

(15) POINT NO. 2. We must consider the intention of the parties while executing the deed on 13-4-50. The motive of putting the property beyond the reach of the creditors, does not by itself make the transaction a sham one. As far as the parties to the sale are concerned, it is a perfectly valid and a binding transaction; it is open only to those creditors to bring a suit for avoiding the sale on the principles contained in S. 53 of the T. P. Act. If from the very beginning there was no real intention that the property should pass, then the deed can be cancelled in a suit by the parties themselves, if no fraud has been committed; and no equities created in favour of bona fide purchasers from the ostensible transfer. If after a real sale the purchaser fails to pay up part or whole of the

consideration, the vendor can demand the consideration with damages or compensation, and hold the property till the consideration is paid up.

(16) In the present case, there is a confusion. A reading of the notice of 8-1-52 which is the first formal statement of the plaintiff's case, would clearly show that the position taken is not that it was a sham sale with no intention to transfer title; but that there was a real sale, but the purchaser was trying to avoid payment. In such a case, the defendant purchaser can show that the consideration has been paid or has been waived or has been reduced, and can also tender the unpaid consideration with such interest or compensation as may be considered equitable. The plaint itself is a medley of mutually exclusive pleadings While paragraphs 3 and 4 of the plaint would indicate a sham sale, paragraph 5 of the plaint would indicate a real sale with the purchasers taking possession of the property on an agreement to reconvey it subsequently, and after it to put the plaintiff back into possession. By the terms of the notice itself, and the fact of the giving of the deed to Lalji, Lalji's possession on the property, the wording of paragraph 5 of the plaint, and the petition for attachment it is clear, that according to the plaintiff himself there was an intention of sale and transfer of title and possession.

(17) On this, as on other points, Lalchand's own statements are the most confusing and evasive; but ultimately he admits his previous statements and conduct. A few witnesses have been brought to say not without a certain amount of colouring, that Lalji told them that he was trying only to help the plaintiff to defraud his creditors and that he has paid no consideration and so on. One of them even paints the picture of Lal Chand being moved to tears by this extraordinary friendliness of Lalji Ram. Another speaks of their invoking the holy grantha saheb as guarantee of their good faith. Apart from that these adumbrations by over zealous witnesses are not spoken of by the plaintiff himself, we have the points already set out which prove that the sale was a real one. As for the statements attributed to Lalji, we hear of them after his death. In fact, the manner in which the plaintiffs have proceeded clearly shows that the notice was issued and the suit was brought only because Lalji was not there to confront them, and that most probably the plaintiffs hoped that the widow might not be able to produce the documents and contest the suit. Therefore, the loose statements of P. Ws. are of little consequence in face of the plaintiffs' own earlier statement, the giving of possession and the making over of the deed to Lal Chand. Therefore, it was a real sale, with intention to defeat the creditors' claim, and not challengeable by the vendor himself.

(18-19) Point No. 3. Whether the whole or part of the consideration is still outstanding is of comparatively less importance here; as this is not a suit to recover it. (After discussing the evidence the judgment proceeded.)

Thus I hold that this was a genuine sale and that the plaintiff himself has admitted in writing his satisfaction in regard to the entire consideration except the outstanding balance of Rs. 1000/-.

(20) Point No. 4. The lower court has not given due attention to the question whether, even on the allegation of the plaintiffs, the fraudulent purpose behind the transaction having already materialised the suit should not have been dismissed.

(21) There is a quantity of judicial decisions both of English courts and following them in the courts of our country, applying the principle that a person cannot, on the one hand, make a fraudulent transfer to defeat somebody else's interests, and then seek to recover the property from the transferee after the fraud has materialised. But if the fraud is only intended, and has not yet materialised to any extent, then the court should not refuse assistance. As a matter of detail, it is noted that the present case is not strictly of a benami transaction. A benami or ism-farzi transaction properly so called is really a tri-lateral one; in other words, A sells property ostensibly to B, but really to C who gives the consideration, and who almost always takes the title deed. The transfer as such is not a sham or imaginary one; it is only the name of the ostensible transferee that is illusory or farzi. In the present case, the transaction is one in which A ostensibly transfers to B, but subsequently alleges that it was a sham transfer and it was intended to defraud X; that is why in the discussion hitherto the use of the word 'benami' has been avoided. But whether it is a benami transaction properly so-called or an ostensible transfer which is subsequently challenged by the transferor himself; the question is: whether A can recover the property from B because both had entered into a sham deal so as to defraud X. One of the earliest cases on this matter is 'CHENVIRAPPA v. PUTTAPPA', 11 Bom 708. It was a case of a collusive decree, but the principle is the same for transfers also.

> "A decree fraudulently obtained may be challenged by a third party, but, as between the parties themselves to a collusive decree, neither of them can escape its consequences. Where an illegal purpose has been effected by a transfer of property, the transferee is not to be treated as a trustee holding it for the benefit of the transferor. But where a collusive transaction has merely proceeded to the length of sham deeds passed between the parties, or even if false declarations made by them in litigation for their common benefit, the courts may displace the apparent by the real ownership. In cases in which the transaction was still inchoate or the grantor still retained a locus paenitentiae, the formal act has been relieved against by reference to the real intention of the parties. The violation or infringement of the law had not in such cases been completed. But the purpose having been once answered especially by defeat of a third person's rights a claim for reconveyance would be properly dismissed".

Similarly, in the old Madras case 'RANGAMMAL v. VENKATACHARI', 18 Mad. 378 it was held that:

> "The plaintiff, who derived from the original transferor was not entitled to have the sale set aside in as much as there had been at least a partial carrying into effect of the illegal purpose in a substantial manner".

The principles outlined in the Madras case 'YARAMATI KRISHNAYYA v. CHUNDRU PAPAYYA', 20 Mad 326 were also similar. In the P. C. ruling reported in 'PETHERPERNAL CHETTY v. MUNIANDY SERVAI', 35 Cal 551 the same question was fully discussed. Here again,, it was held that:

> "In the event of the fraud being committed the plaintiff cannot seek to recover alleging the benami nature of the transaction. While if no fraud had been committed, he can".

In many cases, the fraud contemplated at the time of the transaction is not fully effected. As long as it is effected to a substantial extent then the person in pari delicto cannot recover. This has been pointed out in the Madras ruling in 'MUTHU-

RAMAN CHETTY v. KRISHNA PILLAI', 29 Mad 72:

"The rule that a person in pari delicto cannot recover is applicable not only where the unlawful agreement has been fully carried out but also where there has been part performance of a substantial character of such agreement".

The entire question was considered at length in the full bench decision of the Lahore High Court 'QADIR BAKHSH v. HAKAM', A. I. R. 1932 Lah. 503 (F. B.). There the question was whether in the particular case the defendant could be allowed to plead his own fraud as a ground for retaining property, and whether the principle of "Nemo allegans turpitudinem suam audiendus est" is inconsistent with the principle of "In pari delicto potior est conditio possidentis". It was held that:

"the principles were not incompatible, but the first one was general and the other one was exceptional. A person who has polluted his hands by being a party to a fraudulent transaction shall not be allowed to approach the fountain of justice with his own infamy on his lips and obtain relief. This is a general rule, but there are exceptions. XXX One exception arises in which the fraudulent transaction is still executory and the purpose of the fraud has not yet been effected. XXX In such circumstances public policy requires that a locus 'paenitentiae' be given to one of the parties and he be allowed to retrace his steps. XXX Another such case arises where two persons secretly conspire to defraud a third and in order to do so enter into a colourable agreement; and after the purpose of the fraud has been achieved one of the confederates sues the other to enforce the agreement. XXX In such a case, it is found that both the parties were in pari delicto, and the court shall stay its hand, and refuse support to either confederate letting the estate lie where it falls".

(22) The question of fact whether any fraud had already been committed in the present case admits of only one answer, namely that it has been. According to the plaintiffs the purpose was to prevent their creditors from proceeding against the S. U. Bhandar for the realisation of their dues. This is exactly what was done. (After discussing the evidence the judgment proceeded:)

Thus even assuming the truth of the plaintiffs' case the property should lie where it is i. e., with Lal Chand's successors.

(23) The result is that looked at in any way the plaintiffs' suit should not have been allowed. The appeal is allowed and the judgment and the decree of the D. J. are set aside. The plaintiffs should pay the defendants' costs throughout and pleader's fee for each court at 7 p. c. The lower court should take steps to realise the deficit court-fee from the plaintiffs for the suit, and the defendants for the appeal, the latter having been allowed to appeal in forma pauperis.

Appeal allowed.

B/ V. B. B.

A. I. R. 1952 VINDHYA PRADESH 74

KRISHNAN J. C.

Sadashiv Baldeo Prasad, Applicant v. Revenue Board, Vindhya Pradesh, Opposite Party.

Misc. Civil Appln. No. 23 of 1952, D/- 26-7-52.

Constitution of India, Arts. 227 and 226 — Applicability — Conflict of jurisdiction between Civil and Revenue Courts — Power of Judicial Commissioner's Court of V. P. to resolve conflict — (Civil P. C. (1908), S. 9) — (Tenancy Laws — Rewa Land Revenue and Tenancy Code, S. 239 (g)).

A plaint presented to a Civil Court was returned by the former Chief Court of Rewa for presentation to the Revenue Court. The plaintiff prosecuted his suit in the Revenue Court but ultimately the Board of Revenue held that the suit was cognizable only by the Civil Court. The plaintiff thereupon applied under Arts. 226 and 227, Constitution of India praying for direction to the proper Court to dispose the suit on merits.

Held (i) that a conflict of jurisdiction having arisen between the Civil Courts and Revenue Courts, and there being no other remedy the matter has to be dealt with by the Judicial Commissioner's Court not under Art. 226 which is inapplicable, but under the general supervisory powers under Art. 227 which can be exercised over the Board of Revenue also: AIR 1952 Vindh P 10, Rel. on. (Paras 3, 8)

(ii) Even under S. 239 (g) of the Rewa Land Revenue and Tenancy Code, such a conflict could be finally resolved by the Durbar which was the highest Court of appeal in the former Rewa State. However, after 1948 when the Durbar ceased to be the highest judiciary, that position was occupied by the High Court and the J. C.'s Court of V. P. Thus the only rational interpretation of S. 239 of the Rewa Code in the present set up is that such conflicts should be resolved by the highest court of general jurisdiction for the time being. (Para 4)

(iii) Consideration of the question on general lines also leads to the same result. The civil courts have general jurisdiction to try all civil cases; any other tribunal of special nature including the Board of Revenue and its subordinate Courts, derive their powers from special statutes. Cases which are not fully covered by the statute would automatically go to the courts of general jurisdiction which are the repositories of residuary jurisdiction. Therefore, in the event of doubt or conflict the highest Court of general jurisdiction should decide whether it should itself exercise the jurisdiction or the court of special jurisdiction should exercise it: AIR 1918 Mad 786; AIR 1940 Rang 84 (SB) and AIR 1941 Lah 234 (FB), Ref. (Para 5)

Anno: Civil P. C., S. 9 N. 50, 51 and 53.

Lal Guruprasnya Singh, for Applicant; Advocate General, for the Government.

REFERENCES: Courtwar/Chronological/ Paras

('41) AIR 1941 Lah 234: (ILR (1941) Lah 524 FB) 7
('18) AIR 1918 Mad 786: (42 Ind Cas 483) 6
('40) AIR 1940 Rang 84: (188 Ind Cas 422 SB) 6
('51) Misc. Appln. No. 44 of 1951, D/- 3-11-1951: (AIR 1952 Vindh P 10) 8

ORDER: The petitioner's grievance is that he brought a suit in 1946 and that in 1947 the

then High Court of Rewa directed that it should be tried in the Revenue Courts and returned the plaint; recently the suit has been thrown out by the Board of Revenue as being cognizable only by the civil courts. He prays for a direction or order under Arts. 226 and 227 of the Constitution to the proper court that it may dispose of the suit on merits.

(2) The present case involves a question of general nature; whether the Highest Court should not take steps to see that litigants are not driven from pillar to post by conflicting decisions of subordinate tribunals. The applicant is the pattadar of some agricultural lands on one of which there are small structures used for agricultural purposes. Certain persons got possession of those structures and the contiguous land on the permission of the applicant and subsequently refused to vacate when requested to do so. Thereupon the applicant brought an eviction suit in the civil court in February 1946. The case came up to the High Court of Rewa State in April 1947, and was disposed of by an order that under the Rewa Land Revenue and Tenancy Code, the suit was cognisable by the Revenue Court. Accordingly, the plaint was returned and was presented to the revenue courts. After about four years, the D. C. passed an eviction order, which was upheld by the Revenue Commissioner. But on second appeal to the Board of Revenue it held that the cause was such as to be cognisable by the civil courts only, setting aside the orders of the Revenue Courts it directed that the plaint be returned again. Thus the plaintiff, who has been diligently pursuing his litigation for the last 6 years is now told by the revenue courts that it would go to the civil courts, having been told by the highest civil court that his case would not be heard there, but is cognisable only by the revenue courts.

(3) There being no other remedy, this matter has to be dealt with by the High Court, not under Art. 226, which in my opinion does not apply, but under the general supervisory powers. This question can be examined in three ways, firstly in the light of the statutory provisions, if any, to resolve such conflicts; secondly, upon the inherent powers of the highest courts of general jurisdiction to rule on the jurisdiction of special courts such as the Board of Revenue and its subordinate tribunals. A third aspect of the question is about whether and how far, this question calls for the exercise of the powers under Art. 227 of the Constitution.

(4) Section 239 (g) of the Rewa Land Revenue and Tenancy Code lays down that when there is disagreement between the Chief Court of Rewa and the Board of Revenue on whether a particular case should be decided by the civil courts or the revenue courts it should be finally decided by the Durbar. Before 1948, the Durbar of Rewa exercised certain powers of judicial nature. It was acting as the highest court of appeal not unlike the old Indian Kings, and the early Norman rulers. However, after 1948, the Durbar lost these judicial powers; its successors in office, the Raj Pramukh, the Chief Commissioner, and the Lt. Governor of the Vindhya Pradesh derived only the powers of the Chief Executive of the State.

The Rewa Land Revenue and Tenancy Code was drafted on the lines of the Agra Tenancy Act with certain modifications to suit local conditions. At present the consolidated Tenancy Act of the U. P. has S. 289 which corresponds to S. 239 of the Rewa Code. This lays down that a conflict of jurisdiction should ultimately be referred to the High Court or the Chief Court as the case may be, and its order "shall be final and binding on all courts subordinate to it or the Board". In the Rewa State also, the highest court of general jurisdiction was empowered to solve such conflicts; the only difference was that while in the province of Agra and Oudh the High Court and the Chief Court were the highest courts of general jurisdiction, in the Rewa State it was the Durbar itself. However, after 1948, when the Durbar ceased to be the highest judiciary, that position was occupied by the High Court and the J. C.'s court of V. P. Thus, the only rational interpretation of S. 239 of the Rewa Code in the present set up is that such conflicts should be resolved by the highest court of general jurisdiction for the time being.

(5) Consideration of the question on general lines also leads to the same result. The civil courts have general jurisdiction to try all civil cases; any other tribunal of special nature including the Board of Revenue and its subordinate courts, derive their powers from special statutes. Cases which are not fully covered by the statute would automatically go to the courts of general jurisdiction which are the repositories of residuary jurisdiction. Therefore, in the event of doubt or conflict the highest court of general jurisdiction should decide whether it should itself exercise the jurisdiction or the court of special jurisdiction should exercise it. If the converse is allowed, we shall have the most anomalous state of affairs, in which the special courts of limited jurisdiction will be deciding matters within the residuary jurisdiction of the general courts. On that view it is for the high court to resolve the conflict of jurisdiction.

(6) I note that even before the present Constitution came into force this principle has been enunciated in certain decisions of High Courts. In the case reported in 'Narayanaswami v. Ghantasala Kotyya', A.I.R. 1918 Mad. 786 a plaintiff was not in a position to know where he was to present the plaint:

> "If he went to the District Court it said 'go to the Revenue Court' and if he went to the Revenue Court that court ordered him to go to the District Court."

In that case also, the civil court had returned the plaint for presentation to the revenue court; the High Court held,

> "that once it has been done, and this was confirmed by the High Court, that the Revenue Court had no jurisdiction to return the plaint."

The same question arose in the case reported in 'Pyu Maung. In the matter of', A.I.R. 1940 Rang. 84. There it was a question of territorial jurisdiction but the principle followed was that

> "the conflict of jurisdiction should be resolved by the superior court of general jurisdiction."

(7) In the case reported in 'K. L. Gauba v. Punjab Cotton Press Co. Ltd.', A.I.R. 1941 Lah. 234 this point has been discussed at some length. There the special tribunal was the Debt Reconciliation Board, but the principle applies to every court of special jurisdiction:

"The question arose whether the court of special jurisdiction has or has not jurisdiction to try a particular case within the court of general jurisdiction.

The civil court is always the final authority as to whether the cause is or is not within the special jurisdiction of the special tribunal. When the question arose, as between the special court and the court of general jurisdiction as to whether a cause is within the jurisdiction of special court or the jurisdiction of the court of general jurisdiction then the decision of the latter should override the decision of the former."

These decisions were made independently of the supervisory powers of the High Court; but as the highest tribunal of general jurisdiction it must have the last say on such conflicts. In the present case, the High Court of Rewa had done this as long ago as April 1947. This order was binding on the Board of Revenue.

(8) Thirdly, one can look at this in the light of Art. 227 of the Constitution, which in fact does no more than give formal expression to the principles discussed above. There have already been several decisions including the one of this court reported in 'Hanuman Prasad v. Ram Autar', Misc. Appln. No. 44 of 1951, D/- 3-11-1951, (Vindh. P.) that the supervisory powers can be exercised over the Board of Revenue also. The only caution is that extensive and general as the supervisory powers are, a High Court should exercise them only in very exceptional circumstances, where there is a grievance of general nature, which cannot be otherwise redressed. This is a typical case of that nature. This question seems to have come up recently before the High Court of Allahabad in connection with the supervision over the courts constituted under the U. P. Panchayat Raj Act, 26 of 1947. The entire ruling* is not before me, but the extract given in 'Monthly Indian Digest' (June part) page 59 is very helpful.

"A reading of the entire Art. 227 of the Constitution of India in the light of the antecedent law on the subject leads one to the irresistible conclusion that the purpose of the Constitution makers was to make the High Court responsible for the entire administration of justice and to vest in the High Court an unlimited reserve of judicial power which could be brought into play at any time that the High Court considered it necessary to draw upon the same. Springing as it does from the Constitution, which is the parent of all Acts and Statutes in India, the fact that the judgment or order of a Court or tribunal has been made final by an Act or the fact that the body performing judicial functions is a special tribunal constituted under a Statute cannot be set up as a bar to the exercise of this power by the High Court. The prohibited area is to be found within the four corners of the Constitution itself and nowhere else. The fact that these unlimited powers are vested in the High Court should, however, make the High Court more cautious in their exercise. The self-imposed limits of these powers are established and laid down by the High Courts themselves. These powers cannot be exercised unless there has been an unwarranted assumption of jurisdiction not possessed by courts or a gross abuse of jurisdiction possessed by them or an unjustifiable refusal to exercise a jurisdiction vested in them by law."

(9) The result is that the Board's order dated 31-3-1952 is set aside and it is directed to treat as final the Rewa High Court's order dated 15-4-1947, and dispose of the case on merits. Neither party will get costs here.

A/K.S. Petition allowed.

(*See Jodhey v. State, A.I.R. 1952 All. 788: 1952 Cri. L. J. 1282—Ed.)

A. I. R. 1952 VINDHYA PRADESH 76

KRISHNAN J. C.

Sita Ram and another, Applicants v. Shanti Lal, Opposite Party.

Civil Revn. No. 13 of 1952, D/- 5-7-1952.

(a) Arbitration Act (1940), S. 10(2) and (3) — In absence of provision that only unanimous decision would be binding, it is majority decision if otherwise valid, that is binding.

(Para 4)

(b) Arbitration Act (1940),S. 30 — Absence of one of arbitrators at stage of evidence — Delegation of powers.

The absence of an arbitrator from any stage of the proceedings, in which witnesses are examined and evidence is taken, is irregular and cannot be remedied by his delegating his powers, or sending for the papers later, and studying them. There is one view that, where the parties expressly consent to it, an absentee arbitrator can send for the papers, study the materials recorded in his absence, and then give his opinion; but such consent of the parties should be clear and explicit as it is their forgoing an essential right. Otherwise even a delegation by the absentee arbitrator goes to the root of the arbitration proceedings.

(Para 5)

Anno: Arbitration Act, S. 30 N. 10.

Badri Prasad Vakil, for Applicants; Mukutdhari Sharma, for Opposite Party.

REFERENCES: Courtwar/Chronological/ Paras.

('44) AIR 1944 PC 76: (ILR (1944) Bom 469) 7
('34) AIR 1934 Bom 476: (155 Ind Cas 801) 6
('42) AIR 1942 Bom 239: (ILR (1942) Bom 558) 6
('43) AIR 1943 Bom 221: (210 Ind Cas 144) 6
('31) AIR 1931 Cal 53: (58 Cal 269) 7a
('48) AIR 1948 Mad 40: (ILR (1948) Mad 83) 7
('41) AIR 1941 Rang 22: (192 Ind Cas 801) 8

ORDER: This is a civil revision from the appellate order of the D. J. filing an award by the arbitrators. The points of law are whether in the absence of specific recital in the agreement the parties are bound by a mere majority decision; and secondly, how far the absence of one of the arbitrators from all, and at all events, certain stages of the deliberations and the proceedings affects the validity of the award.

(2) The facts of the case are the following: The appellants Sita Ram and Kailash Bihari and the plaintiff respondent, Shanti Lal Jain, had a joint business in gold and silver ornaments. There were disagreements, and anxious to settle the accounts and liquidate the business,

the partners appointed by a written agreement, dated 4-10-50 Bhura Lal, Hira Lal Agrawal, and Narain Deen Jain, arbitrators, and agreed to abide by their decision. The agreement has been produced in court by Narain Dass Agrawal and states thus:

"Whatever the majority of the aforesaid panchas decide is binding on the partners: (Jo bhi faisla uprokta panchan tai bahumat se kar denge wah ham tino sharikdaran ko purna rup se manya va vadhya ho ga)"

In regard to the word "majority" the present applicants have urged that it is a subsequent insertion and that the intention was that only a unanimous and not merely a majority award would be binding.

The panchas began the deliberations at once, but on 6-10-50 when the parties appeared before them Bhurelal was absent. Sita Ram, the present applicant, insisted by petition that the proceedings should be put off, and nothing should be done till he also joined (Ex. D-1). Upon this petition Hira Lal, one of the remaining arbitrators, ordered that they were competent to proceed as Bhure Lal had authorised them to proceed in his absence; Sita Ram should either answer questions properly, or suffer the consequences of an inference being drawn (Exhibit D. 2). The deliberations continued; it is not clear if Bhure Lal attended on any other date, except on 29-12-50 when the award was prepared, and signed by all the arbitrators, Bhure Lal noting that he was not in agreement with the decision. The partners signed in proof of their having heard it. Sometime later, some properties and money were given by Sita Ram to two other partners; he alleges that it was in complete liquidation and settlement of all liabilities, not in accordance with this majority award, but in accordance with the subsequent new award given by Bhure Lal as sole arbitrator. According to the respondent there was no second arbitration.

(3) Shanti Lal Jain brought the suit for the filing of the award. He urged that the majority decision was binding and further that the absence of Bhure Lal at certain stages of the proceedings did not affect the validity of the award, because he had authorised two others to proceed in his absence; the partners had acquiesced in this by their taking part in the proceedings subsequently to this absence.

(4) On the question of fact, whether the words "bahumat se" (by the majority) were originally in the agreement, or were subsequently inserted, there has been considerable argument. They are written by the same person, but the ink appears deeper. It is impossible to decide whether the deeper colour is due to the manner of writing or to these words being inserted later on. Nor is verification from other counterparts possible because they were not made, and the only copy signed by the partners was made over to Narain Das However, these words whether present or not, are of no consequence in view of S. 10 (2) (3) of the Indian Arbitration Act which lays down that if there is no provision for unanimous decision, then the majority decision, if otherwise valid, is binding.

(5) The second question is more difficult. A majority award still requires that all the arbitrators should have taken part in the proceedings. The parties are entitled at every stage of the proceedings to the benefit of the opinion of each arbitrator arrived at after himself seeing the witnesses, examining the papers, and discussing with the others; to the application to every material and controversial aspect of the dispute, the individual and non-delegatable quality called "personal judgment". Nor is it possible for the court or any outsider to find out whether anything important was done in absence of any arbitrator; everything, in fact, which calls for his personal, and therefore non-delegatable, mental and moral quality, is important from this view point. There are, it is true, certain steps which the arbitrators have to take, such as fixing dates, sending for registers, and the like, acts of a formal or ministerial nature, which can be done in the absence of one of themselves, and which he can regularise by consenting. But these acts are different from the judicial functions.

The absence of an arbitrator from any stage of the proceedings, in which witnesses are examined and evidence is taken, is irregular and cannot be remedied by his delegating his powers, or sending for the papers later, and studying them. There is one view that, where the parties expressly consent to it, an absentee arbitrator can send for the papers, study the materials recorded in his absence, and then give his opinion; but such consent of the parties should be clear and explicit as it is their forgoing an essential right. Otherwise even a delegation by the absentee arbitrator goes to the root of the arbitration proceedings.

(6) The applicant has placed the following rulings: 'Fazalally Jivaji v. Khimji Poonji & Co.', AIR 1934 Bom 476:

"where there are several arbitrators all must act together in the making of the award. Every stage of the proceedings must be in the presence of all and every judicial act to be done by two or more must be completed in the presence of all."

'Patel Bros. v. Shree Meenakshi Mills, Ltd.', AIR 1942 Bom 239:

"Once a board of arbitrators has been constituted to hear an appeal and has commenced to hear it then it is not open to any member to withdraw; the remaining members to continue the appeal unless of course the parties agree to that course being adopted."

In such a case it was just as if there was a new agreement. 'Laxmibai v. Shridhar Manik', AIR 1943 Bom 221:

"The general rule is that the meetings of the arbitrators must be attended by all the arbitrators and the decision arrived at must be the decision of all."

This ruling gives an exception in favour of the formal decisions only; in other words, decisions which do not involve any exercise of judicial functions:

"If some formal decision has been made in the absence of some of the arbitrators the irregularity may be waived. It has been deemed to have been waived if the decision is put at a subsequent meeting before all the arbitrators and in the presence of all the parties."

In the present case, there is considerable doubt as to whether at any stage at all except while noting his disagreement with the award, Bhure Lal took part in the proceedings. At all events, Bhure Lal's non-participation in the proceedings on 6-10-50 and the objection of Sita Ram are on the record. What happened on 6-10-50 was the recording of evidence, examination of parties, and the drawing of an adverse inference against Sita Ram. These

cannot be called 'formal" functions. They are judicial functions and even if the minutes of the proceedings were read out in presence of the parties and the absentee arbitrator on a subsequent occasion, no waiver can be presumed.

(7) This has been made clear in 'J. Kuppuswami Chetty v. B. V. Anantharamier', AIR 1948 Mad 40. Where the reference is to two or more arbitrators, all must act together. If one of them declines to act during arbitration proceedings, and the award is made by the remaining arbitrators, the award is invalid even though there might have been provision in the arbitration agreement that the majority view should prevail. The majority decision is something different from what can be called a decision after only the majority deliberate. If all the arbitrators deliberate, the majority decision unless otherwise provided is binding; on the other hand if only the majority take part in the arbitration the decision is not binding because one or more arbitrator has not at all brought his personal judgment to bear on the case. The P. C. decision in 'Shree Meenakshi Mills Ltd. v. Patel Bros.', AIR 1944 PC 76 also acts on the principle that when the reference is to two or more named arbitrators all of them must act together.

(7A) The plaintiff-respondent has quoted two rulings. 'Brojendra Kumar v. Purna Chandra', AIR 1931 Cal 53 really lays down no exception to this principle. All that it says is that it is not misconduct, if the arbitrator is absent at some sittings, but "nothing of importance" is done at that time, and every thing is done over again when all are present. In such a case the award depends upon what is done over again, and not what is done by some arbitrators only. The words "nothing of importance" should be taken to mean the same thing "anything formal" in the Bombay ruling quoted above.

(8) The Rangoon ruling quoted in — 'U Po Hlaing v. Daw Ngwe', AIR 1941 Rang 22 reads:

> "Some evidence was recorded in the absence of one arbitrator and which was sent to him subsequently."

It is not clear in what form the parties acquiesced in the proceeding, but it was essential that the parties should expressly acquiesce. In the present case one party not only did not acquiesce, but protested, but was silenced by the order of the arbitrators that an adverse inference would be drawn if he did not answer questions. Thus the admitted facts show that Bhure Lal was absent, at least during some important stages of the deliberations. Sita Ram objected to it in writing, but the other arbitrators instead of adjourning or stopping the deliberations, proceeded because they said that Bhure Lal had authorised them to do so. But even if he had authorised, in the absence of an express agreement of the parties to this procedure, the award cannot be binding.

(9) The applicant, Sita Ram, has tried to show that the award was rejected by the parties themselves, and there was a subsequent arbitration by Bhure Lal as the sole arbitrator, and somethings were done, and a final settlement made in accordance with it. It is sufficient to state here that the evidence on record does not at all support this contention. There was no written agreement for the second arbitration nor was there a written award made in the presence of the parties or tendered to them. In fact, in view of Bhure Lal's dissent from the award, and the statement by Sita Ram that Bhure Lal was his nominee, his being sole arbitrator is highly improbable. In any case, it has not been proved by good evidence and I disbelieve it.

(10) As far as the majority award dated 29-12-50 goes it should not have been filed. The judgment and decree of the first appellate court are set aside, and the award is declared to be invalid and inoperative. The applicants should get the costs of this proceeding from the respondent and pleader's fee according to rules.

B/R.G.D. Order accordingly.

A. I. R. 1952 VINDHYA PRADESH 78

KRISHNAN J. C.

Dr. Bhagwant Kishore Tandon, Applicant v. Deputy Commissioner, Rewa District, Opposite Party.

Misc. Civil Appln. No. 26 of 1952, D/- 28-6-1952.

(a) Constitution of India, Art. 31 — Requisition for limited purposes or period.

The wording "acquires or takes possession" is comprehensive enough to include both acquisition, which is a complete deprivation of all interests in the property, and requisition, which is the taking possession for a limited period or a limited purpose. (Para 3)

(b) Constitution of India, Art. 31 — "Property" includes, "any interest", including temporary or precarious interest such as that of mortgagee, lessee or a tenant. (Para 3)

(c) Houses and Rents — V. P. Requisition of Buildings and Premises and Fixation of Rent Ordinance (3 of 1949) — Ordinance is ultra vires — (Constitution of India, Arts. 31 and 226).

The law authorising the acquiring or the taking possession of property should clearly lay down that it should be done for a public purpose or in the public interest. The next requirement is that the law should expressly provide for compensation. Finally, the law itself should contain the principles upon which the compensation should be worked out. Any law whether pre-existent or made after the Constitution came into force, which does not conform to all these criteria has to be declared invalid to that extent; and the High Courts under Art. 226 have to issue directions to the acquiring or requisitioning authorities not to act upon the law. (Para 3)

V. P. Requisition of Buildings and Premises and Fixation of Rent Ordinance 3 of 1949, inasmuch as it makes no mention of the purpose at all, but straightaway authorises any officer empowered in this behalf to requisition any premises whatever the purpose may be, conflicts with one of the provisions in the Constitution for the protection of a fundamental right, and therefore is to that extent ultra vires. (Para 3a)

The Ordinance also is silent on the question of compensation even in regard to the

full owner of the property. Whatever provision there is on this matter is not sufficient compliance with Cl. (2) of Art. 31. (Para 4)

Thus on both these grounds the Ordinance is ultra vires to the extent of the non-mention of public purpose and non-provision of compensation payable to the tenants' interest in the immovable property. (Paras 7 & 10)

(d) Part C States (Misc. Laws) Repealing Act (66 of 1951) — Act repeals Rewa Rent Control Ordinance, 1946 from 31st October 1951 and not retrospectively — (Houses and Rents — Rewa Rent Control Ordinance (1946)). **(Para 8)**

Lal Guruprasnya Singh, for Applicant; Advocate General, On behalf of Government.

REFERENCES: Courtwar/Chronological/ Paras

('52) AIR 1952 EP 70: (53 Pun LR 391) 3
('51) AIR 1951 Nag 32: (1951 Nag LJ 248) 6
('52) S A No 208 of 1951: (AIR 1952 Vindh Pra 39) 8

ORDER : The applicant's grievance is that he has been ordered on 17-4-1952 by the D.C. Rewa acting under the V.P. Requisition of Buildings and Premises and Fixation of Rent Ordinance III of 1949, to vacate the house in his occupancy as tenant. The landlord himself, who has made unsuccessful attempts to evict this tenant has not complained against this requisition. The applicant wants a direction to be issued to the D.C. that he should not enforce the requisition. The grounds urged are; firstly that the Ordinance is ultra vires as it violates the provisions of Art. 31 Cl. (2) of the Constitution; secondly, that it was not intended that the premises already occupied by tenants should be requisitioned under it; thirdly, that the Ordinance does not override the Rewa Rent Control Ordinance of 1946; and finally in any view of the matter the premises being used for an essential service the express exception should have been applied.

(2) The first question involves a fundamental right, which it is argued the Ordinance violates in two respects: firstly it does not mention that the requisition should be for a public purpose, and secondly it does not provide for compensation to everybody "holding an interest in the property." If this is correct then, this existing law will become void to the extent of its conflict with the provision of Art. 31(2) of the Constitution.

(3) The marginal note to the article refers to "compulsory acquisition" only, but the wording "acquires or takes possession" is comprehensive enough to include both acquisition, which is a complete deprivation of all interests in the property, and requisition, which is the taking possession for a limited period or a limited purpose.

"Property" in this article, expressly includes in its definition, "any interest" in it; in other words even a temporary or a precarious interest such as that of a mortgagee, lessee or a tenant is also property for the purposes of this article.Obviously, the quantity of compensation for the entire property will be much more than that for a precarious interest; but the point is that the article covers every interest in property. Now the property or any interest in it can be requisitioned or acquired by law for a public purpose only: a principle common both to Art. 31, and to S. 299 of the Government of India Act which has been applied in some of the pre-Constitution rulings on this subject. The law authorising the acquiring or the taking possession of property should clearly lay down that it should be done for a public purpose or in the public interest. The next requirement is that the law should expressly provide for compensation. Finally, the law itself should contain the principles upon which the compensation should be worked out. Any law whether pre-existent or made after the Constitution came into force, which does not conform to all these criteria has to be declared invalid to that extent; and the High Courts under Art. 226 have to issue directions to the acquiring or requisitioning authorities not to act upon the law.

(3a) Now let us apply these criteria to S. 3 of the Ordinance in question. It runs thus:

REQUISITION

"(1) The Vindhya Pradesh Government or any officer empowered by it in this behalf may by order in writing requisition any building or other premises, together with any fixtures, fittings, furniture or other things therein of any individual corporation or body in any part of Vindhya Pradesh where this Ordinance has been brought into force by the notification of the Government as provided by Section (1) Clause 3, and may make such further orders as appear to the Government to be necessary or expedient in connection with the requisitioning and may fix such rent for them as may appear reasonable but which shall not be less than the standard rent as defined in Section 2(c).

Provided that no premises or buildings used for the purpose of,

(i) religious worship;

(ii) stocking or doing business in connection with essential supplies;

(iii) public utility shall be so requisitioned.

(2) where the Vindhya Pradesh Government or any Officer empowered by it in this behalf has requisitioned any premises or thing under clause (1) above the Government or the Officer may dispose of and use such premises or thing in such manner as it or he may consider necessary or expedient.

(3) The V.P. Government or an officer empowered by it in this behalf may by order require the owner or occupier of any building, part of a building, or other premises to furnish to such authority as may be specified in the order such information in his possession relating to the building, part of a building, or other premises or to any fixtures, fittings, furniture or other things therein (being information which may reasonably be required of him in connection with the execution of this section as may be specified."

There is no mention whatsoever about the purpose. The High Courts and ultimately the Supreme Court should be in a position to know whether citizens are going to be deprived of their property or interest in property for public purpose or in public interest only, or for any purpose which may appear "necessary and expedient" to the executive authority. One can understand the public purpose being mentioned in detail, as in the Defence of India Rules; one can also understand that phrase itself being used. But in one way or other this should be expressly provided in the law.

Recently the validity of the corresponding East Punjab Law (East Punjab Requisition of Immovable Property Temporary Powers Act XVIII of 1948) was questioned: 'Shyam Krishen v. State of Punjab', AIR 1952 E.P. 70. There the words used were "whenever it appears necessary and expedient." It was held that these words were defective and "it was necessary that after the words "necessary and expedient" for a public purpose or any public interest" or some such phrase should have been inserted. In the absence of this the law was held to be ultra vires of the Constitution. The wording of the V.P. law is even more defective. It makes no mention of the purpose at all, but straightaway authorises any officer empowered in this behalf to requisition any premises whatever the purpose may be. Though the ordinance was made before the Constitution came into force, the present requisition order has been passed after it. Conflicting with one of the provisions in the Constitution for the protection of a fundamental right; the Ordinance is to that extent ultra vires.

(4) Art. 31(2) expressly states that any such law empowering acquisition or the taking possession of property should provide for the compensation and either fix the amount or specify the principles and the manner in which it should be determined and given. Now this ordinance is silent on this matter even in regard to the full owner of the property. The nearest approximation to compensation is that

> "the requisitioning authority may fix such rent for the premises as may appear reasonable. but it shall not be less than the standard rent defined elsewhere in the ordinance."

Even in regard to the full owner, who gets a rent this provision is not sufficient compliance with Art. 31, Cl. 2 as it does not show how it should be fixed, and how it should be paid; but whether or not this is sufficient in regard to the compensation payable to the full owner, the entire enactment has nothing to say about how the other interests, if any, in the property, are to be compensated.

(5) In this connection it is of interest to see whether the corresponding law in any of the other states provides for this. For example, the West Bengal Requisition Act of 1947 (Act V of 1947) avoids this defect, and complies with the requirements of the corresponding Section (299) of the Government of India Act of 1935. S. 3 of this law begins by saying

> that "it should appear to the Provincial Government that any premises are needed or likely to be needed for any public purpose."

S. 11 begins by saying:

> "when any premises are requisitioned under this Act all persons interested should be paid compensation, the amount of which should be determined etc. etc."

It does not merely say "the proprietor", but "all persons interested", which obviously includes the lessee or the occupant. S. 12 provides that in determining an amount of compensation the collector shall take into consideration certain facts out of which (b) is of significance here.

> "If in consequence of the acquisition of premises the person interested is compelled to change his residence or place of residence or to remove his furniture or other articles the reasonable expenses incidental to such change."

This indicates that the West Bengal enactment was keeping in mind both of the proprietor and the occupant, if any, and was enunciating the principles upon which both of them were to be compensated.

(6) On the other hand, the C.P. and Berar enactment on this subject (Act 63 of 1948) was faulty in this respect. It was held in the case reported in 'Gendalal Motilal v. Mathuradas Ramprasad', AIR 1951 Nag. 32, that a tenant or a lessee of a property is the transferee of an interest in it. Art. 31(2) clearly contemplated payment of compensation to such a person, who has the present right to occupy the requisitioned premises. As there was no provision in the C.P. and Berar Requisitioning of Accommodation Act, for the payment of compensation to a tenant that Act was declared void in so far as it permitted requisitioning of the property in the possession of the tenants.

(7) Thus, on the two grounds of the non-mention of public purpose and the non-provision of compensation for the tenant in any case, the V.P. Houses and Premises Requisition Ordinance of 1949 is ultra vires of Art. 31(2) of the Constitution. On these grounds alone the applicant is entitled to get a direction to the D.C. not to enforce the order of requisition as the law under which it was made is ultra vires of the Constitution.

(8) The applicant has raised one or two other points which can be disposed of with bare mention. He alleges that the ordinance was never intended to apply to premises already occupied by tenants; he relies on cl. 8 which says that this ordinance does not affect Rewa Rent Control Ordinance of 1946. In regard to the latter enactment there has been very considerable confusion. This court had held in 'Abadi Jan v. Oter Mal', S. A. No. 208 of 1951 decided on 25-2-52, that this law was not repealed by the President's order extending the C.P. and Berar legislation. But after the President's order there was a Parliamentary enactment (Act No. LXVI of 1951. The Part C States (Misc. Laws) Repealing Act, 1951) repealing this Rewa Rent Control Ordinance. This has become law on the 31st Oct. 1951. Certainly this law could not be deemed to have been repealed with retrospective effect from 7-12-50; but there is no doubt that the repeal was effective from the 31st Oct. 1951, a date prior to this requisition order. So there is no force in this contention.

(9) Yet another point raised by the applicant is that even if the Ordinance 3 of 1949 is good law, it expressly exempts the requisitioning of premises used for the purpose of public utility. The applicant contends that the business for which this building is used is public utility service. There are no materials placed either by him or by the learned A.G. to enable me to consider whether or not a bus service in general or the applicant's bus service in particular is a public utility attracting one of the exceptions in this Ordinance.

(10) The applicant succeeds because the Ord. 3 of 1949 is ultra vires to the extent of the non-mention of public purpose and non-provision of compensation payable to the tenants' interest in the immovable property. The D.C. is accordingly directed under Art. 226 of the Constitution not to take any action under Ord. III of 1949.

(11) It is certified that this case involves a substantial question of law as to the interpretation of Art. 31(2) of the Constitution.

Order accordingly.

B/R.G.D.

A. I. R. 1952 VINDHYA PRADESH 81

KRISHNAN J. C.

Ram Kripal, Applicant v. Ganesh Prasad, Opposite Party.

Criminal Ref. No. 153 of 1952, D/- 25-8-1952.

(a) Cr. P. C. (1898), S. 145 — Attachment pending decision.

Even when a preliminary order u/s 145 Cr. P. C. is passed the property should not be attached unless there is an emergency. The preliminary order is passed after the Magistrate makes up his mind, that there is a dispute about the immovable property likely to cause breach of the peace; for attaching the property pending decision the Magistrate should have further reasons, namely that there is an emergency, and unless the property is attached there is likelihood of some serious riot or similar acts of violence. If the police want it, they should satisfy the Magistrate on this. Attachment pending decision seriously affects the rights of citizens; and also gives rise to unnecessary and inconvenient controversies. So, it has to be resorted to only exceptionally. (Para 5)

Anno: Cr. P. C., S. 145 N. 29.

(b) Cr. P. C. (1898) S. 145 — Attachment of property — Preliminary order cancelled on petition by parties — Raising of attachment subsequently — Proper procedure indicated.

The Magistrate has the complete jurisdiction either to continue the proceedings or at any stage to drop it on being satisfied that no such dispute either existed or at any rate does not exist at that moment. However, if the proceedings are being dropped at joint petition of the parties, the Magistrate will be well advised as a matter of prudence to satisfy himself that the compromise is a real one, and not merely a device to get the dispute out of court, and fight it out in their own way.

If possible, the existence of the continuance of the dispute may be ascertained without inviting the police, because the arrival of the police does itself create a certain amount of restlessness. (Para 6)

Where the Magistrate accepts the petition without fully considering the bona fides of the petition and cancels the preliminary order, without passing any order regarding the raising of the attachment, in such a case the duty of the Magistrate is clear. Being functus officio he cannot decide the question of possession by taking evidence and weighing pros and cons. But whenever in course of a proceeding properties come to be in custodia legis the court has the duty and certainly the inherent power to restore status quo ante. In the event of the impossibility of restoring status quo ante, it will become necessary for the parties to start another proceeding before the Magistrate or any other competent court. But if possible this should be avoided. (Para 7)

It should be ascertained from the materials that came to the court before the passing of the preliminary order from whom the property passed into custodia legis. If those materials enable the ascertainment of the status quo ante, then it should be restored. If it does not, then the attachment should be vacated without reference to either party's taking the property. If the parties still disagree they should reagitate the matter in the civil court, or expose themselves to a further proceeding u/s 145 Cr. P. C. (Paras 6 & 7)

Anno: Cr. P. C., S. 145, N. 48.

Ramayan Prasad, for Applicant; Lal Pradumn Singh, for Opposite Party; Lal Chakradhar Singh, A. A. G., for the Government.

REFERENCES: Courtwar/Chronological/ Paras

('48) AIR 1948 All 425: (49 Cri LJ 714) 10

('42) AIR 1942 Sind 117: (43 Cri LJ 876) 10

ORDER: This is a reference by the learned S. J. Rewa on a revision application from an incidental order by the learned Magistrate of Teonthar in regard to properties attached in a proceeding under section 145 Cr. P. C. which was, however, dropped under clause (5) of that section. Though this case is by itself unimportant, the general principles for guidance of the Magistrate can be conveniently laid down here.

(2) Ganesh Prasad, non-applicant opposite party, alleged in a petition before the Magistrate that he was in possession of the properties in this proceeding, and that the other party, the applicants Ram Kripal Ram and others, were trying to break the peace and disturb his possession. The Magistrate had the matter inquired into by the police, who reported that there was a dispute about these lands likely to result in breach of the peace, & further that Ganesh Prasad was still in possession. In view of the imminent fear of the breach of the peace the police suggested that the lands be attached and placed in charge of a receiver; in anticipation they had already made the attachment. Whatever the propriety of the Police attaching the property, the Magistrate made the preliminary order and also ordered attachment and the control of the receiver.

(3) For almost one year the proceedings were pending. Ultimately, the parties filed a joint petition alleging that they were going to settle the matter privately and that there being no likelihood of the breach of the peace proceedings might be dropped. The Magistrate cancelled the preliminary order and dropped the proceedings under Section 145 (5) Cr. P. C. Soon after, the Magistrate ordered that the status quo ante should be restored by calling upon the receiver to deliver the properties and the proceeds, if any, to Ganesh Prasad. Upon this the present applicant filed an application in revision before the S. J. who has pointed out, that the Magistrate being functus officio after the dropping of the proceedings, no such order should have been passed.

(4) The question here is whether any incidental order about the land could be passed at all, and if so whether the one that was passed was correct.

(5) Even when a preliminary order under Section 145 Cr. P. C. is passed the property should not be attached unless there is an emergency. In this State the Police almost invariably request that the disputed property might be attached; sometimes they attach, and then ask for the Magistrate's approval. In all such cases the Magistrates order attachment or approve of the attachment already made by the Police. The preliminary order is passed after the Magistrate makes up his mind, that there is a dispute about the immovable property likely to cause breach of peace; for attaching

the property pending decision the Magistrate should have further reasons, namely that there is an emergency, and unless the property is attached there is likelihood of some serious riot or similar acts of violence. If the police want it, they should satisfy the Magistrate on this. Attachment pending decision seriously affects the rights of citizens; and also gives rise to unnecessary and inconvenient controversies. So, it has to be resorted to only exceptionally.

(6) There is no doubt that the Magistrate has the complete jurisdiction either to continue the proceeding or at any stage to drop it on being satisfied that no such dispute either existed or at any rate does not exist at that moment. However, if the proceedings are being dropped at joint petition of the parties, the Magistrate will be well advised as a matter of prudence to satisfy himself that the compromise is a real one, and not merely a device to get the dispute out of court, and fight it out in their own way. I do not suggest that the police should necessarily be asked if there was still a likelihood of the breach of the peace, and I would go to the extent of saying that, if possible, the existence of the continuance of the dispute may be ascertained without inviting the police, because the arrival of the police does itself create a certain amount of restlessness. The point here, however, is that the learned Magistrate did not feel any curiosity whatsoever on what the parties really intended to do on the question of possession. The parties stated that they were going to settle it by private arbitration; nothing serious whatever could have happened had the Magistrate asked them to take a week or two more, and tell him what exactly was the settlement, so that he could be sure that the dispute had really been settled and the petition was not a mere device.

(7) When the compromise petition was accepted each party began to run a race to get possession of the property. They had obviously never intended to compromise. In such a case the duty of the Magistrate is clear. Being functus officio he cannot decide the question of possession by taking evidence and weighing pros and cons. But whenever in course of a proceeding properties come to be in custodia legis the court has the duty and certainly the inherent power to restore status quo ante. In the event of the impossibility of restoring status quo ante, it will become necessary for the parties to start another proceeding before the Magistrate or any other competent court. But, if possible this should be avoided.

(8) It should be ascertained from the materials that came to the court before the passing of the preliminary order from whom the property passed into custodia legis. If those materials enable the ascertainment of the status quo ante then it should be restored. If it does not then the attachment should be vacated without reference to either party's taking the property. If the parties still disagree they should reagitate the matter in the civil court, or expose themselves to a further proceeding under section 145 Cr. P. C.

(8a) In this case the only material on the record at the stage before the prelminary order, is the police report which shows that the property was in possession of Gansh Prasad and was taken from him to be placed in charge of the receiver. I do not for a moment suggest that it is necessarily true or that the police acted properly in recommending attachment, or that the report of this nature would have any evidentiary value when the matter would be formally decided under section 145 Cr. P. C. Obviously, it would be wrong to hold so; but this is the very report on which the preliminary order was made, the contents of which the parties were aware of while filing the compromise petition. No doubt, the applicant makes a feeble suggestion that there are subsequent insertions in the report. I do not believe it. In this case restoration of the status quo ante means the vacating of the attachment in favour of Ganesh Prasad from whom the property was taken by the police.

(9) If it is impossible to restore the status quo then the matter would have been otherwise. The courts should make no direction in regard to the restoration of the property, but should let the parties get it decided in the civil court, at the same time keeping a watchful eye and straightaway starting further proceedings under Cr. P. C. if there is a tendency on their part to quarrel against it and break the peace.

(10) The principles I have laid down here are in any event the most reasonable ones consistent with the equities of the parties and public policy. I find that they have been followed in some rulings, two of which are worth citing. The first is reported in — 'Jam Bhambho Khan v. Makhdum Muhammad Hassan Shah', A. I. R. 1942 Sind 117:

"Once the Magistrate passes an order under S. 145 (5) cancelling the order under S. 145 (1) he has no further jurisdiction to adjudicate upon the dispute between the parties, and the parties must so far as possible be restored to the position which they occupied before the proceedings were started, not only with regard to the land, but with regard to the produce of the land or its proceeds. The Magistrate has, therefore, power to direct the crops or their proceeds to be restored to the party from whose possession they are taken. But circumstances may arise where it is not possible to put the parties in the position they occupied before the proceedings started, once the produce has been sold. In such cases parties should be directed to seek redress of their grievances in civil court: Case law discussed."

In the case reported in — 'Rajdeo Singh v. Emperor', AIR 1948 All 425 old case law was examined and the matter fully discussed.

"When proceedings are dropped under S. 145 (5), Cr. P. C...., the Magistrate's jurisdiction to act under Section 145 Cr. P. C. altogether ends and as such he can only pass an incidental order relating to attached property. He cannot enter into a minute examination as to the claims of the respective parties. If the record shows that the property was attached from the possession of a certain party the Magistrate must be deemed to have inherent jurisdiction to restore the possession of the property; by doing so he will be restoring the status quo ante. If however the record does not show it then the only alternative for him is to pass an order that the attachment should be lifted without saying in whose favour the release was to be effective."

(11) The result is that in this case it was ascertainable from the record that the property

was taken out of the possession of Ganesh Prasad and then placed in charge of the receiver. The Magistrate's order was correct and the reference is dismissed.

B/R.G.D. Reference dismissed.

A. I. R. 1952 VINDHYA PRADESH 83

KRISHNAN J. C.

Chhote Lal Gokul Chand, Plaintiff-Appellant v. Union of India, Defendant-Respondent.

First Appeal No. 73 of 1952, D/- 15-9-1952.

(a) Limitation Act (1908), Arts. 30, 31 — Applicability — Practical criterion determining which article applies stated.

The practical criteria for deciding which of the Arts. 30 and 31 is to apply can be stated thus: If the single importable unit in which the carrier has to handle the goods, fails to reach the destination then it is a case of non-delivery under Art. 31. On the other hand, if the unit that is handled reaches the consignee all right, but there is damage or shortage, then it is a case of loss or injury attracting Art. 30. (Para 4)

Thus where a single packet alone is sent and it reaches damaged or broken or part of the contents removed, obviously Art. 30 comes in. The same would apply when a number of packages are sent in a single wagon and the wagon reaches all right with, however, damage or disappearance of some of the contents. If several separate packages are sent, each capable of being handled separately, and one of them does not reach the hands of the consignee then it is not a case of injury or loss, but of non-delivery. (Para 4)

Anno: Lim. Act, Art. 30 N. 1: Art. 31 N. 2.

(b) Limitation Act (1908), Art. 31 — Non-delivery of one of several packages — Inquiry by carrier — Starting time for limitation is from carrier's reply pleading inability.

When the goods have not arrived though similar packages consigned at the same time have reached the owner he has to make enquiries and await the result of the carrier's measures to push the goods on to the destination. If the carrier either delays to do so or lulls the owner into a false sense of security then obviously the plaintiff cannot suffer. The proper interpretation of column three of Art. 31 in these circumstances would therefore be to start limitation on the date the carrier refuses to deliver or pleads inability. Case law discussed. (Paras 6, 9)

Anno: Lim. Act, Art. 31 N. 10 Pt. 5.

Lal Guruprasanna Singh, for Appellant; Ram Kripal, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('23) AIR 1923 All 22(2): (45 All 43) 7
('47) AIR 1947 Cal 98 8
('24) AIR 1924 Mad 567: (77 Ind Cas 511) 7
('46) AIR 1946 Mad 133: (224 Ind Cas 436) 7
('27) AIR 1927 Pat 335: (103 Ind Cas 383) 6
('33) AIR 1933 Pat 45: (12 Pat 67) 6
('49) AIR 1949 Pat 268: (29 Pat LT 477) 8

JUDGMENT: In this appeal by the plaintiff against the Union of India for damages for the non-delivery of a bale of cloth two questions arise; firstly, whether Art. 30 or 31 applies, and which date should be starting point; secondly about the liability of the railway which has only pleaded the disappearance of the bale by possible theft at some place between Ujjain and Bhopal.

(2) A textile manufacturer at Ujjain consigned three bales of cloth to Bihar Station G. I. P. The consignees were Darbari Lal Ghasi Ram, importers for V. P., who in their turn assigned the consignment by endorsing the way-bill in favour of the present plaintiffs. Two of the bales reached Bihar on 2-9-50 when the plaintiff took delivery. The third bale never arrived. The plaintiff waited for a time and then wrote to the railway authorities at Bombay. On 19-2-51 the latter asked for particulars of the consignment and the way-bill. The plaintiff gave the particulars; the railway again wrote to the plaintiff on 26-6-51 that they were looking into the matter. Nothing more was heard of it from that side. On 5-11-51 the suit was filed, as it happened four days beyond the one year and 2 month period from 2-9-50.

(3) The defence was that the goods having been lost possibly by theft the carrier was not liable. There was no pleading in regard to the nature of the risk forms. It was further urged that the suit was barred by limitation because it was filed a few days after the one year period prescribed by Arts. 30 and 31 and the two months for the notice under section 80 C. P. C. The plaintiff's rejoinder was that the theft of the bale was the result of the negligence of the railway and not the consequence of an unforeseen calamity, which could not be guarded against even with due diligence. As regards limitation the plaintiff replied that Art. 31 applied and the starting point was not the date of receipt of the other bales, but the date on which the railway authorities refused or pleaded inability to deliver the undelivered goods. The learned D. J. held that the railway would have been liable but for limitation which he started from the date on which the remaining two other bales were actually received. Accordingly, he dismissed the suit.

(4) POINT NO. 1:— Limitation: In a suit by the owner of the goods against the carrier for compensation the limitation is governed by one or the other of Arts. 30 or 31, Limitation Act. Article 30 applies when there is a loss or injury to the goods. As this happening would be one within the special knowledge of the carrier he has to prove that a loss or injury happened at a particular time, if he does want to defeat the suit under that article. On the other hand, when it is a case of non-delivery for whatever reason the claimant has to show he has sued in time from "the date on which the goods ought to have been delivered". The practical criteria for deciding which article is to apply can be stated thus: If the single importable unit in which the carrier has to handle the goods, fails to reach the destination then it is a case of non-delivery under Art. 31. On the other hand, if the unit that is handled reaches the consignee all right, but there is damage or shortage, then it is a case of loss or injury attracting Art. 30. Where a single packet alone is sent and it reaches damaged or broken or part of the contents removed, obviously Article 30 comes in. The same would apply when a number of packages are sent in a single wagon and the wagon reaches all right with, however, damage or disappearance of some of the contents. If several separate packages are sent, each capable of being handled separately, and

one of them does not reach the hands of the consignee, then it is not a case of injury or loss, but of non-delivery. The reason is that whereas in the former case the moment the unit handled (whether a full wagon or a single package) has reached the hands of the consignee, he can be certain of whether he has got the goods intact or whether there is loss or injury. In the latter case when an individual unit does not reach, the consignee cannot say he has suffered injury or loss; he has to wait and see if that unit is coming on. Even if several individual packages are consigned on the same way bill, and some reach earlier, he can reasonably expect, that the others will be following soon. Indeed, it is an every day happening that some of the separate packets on the same way bill reach earlier and some later. In such cases also Art. 31 applies.

(5) The third column to Art. 31 mentions the time "the goods ought to be delivered". In the event of the date for delivery being fixed, non-delivery happens on that date. Most often there is no such date fixed, and it becomes an important question, what date is to be the starting point. One alternative is to start from the date on which, other packages, sent at the same time as the undelivered one, have reached the same destination; in this case it would be the arrival of the two bales. Where this is not possible, the one might think of the time at which, in ordinary circumstances, the goods would have reached. But this alternative introduces an element of uncertainty and in any event works unfairly on the owner who is reasonable enough not to rush to the court, but waits to see if they arrive late, and tries to get the carrier to push them on, if they are held up, as often happens, at some place enroute. That is why several High Courts have taken another alternative; the failure to deliver is complete only when the carrier refuses or pleads inability to deliver them. The date of such refusal or inability, is taken by these High Courts as the starting point.

(6) The first alternative has been taken in some of the earlier decisions. For example in — 'Gopi Ram Gauri Shankar v. G. I. P. Rly Co.' AIR 1927 Pat 335 the position was similar to that of the present one. Out of six separate bales consigned to the plaintiff four alone reached the destination. In a suit by the consignee for compensation, that High Court following an earlier ruling, held that the suit was governed by Art. 31 and not by Art. 30. However, it was time barred as limitation should start from the date on which the "major part of the consignment" namely the four other bales arrived at the destination. In the later case reported in — 'Bengal and North Western Rly. v. Kameshwar Singh', AIR 1933 Pat 45 the High Court held that the starting point would be the date on which the goods should have been delivered either under contract or if no time is specified within a reasonable time. However, in that case the plaintiff complained of the loss immediately and the carrier defendants deliberately ignored his request and thereby misled him into delaying his suit. They held that the defendant could not plead limitation. Though on other grounds, the effect has been to extend limitation to one year after the refusal or inability. When the goods have not arrived though similar packages consigned at the same time have reached the owner he has to make enquiries and await the result of the carrier's measures to push the goods on to the destination. If the carrier either delays to do so or lulls the owner into a false sense of security then obviously the plaintiff cannot suffer. The question only is whether we should prevent the defendant from pleading it as he himself has been responsible, or interpret the phrase "when the goods ought to have been delivered" so as to include and imply a reasonable opportunity to the carrier to look up and send on the case.

(7) In — 'Jugal Kishore v. G. I. P. Rly. Co.', AIR 1923 All 22 (2) it was held that no time was fixed for the delivery of the goods and the correspondence between the parties showed that the matter was being inquired into and there was no refusal to deliver, the second alternative should be taken as the starting point. In — 'South Indian Rly. Co. v. Narayana Iyer', AIR 1924 Mad 567 it was held

> "the starting point under Art. 31 is the date when the railway company finally says that the goods cannot be delivered."

The same principles were reaffirmed in the ruling reported in — 'Palanichami Nadar v. Governor-General of India in Council', AIR 1946 Mad 133.

(8) The same view is contained in decision — 'Raigarh Jute Mills Ltd. v. Commissioners for the Port of Calcutta', AIR 1947 Cal 98. A cause of action will arise when the owner is apprised that there will be no delivery of the undelivered goods, time begins to run after the definite refusal or declaration of inability to deliver. In the recent Patna ruling — 'Governor-General in Council v. Kasiram Marwari', AIR 1949 Pat 268 that High Court has also veered round to the same view as has been held by Madras, Allahabad and Calcutta.

> "that where no date is specified for the delivery of goods and the correspondence between parties shows that the consignor has received a reply from the railway authorities that the matter was being investigated and the plaintiff filed the suit for damages for non-delivery within one year from the railway's refusal to deliver the consignment it was not time-barred."

(9) Both on account of intrinsic uncertainty of the time on which the goods should have reached "in ordinary circumstances", and with regard to the very natural expectation that the delayed goods might be coming on and might be found lying at some station on the way, the proper interpretation of column three of Art. 31 is to start limitation on the date the carrier refuses to deliver or pleads inability. Looked at that way the suit was not time-barred.

(10) POINT NO. 2: It is clear that in the present case the carrier is liable for the non-delivery. The allegation is that somewhere between Ujjain and Bhopal the seal of the wagon in which the bale was kept had broken and one bale pushed out of it or stolen. It was not a case of theft or destruction during a unforeseen calamity which could not have been guarded against even with the exercise of due diligence, but as an immediate result of gross negligence on the part of the carrier's employees. I affirm the finding of the lower court that the carrier was responsible for the loss.

(11) There is no other point in this appeal. The claim made includes the price of the goods plus excise charges and freight already paid,

costs of the notice, interest at the rate of -/8/- per cent per mensem all of which are legitimate. However, a sum of Rs. 51/13/- has been claimed as profits at the rate of 5½ per cent. Had the goods been received and sold by the plaintiff he could have made the profits, but at this stage no claim for the possible profits could be made. I, therefore, allow the appeal and decree that the plaintiff should get a sum of Rs. 1055-12-0 and costs and pleaders' fee in both courts according to rules on the claim that has been allowed. Future interest at 6 per cent.

B/D.R.R. Appeal allowed.

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KRISHNAN J. C.

Wali Ullah Khan, Plaintiff-Appellant v. Mohd. Yakub, Defendant-Respondent.

First Appeal No. 55 of 1951, D/- 6-10-1951.

Limitation Act (1908) S. 5 — Sufficient cause — Delay in taking copy of decree.

The appellant applied for a copy of the decree on 7-4-1951, but he did not file the requisites for the stamps which he produced on 11-4-1951. He was asked to come on 6-5-51 to take the copy. Actually nobody turned up on 6-5-1951, and the appellant's lawyer came on 14-5-51, and took the copy.

Held that there was no sufficient cause for condoning the period between 6-5-51 and 14-5-51. (Paras 5 & 6)

Anno: Lim. Act, S. 5, N. 10, 11.

Hanuman Pd. and Lal Guruprasnya Singh, for Appellant; Lal Pradumn Singh, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('37) AIR 1937 PC 276: (31 Sind LR 672 PC) 4
('30) AIR 1930 All 112: (121 Ind Cas 546) 4
('27) AIR 1927 Cal 829: (105 Ind Cas 217) 4
('33) AIR 1933 Cal 462: (145 Ind Cas 116) 5
('26) AIR 1926 Nag 503: (27 Cri LJ 1001) 4
('44) AIR 1944 Oudh 135: (211 Ind Cas 499) 5
('33) AIR 1933 Rang 96: (142 Ind Cas 185) 5

JUDGMENT: The main appeal is by the plaintiff appellant from the judgment and decree of the learned District Judge Umaria dismissing the suit in regard to a larger part of his claim of Rs. 4,600/-. There is a cross-objection by the defendant from the judgment and decree of the learned District Judge deciding that Rs. 622/- were payable by him to the plaintiff.

(2) The preliminary question of limitation has been raised and discussed by the parties. The following dates are important. The decree was signed and sealed on 14-3-51. The party applied for a copy on 7-4-51, but he did not file the requisites for the stamps which he produced on 11-4-51. He was asked to come on 6-5-51 to take the copy. Actually nobody turned up on 6-5-51, and the party's lawyer Mr. Baboolal came on 14-5-51 and took the copy as well as the balance of Rs. 2/14/- left after the purchase of the necessary stamps and paper. This Court closed on 11-5-51, reopened on 24-6-51, but the appeal was filed on 14-7-51. If we leave out or condone the period between 6-5-51 to 14-5-51 then the application is in time, but if we include this period in calculating limitation then the application is time-barred. These dates are mentioned in the certificates given on the copies, as well as in the endorsement made on the back of the application for copy. When the matter came up for consideration on 21-9-51 it was urged on behalf of the appellant that the copy was to be given by the Umaria circuit court on 6-5-51, and that the pleader had asked for a copy on that date, but was told that it had not come from Satna and was not ready. I accordingly sent for all the registers and papers concerning the application. The dates already noted are borne out by all of them and there is no note or trace that the party or his lawyer asked for the copy on 6-5-51. In fact the circuit court was there at Umaria on 6-5-51. There is no particle of evidence that anybody asked for a copy on 6-5-51. Usually, the counter-part of the printed form on which these particulars are noted is given to the applicant and he produces it on the date fixed, when he either gets the copy for which he gives a receipt or takes endorsement that the copy has not yet been made. In the present case the appellant has not produced that counter part, nor is the signature given on it. Probably he did not take the counter part. This by itself is nothing as the receipt for the copy has been given on the original form itself, but there is nothing to support his story of appearing, and asking for copy on 6-5-51. I do not believe it.

(3) When this was pointed out the appellant suggested that the copy itself might not have been ready by 6-5-51. Actually, these papers show that it was ready on 26-4-51. Had the applicant for copy turned up on the proper date and the office did not give it to him then he could certainly assert that it was not ready, but when he did not turn up himself, I fail to understand how we can say that it was not ready. There is nothing to disprove the statement in these papers that the copy was ready on 20-4-51. (sic).

(4) After this an application is filed for condoning the delay under section 5 because it was "a bona fide mistake on the part of the pleader". A number of rulings have been cited to support this view. For instance in the Privy Council ruling — 'Rajendra Bahadur Singh v. Rajeshwar Bali', AIR 1937 PC 276 it was held that it was not gross negligence where the pleader filed the appeal before the District Judge within limitation, while the valuation was in excess of Rs. 5,000/- and the appeal lay before the Chief Court. In the present case the position is quite different as the pleader or the party had only to go and ask for the copy on 6-5-51, but he failed to do so. They had also failed to do so for 8 days, so there is no analogy. Again, for the ruling reported in — 'Pramatha Nath Mukerjee v. Bhabataran Ganguli', AIR 1927 Cal 829 the position was different. The appeal was getting time-barred on the 16th. The Pleader was given all the papers well before this date, but somehow he thought that limitation was up to 22nd. However, the client began to press and got the appeal filed on the 17th. There the one day's delay was condoned. Here the papers were not ready and, neither the client nor the lawyer cared to go and take the copy on the 6th or any date between it and the 14th May. Another point to note also is though this court reopened on the 24th neither the client nor the lawyer cared to come for 20 days. The principle of that case cannot apply. The third ruling placed by the appellant is the one reported in — Mahomed Qamar

Shah v. Mahomed Salamat Ali', AIR 1930 All 112. This case has altogether no bearing on the present question. There it was an inadvertent mistake on the part of the vakil in failing to endorse his acceptance on the vakalatnama. In the case reported in — 'Baban v. Emperor', AIR 1926 Nag 503 it was held that a mistake in the pleader's calculation of limitation (sic) which the court held to be bona fide. In the present case, there is no question of calculation.

(5) The rulings placed by the respondent can also be briefly noticed. — 'Khajeh Habibullah v. Abdul Karim', AIR 1933 Cal 462. Condonation was sought because the appellant was misled by the advice given to him by the stamp reporter of the court. It was refused as it was a failure to go and do what a man of reasonable prudence or expediency should do. In the ruling reported in — 'Ma Sein v. S. T. R. M. Firm', AIR 1933 Rang 96 this has been clearly expressed.

"In order that the provisions of S. 5 may be invoked in favour of an appellant it must be found that the error which caused the delay was one that might easily have occurred even if reasonable due care and attention had been exercised by the Advocate."

In the present instance either the client or somebody authorised by him had to appear on 6-5-51 and take the copy. One can even understand him calling for it on the 6th or even on 7th or the 8th; but I do not see why the party should wait for 8 days. Such a mistake is altogether inconsistent with due care. In the case reported in — 'Municipal Board, Lucknow v. Kali Krishna Narain', AIR 1944 Oudh 135 it was held that even the counsel's advice cannot be sufficient cause if it had been negligently given. The present case is much weaker from the view point of the appellant because here was no question of advice, but the simple mechanical process of turning up and asking for the copy.

(6) The result is that the cause shown is not sufficient and the limitation cannot be condoned. The appeal is dismissed as time barred. The defendant respondent shall get his costs in the main appeal and pleader's fee on uncontested scale. The cross-appeal automatically fails, and there will be no pleader's fee or costs in regard to it.

D/D.H. Order accordingly.

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KRISHNAN J. C.

Mahadeo Prasad Chhote Lal, Accused-Applicant v. Vindhya Pradesh Government.

Criminal Revn. No. 157 of 1951, D/- 13-7-1951.

(a) Vindhya Pradesh Sugar (Control) Order, 1950 — Validity of.

The Vindhya Pradesh Sugar (Control) Order 1950 is not properly made, as it purports to have been made under the Vindhya Pradesh Essential Supplies (Temporary Powers) Ordinance 1948 which had already been repealed by the Part C States Laws Act, 1950.

Further, the Chief Commissioner was not competent to make the Order which he made on 1-5-1950 even under the Essential Supplies (Temporary Powers) Act, 1946, as the power to make such an Order was not delegated to him under that Act. (Paras 6, 7)

(b) Words and Phrases — Dealing and transport.

Dealing means engaging in a business of purchase, sale, storage or distribution; distribution in this context means distribution to purchasers. Transport is the taking away from place to place by the owner of the property. It may be that the person transporting is a dealer and really transports the article with a view to distributing it. But the two acts are different. (Para 5)

Oudh Behari Lal, for Applicant; Asst. Advocate General, for the Government.

JUDGMENT: The applicant has been convicted and sentenced for transporting sugar out of Vindhya Pradesh in contravention of section 8 of the Vindhya Pradesh Sugar (Control) Order, 1950. The appeal having been dismissed, he has come up in revision.

(2) The proved facts of this case are the following: On the evening of 1-6-1950 the applicant was found in the Saugor District of the Madhya Pradesh just outside the boundary of the Vindhya Pradesh, in a lorry with two bags of sugar. The evidence was that they had been brought from the applicant's shop at Pawai within the Vindhya Pradesh. Admittedly the applicant did not have the proper permit for this.

(3) In this Court the applicant has taken three grounds. Firstly, that he was not 'transporting' the sugar but was 'dealing' in it without license. This was an offence only after the 1st June 1951, and the prosecution has not proved that the act was completed before that date. The second ground is that the Chief Commissioner made the order under the Vindhya Pradesh Essential Supplies (Temporary Powers) Ordinance of 1948, on the 1st May 1950, when the Ordinance had been repealed. The third ground taken is this that an order under the Essential Supplies (Temporary Powers) Act 1946, which was the law in force on this subject, on the 1st May, 1950, has to be made by the Central Government or any other authority to whom the powers are delegated under section 4 of that Act. The Chief Commissioner having got the delegated powers only on 5-9-1950 by virtue of the Central Government's order No. 115 J, the order was void and inoperative at all events on the 1st June 1950.

(4) Taking up the first ground, even on the assumption that the applicant's taking the sugar from Pawai in the Vindhya Pradesh into the adjoining province was dealing in sugar, the offence was committed on the 1st June 1950 and not earlier. In such a case the prosecution can only prove that the article came from place 'A' and was actually found in place 'B'. It is unnecessary and very often impossible to get evidence that the article was seized or was actually seen passing across the boundary. Again, the time of the actual movement across the line, and at any rate the limits on either side, are proved if, considering the natural course of events and the usual speed of the means of locomotion actually employed, the line must have been crossed at or about such and such time. An article found in a moving lorry about one hour's run from the border, can be safely presumed to have crossed it just as long before the detection. Any party challenging this presumption under section 114 Evidence Act should adduce evidence to rebut it. In

this case, the sugar being detected in the lorry just outside the Vindhya Pradesh in the evening of the first June, the act of taking it across was done on the 1st June and not on any earlier date.

(5) Really the act of the applicant comes under the definition of transporting and not dealing. Dealing means engaging in a business of purchase, sale, storage or distribution; distribution in this context means distribution to purchasers. Transport is the taking away from place to place by the owner of the property. It may be that the person transporting is a dealer and really transports the article with a view to distributing it. But the two acts are different. Dealing without licence and transporting without permit are two different offences, though they might be committed by the same person. In this particular case, we are concerned with the latter and not the former. There is, therefore, no force in the first ground taken by the applicant.

(6) Coming to the second ground, I note that there has been a mistake in the making of the Order. The Vindhya Pradesh Essential Supplies (Temporary Powers) Ordinance 1948 had been promulgated by the Raj Pramukh. It continued to be in force after the Raj Pramukh retired on the 31st December 1949 and the Chief Commissioner took his place. On the 15th of April 1950 the President gave his assent to the Part 'C' States Laws Act, 1950, which brought into force in this State a number of Central Acts including the Essential Supplies (Temporary Powers) Act, 1946 and repealed the pre-existent corresponding laws on the same subjects, including the Vindhya Pradesh Essential Supplies (Temporary Powers) Ordinance 1948. Published in the Government of India Gazette on the 17th April 1950, this Act was also re-published for general information in the Vindhya Pradesh Gazette on 30th May 1950; but from the 15th April 1950 onward, the law on this subject was the Central Act, and not the Vindhya Pradesh Ordinance. Had the Sugar Control Order been made before the 15th April under the Ordinance, it would continue to be operative even after the 15th April; assuming, that it is such as could have been made under a corresponding provision in the Central Act. But if the Order is made under the old law after its repeal, it cannot be deemed to have been made under the new law. Thus I find that the Vindhya Pradesh Sugar (Control) Order 1950 was not properly made, as it purports to have been made under a law which had already been repealed.

(7) The third ground is that even on the assumption that this Order was made under the Essential Supplies (Temporary Powers) Act, 1946 the Chief Commissioner was incompetent to make it on 1-5-1950. The learned Assistant Advocate General has argued that the Central Government had passed a general Order under section 4 of the Essential Supplies (Temporary Powers) Act 1946 delegating powers to all Provincial Governments. But this cannot be delegation of powers to the Chief Commissioner, as the Chief Commissioner ipso facto is not a Provincial Government or competent to exercise the powers of the Government of a Part 'A' State. When the Chief Commissioner, Vindhya Pradesh took over from the Raj Pramukh, he was invested with all the powers of the Raj Pramukh; but the Raj Pramukh himself did not have all the powers of a Provincial Government under the Government of India Act. He derived his powers from a separate Constitution as well as from certain Instruments of Accession. The net result is that there was no delegation of powers to the Chief Commissioner under section 4 of the Essential Supplies (Temporary Powers) Act till the 5th September 1950. The Chief Commissioner also did not derive any such powers from the Raj Pramukh. As long as the Ordinance was in force, i.e., till 15-4-50, the Chief Commissioner could make Orders under it, because the Raj Pramukh himself could make them, but with the repeal of the Ordinance, these powers were gone. Thus between the 16th April 1950 and 5-9-1950 the Chief Commissioner was not competent to make the Order even under the Act.

(8) The result is that the application succeeds and it is allowed. The conviction and the sentence of the applicant are set aside. The fine, if paid, must be refunded. If the sugar has already been forfeited, it should be returned, or the sale-proceeds, if any, in deposit should be made over to the applicant.

(9) Since important points of law are involved, a certificate is given under Article 134 of the Constitution. A copy of this judgment should be sent to the Government.

D/V.S.B. Revision allowed.

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KRISHNAN J. C.

State through A.-G. v. Jagan Singh.

Criminal Revn. No. 178 of 1952, D/- 19-8-1952.

(a) Criminal P. C. (1898), Ss. 177 and 182 — Concurrent jurisdiction — Proper forum.

It is a recognised, and in any event a convenient principle, that where two forums have concurrent jurisdiction the lower one should be approached at the first instance, unless the party concerned gives special reasons for a direct approach to the higher, such as extreme urgency or a momentous question of general public policy. (Para 1)

Anno: Cri. P. C., S. 177 N. 1; S. 182 N. 2.

(b) Criminal P. C. (1898), S. 496 — Bail — Persons anticipating arrest in cognizable offence — They can be granted bail. **(Para 3)**

Anno: Cr. P. C., S. 496 N. 4.

Maheshwar Prasad, Advocate-General, for the State.

ORDER: These are five applications by the State of V. P. from orders of Magistrates granting bail to five persons. No reason has been given why these applications are being filed without the State moving the Sessions Judge. It is a recognised, and in any event a convenient principle, that where two forums have concurrent jurisdiction the lower one should be approached at the first instance, unless the party concerned gives special reasons for a direct approach to the higher, such as extreme urgency or a momentous question of general public policy. I find none of the special reasons here. Secondly, these applications really make out no grievance at all. Since this seems to be the first occasion of such applications being filed here, it is better to lay down at some length the general principles applicable.

(2) In all these cases certain persons directly appeared before the magistrate, stating that the police had not yet arrested them, but

might arrest them in connection with some cognizable cases. The applicants feared that the arrest by the Police and their being marched to the Magistrate might cause them inconvenience of a serious nature. Accordingly, they themselves surrendered with a request that the magistrate might ascertain whether they were wanted by the police, and take bail and release them. The magistrate accordingly sent for the Public Prosecutor and asked him whether there was any process against these, and whether they were going to be arrested. The Public Prosecutor reported that no doubt the cases they were referring to were being investigated but till then no steps had been taken to arrest them; but it was not unlikely these men would be arrested in future though he could not be definite. Thereupon, the magistrate took bail for their appearance when and if wanted.

(3) I am unable to understand what else the Magistrate could have done. He could not put them into lock-up because Police have not shown any desire to arrest them till now; and certainly there was no warrant outstanding. The magistrate could certainly let them go, but then they themselves wanted to be on bail, so that they might come directly to the magistrate if and when the police wanted them in connection with the case concerned. It is certainly a restriction of the liberties of these persons, but they were voluntarily seeking it. The reason is obvious; if they were not on bail the police would arrest them and would march them to the magistrate; this meant full control of the police for at least 24 hours, during which they feared serious inconveniences. The police need have no special fancy for themselves arresting the men and marching them to the Magistrate's court. As soon as the police come to the conclusion that any of these persons should be arrested they need only petition the magistrate that the bail should be enforced and the men brought to the court. After it the police may show cause before the magistrate why the men should be remanded and not let off on bail. He should hear both the parties and decide whether the men concerned now properly accused in a criminal case should be detained or should be released on bail. The police authorities have no grievance.

(4) The result is that these applications are summarily dismissed.

B/R.G.D. Applications dismissed.

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